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CAN THE STATE BEAR A CROSS?: THE BOUNDARIES OF THE ESTABLISHMENT CLAUSE

INTRODUCTION

In December of 1975, the Los Angeles City Council passed a resolution authorizing the lighting of the windows of its City Hall in the configuration of a cross, to be displayed on Christmas Eve and Day. Similar resolutions had been adopted by the city council for the past thirty years. Since 1970, the cross had also been illuminated on Easter Sunday.[1] The cost of selectively illuminating the City Hall windows on each holiday was approximately one hundred dollars.[2]

Plaintiff Fox sought a preliminary injunction restraining the city from lighting the windows in the cross configuration. She alleged that the practice violated both the first amendment prohibition against the establishment of religion[3] and the analogous provisions of the California Constitution.[4] The trial court granted the preliminary injunction.[5]

1. In response to a request from a member of the Greek Orthodox faith, the city authorized the illumination of the cross on the Greek Orthodox Easter. The City Council also permitted the lighting of the windows in configurations representing the symbols of the Heart Fund and Easter Seal Society. Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1977), *hearing granted,* L.A. No. 30830. (Cal. Sup. Ct., Aug. 18, 1977). (Because a hearing was granted, the opinion of the court of appeal in *Fox* was vacated and not published in the official reports. The case therefore should not be cited to any court of law except under special circumstances. CAL. R. CT. 977 (West 1970). The unofficial citation will be used throughout the remainder of this Note.)

2. The city's Public Works Department estimated the cost at $103. *Id.* Plaintiff Fox estimated the cost at between $100 and $150 per lighting, amounting to more than $10,000 over the 30 year history of the practice. Plaintiff's Petition for Hearing, at 9, Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

4. CAL. CONST. art. I, § 4 provides that "[t]he legislature shall make no law respecting an establishment of religion." Surprisingly, California did not adopt this prohibition until 1974.

5. 139 Cal. Rptr. 180, 181 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

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On appeal, the city contended that the trial court had abused its discretion in granting the preliminary injunction since the plaintiff had shown neither irreparable injury nor a substantial likelihood of prevailing at the trial for a permanent injunction. The court of appeal reversed,[6] holding that the lighting of the cross did not violate the establishment clause but was rather a permissible accommodation of religion by the city, since the practice conferred no measurable benefit on religion and did not breach the neutrality required of government toward religion.[7] Upon a petition by the plaintiff, the California Supreme Court granted a hearing[8] but has yet to render a decision.

In order to withstand a challenge under the establishment clause, any governmental involvement with religion must satisfy a tripartite test that was most fully articulated by the United States Supreme Court in *Lemon v. Kurtzman.*[9] The challenged practice must have a clearly secular purpose, its primary effect must neither advance nor inhibit religion, and it must avoid excessive government entanglement.[10] All three prongs of the test must be met.[11] Although this tripartite test is considered "well-defined"[12] by the Supreme Court, it is easier to state in the abstract than to apply to a given set of facts.[13] This Note will examine the court of appeal's treatment of the facts under the tripartite test and will compare that analysis with that of another court of appeal decision, *Mandel v. Hodges,*[14] which came to an opposite conclusion under similar facts.

6. *Id.* at 185.

7. *Id.* at 184-85. Since the court based its reversal on the constitutional issue, it did not pass on the sufficiency of the allegation of irreparable injury. *Id.* at 182.

8. L.A. No. 30830, Aug. 18, 1977.

9. 403 U.S. 602 (1971).

10. *Id.* at 612-13.

11. Wolman v. Essex, 342 F. Supp. 399, 411 (1972). *But see* Meek v. Pittenger, 421 U.S. 349 (1975). In *Meek,* the Court stated with regard to the tripartite test: "It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the establishment clause have been impaired." *Id.* at 358-59. In reversing the preliminary injunction granted by the lower court, the court of appeal in *Fox* relied upon this language in exercising considerable latitude in deciding whether lighting the cross violated establishment clause prohibitions. As stated in the opinion: "Thus, the central inquiry is at all times directed toward determining whether the challenged activity *truly* results in furtherance of the prohibited establishment clause evils." 139 Cal. Rptr. at 183 (emphasis added).

12. Committee for Public Education v. Nyquist, 413 U.S. 756, 772-73 (1973).

13. *See* Meek v. Pittenger, 421 U.S. 344 at 358 (1975).

14. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

I. THE *FOX* COURT'S ANALYSIS

A. Clearly Secular Legislative Purpose

According to the city's resolution which authorized the practice, the arrangement of the window blinds of City Hall in the form of a cross on Christmas and Easter was not undertaken as a religious tribute. Rather, it was allegedly done in a secular spirit of "peace and good fellowship toward all mankind."[15] The initial question, then, was what deference was to be given to the city's resolution in determining whether the lighting of the cross had a secular or religious purpose. The city had claimed that the contemporaneous declaration of intent found in the resolution was entitled to great weight.[16] If more than one reasonable meaning of the Act existed, then, consistent with the presumption of the constitutionality of legislative acts, the court should construe the Act in favor of the city's intendment.[17]

If accepted, this argument would enable legislative bodies to transform a patently religious purpose into a secular one merely by adopting a statement disavowing any religious purpose. The trial court in *Fox* concluded as much by characterizing the city's declarations of purpose as a "self-serving recital."[18] That a legislative declaration should not be controlling is consistent with the

15. 139 Cal. Rptr. 180, 183 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977). Similarly, the lighting of the cross on the Greek Orthodox Easter was to be a "further symbol of the spirit of peace and good fellowship toward all mankind on an interfaith basis, particularly toward the eastern nations in Europe." *Id.*

In her petition for hearing before the Supreme Court, Plaintiff Fox conceded that Christmas had become a legal holiday and thus as much a secular celebration as a religious one. Nevertheless, she argued that a similar secular status could be ascribed to Easter and Greek Orthodox Easter but to do so would be an affront to non-Christians, especially since "the majority of all mankind" is not of the Christian faith. Plaintiff's Petition for Hearing at 5, Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

The plaintiff asserted further that, historically, the cross did not denote a symbol of "peace and good fellowship. It evokes the memory of 'marching Christian armies' bearing the Cross while pillaging, burning and slaying the 'Infidel' in the Crusades." *Id.* Other examples included the pogroms of Eastern Europe and the forced conversion of the California Indian.

16. Defendant's Supplemental Brief in the Supreme Court of the State of California at 2-4, Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977). In support, the city cited Cal. Civ. Code 3535 (West 1970) which simply states that "contemporaneous exposition is in general the best."

17. *See* Lundberg v. County of Alameda, 46 Cal. 2d 644, 652, 298 P.2d 1, 6 (1956). The important word here is "reasonable". Whether the city's interpretation of their resolution is "reasonable" is highly debatable.

18. 139 Cal. Rptr. 180, 183 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

California Court of Appeals for the First District's decision in *Mandel v. Hodges.*[19] There, the designation of a three-hour period of Good Friday as a paid state holiday was held to have a religious purpose despite a legislative declaration that its intention was the secular one of providing state employees a needed rest.[20]

Unlike other symbols of Christmas, such as the evergreen tree or yule logs, which have acquired secular meanings,[21] the cross is inherently religious. It serves no other purpose than to commemorate that which it represents, the cross upon which Jesus died, and "the culmination of his redemptive mission."[22] While non-Christians might display a tree as part of the festive season, they would hardly be expected to display a cross. The use of a cross on a city hall symbolizes to non-Christians the particular religion that is Christianity, even though to Christians, the cross may also symbolize peace and good fellowship for all.[23] Thus, it cannot fairly be said that the display of the cross had a *clearly* secular purpose, even if it is conceded that the city only intended to join in the secular aspects of Christmas and Easter by promoting good fellowship. The display of a cross for secular purposes simply cannot be meaningfully distinguished from a display for religious purposes.[24]

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19. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

20. *Id.* at 612, 127 Cal. Rptr. at 254.

21. *See* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973). *See also* Comment, *Display of Religious Symbolism Upon Public Lands Restricted Through Excessive Entanglements,* 8 SUFFOLK U.L. REV. 815 (1974).

22. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 346 (Unabr. 1966). "Crosses are a symbol of the Christian religion, and their presence on governmental property is a symbol of established Christianity." L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 341 (1975).

23. *See* Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976). As part of its holding, the *Mandel* court determined that the Christian holy day of Good Friday had not become secularized, and a Resolution ordering state governmental offices closed for a three-hour period did not satisfy the first prong of the tripartite test, thereby violating the establishment clause of the first amendment to the United States Constitution. *Id.* at 612, 127 Cal. Rptr. at 254. If Good Friday is not secular, how can the cross, which is the basis for the religious holiday, be considered less secular? *Id.* at 612, 127 Cal. Rptr. at 254.

24. *See* Lowe v. City of Eugene, 254 Or. 518, 459 P.2d 222 (1969), *cert. denied,* 397 U.S. 1042 (1970), wherein the Oregon Supreme Court held that the permanent display of a cross in a city park was motivated by a desire on the part of the City Council to conform to the wishes of a majority of the citizens of the community, who conscientiously believed that their religious symbol was entitled to preference in display. 254 Or. at 519, 459 P.2d at 224. This, the *Lowe* court stated, was the true purpose of the display even though the city presented evidence that the Council intended to aid the business community, which felt the cross would enhance the commercial exploitation of the principal Christian holidays. *Id.* at 519, 459 P.2d at 224. *See generally* annot., 36 A.L.R.3d 1256 (1971).

Perhaps in recognition of this problem, the court of appeal attempted to avoid applying the first prong's command that there be a clear secular purpose. It did so by relying on a 1952 United States Supreme Court case, *Zorach v. Clauson*,[25] for the proposition that "[s]tate action that has as its purpose accommodation of the religious nature of our people is not for that reason alone impermissible."[26] The *Zorach* Court held that a New York program which permitted public schools to release consenting students from class in order to obtain religious instruction in sectarian schools did not violate the establishment clause.[27] The Court's rationale was that the school's "released time" program was merely a permissible "accommodation" of religion: "When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[28]

The *Fox* court correctly pointed out that the purpose of the legislation reviewed in *Zorach* was *not* secular but was "quite clearly to enable school children to receive religious instruction."[29] Since the released time program in *Zorach* was held not to violate the establishment clause, the *Fox* court concluded that the practice of illuminating a cross was also not unconstitutional if it had as its purpose the recognition and accommodation of religion.[30]

The weakness of this conclusion is that it renders the first prong irrelevant. The rubric of "accommodation of religion," concedes that the illumination of a cross has no *clear* secular purpose without disallowing the practice. *Zorach,* although never overruled, was decided a full decade before the landmark "high wall of separation" decisions of *Engel v. Vitale*[31] and *Abington School District v. Schempp*,[32] from which the tripartite test evolved.[33] It

25. 343 U.S. 306 (1952).

26. 139 Cal. Rptr. 180, 183 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

27. Zorach v. Clauson, 343 U.S. at 312 (1952).

28. *Id.* at 313-14.

29. 139 Cal. Rptr. 180, 183 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

30. *Id.* at 184.

31. 370 U.S. 421 (1962).

32. 374 U.S. 203 (1963).

33. *See* L. PFEFFER, *supra* note 22: "It seems difficult to reconcile *Zorach v. Clauson*

is doubtful that *Zorach* could survive the stricter view of separation of church and state that these cases represent.[34] In addition, the *Fox* court failed to recognize a pertinent part of the *Zorach* Court's opinion, which makes the cases easily distinguishable, specifically: "[T]his 'released time' program involves neither religious instruction in public school classrooms *nor the expenditure of public funds.* All costs, including the application blanks, are paid by the religious organizations."[35] Furthermore, the display of a cross on a *public* building is not comparable to allowing children time off from public school to engage in religious devotion in *private* schools.

The city also cited *Paul v. Dade County*[36] in support of the constitutional validity of displaying the cross on Los Angeles' City Hall. In *Paul,* a taxpayer filed a complaint alleging that the display of a latin cross on the side of a courthouse constituted an establishment of religion in violation of the first and fourteenth amendments of the Constitution. The *Paul* court found no establishment of religion violation, reasoning that the cross and other decorations had been put up at the request of the Miami Chamber of Commerce to attract holiday shoppers and thus had a

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with later decisions which interpreted the Establishment Clause as barring laws whose purpose is to advance religion, for releasing children to enroll for religious instruction and not other children would seem to serve no purpose other than to advance religion . . . ." *Id.* at 192-93; Note, *The "Released Time" Cases Revisited: A Study of Group Decision Making by the Supreme Court,* 83 YALE L.J. 1202 (1974).

L. PFEFFER, *supra* note 22, terms Justice Douglas' opinion in *Zorach* an "aberration", "since the Justice later became the most absolute separationist on the court. *Id.* at 192. The Supreme Court has refused to reconsider the *Zorach* decision despite the difficulties encountered by the lower courts in overcoming its inconsistencies. *See* Smith v. Smith, 391 F. Supp. 443 (W.D. Virg. 1975), *aff'd* 523 F.2d 121 (1975), *cert. denied,* 423 U.S. 1073 (1976).

34. *Zorach* was decided four years after Illinois *ex rel.* McCullom v. Board of Education, 333 U.S. 203 (1948). *McCullom* held unconstitutional a program in which students were released from class on consent of their parents in order to obtain religious instruction during school hours in the school building itself. Justice Douglas, writing for the majority in *Zorach,* distinguished *McCullom* by asserting that the school in *Zorach* was merely closing its doors or suspending its operation in order to allow students to gain religious instruction. He concluded that "[h]ere . . . the public schools do no more than accommodate their schedules to a program of outside religious instruction." 343 U.S. at 315. But in fact, the school did not "close its doors"; rather, students not attending the religious classes had to attend other public school activities. Thus, religious groups actively benefited from the state's power to compel children to attend public school, since the classes in religion served "as a temporary jail for a pupil who will not go to church." 343 U.S. at 324 (Jackson, J., dissenting). *See* C. PRITCHETT, THE AMERICAN CONSTITUTION 405 (1977).

35. 343 U.S. at 308-09 (emphasis added).

36. 202 So. 2d 833 (Fla. App. 1967).

secular purpose.[37] However, *Paul* is also inapposite in that *no public funds* were expended to erect the cross.[38]

B. Primary Effect

The second prong of the tripartite test required that the display of the cross have a principal or primary effect that neither advanced nor inhibited religion. The court in *Fox* concluded that

> if the challenged custom really conferred a measurable benefit upon religion, members of various sects and faiths would either have expressed a desire for equal recognition and aid, or in the alternative, lodged their objection . . . . Yet the record is wholly devoid of any complaint . . . other than that of respondent alone . . . . We are convinced that whatever benefits conferred by that custom are so remote and inconsequential that any threat posed to the First Amendment is hypothetical at best.[39]

Despite the court's observation that "mere longevity of custom does not in itself insulate a practice from constitutional scrutiny,"[40] that is exactly the effect of the court's reasoning. The plaintiff in *Fox* asserted, however, that such reasoning, "brought to its logical conclusion, would sanction every governmental action, no matter how violative it may be of the Constitution, so long as a certain period of time has elapsed before anyone lodged a complaint against it."[41]

What, then, would be the appropriate period of time within which one would have to object or lose the objection forever? How many objections would be necessary before it could be said that government had conferred an impermissible benefit upon religion? The *Fox* court provided no guidelines by which trial courts could have adjudicated these issues in the future. Moreover, the court dismissed as unimportant the fact that another group—members of the Greek Orthodox faith—had specifically

37. *Id.* at 835.

38. *Id.*

39. 139 Cal. Rptr. at 184 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

40. *Id.*

41. Plaintiff's Petition for Hearing, at 7. The plaintiff pointed out that if this line of reasoning were correct, the long-practiced segregation on public conveyances would not have been stopped because a formal complaint had not been filed for a lengthy period of time.

requested that the city give it similar recognition by illuminating the cross on *its* Easter. It is difficult to understand why the nonexistence of an earlier protest necessarily implied that no religion had been or was advanced or inhibited. Fox's objection deserved full constitutional consideration regardless of whether others had not already complained. The *Fox* court's reasoning operates to establish a theory of waiver of constitutional rights, which is especially repugnant in light of the first amendment rights that were in dispute.

Displaying a large and highly visible cross on three sides of a building that is widely recognized to be the center of local government could be interpreted as an observance of the religious holiday by the city itself.[42] The city effectively granted its official imprimatur to the holiday, which perhaps indicated to those who did not share in the holiday that their religious beliefs were somehow less worthy. This can be construed as inhibiting other religions. By authorizing the display of a symbol of the Christian faith on public property, the city also impliedly endorsed the beliefs of a particular religious denomination. In this respect, the *Fox* facts are similar to those in *Lowe v. City of Eugene,*[43] which enjoined the erection of a cross in a public park on the grounds that the display connoted government sponsorship of and preference for a religious symbol.

A separate but related question is whether the effect of the practice was substantial enough to warrant constitutional invalidation. In *Hunt v. McNair,*[44] the United States Supreme Court, in the context of state aid to parochial schools, stated:

42. *Cf.* Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976). The *Mandel* court found that the governor's order mandating a three-hour holiday on Good Friday amounted to an "observance by the state itself" of the holiday. Such observance was in "the sense of its recognition, if not its active ceremonial participation." *Id.* at 614, 127 Cal. Rptr. at 255.

43. 254 Or. 518, 459 P.2d 222 (1969). This case, decided by the Supreme Court *en banc,* concerned the constitutionality of the city's issuance of building permits for the erection of a cross on city property. The court adopted the dissenting opinion handed down by Justice Goodwin in Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117 (1969): "Government has no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple." *Id.* at 124. Although an out-of-state decision, this case is close to the situation in *Fox.* The Oregon Supreme Court thus unequivocally stated, albeit in dicta, that it would strike down as unconstitutional a resolution such as the one the Los Angeles City Council adopted.

44. 413 U.S. 734 (1973). This case challenged the South Carolina Educational Facilities Authority Act as violative of the establishment clause. The Act authorized a financing transaction involving the issuance of revenue bonds benefitting a Baptist-controlled col-

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.[45]

The expenditure of the city's revenues for the lighted cross on City Hall did entail the funding of a specifically religious activity in the otherwise secular setting. Thus, it would seem that even one lighting of the cross violated the *Hunt* guidelines. But the city argued that aid only has a primary effect of advancing religion when it funds a *substantial* religious activity in a secular setting. The argument, then, is that the lighting of the cross was comparable to other religious activities which other courts had upheld because of their de minimis effect.[46]

These cases rejected establishment clause challenges to the federal government's issuance of postage stamps depicting a reproduction of a painting of the Madonna,[47] to a state law requiring a period of silence for meditation or one that required each classroom to have a plaque bearing the words, "In God We Trust",[48] to the erection of a nativity scene on a public school lawn during Christmas vacation,[49] and to the temporary display of religious symbols in public schools.[50] These cases, while resembling *Fox* in certain respects, are nevertheless dissimilar. It is easier to accept the Madonna on a stamp as a work of art than it is to accept the lighting of a cross as such. The reference to "God"

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lege. The Court upheld the Act, which prohibited the recipient institutions from using the funds for sectarian purposes and provided for inspections to assure compliance.

45. *Id.* at 743.

46. Allen v. Hickel, 424 F.2d 944 (1970). However, in giving examples of "insubstantial" religious practices, the court in this case referred to God, not to any religion. It stated: "Obviously, brief references to the Diety in courtroom ceremony, in oaths of office taken by public officials, and on coins of the realm are modest in impact . . . ." *Id.* at 949.

47. Protestants and Other Ams. United for Separation of Church and State v. O'Brien, 272 F. Supp. 712 (1967).

48. Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (1967).

49. Baer v. Kolmorgen, 181 N.Y.S.2d 230 (1958). This court noted that "[a]bsolute separation is not and never has been required by the Constitution." *Id.* at 239.

This case is distinguishable from *Fox* because, as the court observed: "The erection of the creche was *not* financed by any public appropriation, and there is no evidence that it has added any sum whatever to the cost of conducting the school . . . ." *Id.* at 234.

50. Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962), *vacated,* 374 U.S. 487 (1963), *original opinion reaffirmed,* 160 So. 2d 97, *reversed on other grounds,* 377 U.S. 402 (1964).

in "In God We Trust" is unrelated to any particular religion, whereas there is no mistaking the connection between a cross and the Christian faith. Finally, a nativity scene does not have the impact that a cross does, especially where one is displayed in a school and the latter over a whole city.

C. Excessive Government Entanglement

The third prong of the tripartite test requires that the challenged activity avoid excessive government entanglement with religion. The prohibition against excessive government entanglement with religion was enunciated by the United States Supreme Court in a 1970 decision, *Walz v. Tax Commission.*[51] The *Walz* court upheld New York's property tax exemption for property used solely for religious purposes. Chief Justice Burger closely analyzed the extent of involvement between government and religious institutions generated by the tax exemption. Whether government was impermissibly intertwined was determined by looking to the amount of control and continuing surveillance a state would need to exercise over sectarian institutions if the program in question were to continue. The harm of such excessive entanglement was its tendency to produce "direct confrontations and conflicts" between government and religion.[52] The Court was particularly concerned with the day-to-day administrative relationships necessary to enforce and oversee direct grants of aid to church-related schools.

"Excessive entanglement" was clarified in *Lemon v. Kurtzman,*[53] a 1971 decision which overturned comprehensive state programs of monetary aid to church-affiliated elementary and secondary schools. In *Lemon,* the state statutes authorized payments or reimbursements to religious schools for the strictly secular educational services they provided their students, such as teacher salaries and textbook purchases. Such payments were deemed an appropriate secular legislative purpose. Nevertheless, the aid programs failed the test of excessive government entangle-

51. 397 U.S. 664 (1970).

52. *Id.* at 674.

53. 403 U.S. 602 (1971). For a discussion of *Lemon* and entanglement inquiry generally, see Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church — State Entanglement,* Sup. Ct. Rev. 147 (1971); *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church—State Relationships,* 3 Pepperdine L. Rev. 279 (1976); *Establishment and Freedom of Religion, The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 167 (1971).

ment, which demanded an analysis of the "character and purpose of the institutions which are benefited," the "nature of the aid that the state provides," and the "resulting relationship between the government and the religious authority."[54] Using these yardsticks, the Court noted the religious authority which pervaded the recipient schools and the risk that the funds earmarked for secular purposes could nevertheless be spent for religious purposes by the church officials who administered them. These factors necessitated continuing administrative surveillance by the state to ensure that the funds would not be spent on religious instruction.

The Court considered another factor in determining that the state was impermissibly entangled with religion: the likelihood of political repercussions. By appropriating funds for a particular religious school, the state could expect demands for similar aid from other unfunded religious groups. Such demands would foster political fragmentation in the legislature and conflicts between the church groups themselves. This "divisive political potential" further entangles the state with religion.

A companion case to *Lemon, Tilton v. Richardson,*[55] upheld federal grants to religious colleges for the construction of buildings used for nonreligious purposes; there was no excessive government entanglement. *Tilton* was distinguished from *Lemon* on the grounds that college students are more resistant to religious indoctrination, that teachers are not religiously neutral and thus require surveillance by the state, whereas the buildings do not, and that the "one-shot" financial grant in *Tilton* did not require continuing surveillance.

It is clear that the city in *Fox* was entangled with religion by using municipal funds to light a cross on a public building. Some degree of entanglement, however, is permissible.[56] The issue was whether that entanglement was excessive. Unfortunately, the state-aid-to-religion cases are of questionable value in deciding the degree of entanglement in *Fox,* although they do aid in deciding what *kinds* of activities constitute government involvement. The *Fox* court reasoned that "since no material benefit of consti-

54. 403 U.S. at 615.

55. 403 U.S. 672 (1971).

56. *Id. Tilton,* for example, approved the federal building grants even though some amount of government surveillance was implied by the Court's limiting the grants to buildings used for non-religious purposes.

tutional significance [was] conferred upon a religious institution we are not convinced that the minimal expenditure of tax dollars here involved comprises state aid to religion."[57] The court properly recognized that the aid did not flow directly to a religious institution and that the ten thousand dollars spent to light the cross over the years could not be compared with the millions of dollars spent on direct aid to parochial schools, as was the case in *Lemon*. But it is also true that the Supreme Court, in its first modern interpretation of the establishment clause, *Everson v. Board of Education,* stated that "[no] tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[58] The expenditure of some ten thousand dollars over the history of the lighting of the cross is not an insubstantial amount, especially since the practice was expected to continue in the future.

Any dispute as to whether the amount of the expenditure was itself impermissible can be resolved by recalling the harms to be avoided by prohibiting excessive government entanglement with religion. There was no need for continuing state surveillance of the lighting of the cross; it was merely displayed during the appropriate holiday period. The city, unlike states which must ensure that aid appropriated for secular uses is not used for religious purposes, did not have to involve itself any further than approving the budget request once a year.

Whether there was a potential for political divisiveness is a closer question. There existed the possibility that other religious groups could demand similar treatment for their respective holidays and symbols which the city could not practicably accommodate. While the city was able to accede to the request of members of the Greek Orthodox faith that one of their holidays be similarly recognized, there was was no assurance that it could continue to do so for other groups. Moreover, even if it were able and willing to make such "accommodation" it would only succeed in becom-

57. Fox v. City of Los Angeles, 139 Cal. Rptr. 180, 184 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

58. 330 U.S. 1, 16 (1947). This case involved the constitutionality of a New Jersey Board of Education resolution authorizing the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. While that activity was held constitutional, the service was available to members of all religions and, furthermore, if the service was not offered it would have seriously handicapped religion, which the first amendment also prohibits.

ing further intertwined with religion. The most serious danger posed, however, was the threat of political fragmentation across religious lines, which the Supreme Court has stated is "one of the principal evils against which the First Amendment was intended to protect."[59] An argument relying on the relatively small expenditure of public money and the lack of previous protest as evidence of insignificant government entanglement disregards the Supreme Court's strict admonitions as to the mere potential of political disturbance.

D. A Multitude of Frivolous Litigation?

The city voiced the fear that ruling in Fox's favor would precipitate a stream of frivolous lawsuits contesting trivial violations of the establishment clause. Examples of such violations would be the use of "In God We Trust" on coins and currency,[60] references to God universally found in invocations at public meetings, legislative assemblies, and courtrooms, the celebration of Christmas as a national holiday, and allusions to God that can be found in nearly every state constitution.[61] However, it is altogether too speculative to predict that outlawing the city's actions would necessarily stimulate litigation attacking these instances of government involvement with religious symbolism. An Oregon decision barring a similar practice has not led to any discernible

59. Lemon v. Kurtzman, 403 U.S. 602, quoting Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1692 (1969).

60. Justice Brennan has addressed this example in dicta:

> As we said in McGowan v. Maryland, 366 U.S. 420, 442 (1961), the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. This rationale suggests that the use of the motto 'In God we Trust' on currency. . .may not offend the clause. It is not that the use of those four words can be dismissed as de minimis — for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

Abington School District v. Schempp, 374 U.S. 203, 303 (1963). *See also* Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (1967) ("In God We Trust" on plaques in public schoolrooms not constitutionally objectionable).

61. See L. Pfeffer, God, Caesar, and the Constitution (1975), at 345-46. The author lists many examples and concludes that although such instances of governmental religiosity are insignificant, "[a]ll this proves is that in an imperfect world there are bound to be distances between the oughts and the is's. The validity of a rule of law [the establishment clause] is not negated by the fact that it may be violated in practice. . . ." *Id.* at 346.

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increase in suits raising violations of the establishment clause in that jurisdiction.[62]

Moreover, what is trivial to one person may be of compelling importance to another, and it is particularly within the province of the judiciary to make the subtle discriminations as to what is trivial and what is material. If this were not so, it seems unlikely that the Supreme Court would have so painstakingly formulated the tripartite test to separate permissible accommodations from impermissible ones.

II. CONFLICT WITH *MANDEL V. HODGES*

The decision of the court of appeal in *Fox* conflicts with *Mandel v. Hodges.*[63] In *Mandel,* the California Court of Appeal for the First District affirmed an injunction barring the implementation of the governor's order proclaiming Good Friday a state holiday. The long-standing practice of closing state offices from noon until three o'clock was found to fail all three prongs of the tripartite test.[64] Rejecting the express statement that the purpose of the closure order was to provide state employees a needed rest from work, the *Mandel* court held that the holiday was "wholly religious," and that the time off was given to enable employees to worship.[65] Thus, the governor's order was found to have no secular legislative purpose.

The Good Friday closure order in *Mandel* cannot be meaningfully distinguished from the legislative resolution that authorized the lighting of the cross in *Fox.* The latter action was no more secular in purpose than the former. The best argument that can be advanced to support any distinction is that Good Friday is "wholly" religious whereas Christmas and Easter have recognized secular aspects.[66] It might then be suggested that the cross only furthered the nonreligious aspects of Christmas and Easter, that is, it celebrated them in a "spirit of peace and good fellowship,"

62. Lowe v. City of Eugene, 254 Or. 518, 463 P.2d 360 (1969).

63. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976). Although *Mandel* is not binding authority on other district courts of appeal, its reasoning is persuasive.

64. *Id.* at 612-15, 127 Cal. Rptr. at 255-56.

65. *Id.* at 611, 127 Cal. Rptr. at 255.

66. The city repeatedly emphasized the "recognized secular acceptance" of Christmas and Easter. Defendant's Supplemental Brief in the Supreme Court of the State of California, Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977). But the fact that a holiday has achieved a degree of "secularization" should not open the door to funding of a religious holiday.

as the city resolution itself asserted.[67] However, for the reasons discussed earlier,[68] such a distinction is untenable.

The *Mandel* court also found that the closure order had a primary effect of advancing religion.[69] The court so held even though the Good Friday proclamation had been promulgated for fifteen years without legal challenge. This is inconsistent with the court of appeal's finding in *Fox* that the lighting of the cross did not advance religion because no one had challenged the activity for thirty years.[70]

The city attempted to distinguish the two cases based on the differences in expenditure of funds. *Mandel* involved two million dollars per year and the jobs of thousands of public employees whereas *Fox* involved a few hundred dollars and the jobs of no public employees. However, the amount of money expended by government has little bearing on the underlying rationale of the prohibition of excessive entanglement. The principal danger which the entanglement prong seeks to prevent is the intrusion of the state into affairs of the church. Even where a state-funded activity is of minimal expense, there still may be a need for continuing surveillance by the state to ensure the money is being properly spent. Or, as is the case here, the minimal funding may nevertheless invite political divisiveness, since "the very symbolism of conspicuous governmental aid to identifiably religious enterprise is regarded as an independent evil."[71] It is hoped that the forthcoming California Supreme Court decision will recognize the perils suggested by *Fox* and affirm the judgment of the trial court.

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67. *Id.*

68. *See* notes 21-24, *supra,* and accompanying text.

69. The court stated that the closure order's "promulgation by the governor, and its execution throughout the State office complex, amounts to an observance by the State itself (in the sense of its recognition, if not its active ceremonial participation), of the 'wholly religious day' which the trial court found Good Friday to be." Mandel v. Hodges, 54 Cal. App. 3d at 614, 127 Cal. Rptr. at 255.

70. Fox v. City of Los Angeles, 139 Cal. Rptr. 180, 184 (1977), *hearing granted,* L.A. No. 30830 (Cal. Sup. Ct., Aug. 18, 1977).

71. L. Tribe, American Constitutional Law 868 (1978).

ADDENDUM

The California Supreme Court rendered its decision in *Fox v. City of Los Angeles*[72] just as this Note was going to press. The court held that the display of the cross on City Hall impermissibly preferred one religion. The order of the trial court granting a preliminary injunction against the city was affirmed and the case remanded for further proceedings.

This Note's discussion of the issues generated by the city's sponsorship of the cross remains applicable to the decision of the Supreme Court, with one exception. The majority opinion relied exclusively on the California Constitution and therefore did not expressly use the tripartite test for analyzing establishment of religion under the United States Constitution. The court pointed out that the California Constitution not only prohibits all laws respecting an establishment of religion, but unlike the federal Constitution, also expressly guarantees the free exercise and enjoyment of religion "without discrimination or preference. . . ."[73] The majority concluded that "[p]reference is thus forbidden even where there is no discrimination."[74] The court reiterated the view that the only proper position for government in the relationship between citizens and religion was one of neutrality.[75]

In a concurrence, Chief Justice Bird argued that the display of a symbol "unique to one religion on the face of the very building housing the representatives of all the people"[76] was prohibited by both the state and federal constitutions. The Chief Justice found that the display failed all three prongs of the tripartite standard.

72. 22 Cal. 3d 792, ___ P.2d ___, 150 Cal. Rptr. 867 (1978).
73. Cal. Const. art. I, § 4.
74. 22 Cal. 3d at 796, ___ P.2d at ___, 150 Cal. Rptr. at 869.
75. Id. at 799, ___ P.2d at ___, 150 Cal. Rptr. at 870.
76. Id. at 799, ___ P.2d at ___, 150 Cal. Rptr. at 871.