THE CRECHE, THE CROSS AND THE ESTABLISHMENT CLAUSE

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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[1] 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*.[2] 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.[3] 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.[4] The Constitution does not require, but actually forbids such a separation as violative of the Free Exercise Clause.[5] 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.[6]

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."[7] To make this determination the Court acknowledged that it has relied on the three-prong analysis formulated in *Lemon v. Kurtzman.*[8] 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*[9] and *Marsh v. Chambers*[10] as two examples where the Court employed a

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[1] 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.

[2] *Lynch v. Donnelly,* U.S. , 104 S. Ct. 1355 (1984).

[3] *Id.* at 1358.

[4] *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."

[5] *Id.* at 1359.

[6] *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.

[7] *Id.* at 1361 (emphasis added).

[8] *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 entaglement with religion.

[9] *Larsen v. Valente,* 456 U.S. 228 (1982).

[10] *Marsh v. Chambers,* U.S. , 103 S. Ct. 3330 (1983).

different analysis.[11]

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.[12] 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.[13]

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.[14] Any benefit a religion might derive from Pawtucket's display was too "indirect, remote, and incidental" to merit concern.[15]

Finally, the Court held that there was no "excessive governmental entaglement 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 entaglement with religion.[16]

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.[17] 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.[18] The purpose of this paper is to formulate a

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[11] 104 S. Ct. at 1362.

[12] *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.

[13] *Id.* at 1363.

[14] *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.

[15] *Id.* at 1364.

[16] *Id.* at 1365.

[17] *Id.* at 1362. Professor Jesse Choper argues that the Supreme Court laid the foundation for abondoning 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).

[18] 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.[19] 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.[20] 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.[21] Consequently, the Supreme Court recognized that a complete separation of government and religion is neither practical nor desirable.[22]

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.*[23] 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).*[24] 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.[25] 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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[19] *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 pulic property by private individuals or organizations for a display of a religious symbol.

[20] 104 S. Ct. at 1362.

[21] *Id.* at 1359.

[22] *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).

[23] 403 U.S. at 612-613.

[24] 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).

[25] 402 U.S. at 612.

religion.[26] 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,[27] a purpose the Supreme Court has recognized as secular.[28] 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,*[29] 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.[30] 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;[31] it was not erected as a display celebrating a secular holiday or event.[32] 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.*[33] *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.[34]

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,*[35] the court reversed the lower court

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[26] 104 S.Ct. at 1362.

[27] *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).

[28] *See* 104 S.Ct. at 1363; *Stone v. Graham,* 449 U.S. 39, 42 (1980) (per curium).

[29] 637 F.2d 924 (3d Cir. 1980).

[30] 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.

[31] 637 F.2d at 929.

[32] 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.

[33] 698 F.2d 1098 (11th Cir. 1983).

[34] *Id.* at 1101-1102.

[35] 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."[36] 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.[37]

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;[38] where state and church officials have participated jointly in designing, erecting or overseeing the display;[39] or where the state has expended inordinately large sums of money on the display.[40] Additionally, when the only divisiveness caused by the religious symbol display is the suit in question,[41] the devisiveness, by itself, is insufficient to violate the entaglement strand of the *Lemon* analysis.[42]

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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[36] 698 F.2d at 1110.

[37] *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.

[38] *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.

[39] *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.

[40] *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.

[41] *See* 698 F.2d at 1098; 475 F.2d at 29; 508 F. Supp. at 823.

[42] 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?[43]

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.[44] 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.[45] Essentially "[t]he question is not whether there is any religious effect at all, but rather whether that effect, if present, is substantial."[46] To determine if the display of a religious symbol *substantially affects* the viewers, all the *circumstances surrounding* the display must be considered.[47] 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[48]

As noted above, the Establishment Clause does not mandate a complete separation of government and religion.[49] The history of the United States is replete with state acknowledgements of the role religion plays in American society.[50] The Supreme Court has recognized in various opinions that such a complete separation is not only impossible, but also undesirable.[51] "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercises without sponsorship and without interference."[52] 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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[43] 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.

[44] *See* 424 F.2d at 948; 508 F. Supp. at 827.

[45] 104 S.Ct. at 1361.

[46] 424 F.2d at 949.

[47] *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.

[48] 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.

[49] 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.

[50] *See id.* at 1358. The Court gave a lengthly list of such governmental acknowledgements.

[51] *See id.* at 1358.

[52] 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.[53] The "surrounding circumstances" approach is similar to that used by the Court in *Stone v. Graham*[54] and *Abington School District v. Schempp.*[55] This determination crystalized the proposition that the lower federal courts had formulated more than ten years earlier. In *Allen v. Morton,*[56] 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.[57] Eight years later, in deciding *Citizens Concerned for Separation of Church and State v. City and County of Denver,*[58] 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.[59]

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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[52] 397 U.S. at 669.

[53] *Id.* at 1362.

[54] 449 U.S. 39 (1980) (per curiam).

[55] *Abington School District v. Schempp,* 374 U.S. 203 (1963).

[56] 495 F.2d 65 (D.C. Cir. 1973).

[57] *Id.* at 72.

[58] 508 F. Supp. 823 (D. Colo. 1981) *appeal dismissed* 628 F.2d 1289 (10th Cir. 1981).

[59] *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.[60] 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.*[61] Professor Chase viewed Denver's annual Christmas display for over eight years before he become 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.[62]

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.[63] 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*[64] directed that a temporary display of a religiously significant symbol during the Christmas season "cannot

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[60] 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.

[61] 508 F.Supp. 823 (D. Colo. 1981).

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

[63] *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.

[64] 272 F.Supp. 712, 721 (D.D.C. 1967).

be deemed in any sense even remotely connected with an establishment of religion."[65] *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.[66] The district court held that the Establishment Clause only prohibited the state from proselytizing or conducting propaganda or publicity in favor of any religion.[67]

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*[68] and *Fox v. City of Los Angeles,*[69] 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.[70]

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.[71] 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.*[72] For thirty years, city officials annually lighted windows in city hall

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[65] *Id.* at 713.

[66] *Id.* at 719.

[67] *Id.* at 719.

[68] 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).

[69] 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

[70] *But See* note 63, supra.

[71] *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.

[72] 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.[73] 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*[74] and *Baer v. Kolmorgen.*[75] 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.[76]

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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[73] 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).

[74] 40 Misc. 2d. 300, 243 N.Y.S. 2d 87 (N.Y. Sup. Ct. 1963).

[75] 14 Misc. 2d 1015 (N.Y. Sup. Ct. 1958).

[76] 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 cemetaries are a prime example of permanent religious displays. The graves at Arlington National Cemetary 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,[77] a monolith inscribed with the Ten Commandments and various other religious symbols,[78] and a lifesize statue of a nun outfitted in full habit.[79]

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.[80]

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,*[81] *Eugene Sand & Gravel, Inc. v. City of Eugene,*[82] and *Lowe v. City of Eugene.*[83] In these cases the crosses were

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[77] *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).

[78] 475 F.2d (10th Cir. 1973).

[79] 57 So. 2d 238 (La. Ct. App. 1952).

[80] *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).

[81] 698 F.2d 1098 (11th Cir. 1983).

[82] 558 P.2d 338 (1976).

[83] *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.[85]

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[86] were passed).[87]

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[84] 698 F.2d at 1100-1101.

[85] *Cf. Lowe* (Case II), 463 P.2d at 362.

[86] 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.

[87] *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 preceeded 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 commemoratory 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 Orgon 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."[88] 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."[89]

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.[90] 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.[91] 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 cemetaries 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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[88] 558 P.2d at 346.

[89] *Id.* at 364.

[90] *Id.* at 347.

[91] *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.[92] 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.[93] 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.[94] 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[95] which possesses a secular purpose,[96] 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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[92] 57 So. 2d 238 (La. Ct. App. 1952).

[93] *Id.* at 240.

[94] 475 F.2d 29 (10th Cir. 1973).

[95] *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]."

[96] *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.