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# THE COLONIAL LAWYER

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## EDITOR'S BRIEF

How is the Constitution meant to be understood? This fundamental question remains overlooked in American legal education, unless we are to accept the explanation that the Constitution "is whatever the Court says it is." Constitutional law is taught by the case method, which allows for the fundamental constitutional principles to be disregarded. Instead, students are presented with crafty legal arguments and novel bases for constitutional interpretations. Constitutional law should at least allow students to question whether there exists a Constitution that is fundamental law and not a fuzzy charter for social activism and judicial governance.

Re-evaluating constitutional law in the law school curriculum has particular contemporary significance in that public dissatisfaction has greatly increased with controversial Supreme Court decisions on abortion, busing and school prayer. These relatively recent holdings ignore hundreds of years of precedent and appear to be based upon personal policy preferences on the High Court rather than the basic principles of republican liberty embodied in the Constitution. Yet students are presented with such cases as the gospel, not as creative jurisprudence where various approaches have been exploited to reach specific ends. The framers' intent, the legislative history, and, most of all, the actual language are often ignored.

Studying the documentary wording and the constitutional history is certainly not an illogical legal approach. In contracts law, for example, we are taught that proper enforcement should be based upon the language of the instrument and, if necessary, an examination of the intent of the parties. While the Constitution may be based upon jurisprudential principles that are not always clear, this is not a reason to shun constitutional principles, discard the intent of the framers and blindly accept the Court's bizarre reworking of the document. Constitutional law should focus upon distinctions between the wording and intent of a particular clause and novel Supreme Court interpretations. Instead, legal curricula employ the case method, where students are presented with judicial assaults on their intelligence—where the Court finds that limits imposed on the federal government can be transformed into federal power over state governments, and the Court discovers "penumbras" and "emanations" floating around specifically enumerated rights regardless of what the framers' intended. In "The Birth of the 'Living' Constitution," Professor Eugene W. Hickok, Jr. questions the basis of a "living" Constitution. This article helps contribute to the contemporary debate by recognizing that the study of constitutional law is inseparable from an understanding of fundamental constitutional principles.

One particular area where the Supreme Court has exhibited confused and inconsistent precedents has been where state practices have been challenged under the Establishment Clause of the first amendment. In "The Creche, the Cross and the Establishment Clause," Tim Shelly discusses how, in *Lynch v. Donnelly*, the Supreme Court squeezed the case into a "surrounding circumstances" analysis in order to uphold a forty-year old municipal practice of displaying a creche during the Christmas season. That government has a duty to promote religion in general and encourage morality among the people has been a fundamental principle of American political tradition since the birth of the Nation. Not until the 1960's, when the federal judiciary first implemented a policy of rigid separation of church and state, did this tradition meet with federal opposition. *Lynch* may signal an about-face in judicial policy. It remains to be seen how far the Court will allow the judicially-imposed barriers between church and state to be broken down. Regardless of the correctness of the *Lynch* result, this case illustrates the ease with which the Court creates a particular analysis to reach a desired result.

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This issue of *The Colonial Lawyer* also includes a tribute to the late Professor William F. Swindler by Chief Justice Warren E. Burger. The staff of *The Colonial Lawyer* would like to express its sincerest appreciation to Chief Justice Burger for providing this tribute to a man who was both a scholar of the Constitution and an inspiration to his students.

Finally, this edition presents a description of the Institute of Bill of Rights Law at the Marshall-Wythe School of Law. This Institute serves as a center for learning and research on the historical significance and contemporary application of the Bill of Rights.

Gordon J. Schiff

# TRIBUTE TO WILLIAM F. SWINDLER

Warren E. Burger

*Chief Justice of the United States*

Professor William F. Swindler was a colleague and personal friend for a long time. We worked together on historical matters and on the founding of the Supreme Court Historical Society, where he later was Director of Publications. We will all miss him greatly.

Bill Swindler was a product of the Midwest. Born in Missouri, he graduated from Washington University in St. Louis and received a master's degree from the University of Missouri. He began his career in journalism and several years later came to the law when he obtained a law degree from the University of Nebraska. His second career was as a law professor and for twenty-five years he was associated with the Marshall-Wythe Law School at William & Mary. Upon his retirement in 1979 he was named John Marshall Professor of Law Emeritus.

An analyst and historian of first rank, Bill Swindler contributed to the American Bar Association, the American Law Institute, the American Judicature Society, and to a wide readership his many ideas. He was prolific in the creative sense, and a careful scholar. I always found him to be an optimist, looking ever on the bright side of things. He was warm, generous, and caring. He was hard-working, but he experienced such joy in what he was doing that he presented no image of a work addict. In the last 15 years of his life, Bill Swindler wrote more than a dozen books. I remember especially his 1978 publication *The Constitution and Chief Justice Marshall* because he asked me to prepare an introduction for it. Typically, at the time of his sudden death, Bill was working on three additional books. One was a treatise on constitutional law, another was on the Continental Congress, and the third was on the Supreme Court during the era of Chief Justice Earl Warren.

During the coming half-decade our Nation will celebrate the Bicentennial of the Constitution. It is our loss that he will not take part in it for he had much to contribute and would have enriched our knowledge and understanding of this great event. Only four days before his death, Bill wrote to me, "I hope in the coming five-year period climaxing in the bicentennial of the Judiciary Act in 1989, we can indeed collaborate frequently on 'matters historical.'" In all my tentative plans, I envisioned a role for this fine scholar-historian.

A teacher of law is trustee of great traditions and Bill Swindler was a trustee who kept that trust. His teaching, scholarship, and professional activities earned the respect of the legal profession and of generations of students. He will be missed.

# THE BIRTH OF THE "LIVING" CONSTITUTION

Eugene W. Hickok, Jr. \*

It has become more than commonplace to refer to the Constitution of the United States as a "living" document. Indeed, it has become doctrine. High school students are taught that the Constitution "adapts" to changes in time and circumstance much the way an organism adjusts to changes in its environment. Students enrolled in undergraduate courses in American Government are told that the Constitution remains relevant primarily because of the efforts of politicians and Supreme Court Justices to "interpret" the document and "bend" it to fit modern circumstance. It is a "living" constitution, so it is argued, not only because it "specifies highly technical governmental 'rules of the game,'" but because it also "encompasses implicit norms of custom and usage, which have evolved over the decades in response to important political needs."<sup>1</sup> As Walter Berns has described it, "a living Constitution is first of all a protean constitution, one whose meaning is not fixed."<sup>2</sup>

Those who advocate this understanding of the Constitution point to John Marshall's opinion in *McCulloch v. Maryland* as intellectual support for their position. In *MuCulloch*, Marshall points out that the Constitution is ". . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."<sup>3</sup> But Marshall's argument is that the *Congress* is the means through which this *government* is to remain "relevant." Marshall did not say that the Constitution should be adapted to the various crises of human affairs; he said that the powers of Congress are adaptable to meet those crises."<sup>4</sup> Marshall's understanding of the character of the Constitution remains consistent with his statement in *Marbury v. Madison*: "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it." For Marshall, the Constitution and the principles it embraces, "are deemed fundamental and permanent."<sup>5</sup>

Proponents of a "living" constitution will have to look elsewhere for a spokesman. John Marshall cannot legitimately be considered an advocate for their position. Of course, this is not to say that advocates can't be found. One might turn to Mr. Justice Douglas, for example, who, in his concern to find a way to protect individual privacy, looked to the "emanations" flowing from the "penumbras" of the Constitution to produce a Constitutional "right to privacy." (*Griswold v. Connecticut*) Then there is Mr. Justice Black dissenting in *Adamson v. California*, after finding that the historical purpose of the fourteenth amendment has "never received full consideration" by the Court and that, contrary to what the majority of his colleagues on the bench at the time might think, "the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule" established in *Barron v. Baltimore*. Indeed, advocates of a "living" constitution can find support in the decisions of a number of Justices.

The doctrine of a "living" constitution is a by-product of judicial decision-

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<sup>1</sup> Ira Carmen, *Power and Balance*, (New York: Harcourt, Brace, Jovanovich, 1978), p. 27.

<sup>2</sup> Walter Berns, "Do We Have A Living Constitution?" in *National Forum: Toward the Bicentennial of the Constitution*, a publication of the Honor Society of Phi Kappa Phi, Fall 1984, p. 29.

<sup>3</sup> *McCulloch v. Maryland*, 4 Wheat.316 (1819).

<sup>4</sup> Berns, *op. cit.*, p. 30.

<sup>5</sup> *Ibid.*

making. Ever since Chief Justice Charles Evans Hughes first announced that the "Constitution is what the judges say it is" the doctrine of a "living" constitution has attracted its score of supporters.<sup>6</sup>

The framers of the document never spoke of a "living" constitution. They did speak of a permanent one. For the men who gathered in Philadelphia, words were not simply empty vessels into which one might pour meaning. For the framers, words had meaning and they chose their words carefully to express exactly what the Constitution was intended to provide. They recognized a need to allow for inevitable change in society. But they also saw a need to temper temporary popularity with adherence to permanent principles. They understood the distinction between popular impulse or inclination and the long-term public interest. They recognized the need for a *written* constitution that would provide "the fundamental and paramount law of the nation," (*Marbury v. Madison*). The very fact that it is a written constitution is important.

It was because certain principles were considered to be of such an important and permanent nature that a revolution was fought and a new government constructed—a new government under a written constitution so that government by men might never stray from those principles. As Walter Berns so aptly puts it, the concern of the framers "was not to keep the Constitution in tune with the times, but, rather, to keep the times, to the extent possible, in tune with the Constitution."<sup>7</sup>

The contemporary doctrine of a "living" constitution is the product of a misguided understanding of the way the framers understood the document and of the early attempts by the Court to interpret it. In addition, it is a by-product of judicial decision-making by activists who, from time to time, have provided the majority on the Court with the authority the Constitution does not provide them. The nourishment for the "living" Constitution, in other words, has been provided by judicial activism. The primary vehicle employed by the activists has been the fourteenth amendment. Indeed, the birth of "our living Constitution" can be traced to the transformation of the Bill of Rights that has transpired through incorporation.

## I

Perhaps the most telling evidence of the degree to which the idea of a "living" constitution has come to dominate the study and practice of law in the United States can be found in the way the Bill of Rights has been transformed. What was originally intended to be a check upon the powers of the federal government has been transformed by means of the fourteenth amendment into a vehicle for the aggrandizement and enhancement of federal governing authority. It is surely one of the supreme ironies of our constitutional history that an entire portion of the Constitution dedicated to the preservation of individual liberties through the maintenance of a limited government has produced instead an expansive federal government in the name of protecting individual rights. In retrospect, the fears of the Anti-Federalists—those who opposed the new Constitution and the threat of consolidated government—seem all too prescient.

The idea of a bill of rights, although certainly part and parcel of the revolutionary fervor that so colored the colonies in the 1770's, actually can be traced to the Magna Carta of 1215. Until the Puritan Revolt in Great Britain, that document, along with English common law, provided the primary protection of individual rights. As Robert Rutland has pointed out, "the American Revolution had its seeds in the Puritan Revolt of English forebears, with the avowed goal of giving

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<sup>6</sup> As quoted in Henry Abraham, *The Judicial Process*, (New York: Oxford Press, 1980), p. 324.

<sup>7</sup> Berns, *op. cit.*, p. 30.



citizens the freedoms won a century earlier in the mother country.”<sup>8</sup>

The Bill of Rights to the federal Constitution has its roots in the several bills of rights that were to be found in the constitutions of the states in the 1780’s, and can be traced directly to the Virginia Declaration of Rights, written by George Mason and adopted in convention in June of 1776. That document says, in part,

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>9</sup>

The similarities between the Virginia Declaration of Rights and the Declaration of Independence adopted a few weeks later is telling. Both documents served to underscore the degree to which colonists understood the nature of the relationship between the individual and his government. In the words of Edmund Randolph of Virginia,

In the formation of the bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons; the other, that in all revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous.<sup>10</sup>

The federal Bill of Rights emerged as the product of political compromise struck during the ratification debates. James Madison, a principal architect of the new Constitution and, in the end, the primary architect of the Bill of Rights, had argued vehemently against attaching a bill of rights to the federal Constitution. According to Madison, “bills of rights” would be both “unnecessary” and “dangerous” in the new Constitution. “They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted.”<sup>11</sup> It made very little sense indeed, reasoned Madison, to declare that the federal government shall not do certain things when the government already has no power to do them. For Madison, the issue was quite clear: “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”<sup>12</sup> Moreover, Madison argued,

the truth is . . . that the Constitution is itself, in every rational sense, and to every useful purpose, a BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each state is its bill of rights.<sup>13</sup>

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<sup>8</sup> Robert Rutland, *The Birth of the Bill of Rights*, (Chapel Hill: University of North Carolina Press, 1955), p. 3.

<sup>9</sup> See Robert Rutland, *op. cit.*, p. 35-40.

<sup>10</sup> From “Randolph’s Essay,” *Virginia Magazine of History*, 44 (1936), p. 47, as quoted in Rutland, *op. cit.*, p. 39.

<sup>11</sup> See *Federalist* No. 84.

<sup>12</sup> See *Federalist* No. 84.

<sup>13</sup> *Ibid.*

According to Madison, attaching a bill of rights to the new Constitution seemed an unwarranted act that in all probability would make the process of ratification even more arduous than already anticipated. But to those in the states who looked upon Mr. Madison's constitution with some concern, a bill of rights seemed a necessary protection against the threat imposed by the construction of a strong and "energetic" central government. As one ardent Anti-Federalist put it, "For universal experience demonstrates the necessity of the most express declarations and restrictions to protect the liberties of mankind, from the silent powerful and ever active conspiracy of those who govern."<sup>14</sup> In response to the Federalist argument that Americans were already so enlightened as to make it almost inconceivable that individual freedoms, such as freedom of religion, would ever be denied, "An Old Whig" replied,

They are idiots who trust their future to the whim of the present hour . . . What is there in the new proposed Constitution to prevent his [a conscientious objector] being dragged like a Prussian soldier to the camp and there compelled to bear arms?<sup>15</sup>

As Raoul Berger has pointed out, then, "it was not fear of State mismanagement but distrust of the remote federal newcomer that fueled the demand for a federal Bill of Rights which would supply the same protection against the federal government that State constitutions already provided against the States."<sup>16</sup> Perhaps more importantly, it was a fear that worked to the political advantage of the Anti-Federalists. Here was an issue that "transcended sectional interests" and struck to the very root of those principles that had produced the Revolution and the Articles of Confederation, and which, allegedly, underwrote the proposed new Constitution as well. In the end, the supporters of the federal Constitution recognized that political necessity required that a bill of rights be attached to the document. James Madison himself, while campaigning for the new Congress, advanced the argument that

the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.<sup>17</sup>

Initially, the Federalists could take some solace in the fact that the Bill of Rights was added by the new Congress upon the ratification of the states, rather than through another constitutional convention that might have led to other, perhaps more far reaching reforms. But perhaps more importantly, the political leaders of the time, men such as James Madison and Thomas Jefferson, eventually came to recognize that a federal bill of rights had a value in its own right, in addition to the purpose it had served in the struggle for ratification of the Constitution. They developed an appreciation for "the salutary effects of a federal Bill of Rights as a benchmark in the American experience in self-government."<sup>18</sup>

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<sup>14</sup> Rutland, *op. cit.*, p. 135.

<sup>15</sup> Rutland, *op. cit.*, p. 137.

<sup>16</sup> Raoul Berger, *Government by Judiciary*, (Cambridge: Harvard University Press, 1977), p. 135.

<sup>17</sup> Rutland, *op. cit.*, p. 196.

<sup>18</sup> Rutland, *op. cit.*, p. 218.

The Bill of Rights emerged from the struggle for ratification then as the product of political compromise. But it was a principled compromise. As Robert Rutland has argued, the Bill of Rights “clearly demonstrated that the American Revolution had a broad ideological base and that it was not only a military, political and social upheaval—but also a legal rebellion,” that “served notice for all the world that national independence, without personal liberty, was an empty prize.”<sup>19</sup>

## II

For the first generation of Americans to live under the Constitution of 1789, the purpose of the Bill of Rights remained clear: to place demonstrably far-reaching restraints upon the central government.<sup>20</sup> The Supreme Court gave its blessings to this doctrine with *Barron v. Baltimore* in 1833. Here, in one of the last decisions written by Chief Justice John Marshall, the Court made it clear that the federal government could not interpose itself between the individual and the state. Marshall reasoned that the “Constitution was ordained and established by the people of the United States for themselves, and not for the government of the individual states.” Because of this, the Bill of Rights must be understood as placing restraints upon “the power of the general government, not as applicable to the states.” For Marshall the issue was not a difficult one to resolve:

Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and expressed that intention.

. . . These amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them.<sup>21</sup>

The first major challenges to the Court’s ruling in *Barron* came after the ratification of the fourteenth amendment to the Constitution in 1868. The amendment itself did not overturn *Barron*. But the stream of Supreme Court decisions that has flowed from this, “the most controversial and certainly the most litigated of all amendments adopted since the birth of the Republic,” has served to transform the Bill of Rights, as Justices, in their attempt to fashion “just” solutions to political and constitutional problems, breathed “life” into the Constitution.<sup>22</sup>

Whether the framers of the fourteenth amendment looked upon it as a vehicle for applying the Bill of Rights to the states does not really concern us here. Regardless of the framers’ intent, the Court indeed has found that the amendment calls for the “incorporation” of the Bill of Rights. It does not seem to matter, in other words, that even a cursory glance at the historical record surrounding the introduction of the amendment and the debates leading up to its ratification might lead one to question how Mr. Justice Black could argue, as he does in his dissent in *Adamson v. California*, that the framers of the amendment intended “to make the Bill of Rights applicable to the States.”<sup>23</sup>

The evidence supporting “incorporation” is not as compelling as Justice Black would have one believe. For example, while Henry Abraham argues, on the one

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<sup>19</sup> Rutland, *op. cit.*, p. 218.

<sup>20</sup> Henry Abraham, *Freedom and the Court*, (New York: Oxford University Press, 1967), p. 26.

<sup>21</sup> See *Barron v. The Mayor and the City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>22</sup> Abraham, *Freedom and the Court*, *op. cit.*, p. 28.

<sup>23</sup> See *Adamson v. California*, 332 U.S. 46 (1947).

hand, that “there seems relatively little doubt that the A mentment’s principal framers and managers, . . . if not every member of the majority in the two houses of Congress, did indeed believe the Bill of Rights to be made generally applicable to the several states via one or more segments of section 1 [of the amendment],” Charles Fairman, in an exhaustive study appearing in the *Stanford Law Review*, finds the opposite to be true.<sup>24</sup>

According to Fairman, Justice Black is wrong.

In his contention that Section 1 was intended and understood to impose Amendment I to VIII upon the States, the record of history is overwhelmingly against him.<sup>25</sup>

And in a companion article to Mr. Fairman’s, Stanley Morrison finds that “in the absence of any adequate support for the incorporation theory, the effort of the dissenting judges in *Adamson v. California* to read the Bill of Rights into the Fourteenth Amendment amounts simply to an effort to put into the Constitution what the framers failed to put there.”<sup>26</sup>

Putting the controversy aside (much as Justice Black did!), however, it may be the better part of wisdom to recognize that there is precious little profit to be found in dwelling upon the integrity of a theory that has acquired the status of “constitutional truth” over the years, no matter how questionable that integrity may be. After all, whether or not the framers of the fourteenth amendment intended the “incorporation” of the Bill of Rights, the Bill of Rights has been incorporated. And the doctrine of “incorporation” has changed the rules of the constitutional game. But what should trouble the advocates of constitutionalism is not so much the wisdom of the idea of “incorporation” but the kind of thinking that produces such controversial and questionable constitutional law. It is not enough that Justice Black was seeking to establish a rule of law for civil rights and liberties that would be “both drastic and simple and that would guarantee certainty for all future litigation.”<sup>27</sup> For as Stanley Morrison points out, the problem with this is that “no matter how desirable the results might be, it is of the essence of our system that the judges stay within the bounds of their constitutional power.”<sup>28</sup> Lino Graglia puts it well:

The use of improper methods in reaching decisions has its own results that detract from any good to be achieved, and the use of proper methods lends some assurance that the good results desired will in fact be achieved and, if achieved, will come to be seen as good.<sup>29</sup>

The decisions by the Court that gradually have led to the “incorporation” of almost the entire Bill of Rights through the fourteenth amendment represent, as a class, decisions aimed at bringing the Constitution into line with the egalitarian

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<sup>24</sup> Abraham, *Freedom and the Court*, *op. cit.*, p. 39.

<sup>25</sup> Charles Fairman, “Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,” 2 *Stanford Law Review*, (December 1949), p. 139.

<sup>26</sup> Stanley Morrison, “Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation,” 2 *Stanford Law Review*, (December 1949), p. 173.

<sup>27</sup> Abraham, *Freedom and the Court*, *op. cit.*, p. 37.

<sup>28</sup> Morrison, *op. cit.*, p. 173.

<sup>29</sup> Lino Graglia, *Disaster by Decree*, (Ithaca: Cornell University Press, 1976), p. 260.

and democratic tendencies that color contemporary society. They reflect the desire of members of the Court to adjust the Constitution to meet particular demands of the times. That members of the Court might act on such a desire is to be expected to a certain extent. Under a republican constitution, public opinion matters, and the Court, as one of the three political institutions, has always, after a fashion, reflected prevailing public sentiment. But the institution devised by the framers for insuring that public opinion influences government is the legislature, not the Court. Moreover, the ability of the legislature to respond to public opinion is limited by the constraints found in the Constitution. And the only way to get around those constraints is to alter the Constitution, through amendment.

The mechanism exists for bringing the Constitution into line with contemporary society. But it is a cumbersome and time-consuming mechanism to employ, and for good reason. The hallmark of good government, so the framers believed, is its ability to respond to the “permanent and aggregate interests of the community” rather than the “transient opinions” and “inclinations” that might from time to time infect the people and inflame the passions. The Constitution, in other words, was not designed to become a flexible barometer of prevailing public sentiment. The document instead forces us to put public sentiment into perspective. It speaks to permanent principles and outlines a government that is designed to act upon those principles when responding to the public will.

Attempts on the part of the Court to bring the Constitution into line with contemporary society represent something of an “end run” around the Constitution; accomplishing constitutional change without having to adhere to the document’s own procedures for providing for change. Playing fast and loose with a written constitution is being defended as interpreting a “living” constitution. The transformation of the Bill of Rights illustrates the extent to which the Court has been able to “breathe” into the Constitution whatever “life” it wishes. It challenges all thoughtful students of the Constitution to reaffirm the integrity of what Thomas Jefferson once referred to as “our peculiar security”—a written constitution.

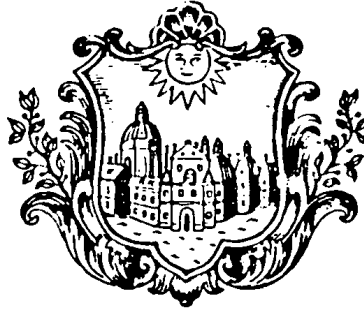
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# THE CRECHE, THE CROSS AND THE ESTABLISHMENT CLAUSE

Tim Shelly\*

## I. THE *LYNCH* DECISION

The display of religious symbols, particularly Latin crosses and creches, by governmental bodies or on public property, has been extensively contested in lower courts to determine whether such displays violate the Establishment Clause<sup>1</sup> contained in the first amendment of the United States Constitution. But the Supreme Court did not address the matter until 1984 when it decided *Lynch v. Donnelly*.<sup>2</sup> In *Lynch*, the Court held that the city of Pawtucket, Rhode Island, did not violate the Establishment Clause when it erected a lifesize creche in a privately-owned park as a part of its annual Christmas display. Numerous other decorations commonly associated with the Christmas season surrounded the creche. The entire display was temporary and the cost of the creche was minimal.<sup>3</sup> Under these circumstances, the Court decided that no establishment of religion existed.

At the outset of its analysis, the Court acknowledged that a complete separation of government and religion is neither possible nor desirable.<sup>4</sup> The Constitution does not require, but actually forbids such a separation as violative of the Free Exercise Clause.<sup>5</sup> In support of this proposition, the Court listed numerous examples where states have recognized "the role of religion in American life" without violating the Constitution.<sup>6</sup>

The Court noted that a literal reading of the Establishment Clause is not required. Both Religion Clauses are to be construed, instead, in a manner of effectuate their objectives. The constitutionality of challenged governmental conduct should be judged by "whether, *in reality*, it establishes a religion or religious faith, or tends to do so."<sup>7</sup> To make this determination the Court acknowledged that it has relied on the three-prong analysis formulated in *Lemon v. Kurtzman*.<sup>8</sup> In the *Lynch* opinion, however, Chief Justice Burger noted that the *Lemon* analysis is not always applicable in Religion Clause cases. Burger pointed to *Larsen v. Valente*<sup>9</sup> and *Marsh v. Chambers*<sup>10</sup> as two examples where the Court employed a

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<sup>1</sup> Sixteen recorded cases have involved Establishment Clause challenges to government displays of religious symbols. Two cases have involved Establishment Clause issues other than the religious symbol question. One case involved both a Free Exercise and an Establishment Clause challenge.

<sup>2</sup> *Lynch v. Donnelly*, U.S. , 104 S. Ct. 1355 (1984).

<sup>3</sup> *Id.* at 1358.

<sup>4</sup> *Id.* at 1359 citing *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). "It has never been thought either possible or desirable to enforce a regime of total separation."

<sup>5</sup> *Id.* at 1359.

<sup>6</sup> *Id.* at 1359. The list included official recognition of religious holidays, references to God in the national slogan and the Pledge of Allegiance, the national museums' displays of religious art and the presidential designation of a National Day of Prayer.

<sup>7</sup> *Id.* at 1361 (emphasis added).

<sup>8</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The Court articulated a three-part test: (1) Does the display possess no secular purpose (2) Is its primary effect to inhibit or advance religion or (3) Does it cause excessive governmental entanglement with religion.

<sup>9</sup> *Larsen v. Valente*, 456 U.S. 228 (1982).

<sup>10</sup> *Marsh v. Chambers*, U.S. , 103 S. Ct. 3330 (1983).

different analysis.<sup>11</sup>

After making this assertion, and immediately prior to undertaking the *Lemon* analysis, the Court suggested that “the surrounding circumstances” must be considered when the state allegedly violates the Establishment Clause.<sup>12</sup> Examining “the surrounding circumstances” made it possible for the Court to apply the *Lemon* test. When viewed as a portion of a large secular Christmas display, the creche passed the three-pronged *Lemon* test.

The Court held first that the creche depicted the origins of a national holiday and thus had some “secular purpose.” The fact that the creche also may have had a religious purpose did not make its erection and maintenance unconstitutional under the first prong of the *Lemon* test.<sup>13</sup>

Just as easily, the Court dismissed the argument that including the creche in the Christmas exhibit had the “primary effect of advancing religion.” The Chief Justice asserted that a simple display of a creche along with numerous other Christmas decorations would not advance religion any more than other state activities which are constitutionally permitted. To support this proposition, he pointed to tax exemptions for church properties, federal grants to church-sponsored colleges and other monetary benefits religious organizations receive from the state.<sup>14</sup> Any benefit a religion might derive from Pawtucket’s display was too “indirect, remote, and incidental” to merit concern.<sup>15</sup>

Finally, the Court held that there was no “excessive governmental entanglement with religion.” Pawtucket officials did not contact any church authorities about the purchase, design or erection of the creche. Additionally, the costs of the creche were viewed as *de minimis*. The Court also pointed out that throughout the forty-year history of the creche display, the only showing of political divisiveness was this lawsuit. Commencement of such a suit, by itself, was insufficient to trigger the *Lemon* prohibition of excessive government entanglement with religion.<sup>16</sup>

Possibly, the most significant aspect of *Lynch* is the Court’s assertion that the *Lemon* analysis need not be employed in all Establishment Clause conflicts.<sup>17</sup> The ease of application to the *Lynch* factual setting possibly saved the *Lemon* test. Questions remain, however, as to the applicability of the test to factual situations that differ from the *Lynch* case.<sup>18</sup> The purpose of this paper is to formulate a

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<sup>11</sup> 104 S. Ct. at 1362.

<sup>12</sup> *Id.* at 1362. The Court stated that “the focus of [its] inquiry must be made on the creche in the context of the Christmas season.” Implicitly the Court held that a display of a religious symbol, if part of a larger exhibit celebrating a holiday, cannot be detached from that context and its constitutionality analyzed as if the symbol were being displayed alone.

<sup>13</sup> *Id.* at 1363.

<sup>14</sup> *See id.* at 1363. The Chief Justice also listed government-supplied textbooks for church-sponsored schools, funding for pupil transportation to such schools, Sunday Closing Laws, release time programs for religious training and legislative prayers as constitutionally valid conduct.

<sup>15</sup> *Id.* at 1364.

<sup>16</sup> *Id.* at 1365.

<sup>17</sup> *Id.* at 1362. Professor Jesse Choper argues that the Supreme Court laid the foundation for abandoning the *Lemon* test in *Lynch*. *See* J. Choper, *Religion Clauses of the First Amendment: An Overview*, speech given at the Southern Conference of Attorneys General (Sept. 13, 1984). At least one federal district court agrees with Dr. Choper. *See May v. Copperman*, 582 F. Supp. 1458, 1462 (D.N.J. 1984), where the court held that after *Lynch* the Supreme Court may “shift course and pursue a less than vigorous application of the *Lemon* [sic.] test.” *See also* 104 S.Ct. at 1370-71 (Brennan, J., dissenting).

<sup>18</sup> 104 S.Ct. at 1370. Justice Brennan expressed his disappointment with the majority’s inability to draft an opinion that would guide decision making in other cases of governmental displays of religious symbols.



practical means of analysis for determining when the exhibit of a religious symbol violates the Establishment Clause.

## II. THE ACTUAL ANALYSIS EMPLOYED IN DETERMINING THE CONSTITUTIONALITY OF A STATE'S RELIGIOUS SYMBOL DISPLAY

Allowing a state practice of displaying a religious symbol even though it may be either religious in origin or nature permits the birth of the analysis elaborated below.<sup>19</sup> If in all cases the judiciary focused solely on the religiosity of the displayed symbol or the religious motivation behind the government's actions, the conduct would inevitably be violative of the Establishment Clause.<sup>20</sup> Such a strict application of the Establishment Clause, producing a frigid restraint upon religious activity by the state, would, however, cause an infringement of Free Exercise rights.<sup>21</sup> Consequently, the Supreme Court recognized that a complete separation of government and religion is neither practical nor desirable.<sup>22</sup>

If a complete separation of church and state is impractical, and indeed unconstitutional, the judiciary is forced to determine the form and extent of commingling of the two clauses permitted by the Constitution. In making these determinations, courts have ardently applied the three-part analysis formulated in *Lemon v. Kurtzman*.<sup>23</sup> In most cases that have involved the display of a religious symbol by the state, the courts have *explicitly* applied the *Lemon* analysis (or one of its predecessors if the decision was rendered prior to *Lemon*).<sup>24</sup> In these cases, however, the courts have not employed a three-prong test like that used by the Supreme Court in *Lemon*. Rather, the analysis has collapsed into a single question: Does the government's display of religious symbols either promote or inhibit religion?

### A. The Ineffectiveness of the First and Third Prongs of the Lemon Analysis

The first step of the *Lemon* analysis invalidates state displays only when purely religious purposes have motivated the action.<sup>25</sup> As the Supreme Court noted in *Lynch*, governmental conduct is constitutionally valid when it is motivated by a single secular consideration, even if the conduct substantially benefits

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<sup>19</sup> *Allen v. Hickel*, 424 F.2d 944, 947-48 (D.C. Cir. 1970). The display of a religious symbol by the state includes the government's purchase, erection and maintenance of a display and the use of public property by private individuals or organizations for a display of a religious symbol.

<sup>20</sup> 104 S. Ct. at 1362.

<sup>21</sup> *Id.* at 1359.

<sup>22</sup> *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952); 104 S.Ct. at 1358; *Also see Walz v. Commissioner*, 397 U.S. 664, 669 ( ); *Protestants and Other Americans United for Separation of Church and State v. O'Brien*, 272 F.Supp. 712, 719 (D.D.C. 1967); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 558 P.2d 338, 342 (1976), *cert. denied*, 343 U.S. 876 (1977); *Baer v. Kolmorgen*, 14 Misc. 2d 1015, 1021-22 (N.Y. Sup.Ct. 1958).

<sup>23</sup> 403 U.S. at 612-613.

<sup>24</sup> 104 S.Ct. at 1362; *See American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983); *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980); *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 508 F. Supp. 823 D. Colo. 1981; 558 P.2d 338 (1976); 424 F.2d 944 (D.C. Cir. 1970); *Paul v. Dade County*, 202 So. 2d 833 (Fla. Dist. Ct. App. 1967) (the latter two cases employed the two-step *Schempp* analysis).

<sup>25</sup> 402 U.S. at 612.

religion.<sup>26</sup> Usually this standard can be easily met, especially when the symbol is displayed in conjunction with a holiday or ceremony having religious origins. In these cases, the government normally maintains that the display depicts the historical background of the holiday or ceremony,<sup>27</sup> a purpose the Supreme Court has recognized as secular.<sup>28</sup> Only in cases involving blatant religious motivation and the lack of any rational secular justification have such displays been prohibited by the first step of the *Lemon* analysis.

In *Gilfillan v. City of Philadelphia*,<sup>29</sup> the city's erection of a large platform, on which stood a thirty-six foot tall wooden cross, was held unconstitutional because it failed the first strand of the *Lemon* analysis.<sup>30</sup> The city constructed the platform at a cost of \$204,000 for the Pope's use during his visit to the United States. From this platform his Holiness celebrated a mass attended by nearly one million persons and viewed by many more on television. The platform was constructed for the sole purpose of providing a place of worship for the Pope;<sup>31</sup> it was not erected as a display celebrating a secular holiday or event.<sup>32</sup> Thus, because the state-supported display lacked any rational secular purpose, it was prohibited under the first prong of the *Lemon* analysis.

Similar to *Gilfillan* is *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*<sup>33</sup> In *Rabun County* a local chamber of commerce, with initial approval from various state agencies and employees, paid for the construction of a permanent Latin cross in Black Rock Mountain State Park. The cross was eighty-five feet tall, and, because of its size and location, it was visible from miles away and could be seen from the major highways traversing the county. Prior to its construction, the chamber of commerce issued press releases containing religious and inspirational statements about the cross. The construction deadline was Easter. Shortly after announcing the construction of the project, the chamber of commerce received several complaints charging that such a display would violate the Establishment Clause. In response, the chamber drafted a resolution designating the cross as a memorial to deceased citizens in Rabun County. This resolution, however, was never officially adopted and the cross was dedicated at Easter Sunrise Services.<sup>34</sup>

Holding that the cross violated the Establishment Clause, the eleventh circuit required that the cross be dismantled. The inability of the Rabun County cross to pass the first prong of the *Lemon* analysis forced this conclusion. Using an analysis similar to that used in *Stone v. Graham*,<sup>35</sup> the court reversed the lower court

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<sup>26</sup> 104 S.Ct. at 1362.

<sup>27</sup> See *id.* at 1363; *Allen v. Morton*, 495 F.2d 65, 72 (D.C. Cir. 1973); *Anderson v. Salt Lake City*, 475 F.2d 29, 33 (10th Cir. 1973).

<sup>28</sup> See 104 S.Ct. at 1363; *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curium).

<sup>29</sup> 637 F.2d 924 (3d Cir. 1980).

<sup>30</sup> The federal court of appeals actually held that the city could not bear the cost of this construction. The court, however, suggested that the decision was limited because the plaintiff had only argued that such expenditures were constitutionally impermissible and did not address the constitutionality of the symbol's display on public property.

<sup>31</sup> 637 F.2d at 929.

<sup>32</sup> The court also held that the city's conduct violated the Establishment Clause under the other two strands of the *Lemon* test; the primary effect of the conduct was the advancement of religion, and the city had become excessively entangled with religion. 637 F.2d at 929.

<sup>33</sup> 698 F.2d 1098 (11th Cir. 1983).

<sup>34</sup> *Id.* at 1101-1102.

<sup>35</sup> 449 U.S. 39 (1980) (per curium).

and held the display was not constitutional because its true religious purpose had been masked at trial with a secular purpose. The historical basis for the cross unquestionably indicated that it “was erected out of religious stirrings and for a religious purpose.”<sup>36</sup> Only in cases such as *Gilfillan* and *Rabun County*, where no rational secular purpose is asserted or discernible prior to the constitutional attacks, does the first prong of the *Lemon* analysis become effective. In most cases, the ease of showing a secular purpose effectively writes out the first prong of the analysis.<sup>37</sup>

Similarly, the third step of the *Lemon* test is effectively read out of the analysis except in the most obvious cases of Establishment Clause violations. Generally, the third prong is a factor only when government officials are actively involved in designing, erecting or overseeing the display;<sup>38</sup> where state and church officials have participated jointly in designing, erecting or overseeing the display;<sup>39</sup> or where the state has expended inordinately large sums of money on the display.<sup>40</sup> Additionally, when the only divisiveness caused by the religious symbol display is the suit in question,<sup>41</sup> the divisiveness, by itself, is insufficient to violate the entanglement strand of the *Lemon* analysis.<sup>42</sup>

In most instances, the display of a religious symbol is conducted in such a manner as to avoid the application of the first and third strands of the *Lemon* analysis. Presumably, this results from the public policy that government should be prohibited from exclusively promoting sectarian goals and that state officials should not and cannot work closely with church authorities. Consequently, most challenged displays have fallen into two categories. Either they have been privately donated and shown on public property or they have been owned and operated by a government whose financial and managerial involvement has been *de minimus*. Additionally, such displays usually have been erected and maintained in conjunction with a secular holiday or ceremony so that the state could assert a rational secular purpose for celebrating that event. Therefore, the vast majority of cases involving religious symbol displays are decided by the second step of the *Lemon* analysis: Does the person viewing the display perceive it as an endorse-

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<sup>36</sup> 698 F.2d at 1110.

<sup>37</sup> See 558 P.2d 346. The ease of meeting this standard is demonstrated in *Eugene Sand*, where the Oregon Supreme Court held that when a secular organization sponsors a display of a religious symbol for a secular purpose, the first prong of the *Lemon* analysis is satisfied.

<sup>38</sup> *Id.* at 347. (The entanglement prong of the analysis is violated when the government has participated “in an active manner” in planning and overseeing the display.

<sup>39</sup> See 104 S.Ct. at 1364. To determine if the “government entanglement” was sufficient to violate the Religion Clauses, the Court’s analysis focused on the extent of contact between religious and government officials with regard to the conduct. See also 631 F.2d at 931, where the excessive government entanglement was found because various city officials were involved in joint planning of the platform and cross with the Archdiocese; 434 F.2d at 950, where the opinion suggests that the government should divest itself of its supervisory role over the display of a creche as part of the annual Christmas pageant; *Fox v. City of Los Angeles*; 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978), where the California Supreme Court expressed particular concern with government officials’ consultations with various sectarian leaders about the maintenance and illumination of a large Latin cross displayed on the side of a courthouse.

<sup>40</sup> See 104 S.Ct. at 1364, where the Court found the government’s tangible (financial) involvement “*de minimus*,” a factor which, individually, does not create an excessive government entanglement with religion; 637 F.2d 924, where the government expenditure of \$204,000 for a platform and a cross was held to be “excessive government entanglement” with religion; 558 P.2d at 347, where the entanglement prong was not violated because the government was only bearing a *de minimus* expense in maintaining the religious symbol.

<sup>41</sup> See 698 F.2d at 1098; 475 F.2d at 29; 508 F. Supp. at 823.

<sup>42</sup> 104 S.Ct. at 1365. See *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), where local candidates who made a religious display a platform issue were adjudged to have violated the entanglement strand.

ment or rejection of religion by the state?<sup>43</sup>

In applying the second strand of the *Lemon* analysis, the lower courts are in agreement that the Establishment Clause does not prohibit the state from depicting objects possessing spiritual content.<sup>44</sup> Rather the Establishment Clause prohibits governmental promotion of any spiritual content of the display. As the Supreme Court held in *Lynch*, a literal interpretation of the Establishment Clause is not employed; instead, courts should scrutinize all questioned conduct to determine whether it actually establishes or tends to establish a religion.<sup>45</sup> Essentially “[t]he question is not whether there is any religious effect at all, but rather whether that effect, if present, is substantial.”<sup>46</sup> To determine if the display of a religious symbol *substantially affects* the viewers, all the *circumstances surrounding* the display must be considered.<sup>47</sup> The size, permanence and setting of a display are all relevant considerations in determining the question of constitutionality. A study of these factors should be undertaken to decide whether they offset any viewer perception that the display is a symbolic endorsement or rejection of religion by the state. Controversies involving religious displays can be more readily resolved by employing a “surrounding circumstances” analysis than by an entire *Lemon* analysis.

## B. The Collapsed *Lemon* Analysis of Religious Symbol Display Cases<sup>48</sup>

As noted above, the Establishment Clause does not mandate a complete separation of government and religion.<sup>49</sup> The history of the United States is replete with state acknowledgements of the role religion plays in American society.<sup>50</sup> The Supreme Court has recognized in various opinions that such a complete separation is not only impossible, but also undesirable.<sup>51</sup> “[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercises without sponsorship and without interference.”<sup>52</sup> This general proposition leads to the question: What form of state conduct sufficiently advances or inhibits religion to cause a first amendment violation?

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<sup>43</sup> To violate the second strand of *Lemon*, the display must have an effect on the individual viewer that causes a perception of the inhibition or advancement of religion.

<sup>44</sup> See 424 F.2d at 948; 508 F. Supp. at 827.

<sup>45</sup> 104 S.Ct. at 1361.

<sup>46</sup> 424 F.2d at 949.

<sup>47</sup> See 104 S.Ct. at 1362-63; Chase, *Litigating a Nativity Scene Case*, 24 St. Louis U.L.J. 239 (1980). If the “surrounding circumstances” concerning the state of a religious symbol were not considered in determining the constitutionality of a display, the second strand of the analysis would become useless, for the only effect of the display (and likely its only purpose) would be to advance religion. Thus, the surrounding circumstances analysis became crucial in finding that the creche did not violate the Establishment Clause.

<sup>48</sup> In this analysis, I have presumed that the first and third strands of the *Lemon* test have been met. Only blatant violations stumble on these two prongs of the analysis. Thus, close cases will be decided on the second strand. See 637 F.2d 924, where the city constructed an open air cathedral from which the Pope could preach; 698 F.2d 1098, where no secular purpose was found when an eighty-five foot tall cross was erected by a municipality.

<sup>49</sup> 104 S.Ct. at 1358-59. The court explained that an “exercise of callous indifference” by the state toward any religion would violate the Free Exercise Clause of the first amendment.

<sup>50</sup> See *id.* at 1358. The Court gave a lengthy list of such governmental acknowledgements.

<sup>51</sup> See *id.* at 1358.

<sup>52</sup> 397 U.S. at 669.

Governmental displays of religious symbols, as that phrase is used in this paper, may be grouped into three categories: first, temporary displays as part of larger secular displays celebrating temporal events; second, temporary displays, standing alone, but in conjunction with secularized celebrations; and third, permanent displays of religious symbols.

## 1. Temporary Displays of Religious Symbols as Part of a Larger Secular Display

Temporary displays of religious symbols as part of a larger secular celebration commemorating a holiday or event that possesses secular aspects include the *Lynch* creche and a variety of other symbols displayed during the Christmas season. Before *Lynch*, the state and lower federal courts found it difficult to decide religious symbol display cases on a rational basis and in a consistent manner. Since *Lynch*, this category of cases has become easier to decide and should be found constitutional.

Read broadly, the *Lynch* decision indicates that such displays do not violate the Establishment Clause because a new factor, "the surrounding circumstances," has been incorporated into the legal analysis enabling the Court to find a *Lynch*-type display constitutional.<sup>53</sup> The "surrounding circumstances" approach is similar to that used by the Court in *Stone v. Graham*<sup>54</sup> and *Abington School District v. Schempp*.<sup>55</sup> This determination crystalized the proposition that the lower federal courts had formulated more than ten years earlier. In *Allen v. Morton*,<sup>56</sup> the Circuit Court of Appeals for the District of Columbia found that the display of a creche on public property as part of the annual Christmas Pageant of Peace, which also included many lighted Christmas trees, live reindeer and a Yule log, could not be judged independently from the other displays of the Pageant.<sup>57</sup> Eight years later, in deciding *Citizens Concerned for Separation of Church and State v. City and County of Denver*,<sup>58</sup> a court made a similar determination when it held that the constitutionality of a creche displayed on the steps of the county courthouse during the Christmas holidays must be judged as only a part of the entire one-block long display which contained thousands of Christmas lights, trees and many other figures commonly associated with Christmas.<sup>59</sup>

Consideration of at least the immediate circumstances surrounding the display requires courts to analyze exhibits in the same manner as would a citizen strolling by the creche. The average person viewing the temporary creche along with the many other displays during the Christmas season would rationally perceive the entire scene as a celebration by the state of a national holiday that has both secular and religious aspects. No reasonable citizen could believe that such government conduct sanctions the adoption or rejection of certain religious beliefs. Thus, if the viewer perceives no message of adoption or rejection, then no advancement or inhibition of religion exists and, consequently, the Establishment Clause is not violated.

The substantial time lag between the creation of an exhibit and the filing of

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<sup>52</sup> 397 U.S. at 669.

<sup>53</sup> *Id.* at 1362.

<sup>54</sup> 449 U.S. 39 (1980) (per curiam).

<sup>55</sup> *Abington School District v. Schempp*, 374 U.S. 203 (1963).

<sup>56</sup> 495 F.2d 65 (D.C. Cir. 1973).

<sup>57</sup> *Id.* at 72.

<sup>58</sup> 508 F. Supp. 823 (D. Colo. 1981) *appeal dismissed* 628 F.2d 1289 (10th Cir. 1981).

<sup>59</sup> *Id.* at 828.

any Establishment Clause challenge supports the theory that the average person views these displays in the context of “the surrounding circumstances” and does not conclude that the displays are a state endorsement of any specific religious tenet.<sup>60</sup> Probably the most telling example is that involving Mr. Jonathon Chase, a constitutional law professor at the University of Colorado Law School and the primary initiator of *Citizens Concerned*.<sup>61</sup> Professor Chase viewed Denver’s annual Christmas display for over eight years before he became aware in 1978 that the display contained a creche (when he read about the display and the creche in a local newspaper). Not until this time did a man possessing exceptional knowledge of the first amendment become aware that the city and county officials might be advancing religion and thus violating the Establishment Clause. After learning about the creche, Professor Chase submitted his name to the local branch of the American Civil Liberties Union and offered to represent anyone desiring to file suit. Two years later, an atheist organization contacted Chase about filing an injunction prohibiting the creche.<sup>62</sup>

The historical background of *Citizens Concerned*, like that of *Lynch*, *Allen* and *McCreary*, indicates that the average citizen-viewer of a temporary creche display which is a part of a larger Christmas celebration does not perceive the creche as a state activity that espouses or spurns particular religious tenets.<sup>63</sup> Without this perception, no actual advancement or inhibition of religion occurs. Without this advancement or inhibition, the second strand of the *Lemon* analysis and, consequently, the Establishment Clause have not been violated.

## 2. Independent Temporary Displays of Religious Symbols

The second category of religious symbol displays is the temporary exhibit of a symbol, by itself, in connection with a secular holiday. Using an analysis similar to that used for symbols as a part of a larger secular celebration, the various court decisions imply that a reasonable viewer would not understand that an interim display exhibited in conjunction with a holiday having both religious and temporal overtones is a state endorsement of religion. The viewer, instead, would see the display as part of the celebration of a secular holiday.

Following this reasoning the district court in *Protestants and Other Americans United for Separation of Church and State v. O’Brien*<sup>64</sup> directed that a temporary display of a religiously significant symbol during the Christmas season “cannot

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<sup>60</sup> In *Lynch*, the city of Pawtucket displayed a creche scene as part of its annual Christmas celebration for nearly forty years before complaints based on the Establishment Clause were lodged against the creche’s display. Almost twenty years passed in *McCreary v. Stone* before complaints about a similar display were lodged against local government officials in Scarsdale, N.Y. Fifteen years passed in *Allen v. Hickel*, and at least nine years elapsed in *Citizens Concerned* before suits were instigated.

<sup>61</sup> 508 F.Supp. 823 (D. Colo. 1981).

<sup>62</sup> See *Chase*, 24 St. Louis U.L.J. 239 (1980), for a more comprehensive explanation of the factual background in the *Citizens Concerned* case.

<sup>63</sup> See 413 U.S. at 792-93. The Court held that historical acceptance cannot “provide a rational basis for ignoring the command of the Establishment Clause that a state pursue a course of ‘neutrality’ toward religion.” Here, historical acceptance of a creche display is not offered to validate that display. Historical acceptance is, instead, used to show that individuals, who at least understand the first amendment and the Establishment Clause, have failed to perceive the state forcing religion upon them or else they would have complained to some official institution. As noted in the text, without such perception by viewers, religious beliefs or practices cannot be advanced or inhibited.

<sup>64</sup> 272 F.Supp. 712, 721 (D.D.C. 1967).

be deemed in any sense even remotely connected with an establishment of religion.”<sup>65</sup> *Protestants* was an injunctive relief action against the United States Post Office attempting to enjoin it from issuing a commemorative Christmas stamp bearing a portrait of the Madonna.<sup>66</sup> The district court held that the Establishment Clause only prohibited the state from proselytizing or conducting propaganda or publicity in favor of any religion.<sup>67</sup>

As with the temporary displays of religious symbols as part of a larger secular exhibit, independent temporary displays of religious symbols were being set up for years without constitutional challenge. This history indicates that the general populace does not perceive such displays as Establishment Clause violations. In both *Paul v. Dade County*<sup>68</sup> and *Fox v. City of Los Angeles*,<sup>69</sup> local officials lighted a large Latin cross on the outside of the central government building during the Christmas season for twelve and thirty years respectively before receiving complaints about the display. This fact pattern indicates that the ordinary viewer did not look upon the government conduct as endorsing or discouraging religion. Therefore, the challenged display passed the second and critical element of the *Lemon* analysis in that it would not be advancing or inhibiting religion when judged in the context of the surrounding circumstances. Thus the display would not violate the Establishment Clause.<sup>70</sup>

The major problem with temporary displays of religious symbols, independent of any secular exhibit, arises when the symbol is displayed for holidays or ceremonies that do not possess minimal temporal significance. Such displays have been held unconstitutional because their “primary effect” is the advancement of religion.<sup>71</sup> Under these circumstances a viewer cannot perceive the display as part of a celebration of a secular holiday. The government will be perceived, instead, as endorsing particular religious activities. This perception will have either a positive or negative effect on viewers, who will tend to become either more receptive to the religious practices and beliefs epitomized in the display or more hostile to those beliefs because of the connection between the display and the local government. Therefore, almost by definition, an advancement or inhibition of religion exists under the second strand of the *Lemon* analysis, and, hence, the Establishment Clause is violated.

Most illustrative of this proposition is a case noted above, *Fox v. City of Los Angeles*.<sup>72</sup> For thirty years, city officials annually lighted windows in city hall

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<sup>65</sup> *Id.* at 713.

<sup>66</sup> *Id.* at 719.

<sup>67</sup> *Id.* at 719.

<sup>68</sup> 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).

<sup>69</sup> 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

<sup>70</sup> *But See* note 63, *supra*.

<sup>71</sup> *See* 637 F.2d at 931. The use of public funds for the temporary erection of a large wooden cross, throne and platform for the Pope’s address had the primary effect of advancing religion, and had little, if any, secular purpose, and caused the excessive entanglement of government and religion. *See also* 587 P.2d at 665. The annual lighting of a Latin cross on the side of city hall during Christmas, Protestant Easter and Eastern Orthodox Easter had the primary effect of preferring and ultimately advancing religion.

<sup>72</sup> 587 P.2d 663 (1978). Although decided on California constitutional law grounds, the Religion Clause of the California State Constitution, Cal.Const. art. I, 4, is identical to the Establishment Clause of the federal Constitution. *Mandel v. Hodges*, 54 Cal. App. 3d 596, 616, 127 Cal. Rptr. 244, 257, 90 A.L.R.3d 728 (1976). *But see* Note, *Fox v. City of Los Angeles: The State, the Cross, and Constitutional Religious Symbolism*, 11 Sw.U.L.R. 713 (1979), interpreting that the California Establishment Clause analysis differs from the analysis used under the federal Establishment Clause.

forming a giant Latin cross on the nights of December 24 and 25. City officials never received any complaints about the cross. Then, upon the request of local religious leaders, the city began to light the cross on Easter and Eastern Orthodox Easter evenings. Los Angeleans immediately showered the city government with applause and reproaches, the plaintiff filed suit, and the display was ultimately held unconstitutional. These facts indicate that the public did not perceive the cross as a state endorsement of religion when the windows were lighted exclusively during the Christmas holiday. The cross was one of many other displays designed to bring a message of good will and peace in celebration of a semi-secularized holiday. Viewed in this manner, the lighted crosses did not advance or inhibit religion. The problem arose only after officials lighted the cross during the Easter holidays, and the public began to view the city as endorsing religion.<sup>73</sup> Thereby, under the second strand of *Lemon*, the state had advanced religion, and the display was held unconstitutional.

This analysis explains why the temporary cross illuminated on the Dade County courthouse is constitutional, while the temporary crosses in Philadelphia and Los Angeles were in violation of the Establishment Clause or the equivalent state constitutional provision. This analysis also accounts for the constitutionality of temporary creches displayed on public school property during the schools' Christmas holidays in *Lawrence v. Buchmueller*<sup>74</sup> and *Baer v. Kolmorgen*.<sup>75</sup> These displays were exhibited in conjunction with a religious holiday, the celebration of which is heavily secularized. No reasonable viewer of the creches during this period could possibly perceive the displays as a governmental endorsement of religion. If the displays were shown at a different time of year, the average viewer would look upon such exhibits as a state endorsement of a particular religion or particular beliefs. In the eyes of onlookers, religion either would be advanced or inhibited, and the symbol would fail the second strand of the *Lemon* analysis, thus violating the Establishment Clause. Consequently, temporary displays of religious symbols exhibited by themselves and not in connection with a secularized holiday or ceremony, such as Christmas or a state funeral, are unconstitutional.<sup>76</sup>

### 3. Permanent Displays of Religious Symbols by the State

The third and final type of religious symbols are those permanently displayed by the state. These displays are more likely to be found to advance or inhibit religion because their permanence causes them to be perceived as a governmental endorsement of religion. To offset this perception, which exists presumptively, the state must undertake adequate measures to counter the religious message conveyed by the display and inform the public of the secular purposes of the exhibit. If such measures effectively offset any possible religious message, the display will be constitutional.

A cursory study of permanent state displays of religious symbols indicates that nearly all stand alone or as a part of a larger permanent display of

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<sup>73</sup> 587 P.2d at 665. (Communications to city council praising the display of the Christian symbol during Eastern Orthodox Easter stirred deep emotions in the speaker and his family).

<sup>74</sup> 40 Misc. 2d. 300, 243 N.Y.S. 2d 87 (N.Y. Sup. Ct. 1963).

<sup>75</sup> 14 Misc. 2d 1015 (N.Y. Sup. Ct. 1958).

<sup>76</sup> Presumably, a temporary display exhibited in such a manner would be constitutional if could pass the analysis employed in determining the validity of a permanent state display of a religious symbol. This analysis would prove difficult because of the lack of an apparent secular purpose in exhibiting the display at this time (such as honoring an individual or group of individuals for their secular contributions to society).



religious symbols. Crosses placed at gravesites in federal and state cemeteries are a prime example of permanent religious displays. The graves at Arlington National Cemetery are marked by small white crosses, all of which are erected and maintained by the federal government on public property. Similarly, memorials exist throughout the Nation which are dedicated to veterans and erected by the state or on public property. Often these memorials have crosses, God's all-seeing eye or the Star of David. Other displays whose constitutionality have been litigated include massive Latin crosses,<sup>77</sup> a monolith inscribed with the Ten Commandments and various other religious symbols,<sup>78</sup> and a lifesize statue of a nun outfitted in full habit.<sup>79</sup>

Permanent displays of religious symbols are more likely to be held an endorsement of religion by the state. The lack of mitigating circumstances, such as secular holidays or non-religious celebrations that would otherwise offset or detract from the religious message conveyed through the symbol, create this constitutional problem. An individual seeing the Latin cross on August 20 cannot perceive its display as a celebration of a secularized holiday. The only reasonable conclusion that an onlooker could reach is that the state has erected the symbol because it endorses the cross and the concepts and beliefs it symbolizes. As noted above, this perception eventually leads to the advancement or inhibition of religion by the state. For these reasons a permanent display of a religious symbol by the government, without any countervailing measures, will be found unconstitutional.<sup>80</sup>

The mere fact that a symbol is permanently displayed, however, does not create a violation *per se* of the Establishment Clause. The display can still be constitutional if the state effectively neutralizes the religious overtones. Essentially, the state must inform the public, either expressly or implicitly, that the purpose of the display is secular and is not intended as a state endorsement of religion. To determine whether a government has used successful means in informing viewers that the display was erected and is maintained for secular purposes, the size and location of the symbol must be closely examined.

If the symbol is large or centrally located, or both, more persons will be able to see the symbol, and the state will have to undertake more extensive measures to inform those viewers about the secular purposes of the symbol. Significant problems have occurred where large crosses were the subject of litigation, as in *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*,<sup>81</sup> *Eugene Sand & Gravel, Inc. v. City of Eugene*,<sup>82</sup> and *Lowe v. City of Eugene*.<sup>83</sup> In these cases the crosses were

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<sup>77</sup> See 698 F.2d 1098 (11th Cir. 1983); 558 P.2d 338 (1976); *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla.), cert. denied, 409 U.S. 980 (1972); *Lowe v. City of Eugene*, 254 Or. 518, 459 P.2d 222 (Case I), 463 P.2d 360 (Case II) (1969), cert. denied, 397 U.S. 1042, reh'g denied, 398 U.S. 944 (1970).

<sup>78</sup> 475 F.2d (10th Cir. 1973).

<sup>79</sup> 57 So. 2d 238 (La. Ct. App. 1952).

<sup>80</sup> See, 24 St.L.U.L.R. at 266, for evidence that a display's permanence is a factor which the courts deem significant. (For example the district court in *Citizens Concerned* repeatedly asked questions concerning the duration of the creche's display).

<sup>81</sup> 698 F.2d 1098 (11th Cir. 1983).

<sup>82</sup> 558 P.2d 338 (1976).

<sup>83</sup> See 459 P.2d 360 (Case II) (1969). *Eugene Sand* and both *Lowe* cases involved the same Latin cross, although many of the circumstances in the *Lowe* cases had changed by the time *Eugene Sand* was litigated.

large and were located where both local inhabitants and passersby could see them.

The cross in *Rabun County* was eighty-five feet tall, constructed of steel, set in concrete and contained thirty-one vapor lights which were turned on two to four hours nightly. The cross stood atop a small mountain located in Black Mountain State Park and was visible from several miles away, where it could be viewed by a large number of persons. Under these circumstances, local government officials would need to publicly establish the secular purpose of the cross, which was allegedly to attract both residents of Rabun County and highway travelers to the park.

Instead of communicating this secular purpose to the public, only religious messages were conveyed. The local chamber of commerce issued press releases asserting the various religious purposes for the erection of the cross and set the date of dedication for Easter Sunday. Additionally, the chamber of commerce arranged for an Easter Sunrise Service at the base of the giant cross. The government could only meet the first strand of the *Lemon* analysis, which requires some secular purpose for the cross—attracting tourists to the park. If the chamber of commerce had also addressed the primary effect strand, presumably they could have pointed to two factors mitigating the religiosity of the symbol. First, a private, secular organization instigated and paid for the construction of the cross. Second, the cross stood in a state park which provided a wholly secular surrounding. The combination of these two factors could have neutralized any message of state endorsement.

Even if the chamber of commerce had addressed the primary effect strand, Establishment Clause problems would remain. Any traveler using the county highways would see the large, permanently displayed cross standing on state property but would have no knowledge that a private secular organization erected the cross. The only reasonable perception he could formulate would be that the government had endorsed the cross and the ideals it represents. The temporal setting surrounding such a symbol, by itself, would be an insufficient mitigating factor to offset the religious message under the *Lemon* analysis.<sup>85</sup>

If a general secular purpose were singularly sufficient to satisfy the *Lemon* test, government officials could permit the construction of a permanent shrine including a cross, a Madonna, crucifixes, various altars and other artifacts of public property in the central business district without violating the Establishment Clause (if the two other prongs of the *Lemon* test<sup>86</sup> were passed).<sup>87</sup>

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<sup>84</sup> 698 F.2d at 1100-1101.

<sup>85</sup> *Cf. Lowe* (Case II), 463 P.2d at 362.

<sup>86</sup> As noted earlier, this would not be as difficult as it initially appears. A secular purpose, for example, could be the attraction of patronage to the central business district, thus stimulating the local economy. Additionally, most religious symbol cases indicate that simply permitting a symbol to stand on public property does not cause excessive government entanglement, as long as the state donated only *de minimus* financial support and did not work closely with local religious leaders in designing and supervising the display.

<sup>87</sup> *But cf.* 496 P.2d 792 (Okla. 1972), *cert. denied*, 490 U.S. 980 (1972). The Oklahoma Supreme Court upheld the erection of fifty-foot tall cross on public property (the local fairgrounds) by an organization of churches. The only factor detracting from the cross's religious message was its secular surroundings. The court emphasized that it was not deciding whether the cross violated the federal Establishment Clause. Its decision rested, instead, on the Oklahoma constitutional provision prohibiting any monetary or proprietary support to be given by the State to any church or church leader. Okla. Const. art. II, 7. Under state court interpretation, the government conduct involved could not be labelled "support of a church or its leader." The court held that "the commercial atmosphere in which the cross . . . stands and the commercial setting that obscures whatever suggestions may emanate from its silent form, stultify its symbolism and vitiate any use, benefit, or support . . . of religion."

The *Lowe* cases and *Eugene Sand* exemplify what measures could be taken to counter any evidence of state endorsement of religion. The cross in these three cases, which is standing today, is fifty feet tall and perched atop a hillside in a public park. Donated by private parties, the cross is lighted by neon lamps and is easily seen from several miles away. Consequently, many residents of Eugene, Oregon, can view the cross from their homes. Travelers using the nearby thoroughfares can also see the symbol glow from the hilltop. In deciding *Lowe*, which preceded the *Lemon* decision, the Oregon Supreme Court held that the erection of the cross violated the Establishment Clause because the cross only had a religious purpose and its primary effect was the advancement of religion.

After the *Lowe* decision, the private parties, rather than dismantling the cross, deeded title to the monument to a veterans' association, who, in turn, donated it to Eugene as a memorial to those who died in battle. The city held an elaborate dedication ceremony for its new monument, installed a commemorative plaque at the base of the cross and made plans to inscribe "Bravely They Died, Honored They Rest" in large letters along the cross bar of the memorial.

Ultimately, the constitutionality of the monument was relitigated. In *Eugene Sand*, however, the Oregon Supreme Court held that the monument was constitutional. Noting that numerous circumstances had changed significantly since the *Lowe* decisions, the court held that a "display of a large cross in a public park as a veterans' war memorial under such circumstances does not violate the Constitution."<sup>88</sup> Later in its opinion the court reasoned that a "religious symbol does not have the primary effect of inhibiting or advancing religion when it is displayed by a secular organization and during secular holidays, festivals or pageants."<sup>89</sup>

The court rationalized that the changed circumstances would lead a viewer to perceive the cross as a war memorial honoring fallen soldiers, not as an endorsement of religion. The highly publicized dedication ceremony and the plaque informed Eugene residents of the secular purpose of the cross and neutralized any potential state endorsement of religion.<sup>90</sup> In addition, the large lettering on the cross served notice to those unaware of the dedication ceremony or the plaque that the cross was not installed for religious purposes and was not intended to be an endorsement of religion by the government.<sup>91</sup> Thus, the changed circumstances neutralized any overtones of state endorsement of religion or a particular set of religious beliefs so that no actual advancement or inhibition of religion occurred, and the Establishment Clause was not violated.

The final type of permanent symbol displays are the small ones that can only be seen from close range. This sub-type of permanent displays includes crosses, crucifixes and other religious artifacts marking gravesites in public cemeteries and lifesize statues of religious figures and leaders. Under an analysis similar to that employed above, state officials must inform the public of the secular purposes of the exhibits, thereby eliminating any possible perception of state endorsement of religion. This standard is not as stringent as that applied to massive

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<sup>88</sup> 558 P.2d at 346.

<sup>89</sup> *Id.* at 364.

<sup>90</sup> *Id.* at 347.

<sup>91</sup> *Stone v. Graham* can be easily distinguished from *Eugene Sand*. First, the posting of the Ten Commandments in public school rooms lacked a true secular purpose. Additionally, only minimal efforts were taken to counteract the endorsement message conveyed by the posting of the Commandments. These efforts only included the "fine printing" of an alleged secular purpose at the bottom of the Commandments. Such measures could hardly be deemed adequate to convey to schoolchildren that the public school system was not encouraging them to adopt and practice these tenets. In *Eugene Sand*, a valid secular purpose existed: honoring those who gave their lives in defense of their country. The efforts made by local officials and organizations were very much more effective in conveying this secular purpose to the general populace and, thus, balanced any religious message.

symbol displays. The lesser standard is justified because fewer measures are necessary to offset the potential religious endorsement. A smaller symbol would be seen by fewer people and from a much closer distance than a huge symbol erected in the same location. Thus, a small plaque, dedication ceremony or a well-known secular program may be sufficient to prevent a violation of the Establishment Clause.

Two cases have involved permanent displays of small religious symbols and both upheld the constitutionality of the monuments. *State ex. rel. Singelmann v. Morrison* involved a lifesize statue depicting a nun in full habit, St. Frances Xavier, Mother Cabrini, and honoring her contributions to the poor and needy of New Orleans.<sup>92</sup> The Louisiana Court of Appeals held that a statue which honors an individual's secular contributions cannot be violative of the Constitution simply because it portrays a member of a religious order.<sup>93</sup> The Knights of Columbus affiliate, who had designed and purchased the statue, conducted a small dedication that was attended by some local government officials. A small plaque noting that private contributions had financed the statue was installed at its base.

Under the *Lemon* analysis, the court found that a legitimate secular purpose existed—honoring the humanitarian contributions made by Mother Cabrini to the city of New Orleans. The court held the primary effect of an effigy of a habited nun could not be an advancement or inhibition of religion. Although the court offered no explanation why religion was not advanced, presumably the plaque and dedication ceremony were sufficient to inform possible onlookers of the statue's secular purposes. When the message of religious endorsement is neutralized by these factors neither advancement nor inhibition of religion can occur. Therefore, the *Lemon* analysis was passed and the display was held constitutional.

In *Anderson v. Salt Lake City*, a secular fraternal organization, the Eagles, donated to Salt Lake City a granite monolith measuring five feet tall and inscribed with the Ten Commandments, a cross, the Star of David and other religious symbols.<sup>94</sup> The city placed the monolith on the courthouse lawn. The Eagles donated the monolith as a part of a state-wide program designed to improve youth morality. The United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the monolith and in its decision addressed only the issue of the monolith's primary effect. Holding that the state may depict objects with a spiritual content, the court reasoned that a "passive" monument<sup>95</sup> which possesses a secular purpose,<sup>96</sup> erected in such a setting by a secular fraternal organization as part of its statewide youth improvement program, did not violate the Establishment Clause. Essentially, the court held that a monument constructed under these circumstances could not advance or inhibit religion because the monument did not convey a message of state endorsement or rejection of religion which the viewer could perceive.

In conclusion, the small permanent display of a religious symbol, like the display of a large symbol by the state, is constitutional if sufficient means are taken by the state to counter any perception by viewers that the government is endorsing or rejecting any particular religious beliefs.

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<sup>92</sup> 57 So. 2d 238 (La. Ct. App. 1952).

<sup>93</sup> *Id.* at 240.

<sup>94</sup> 475 F.2d 29 (10th Cir. 1973).

<sup>95</sup> *Id.* at 33. The court found that the monument was a "passive display" because it did not include any "element of coercion." Even though the religious display was in "plain view," according to the court, "no one is required to read or recite them [the Ten Commandments]."

<sup>96</sup> *Id.* at 33.

### III. CONCLUSION

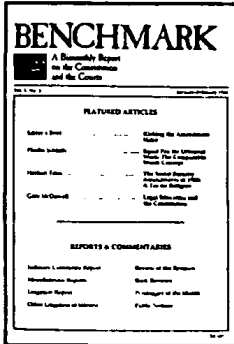
In deciding the Establishment Clause question concerning state displays of religious symbols, the various courts have constructed, unintentionally, a sliding scale standard. Assuming that a valid secular purpose exists and no excessive entanglement between religion and government occurs, the state may display a religious symbol as long as sufficient measures are taken to squelch the inference of state endorsement of religion transmitted by the display. Almost by definition, a temporary display of a religious symbol that is only a part of a larger secular exhibit is constitutional. Such displays are normally celebrations of holidays or ceremonies with significant secular overtones. In this situation, an individual seeing the display would understand it to be a secular celebration and not a state endorsement of religion.

A nearly identical analysis is employed for determining the constitutionality of a temporary symbol display standing alone. The question in this situation becomes whether the holiday or event being celebrated is sufficiently secular in nature so that an individual who views the symbol understands it to be a celebration of a secular occasion and not a general endorsement of the religious tenets surrounding the symbol.

With the final type of state display, permanent symbols, the courts will look to the circumstances attached to the symbols and attempt to determine if they effectively neutralize the endorsement of religion and send a message of secular purpose to the viewers. If the viewers perceive no state endorsement or rejection of religion, no advancement or inhibition of religion occurs, and the modified *Lemon* analysis is passed. Thus the Establishment Clause is not violated.

Regardless of the type of display involved, future Establishment Clause cases will, most likely, employ a sliding scale analysis.

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## THE INSTITUTE OF BILL OF RIGHTS LAW

The Institute of Bill of Rights Law at the Marshall-Wythe School of Law is well on its way toward establishing itself as a national center for research on the Bill of Rights, particularly on first amendment speech and press issues. The endowment generously provided by the Lee Memorial Trust Fund has enabled the law school to maintain a diverse full and part-time staff and to establish a framework of symposia and other meetings to encourage research on Bill of Rights-related issues and interaction between journalists and academic and practicing lawyers. The establishment of the Institute of Bill of Rights Law at the Marshall-Wythe School of Law recognizes the substantial impact of Williamsburg and the College of William and Mary in the early history of the Bill of Rights.

The Institute's primary objective is scholarly research on the Bill of Rights, particularly in the area of the first amendment. The major endeavor is modern first amendment law, with an emphasis on speech and press issues, together with the dissemination of knowledge of Bill of Rights law to lawyers, people involved in communications media, and the public. Substantial resources are also dedicated to the study and teaching of legal history, particularly the Anglo-American history of personal liberties, professional responsibility and effective legal writing. The additional professorial staff and opportunities available to the students make the Institute a major contribution to the growth, development and diversity of the Marshall-Wythe School of Law.

The Institute function most noticeable outside the law school is its annual symposium on first amendment issues. The symposium is designed to stimulate and disseminate original research on the first amendment. It attracts a national audience of both practicing and academic lawyers and journalists. The first symposium was co-sponsored by the *William and Mary Law Review*; jointly the law review and the Institute published the proceedings. The Institute separately distributed the proceedings to a large audience of those interested in journalism and the law.

This year's symposium, on March 29 and 30, 1985, will be on "National Security and the First Amendment" and will feature three speakers of national reputation: Burt Newborne, Legal Director of the American Civil Liberties Union and Professor of Law at New York University; Bruce Fein, Vice President of Gray and Company, Washington, D.C.; and Robert Kamenshine, Professor of Law at Vanderbilt University and visiting Lee Distinguished Professor in the Institute of Bill of Rights Law. They will speak, respectively, on "The Use of National Borders to Interfere with Free Trade in Ideas," "Access to Classified Information: Constitutional and Statutory Dimensions," and "Embargoes on Exports of Ideas and Information: First Amendment Issues." Additionally, John Shenefield of Milbank, Tweed, Hadley and McCloy will address the luncheon audience on the subject of "National Security and the Exercise of Civil Liberties." A distinguished panel of varied backgrounds and employment will comment on the papers; both the papers and commentaries will be published soon after the symposium.

The Institute's first symposium, in March, 1984, was a resounding success. The topic was "Defamation and the First Amendment: New Perspectives." The Institute was fortunate in its first year to attract as principal speakers Professor David Anderson of the University of Texas Law School, Professor Marc Franklin of Stanford Law School, and Professor Frederic Schauer, then a visiting professor and now permanently at the University of Michigan Law School. Both Professor Schauer, while Cutler Professor of Law at Marshall-Wythe, and Professor Anderson were instrumental in the formation of the Institute and in setting its direction. The proceedings of the first symposium, published as a special issue of the *William and Mary Law Review*, have received extraordinarily favorable reactions.

The Institute also sponsors and supports other substantial events related to its

mission. On November 7-8, 1984, the Institute invited Professor Lee Bollinger to speak on "Tolerance and the First Amendment" at the annual George Wythe Lecture; that paper, delivered in two sessions, will be published soon. The Institute is sponsoring a plenary session on the making of the Constitution at the annual meeting of the American Society for Eighteenth Century Studies, which will meet in Williamsburg in March, 1986.

The Institute's interest in the relationship between law and media leads it also to co-sponsor events of particular interest to the media. In July, 1985, the Institute is co-sponsoring a conference of the American Society of Newspaper Editors here in Williamsburg. That conference will address libel, privacy and megaverdicts, government restrictions on access to information, and anti-trust. In November, 1985, the Institute will co-sponsor a conference of the Southern Newspaper Publishers Association for the discussion of the development of first amendment press doctrine.

The symposia and other co-sponsored events constitute a vital contribution to the legal and journalism professions and contribute to the educational potential of the Marshall-Wythe School of Law. These programs should grow in stature as the quality already established is maintained.

Although it has a special mission and is totally funded from outside sources, the Institute is designed as an integral part of the law school. To maintain a careful congruence of goals with law school needs and purposes, Dean William Spong, Jr., is ex officio the Director of the Institute. Since Dean Spong is retiring this year, his successor will likewise assume that position. Dean Spong has been Director of the Institute since its inception in 1982. His long career of involvement in state and national politics, including his service both as a senator in the Virginia legislature from 1956 to 1966 and as a United States Senator from 1966 to 1973, eminently qualified him for this position. In teaching the professional responsibility course in the law school, Dean Spong has actively fulfilled that portion of the goals of the Institute. During his three years as Director, he has set the Institute on a course that combines a dedication to research with teaching and service to the school and the profession.

The ordinary administrative tasks, preeminently the organization of the symposia and various functions, are the province of James W. Zirkle as the Deputy Director of the Institute. Professor Zirkle received his J.D. from the University of Tennessee and LL.M. from Yale Law School in 1973. Prior to coming to Marshall-Wythe as Deputy Director of the Institute and Associate Professor, he was an Associate Dean and Lecturer in Law at Yale. At Marshall-Wythe, in addition to his administrative duties, he teaches Constitutional Law. Professor Zirkle has a lively interest in national security problems, particularly in regard to intelligence agencies. He is currently researching the Freedom of Information Act and its functions.

In fulfilling the primary mission of the Institute toward first amendment concerns, the Lee Memorial Trust Fund enables the law school each year to bring in a Distinguished Lee Professor, normally with a light teaching load, to encourage first amendment research while providing additional opportunities for students. Currently Robert Kamenshine of Vanderbilt University is the Lee Professor; David Anderson of the University of Texas was the first Lee Professor. In 1985 R. Kent Greenawalt, Cardozo Professor of Law at Columbia Law School, will be the Lee Professor. He is the co-author of *The Sectarian College and the Public Purse* and the author of *Legal Protection of Privacy* and *Discrimination and Reverse Discrimination*.

Robert C. Palmer is the Adler Fellow of the Institute and an Assistant Professor at Marshall-Wythe. He received his Ph.D. in History from the University of Iowa in 1977, and taught at the University of Michigan Law School for four years, first



as a junior fellow of the Michigan Society of Fellows and then as a Lecturer in Law. Professor Palmer has published extensively in English legal history and, under the auspices of the Institute, is researching also in American legal history. His first book, *County Courts of Medieval England*, received the American Historical Association's Herbert Baxter Adams Prize for 1984, as the best first book of an author in European history. His second book, *The Whilton Dispute, 1264-1380: A Social-Legal Study of Dispute Settlement in Medieval England*, was published in 1984. His most recent work has been on the origins of property law in twelfth century England and on the incorporation of the Bill of Rights through the fourteenth amendment in the United States. He is currently working on a book on the Bill of Rights. Professor Palmer teaches both American and English Legal History as well as a course on the Historical Backgrounds of the Bill of Rights.

Professor Michael Hillinger fulfills the legal writing portion of the Institute's mission as the Director of Legal Writing at Marshall-Wythe and the Moot Court Advisor. He received a Ph.D. in Political Science from Columbia University in 1967 and his J.D. from Marshall-Wythe in 1983. Before receiving his J.D., he taught History and Political Science at the Hampton Institute. Prior to joining Marshall-Wythe in 1984, he was a law clerk to the Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia. Professor Hillinger teaches Appellate Advocacy and Legal Research and Writing. One of his moot court teams recently won the Marshall-Wythe Moot Court Invitational Tournament. His research interests are in the area of immigration law and comparative law, with a special interest in Eastern European legal systems.

The late Laura Lee provided the endowment for the Institute in memory of her parents, Alfred Wilson Lee and Mary I. W. Lee. Her bequest created the Lee Memorial Trust Fund, stipulating that an Institute of Bill of Rights be established to further the principles embodied in the first amendment's guarantee of free speech and a free press. The Lee Memorial Trust Fund provides the Institute with \$250,000 annually for its first seven years, of which 1984-85 year is the third, with the corpus of the endowment to be conveyed in the final year. The Trust is currently managed by Arthur B. Hanson, of Hanson, O'Brien, Birney and Butler, Washington, D.C., the late Laura Lee's lawyer; Lloyd G. Schermer, current President of Lee Enterprises, Inc., of Davenport, Iowa; and Richard Schermer of Hanson, O'Brien, Birney and Butler, Washington D.C. Richard Schermer assumed his position as trustee on the death of Philip D. Adler, a previous president of Lee Enterprises, Inc.