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CONSTITUTIONAL LAW

COMMENTARY

*Ralph Michael Stein**

During the past year, the Court of Appeals for the Second Circuit decided a number of significant appeals involving constitutional issues. As is generally the case, most of the issues presented to the Second Circuit were also under judicial scrutiny in other federal appellate courts. Four first amendment cases decided by the court — three dealing primarily with freedom of religion and a fourth with freedom of the press — are particularly noteworthy and merit review.

I. THE FIRST AMENDMENT AND RELIGION

A. *That Crèche in Scarsdale*

Believing that both freedom of speech and freedom of religion were transcendental concerns, the architects of the first amendment to the United States Constitution placed the two subjects together as the first guarantees in the Bill of Rights.¹ While a plain reading of the amendment would suggest that the two subject areas — speech and religion — were discrete, contemporary first amendment litigation often results in a fusing of these two areas of constitutional concern. Such a situation was encountered in *McCreary v. Stone*.²

In mid-1984, the Second Circuit, without dissent, reversed the district court in *McCreary v. Stone*, a case of some public

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¹ See I. BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING*, *passim* (1985).

² 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985).

controversy and also a case fairly typical of recent challenges in courts throughout the United States to publicly supported and often publicly financed displays of religious symbols in public places. *McCreary v. Stone* was affirmed without an opinion by an equally divided Supreme Court on March 27, 1985.³ In view of this disposition, the analysis of the three-judge Second Circuit bench⁴ is of interest.

Big constitutional issues from little local issues grow. The background of *McCreary* is a story of traditional local government practices confronted by shifts in constituency and the inexorable impact of evolving first amendment doctrine even in the smallest villages. The Village of Scarsdale (Scarsdale), a municipal corporation,⁵ is located in Westchester County north of New York City. Scarsdale⁶ owns a small park called Boniface Circle, "located in the center of the business district of Scarsdale."⁷

Two separate actions were brought in 1983 to compel Scarsdale's Board of Trustees to permit the continued display of a crèche during the Christmas season. These lawsuits were the culmination of a history of permitted display, followed by doubts as to the constitutionality of the display, followed by a refusal to permit the crèche in the future. It was this refusal by the Board of Trustees that led directly to the commencement of the actions in the district court.⁸

³ *Board of Trustees v. McCreary*, 105 S. Ct. 1859 (1985). Justice Powell did not participate in the decision. *Id.*

⁴ *McCreary* was before Judges Mansfield, Pierce and Pratt in the Second Circuit.

⁵ *McCreary*, 739 F.2d at 718. The village has about 17,000 residents, who elect local government through a non-partisan system. *Id.*

⁶ Scarsdale and Scarsdale Post Office cover two political entities. The Village of Scarsdale is a municipal corporation, while parts of the contiguous post office of Scarsdale, N.Y., are within the political jurisdiction of the Town of Greenburgh. Although it is not clear from the opinion, some of the plaintiffs appear to have Scarsdale Post Office, instead of Scarsdale Village, addresses. As this was never raised, it was not at issue in this suit. It may be, however, that one or more of the individual plaintiffs lacked standing to bring an action protesting a decision by the Village of Scarsdale authorities.

⁷ *McCreary*, 739 F.2d at 717.

⁸ The Citizens' Group, consisting of 17 Scarsdale residents, commenced an action in the United States District Court for the Southern District of New York on February 7, 1983, after the Scarsdale authorities denied their application to place a crèche at Boniface Circle. The Crèche Committee commenced its action on April 28, 1983 in the same forum. The two actions raised the same issues and ultimately were consolidated. *Id.* at 721-22.

A crèche, depicting the birth of Christ,⁹ was first installed in Scarsdale's Boniface Circle in 1956.¹⁰ A Crèche Committee composed of Scarsdale churches,¹¹ later a plaintiff in one of the actions in this controversy, was responsible for commissioning the sculpting of the wood-carved crèche itself and its placement and maintenance in Boniface Circle each Christmas season. No public money financed the sculpting of the crèche.¹² The Second Circuit detailed the history of the Scarsdale crèche display as follows:

In each year from 1957 through 1982, the Creche Committee submitted a written application to the Board seeking permission to display its creche at Boniface Circle during the Christmas season; from 1957 through 1972, the Board unanimously granted the Committee's applications; from 1973 through 1980, the Board granted the Committee's applications, but minority votes of abstention or denial marked the grants. In 1981 and 1982, the Board voted 4-3 to deny the Committee's requests to display its creche at Boniface Circle.¹³

Beginning in 1976 the Board of Trustees required the sponsors of the Christmas exhibit to display a sign indicating their sponsorship of the crèche.¹⁴ In both 1979 and 1980, the Board of Trustees, while continuing to sanction display of the crèche, rec-

⁹ Other seasonal decorations seem to have accompanied the crèche display during the years that the Scarsdale Trustees permitted the display. *Id.* at 719. However, the *McCreary* plaintiffs apparently had nothing to do with them. Therefore, unlike plaintiffs in other crèche cases, advocates of the Scarsdale display could not and did not claim that their display was in any sense "softened" by related material.

¹⁰ *Id.* at 720.

¹¹ The Scarsdale churches brought this action as the Crèche Committee and not as individual houses of worship. The Crèche Committee is a private unincorporated association of seven Catholic and Protestant churches in the Scarsdale area. *Id.* at 718.

¹² *Id.* at 720. Though speculative, it is worth considering whether the court of appeals would have taken a more stringent view of the Crèche Committee's position had they not been joined by a Citizens' Group. Without the involvement of the Citizens' Group, the argument for display is more straightforward: a group of Christian churches asserting the right to place a quintessentially religious symbol on public property to celebrate a major religious holiday central to the beliefs of church members. This is a factor distinguishing *McCreary* from *Lynch v. Donnelly*, 465 U.S. 668 (1984). See text accompanying note 24 *infra*.

¹³ *McCreary*, 739 F.2d at 720.

¹⁴ *Id.* The sign read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." During oral argument before the Supreme Court, Justice O'Connor expressed the view that the sign mitigated the danger that the public would attribute sponsorship of the crèche to Scarsdale. Counsel for the Scarsdale Board of Trustees responded: "But it has the appearance of sponsorship." 53 U.S.L.W. 3627 (Mar. 5, 1985).

ommended to the Crèche Committee that they find another location in the future.¹⁶ The trustees' repeated, strong recommendations reflected the growing divisiveness engendered by the crèche.

In December 1982, a group of Scarsdale residents¹⁶ sought permission to place a new, smaller crèche in Boniface Circle to replace the one displayed in previous years.¹⁷ Their request was denied by the Board of Trustees, and these local residents (denominated the Citizens' Group) brought an action against Scarsdale and its trustees in February 1983.¹⁸ In April 1983, following the denial of its application to place the crèche in Boniface Circle for the 1983 Christmas season, the Crèche Committee also sued Scarsdale and the trustees.¹⁹ Because the two actions were virtually identical, United States District Judge Stewart consolidated them.²⁰ The defendants argued that placement of the crèche violated the establishment clause of the first amendment. The district judge agreed and found in favor of Scarsdale and its trustees on all issues.²¹ Both the Crèche Committee and the Citizens' Group appealed to the Second Circuit. The Second Circuit reversed the district court and remanded "for the entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche

¹⁶ *McCreary*, 739 F.2d at 721. In 1979, the Scarsdale authorities "strongly recommended" and in 1980 "strongly urge[d]" that the crèche be relocated to private property. It must be assumed, in the absence of contrary evidence, that the trustees were discharging their duties in the public interest. There is no indication that any of the trustees who questioned placement of the crèche on public property were subject to political pressure. Although they did not deal directly with the issue, the reported district and circuit court opinions permit the inference that the Scarsdale community generally supported the trustees' actions. Otherwise, it is reasonable to assume that the Citizens' Group and the Crèche Committee would have raised this point. On the other hand, the expression of rights protected by the first amendment must not depend on majority views. In the establishment clause area, entanglement is not always conspicuous. Thus, the apparent lack of pretext for the trustees' recommendation does not by itself indicate the absence of impermissible entanglement.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* While the Citizens' Group sought damages in this action, it is clear that the gravamen of their demand for relief was an injunction enjoining Scarsdale authorities from preventing plaintiffs' use of Boniface Circle for their crèche display.

¹⁹ *Id.* at 722.

²⁰ *Id.*

²¹ *Id.* at 722-23. "The case was tried on July 20, 1983, upon a record consisting entirely of stipulated facts, depositions, answers to interrogatories and documentary evidence." *Id.* at 722.

at Boniface Circle."²²

Circuit Judge Pierce, writing for the Second Circuit bench, noted that

[t]he principal issue before us on appeal is whether the Village's content-based denials of the applications to display a crèche for a period of approximately two weeks during the Christmas holiday season at Boniface Circle, a traditional public forum, were necessary in order to serve a compelling state interest of avoiding contravention of the establishment clause of the first amendment.²³

The court went on to find that "the district court at that time did not have the benefit of *Lynch v. Donnelly*,"²⁴ a crèche case recently decided by the Supreme Court. Further, the Second Circuit found that Judge Stewart had incorrectly analyzed *Widmar v. Vincent*²⁵ in reaching its conclusion. This author maintains that the district court did not misconstrue "*Widmar* in light of *Lynch*"²⁶ and that, in any event, *McCreary* can and should be distinguished from *Lynch*.

Lynch was decided by the Supreme Court in March 1984 by a five-to-four vote. This nationally publicized action involved an establishment clause challenge to the erection by a municipal corporation, the City of Pawtucket, Rhode Island, of a Christmas display, including a crèche, in a private park.²⁷ Like Scarsdale, Pawtucket had long permitted the Christmas display,²⁸ and concern about its constitutionality had emerged only in recent years. Unlike Scarsdale, Pawtucket funded the display. The district court in *Lynch* upheld the plaintiffs' claims that the establishment clause forbade such a municipally sponsored and funded display of a crèche.²⁹

²² *Id.* at 730. While the Second Circuit ordered the Village not to rely on the establishment clause to block the crèche display in the future, it is not clear whether there exists any additional basis for refusing to allow the display of a religious symbol on public property. Counsel for Scarsdale argued before the Supreme Court that the Second Circuit had, in effect, affirmatively ordered display of the crèche in Boniface Circle. 53 U.S.L.W. 3627 (Mar. 5, 1985). When Justice O'Connor objected to that characterization of the Second Circuit's opinion, counsel retorted: "None of the parties have seen it as anything else [than an order directing display of the crèche]." *Id.* at 3628.

²³ *McCreary*, 739 F.2d at 723.

²⁴ *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

²⁵ 454 U.S. 263 (1981).

²⁶ *McCreary*, 739 F.2d at 723.

²⁷ *Lynch*, 465 U.S. at 671.

²⁸ *Id.* The record shows that the practice was ongoing for forty or more years. *Id.*

²⁹ *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir.

By a narrow margin, the Supreme Court, in a somewhat meandering opinion highlighted by references to irrelevant considerations,³⁰ overturned the district court's determination. The Court's main concern was the contextual setting of the crèche rather than its innate identity as a religious symbol. Chief Justice Burger, writing for the Court, stated that "[i]n this case, the focus of our inquiry must be on the crèche in the context of the Christmas season."³¹ Noting that the district court had concluded that the religious nature of a crèche was in itself evidence of a lack of secular purpose, Chief Justice Burger continued:

[The district court] rejected the City's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.³²

While suggesting that challengers of government practices supposedly violative of the establishment clause must meet a new test by proving — almost literally — a holy conspiracy to advance or support religion, the Chief Justice also found that the Pawtucket practice had a secular purpose. "The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday."³³ The Court did not address the question of whether the Pawtucket display highlighted the origin of Christmas as a religious event or of Christmas as an American

1982), *rev'd*, 465 U.S. 668 (1984).

³⁰ See, e.g., 465 U.S. at 674-78. In attempting to outline a basis for its decision, the Court discussed a number of prior cases which have little or no relationship to the special establishment clause issues raised by the public display of religious symbols. While the use of history may illuminate and help to explain an opinion, the Court's all too frequent harking back to the first Thanksgiving, *id.* at 675, and its references to the holdings of the National Gallery, *id.* at 676, served no analytic purpose.

³¹ *Id.* at 679. Had the Pawtucket or the Scarsdale crèches featured the slogan "Keep Christ in Christmas," would the Court have examined the crèche merely "in the context of the Christmas season"? Probably only with the greatest difficulty. Such a sign would make the crèche's innate religious symbolism unmistakable. What the Court ignored, however, is that religious symbols traditionally convey spiritual values without a need for words. Thus, its conclusion that "in the context of the Christmas season" nobody would give a religious interpretation to a crèche is singularly anti-religious.

³² *Id.* at 680.

³³ *Id.* at 681.

holiday for all. There is a difference.³⁴ The Court's per curiam affirmance of *McCreary* did not shed further light on the question.³⁵

Widmar v. Vincent,³⁶ upon which the district court in *McCreary* also relied, presents different issues from those raised in *Lynch*. In *Widmar*, the University of Missouri at Kansas City had promulgated a regulation that denied to religious groups the use of campus facilities that were available to nonreligious groups. The defendant university, in an action brought by a number of students belonging to a religious organization, maintained that its primary concern in enacting the challenged regulation was to ensure church-state separation pursuant to the mandate of the establishment clause.³⁷ The Supreme Court, in rejecting the school's regulation, found that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion."³⁸ The Supreme Court further noted that "an open forum

³⁴ The Supreme Court's reasoning in *Lynch* does nothing to resolve the problem of a municipality that uses a display to celebrate the true origins of Christmas. In that case, the municipality is certainly engaged in impermissible conduct. If, on the other hand, the historical origins of the American celebration of Christmas are to be highlighted, a neutral museum-like exhibit would be constitutionally unobjectionable, even if it included a cross or crèche. Such exhibits are by their nature informative and educational, and this quality justifies governmental sponsorship of them. There is no indication, however, that the Pawtucket crèche was intended to be informative.

³⁵ Board of Trustees v. *McCreary*, 105 S. Ct. 1859 (1985) (per curiam).

The Second Circuit relied heavily on *Lynch* when it reversed the district court's finding that Scarsdale's content-based denials of the Crèche Committee's applications were proper. See *McCreary*, 739 F.2d at 724-27. The court's opinion emphasized *Lynch*'s ruling that there was no primary advancement of religion even if Pawtucket appeared to have aligned itself with Christianity by permitting the crèche display on municipal property. *Id.* at 727.

³⁶ 454 U.S. 263 (1981).

³⁷ *Id.* at 270. Many sectarian groups on college campuses today are viewed either as "fringe" organizations or, in some instances, as heretical by observers of traditional religious practices. In *Widmar*, the university, probably correctly, saw itself as a logical and inevitable target of litigation by those who opposed the use of university property by sectarian groups. The reluctance of universities to become involved in such litigation has led to the adoption of regulations such as the University of Missouri's, which prohibit sectarian group use of campus facilities. Because state university officials are more directly accountable, generally, to legislators than they are to the public, it is understandable if not commendable that they so often take a safe path. However, the Constitution not only does not command them to do so, but on examination, it probably forbids them to do so. This is another factor militating against a broad application of *Widmar* to *McCreary*.

³⁸ *Id.* at 271-72 (citations omitted).

in a public university does not confer any imprimatur of State approval on religious sects or practices."³⁹

The significance of *Widmar* is that, in an institution of higher education, the mere use by religious student groups of facilities otherwise available to nonreligious student groups does not lead to an inference of governmental support for religion or for any particular religious group.⁴⁰ While, without doubt, *Widmar* results in incidental benefits to those religious groups seeking the use of campus facilities, the Court has often stated that mere incidental benefits do not violate the Constitution.⁴¹ It is hard to read *Widmar* without coming to the conclusion that the Supreme Court was restricting its discussion to the issue of open access as it applied to state-sponsored institutions of higher learning.⁴² *Widmar* is cited in *Lynch* solely for the proposition that indirect or incidental benefits to religion do not *ipso facto* invalidate laws;⁴³ in addition, the Court in *Lynch* referred to *Widmar* only after discussing another case that more directly stood for the proposition it followed.⁴⁴

Before proceeding to a doctrinal analysis of the Second Circuit's reliance on both *Widmar* and *Lynch*, it is useful to mark the clear factual distinctions between *Widmar* and *Lynch*, on the one hand, and *McCreary* on the other. *Lynch*, as previously indicated, involved the use of private property by a municipality. In *Lynch*, the municipal but privately owned corporation argued for the placement of the crèche in a conspicuous public but privately owned place. The Pawtucket civic authorities argued that their display was essentially and inherently secular because it, together with other nonreligious symbols, marked the celebration of a legal holiday.⁴⁵ The Pawtucket display was maintained by the city, and the crèche was only one part of a larger dis-

³⁹ *Id.* at 273.

⁴⁰ See *id.* at 274 ("[A]n open forum in a public university does not confer any imprimatur of State approval on religious sects or practices, just as it does not imply State approval of political views espoused by campus groups utilizing campus facilities.").

⁴¹ See, e.g., *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) ("not every law that confers 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid").

⁴² See *Widmar*, 454 U.S. at 274 n.14, 276 n.20.

⁴³ *Lynch*, 465 U.S. at 683.

⁴⁴ *Id.* (discussing *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

⁴⁵ *Lynch*, 465 U.S. at 679-84.

play.⁴⁶ Further, as Justice Blackmun pungently noted in his dissenting opinion, a concomitant secular purpose of the crèche in Pawtucket was commercial exploitation of a religious holiday, a goal apparently subscribed to by the city authorities.⁴⁷

Other aspects of the factual setting of *McCreary* are demonstrably and, from the standpoint of legal analysis, significantly different from *Lynch*. Proponents of the crèche in Boniface Circle were a coalition of churches and a group of citizens, some of whom were probably also members of the church group.⁴⁸ The record in *McCreary* does not indicate any serious argument raised by plaintiffs that a secular purpose was the main inspiration for the yearly crèche display. Instead, as will be discussed, the arguments of the pro-crèche group in Scarsdale implicitly acknowledged the essentially religious nature of their display.⁴⁹

Thus, in terms of factual distinctions alone, there was no strong basis, let alone an imperative, for the Second Circuit panel to apply *Lynch* to *McCreary*. The district court opinion in *McCreary* presented a clear statement of the facts upon which the court's judgment was predicated. Judge Stewart's opinion could have been, and should have been, assessed on the basis of relevant first amendment cases. *Lynch*, however, was not relevant because its facts differed so markedly from those of *McCreary*. Consequently, it should not have been viewed as analytically controlling.

Widmar can also be distinguished factually from *McCreary*. The Second Circuit applied *Widmar* for its stated truism that denial of the university's establishment clause claim does not negate the possibility of reasonable time, place and manner regulations.⁵⁰ However, the Second Circuit's reliance on *Widmar*

⁴⁶ *Id.* at 671. Included in the display were, along with Jesus, Mary, and Joseph, "angels, shepherds, kings, and animals, all ranging in height from 5" to 5'." *Id.*

⁴⁷ *Id.* at 726-27. See also Justice Brennan's dissent, in which he rejected Pawtucket's argument that commercial purposes were of sufficient secular weight to overcome any establishment clause problem. *Id.* at 698-701 (Brennan, J., dissenting).

⁴⁸ A possible affinity of membership between the two plaintiff groups should have been, but apparently was not, determined by the district court.

⁴⁹ Unlike those in *Lynch*, the theory of the crèche advocates in *McCreary* was that Scarsdale was legally bound not to discriminate on content-based grounds in allocating space in Boniface Circle. *McCreary*, 739 F.2d at 722. The Scarsdale crèche proponents argued that their right of access to the public area was no greater and no less than that of nonreligious affiliated organizations. *Id.* at 722-23.

⁵⁰ *Id.* at 724.

for this principle was inapposite. The *Widmar* Court reassured universities that expanding equal access to religious groups in no way imperiled the institutions' basic right to control their own facilities, a control that is obviously vital when many groups seek the use of limited facilities. Non-content-focused time, place and manner regulation of access to university facilities is not a constitutional rule so much as it is a recognition of practicalities and social reality.⁵¹

No *Widmar* parallel can be found in *McCreary*. The crèche had been displayed at Boniface Circle for several decades, and the Citizens' Group and the Crèche Committee both wished to continue using that, and no other, public facility.⁵² This is evident from the fact that the crèche sponsors had rejected requests, which later amounted to pleas by the Scarsdale authorities, that they relocate to private property. With respect to time, the crèche sponsors were interested in displaying their exhibit only at Christmas time, as they had in the past. Flexibility was not an issue in *McCreary* because of the nature of the exhibit; hence the free speech rules relating to manner do not apply. *McCreary*, as *Lynch*, ineluctably comes to the question of crèche or no crèche. Unlike typical first amendment free speech disputes, which may allow for both negotiation and adjustment, *McCreary* forces the question as to the inherent permissibility of a crèche on public property. Thus, *Widmar* is largely irrelevant, a fact the Second Circuit apparently did not comprehend.

B. *The Lemon Standard*

The Second Circuit, following its discussion of *Lynch* and

⁵¹ There is also a clear difference between college administrators discharging their functions on campus and elected officials representing a political constituency. Whereas college administrators have fiduciary responsibilities to the students who attend those institutions, elected officials take an oath to uphold the Constitution and hence have a specific obligation to prevent first amendment abuses of religion. Moreover, there is a general recognition that institutions of higher education should not be regulated to the degree that, say, public high schools are.

⁵² *McCreary*, 739 F.2d at 721. The proponents of public display wanted to place the crèche in Boniface Circle, probably because of the Circle's central location in the Scarsdale business district. *Id.* at 719. On at least one occasion in 1981, the Crèche Committee accepted an offer to place its display on the grounds of Scarsdale's Frog Prince Proper Restaurant. *Id.* at 721. Apparently this was not a satisfactory solution for the Crèche Committee. There was no evidence that Committee members were willing to consider a location other than Boniface Circle.

Widmar as precedents, stated that the controlling case for analyzing defendants' establishment clause argument in *McCreary* was *Lemon v. Kurtzman*.⁵³ As summarized by Judge Pierce:

The *Lemon* test asks whether governmental conduct in an establishment-clause case has a secular purpose, whether the principal or primary effect of that conduct advances or inhibits religion and whether the conduct will foster an excessive governmental entanglement with religion It is settled that if one prong of the test is breached, the challenged governmental conduct will violate the establishment clause The *Lemon* test generally has guided courts in the establishment-clause area . . . although the Supreme Court has warned that in this area it will not be bound by a single test.⁵⁴

With respect to the first, or "secular purpose" prong of the *Lemon* test, the Second Circuit agreed with District Judge Stewart that *Widmar* applied, at least insofar as that case considers "equal access for religious as well as nonreligious speech" to be an acceptable secular purpose.⁵⁵ However, *Widmar* speaks in terms of pursuing a policy of an open forum to all comers, a concept especially suited to state educational institutions, which generally reflect a number of ethnic, economic, religious, political and social constituencies. Although not specifically defined, the forum atmosphere encouraged by *Widmar* is aimed at stimulating ideas and debate as part of the learning experience. A crèche, by contrast, is a symbol designed not to inspire debate but to awaken religious sentiment. *Widmar's* holding regarding speech, therefore, would not seem to apply to a religious symbol.

A more significant issue is that of entanglement — the third prong of the *Lemon* test. In *McCreary*, the Second Circuit correctly noted that "the Village's involvement here would be far less than the involvement of Pawtucket, the sponsor of the creche in *Lynch*."⁵⁶ The appellate court also supported the district court's finding that "the potential-political-divisiveness part of the [*Lemon*] excessive-entanglement prong was insuffi-

⁵³ 403 U.S. 602 (1971). This case concerned state efforts to provide significant aid to pre-college parochial schools. In a landmark opinion, the Court analyzed the *realpolitik* of involving the state in the educational operations of sectarian schools, and it struck down statutes of two states authorizing grants to parochial schools for expenses incurred in providing instruction in secular subjects.

⁵⁴ *McCreary*, 739 F.2d at 725 (citations omitted).

⁵⁵ *Id.*

⁵⁶ *Id.*

cient to constitute an establishment-clause violation."⁵⁷ The Second Circuit noted that "*Lynch* specifically limited the potential-political-divisiveness part of the excessive-entanglement prong to cases involving direct subsidies to church-sponsored schools, colleges or other religious institutions."⁵⁸ The author would argue that both the district and the appellate courts missed the real entanglement issue here. The so-called "potential-political-divisiveness" that might be created is essentially the product of feelings about the open display of religious symbols on public land. The real divisiveness issue has to do with deep and genuine religious concerns that cannot be brushed aside by suggestions that divisiveness only arises in cases involving government subsidies to religious institutions. The potential divisiveness acknowledged by the court becomes actual, profound and religious, in addition to being simply political, with the sanctioning of the display on the ground that no establishment clause problem is presented.⁵⁹

The Second Circuit noted in *McCreary* that "[i]n reality, when evaluating an application for display of a creche, the Village will have to do no more than when evaluating any other request for access to its public properties."⁶⁰ Would that it were so simple. By permitting public display of a symbol of seminal importance to a major religion, the Second Circuit is, in effect, virtually denying Scarsdale any right to reject any religious sym-

⁵⁷ *Id.* (citations omitted).

⁵⁸ *Id.* at 726 (citations omitted). The political divisiveness issue is deceptively simple. As the Court noted in *Lemon*, the mere existence of aid programs to sectarian schools awakens discord which, by itself, injects the state deeply into religious affairs. The pluralistic nature of American society, coupled with a history of uneasy mutual accommodation of religious beliefs, thrusts potential political divisiveness forward as a test of entanglement.

⁵⁹ These are issues that will not die or simply go away. At most, denial of the right to use public property for the display of patently religious symbols results in attempts to have the original determination set aside or overruled. By contrast, granting permission to use public property would seem, at least impressionistically, to foment much greater divisiveness and to stoke a debate that the first amendment seeks to avoid. Every use of public property for the display of religious symbols engenders some form of entanglement, albeit of a constitutionally insignificant level in some instances. The dangers of entanglement are often greater than the claimed benefits of permitting an intermingling of church and state. It is difficult to believe that protecting the partly secular purpose of encouraging Christmas sales with a crèche display is of the same level of magnitude as ensuring church-state separation.

⁶⁰ 739 F.2d at 725. The Supreme Court's "affirmance" does nothing to curb the court's decision.

bol, whatever the message conveyed by the proposed display.⁶¹ The religious divisiveness inherent in any pluralistic society, which is not necessarily a negative tension, thus can become a political battleground. Government may be neutral with regard to a particular faith or religious display, but under *Lynch* and *McCreary* it becomes seriously entangled in all the emotional issues that public discussion of religion engenders. *Lemon* was not intended to promote this dangerous result.⁶²

In analyzing the "primary effect" prong of *Lemon*, the district court in *McCreary* found that placement of the crèche in Scarsdale's Boniface Circle would, in the words of the reviewing court, "have the direct and immediate effect of advancing religion."⁶³ Such an application of *Lemon*, of course, fatally undermines any claim to the use of Boniface Circle for crèche display.

Here the Second Circuit rejected the district court's finding and applied *Lynch*, pointing out that Scarsdale was less involved with the crèche than Pawtucket, Rhode Island, which owned and managed the crèche in *Lynch*. However, *Lynch* involved Pawtucket's policy to celebrate, with commercially beneficial overtones, the Christmas season.⁶⁴ Pawtucket strongly argued the existence of a secular purpose for the display. Whether this practice aided religion impermissibly is beyond the scope of this Commentary. It should be noted, however, that neither a municipal authority with a secular interest in encouraging Christmas cheer⁶⁵ nor a commercial establishment underwrote the Boniface Circle crèche. In contradistinction to *Lynch*, the supporters of the Scarsdale display are churches or their individual members.

⁶¹ A fair reading of the decision in this case reflects the fact that the availability of Boniface Circle to any group mandates its availability under similar circumstances to all groups. While Scarsdale may, of course, refuse clearly obscene displays, all religious groups have been placed on an equal footing with all secular organizations. The nature of the message, as opposed to the form in which it is presented, appears to be beyond the control of the Village. Thus, any religiously based principle may be proclaimed on public property.

⁶² Indeed, the full thrust of *Lemon* is to prevent the very entanglement which the Second Circuit permitted in *McCreary*. See, e.g., 403 U.S. at 625 ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.").

⁶³ *McCreary*, 739 F.2d at 726.

⁶⁴ *Lynch*, 465 U.S. at 671.

⁶⁵ There is no reason to believe that the Scarsdale authorities were any less interested in the welfare of business tenants than were the Pawtucket officials.

It is suggested that when religiously motivated citizens and churches succeed in placing a religious symbol in a publicly owned park,⁶⁶ the applicability of *Lynch* becomes ephemeral and direct and immediate aid to religion as religion⁶⁷ clearly emerges.⁶⁸

While *McCreary*, as demonstrated, can be readily distin-

⁶⁶ Boniface Circle in Scarsdale is a park by designation but hardly by common definition of the term. The author visited the park and found it to be no more than a small resting place in a busy commercial area. Even a small display would, of necessity, dominate the Circle, and would be visible from a large part of the commercial district.

⁶⁷ Without questioning the absolute right of the proponents of the crèche in Scarsdale both to transmit a religious message and to publicly do so utilizing private property, the author emphasizes his belief that the display in Boniface Circle, a public place, conveyed a clearly religious message. The author queried several storekeepers in the vicinity of the Circle. One described the crèche as a "reminder" of the religious nature of Christmas, another suggested that the display "made people think about something other than gifts," and a third said that the display showed Scarsdale's "Christmas spirit." This survey is hardly scientific, but even anecdotal accounts may display a street sense, often absent from court opinions, about the reality of a long-standing practice.

⁶⁸ An argument not raised by Scarsdale is that the establishment clause forbids not only direct aid to religion but also hostility to religious precepts through governmental actions. Justice Blackmun's dissent in *Lynch* raises an intriguing possibility for future litigation in the area of governmentally supported public displays of religious symbols. Quoting an expert witness for the City of Pawtucket who bolstered, before the district court, the city's argument that the crèche had the secular purpose of encouraging people "to . . . let loose with their money," *Donnelly v. Lynch*, 525 F. Supp. 1150, 1161 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984), the dissenting Justice in *Lynch* noted that

[t]he crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory — but it is a Pyrrhic one indeed.

465 U.S. at 727 (Blackmun, J., dissenting).

It is reasonably clear that no sponsor of a crèche display will or can admit that the crèche is sufficiently secularized to be stripped of its inherent religious symbolism. This type of argument was successfully advanced in a New Mexico district court, but was ultimately reversed on appeal. *See Johnson v. Board of County Comm'rs*, 528 F. Supp. 919 (D.N.M. 1981), *aff'd*, No. 82-1064 (10th Cir. Dec. 27, 1984), *vacated and reversed sub nom. Friedman v. Board of County Comm'rs*, No. 82-1064 (10th Cir. Dec. 26, 1985) (en banc).

If the crèche is to be viewed as a quintessentially religious symbol, cannot an argument be advanced that its publicly supported display, which encourages such secular objectives as boosting seasonal commercial sales, is hostile to the true purposes of religion? This author suggests that the government's linking of a symbol sacred to many with holiday mercantilism is the kind of hostile entanglement with religion that is prohibited by *Lemon* and a long line of first amendment cases. These cases may permit incidental benefits for religion through state action, *see, e.g., Lynch*, but they also restrain the state from hurting the free exercise of religion except for compelling reasons. Advancing Christmas sales has not been considered such a compelling reason to date.

guished from *Lynch*, the ultimate doctrinal treatment of public displays of religious symbols, and in particular Christmas displays, rests upon accepting one of two competing first amendment interpretations. The *Lynch* majority acknowledged its sensitivity to possible entanglement,⁶⁹ but an apparent lack of widespread public concern predisposed the Court to side with supporters of this display of religious symbolism. The sensitivity of the *Lynch* Court to the historical dimensions of the entanglement problem actually seems slight given Justice O'Connor's observation, in her concurrence, that "the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years."⁷⁰ The inability of the Court to recognize the extreme difficulty that many people have in openly opposing the publicly supported display of a symbol of the majoritarian creed does not diminish the actual support of and aid to religion that such displays represent. As Justice Blackmun noted in his dissenting opinion in *Lynch*,

[t]he import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the crèche, I dissent⁷¹

The Second Circuit could have rationally supported Judge Stewart in his initial determination that the Scarsdale crèche violated the establishment clause. Instead, the Second Circuit reversed, and its decision has not advanced the historic principles of the first amendment.

C. *Aid to Schools*

In *Felton v. Secretary, United States Department of Education*,⁷² the Second Circuit reversed the dismissal, by the

⁶⁹ 465 U.S. at 687-88.

⁷⁰ *Id.* at 693 (O'Connor, J., concurring).

⁷¹ *Id.* at 727 (Blackmun, J., dissenting).

⁷² 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom.* Aguilar v. Felton, 105 S. Ct. 3232 (1985). See Comment, *The Second Circuit and the Establishment Clause: Shoring up a Crumbling Wall*, 51 BROOKLYN L. REV. 642 (1985).

United States District Court for the Eastern District of New York, of a taxpayers' suit to enjoin the use of federal funds to send public school teachers into parochial institutions. The Supreme Court affirmed the Second Circuit's decision.⁷³

Whatever the increased scope of state involvement with religious groups or practices at the level of higher education might be,⁷⁴ federal courts have remained constitutionally constrained and institutionally reluctant to relax the barriers where public school and high school children are involved.⁷⁵ Faced with the inability of parochial schools to provide special services mandated for public school students and with political pressure exerted by the parents of parochial school pupils, various legislatures have attempted to provide such services without crossing into constitutionally forbidden territory. Most have failed, as has New York's under the Second Circuit's analysis in *Felton*.

The New York City Board of Education receives funds from the federal government through Title I of the Elementary and Secondary Education Act.⁷⁶ This Act:

declared it to be the policy of the United States to provide financial assistance to local educational institutions serving areas with concentrations of children from low-income families to expand and improve their educational programs which contribute particularly to meeting the special education needs of educationally deprived children⁷⁷

Educationally deprived children are not to be found solely in the public schools, and society must bear the responsibility for such deprivation, regardless of where these children attend school. Recognizing this, New York school authorities, since 1966, have sent "public school teachers and other professionals into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services."⁷⁸ Writing for a unanimous appellate bench, Judge Friendly recognized the positive results of New York's program, even though he ultimately found

⁷³ 105 S. Ct. 3232 (1985).

⁷⁴ See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1972) (upholding federal grants for construction of secular facilities at church-affiliated colleges).

⁷⁵ As the Supreme Court noted in *Tilton*, "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 685.

⁷⁶ 20 U.S.C. §§ 2701-3386 (1982).

⁷⁷ *Felton*, 739 F.2d at 49.

⁷⁸ *Id.*

the program constitutionally impermissible.⁷⁹

The establishment clause has been interpreted to mean that no entanglement with religion is permissible. However, not all government support services which incidentally benefit a religious group or individual members of a religion are prohibited. Certainly no one today would argue that fire safety inspections of parochial schools or lectures to parochial school students by detectives on how to avoid sexual molestation violate the establishment clause. Constitutional barriers arise as the state's involvement approaches either direct support of the teaching mission of the parochial school or the provision of specialized teaching by regularly employed educational personnel. Thus, by a bare majority, the Supreme Court has sanctioned a bus fare reimbursement program which benefited families of both public and parochial school children.⁸⁰ The Supreme Court has also sustained the lending of textbooks to parochial school students on the legally and technically rational but pragmatically irrelevant theory that the books in question were "furnished at the request of the pupil and ownership remain[ed], at least technically, in the State. Thus, no funds or books [were] furnished to parochial schools and the financial benefit [was] to parents and children, not to schools."⁸¹

The Supreme Court has found unacceptable various schemes for parochial school salary supplementation for teachers who taught courses of nonsectarian content identical to those offered in public schools⁸² as well as schemes for purchasing of secular courses from sectarian institutions.⁸³ The latter arrangement, of course, was nothing more than the funding of secular courses under a different form of contract.

The Supreme Court's reluctance either to permit the use of public school teachers in parochial schools or to allow direct funding of teaching in such schools was well expressed in *Lemon*

⁷⁹ *Id.* at 49-50. ("We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act.")

⁸⁰ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

⁸¹ *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968). That a pupil in an elementary school would ask to borrow a book from the state sets a new level of achievement for creators of legal fictions.

⁸² *Felton*, 739 F.2d at 55.

⁸³ *Id.*

*v. Kurtzman*⁸⁴ in a statement that continues to guide lower courts faced with new approaches by local educators and legislators to provide services to parochial schools:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and *subjective acceptance of the limitations imposed by the First Amendment*. These prophylactic contacts will involve excessive and enduring entanglement between state and church.⁸⁵

Simple distrust of the impact of a parochial atmosphere on a teacher, as well as an inability to determine whether the teacher's own religious beliefs and practices would be less restrained in a parochial setting, have motivated the Supreme Court to decide on the side of caution. The degree of surveillance necessary to ensure that the first amendment is not violated in these situations is not only costly and time-consuming, but also exacts a toll on teachers' morale and the integrity of their teaching function.

Relying most heavily on *Meek v. Pittenger*,⁸⁶ the Second Circuit in *Felton* pointed out the fatal defects in New York's use of Title I monies.⁸⁷ In *Meek*, the Supreme Court struck down a Pennsylvania statute that articulated goals and methods similar to those of New York under the Title I program. Basically, only the source of funding was different.⁸⁸ Proponents of the Pennsylvania scheme argued that services to special students in parochial schools posed a minimal establishment clause problem and, indeed, did not foster the entanglement forbidden by the first amendment. Justice Stewart, author of the plurality opinion in *Meek*, responded by noting that "the likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient"⁸⁹

⁸⁴ 403 U.S. 602 (1971).

⁸⁵ *Id.* at 619 (emphasis added).

⁸⁶ 421 U.S. 349 (1975).

⁸⁷ 739 F.2d at 60.

⁸⁸ Pennsylvania would have expended state monies to carry out the purposes of the state's Act 194. *Meek*, 421 U.S. at 352-53 & n.2.

⁸⁹ *Id.* at 370-71.

The Supreme Court's decision in *Wolman v. Walter*⁹⁰ also buttressed the Second Circuit's position in *Felton*. In *Wolman*, the Ohio statute under scrutiny⁹¹ provided for various professional, but not pedagogic, diagnostic services to be performed on parochial school premises, as well as on private school grounds. However, the subsequent treatment of individual pupils was to be conducted within public school facilities. The Court sustained the Ohio enactment, finding that the difference between the role of the professional diagnostician and that of the teacher in itself insulated the state program from prohibited entanglement.⁹²

Judge Friendly in *Felton* thus found that the Supreme Court's prior rulings

lead[] inescapably to the conclusion that public funds can be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises of the religious school.⁹³

In his painstaking review of the defendant's contentions in *Felton*, Judge Friendly resisted defendants' attempts to separate the New York program from its ill-fated predecessors on the basis of how the New York plan operated.⁹⁴ Many of the defendants' contentions regarding the involvement of religion with remedial teaching were highly speculative.⁹⁵ It is precisely the need to employ such speculation to support the constitutionality of this type of program that, in itself, suggests establishment clause problems.

Judge Friendly stressed an important point when he ob-

⁹⁰ 433 U.S. 229 (1977).

⁹¹ OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

⁹² *Wolman*, 433 U.S. at 242. Justice Blackmun likened the role of the diagnostician of psychological or learning disabilities to that of physicians, dentists, and optometrists. Approval of these and related state services for parochial school children, to be delivered on the premises of the religious schools, was granted in *Lemon. Id.*

⁹³ *Felton*, 739 F.2d at 64.

⁹⁴ *Id.* at 65-68. The arguments essentially go to the scope and adequacy of supervision of public school teachers in the parochial setting. The city also argued that because no harm had been done in the past, this somehow removed the practice from judicial scrutiny.

⁹⁵ It is doubtful that any amount of research, statistical or empirical, can remove the presumption of entanglement found in the Supreme Court's line of cases on aid to parochial schools. The Court has recognized that teachers can and may respond to the environment of the parochial school. No amount of supervision, however well intended, is likely to eliminate these risks.

served that the "appellees' arguments ignore the symbolic significance of the regular appearance of public school teachers in religious schools."⁹⁶ Unlike diagnosticians, whose occasional presence — even when repeated by the same personnel — raises no authority issues in the minds of children because their mission is clearly discrete, pupils cannot be expected to recognize role differences among teachers. The existence of a public versus a private payroll is of no importance to young children. What is real to them, however, is the regular presence in a parochial school of individuals whose behavior, demeanor, and expectations identify them as teachers. In the vernacular of New York streets, pupils can "make" a teacher, regardless of his or her source of income, and this starts public education down the ill-defined but nonetheless slippery slope of prohibited church-state entanglement.

As the Second Circuit panel noted in its conclusion, after all the arguments raised in favor of New York's practice are scrutinized, the ultimate reality is that the *Felton* defendants did not ask the court to distinguish the case from its predecessors but rather asked it "to say that *Meek* was wrongly decided."⁹⁷ This the court prudently declined to do. *Felton* was rightly decided in an especially well-reasoned opinion which should be cited frequently in this and other circuits as new plans to aid parochial school children are, inevitably, tested in the courts against the language, interpretation and application of the establishment clause. The Supreme Court's affirmance of *Felton*⁹⁸ ensures that the Second Circuit's analysis will have a deserved impact on those cases.

D. *And Lastly, Reverend Moon*

The Second Circuit, in *United States v. Sun Myung Moon*,⁹⁹ upheld the conviction of the Reverend Sun Myung Moon on charges stemming from his filing of false income tax returns. The case was a significant Second Circuit decision chiefly because Rev. Moon is a controversial and wealthy figure.

⁹⁶ 739 F.2d at 67.

⁹⁷ *Id.* at 72.

⁹⁸ *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (closely tracking the Second Circuit opinion).

⁹⁹ 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984).

Many of the issues raised in Judge Cardamone's opinion,¹⁰⁰ as well as in Judge Oakes' dissent,¹⁰¹ are beyond the scope of this Commentary. However, the appellants did raise several constitutional issues worthy of brief review.

Moon alleged prejudicial error based on jury instructions that allowed the jury to find that if Moon used certain monies from a bank account for his own purposes, he could not claim that the funds were in trust for his church.¹⁰² Moon argued that only the church's own definition of a church use was constitutionally acceptable and binding on the jury.¹⁰³ The Second Circuit majority disposed of these arguments, pointing out that

[t]he First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.¹⁰⁴

Moon also raised what the appellate court termed the "so-called 'Messiah' defense."¹⁰⁵ The gravamen of this claim was that Moon, as viewed theologically by his followers, was inseparable from Moon as a legal, natural person.¹⁰⁶ This claim fared no better than his other novel constitutional theories.

II. THE PRESS: PRETRIAL ACCESS

An important first amendment case, *In re Herald Co.*,¹⁰⁷ brought the Second Circuit in line with the Third, Fifth, and

¹⁰⁰ Many issues of substantive criminal law, e.g., sufficiency of the evidence as to Moon's tax offenses, *id.* at 1219-23, and propriety of jury instructions with regard to Moon's criminal intent, *id.* at 1228, were raised in the appeal.

¹⁰¹ The dissent is largely concerned with issues of New York trust law. Circuit Judge Oakes argued that the trial judge's charge to the jury "contained errors which, because they were on the crucial issue of the case [whether Moon or the Church owned bank accounts and stock], must be considered prejudicial." *Id.* at 1245. His disputations centered on: the weight to be given to the donor's intent, *id.*; whether a "'clear and unambiguous' intent is necessary to create a charitable trust," *id.* at 1246; and whether it was necessary for the jury to find that the Church had a "specific organizational structure" so as to be viewed as a beneficiary, *id.*

¹⁰² *Id.* at 1226.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1227.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1227-28.

¹⁰⁷ 734 F.2d 93 (2d Cir. 1984).

Ninth Circuits¹⁰⁸ and evolving free press doctrine by recognizing "that the First Amendment extends some degree of public access to a pretrial suppression hearing."¹⁰⁹ *Herald Co.* arose from the federal prosecution of Michael Klepfer, who was charged with making false statements to government investigators and obstructing justice.¹¹⁰

Klepfer sought to suppress oral statements made to federal investigators,¹¹¹ and also moved to "exclude the public from the hearing on the suppression motion."¹¹² The government opposed Klepfer's motion for a closed hearing, stating that

[t]he government does not feel that there is any greater threat posed by the continuance of an open hearing in a case that's already been made public where there's been a public indictment, there ha[ve] been newspaper articles and conclusions drawn from the articles and the public proceedings so far¹¹³

Chief Judge Munson, the trial judge, permitted an attorney for a newspaper published by The Herald Company to argue against the motion for exclusion.¹¹⁴ Counsel was somewhat handicapped by the fact that he did not know, nor could he learn, Klepfer's reasons for seeking exclusion.¹¹⁵ Judge Munson then granted the motion, finding that "the potential for harm to this defendant, as well as the tainting of any future proceedings by pretrial disclosures, I think outweighs the right of the public at this time and the press to attend this hearing."¹¹⁶ The Herald Company appealed both the suppression and sealing of the hearing transcript and related papers, and the court's refusal to provide it, and the public, with "prior notice of any further actions to ex-

¹⁰⁸ *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (first amendment right of access applies to pretrial bail reduction hearings); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (public has first amendment right of access to pretrial suppression, due process, and entrapment hearings); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (policies underlying public's first amendment right of access to criminal proceedings also apply to voir dire).

¹⁰⁹ *Herald Co.*, 734 F.2d at 99.

¹¹⁰ *Id.* at 95.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 96.

clude the public from proceedings."¹¹⁷

In its review of prior Supreme Court pretrial closure cases,¹¹⁸ the Second Circuit majority¹¹⁹ found that while closure had been permitted in one instance, it had been found improper in three others. Circuit Judge Newman noted that "the increasing reliance by a majority of the Justices upon the functional argument strongly suggests that we should recognize some degree of First Amendment access to pretrial proceedings."¹²⁰ The court further noted:

It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases. There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding, including pretrial suppression hearings that may have a decisive effect upon the outcome of a prosecution.¹²¹

Having determined that some right of access to pretrial proceedings exists, the Second Circuit then formulated the limits of that right. The court refused "to frame a test for closure of a pretrial suppression hearing that incorporates the rigorous First Amendment standards associated with abridgement of free expression."¹²² Judge Newman observed that, historically, protecting free speech has been the chief concern of the first amendment, and that while a first amendment right of access has also been developed, it cannot be equated with the central and fundamental right of freedom of speech.¹²³

¹¹⁷ *Id.*

¹¹⁸ *Id.* (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979)).

¹¹⁹ Circuit Judges Newman and Winter. District Judge MacMahon, sitting by designation, dissented.

¹²⁰ 734 F.2d at 98.

¹²¹ *Id.*

¹²² *Id.* at 100.

¹²³ *Id.* Little support is given by Judge Newman for his statement that "[t]o claim a value in access to information, even information concerning significant governmental activities, comparable to the value of freedom of expression, is to ignore 200 years of First Amendment jurisprudence." *Id.* In any real sense, however, first amendment doctrine was born in the courts only in the second decade of the present century. Legal history aside, the dominant reality today is that access to information, especially information about government and its activities, is an indispensable prerequisite to any meaningful free speech about such activities. The right to petition government for a redress of griev-

The circuits do not agree on this issue. The Third Circuit will grant a closure motion only on a strong showing that "other means will be insufficient to preserve the defendant's rights and that closure is necessary to protect effectively against the perceived harm."¹²⁴ The Fifth Circuit requires evidence of "likely prejudice to a fair trial"¹²⁵ which cannot be cured adequately by alternatives to closure. Under these circumstances, the Fifth Circuit will permit closure if it "will probably be effective" in preventing prejudice to a fair trial.¹²⁶ The Ninth Circuit has adopted Justice Blackmun's standard,¹²⁷ as articulated in *Gannett Co. v. De Pasquale*,¹²⁸ whereby closure must be "strictly and inescapably necessary to protect the fair-trial guarantee."¹²⁹

The standard adopted by the Second Circuit to protect the limited right of free access to suppression hearings is essentially a middle-of-the-road approach that rejects the far-reaching standard of Justice Blackmun. Noting that closure is not a step to be taken lightly,¹³⁰ the Second Circuit articulated a cautiously worded standard to be applied by trial judges:

[Closure] should be invoked only upon a showing of a significant risk of prejudice to the defendant's right to a fair trial or of danger to persons, property, or the integrity of significant activities entitled to confidentiality, such as ongoing undercover investigations or detection devices Though we do not believe that closure must be found to be the least restrictive means possible to avoid the perceived risk, the trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue. The closure should be tailored to the circumstances of the perceived risk The trial judge must articulate the basis for any

ances similarly requires information, and so much of what government does today will not come to public attention unless there is a positive and legally enforceable right of access. Court proceedings, not infrequently at the pretrial stage, often provide enticing clues or outright revelations about official acts that the public should know about. This is not to suggest that government does not have a right to keep secrets or that closure of pretrial proceedings always violates the first amendment. Rather, there are compelling practical reasons that the concept of free access should be elevated to the same constitutional dimension as free speech and should be subject to the same restrictions as speech.

¹²⁴ *United States v. Criden*, 675 F.2d 550, 561-62 (3d Cir. 1982).

¹²⁵ *United States v. Chagra*, 701 F.2d 354, 365 (5th Cir. 1983).

¹²⁶ *Id.*

¹²⁷ *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982).

¹²⁸ 443 U.S. 368 (1979).

¹²⁹ *Id.* at 440.

¹³⁰ *Herald Co.*, 734 F.2d at 100.

closure order¹³¹

The standard articulated by the Second Circuit will, in most instances, provide the same resolution of a closure question as the application of the Blackmun-formulated stricter standard followed by the Ninth Circuit. However, the Second Circuit's position does allow for substantial discretion by trial judges faced with motions for closure. The caution with which the Second Circuit majority approached this issue is apparent throughout its decision in *Herald Co.*, and may have been a specifically tailored counterbalance to the dissent.¹³² While the decision is functionally and doctrinally an advance for Second Circuit first amendment jurisprudence, this author suggests that the Second Circuit majority placed undue reliance on vague and unsupported statements of first amendment history and gave insufficient weight to the realities of contemporary judicial proceedings.

Justice Blackmun's test in *Gannett Co. v. De Pasquale*¹³³ is not, as Judge Newman stated, a "slightly more rigorous standard,"¹³⁴ but is instead a fundamental recognition of the centrality of pretrial procedures in contemporary criminal litigation. Pretrial proceedings often determine whether further proceedings will be held. Official conduct, and too often misconduct, surfaces at pretrial proceedings, most especially at suppression hearings. These are matters of great public interest which, as a practical matter, only the news media can cover effectively. Unlike Justice Blackmun, however, the Second Circuit stopped just a bit too short of recognizing this reality.

¹³¹ *Id.* (citations omitted).

¹³² The dissent urged a broad understanding of the reasons for closure, e.g., historical practice, prejudicial pretrial publicity, and potential for unreasonable delay, *id.* at 104-06 (MacMahon, J., dissenting), while ignoring the contemporary shift away from closure by the other circuits. *Id.* at 96-100 (MacMahon, J., dissenting).

¹³³ 443 U.S. 368, 440 (1979).

¹³⁴ *Herald Co.*, 734 F.2d at 99.