

In Search of a
“Grand Unified Theory”:
Thirty Years with the
Endorsement Test

5th Annual Law & Society Symposium

April 15, 2013

Charleston, South Carolina

Presented by

Charleston Law Review

and

The Riley Institute[®] at Furman



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Symposium Agenda

Monday, April 15, 2013 | Charleston Music Hall, 37 John Street

- 8 a.m. Registration
CLE Course No. 130183
- 8:20 a.m. **Introduction & Welcome**
V. Morgan Peterson
Editor in Chief, Charleston Law Review
- Donald L. Gordon, Ph.D
Executive Director, The Riley Institute at Furman
- Sheila B. Scheuerman
Professor of Law, Charleston School of Law
- 8:30 a.m. **Opening Remarks**
The Honorable Sandra Day O'Connor
Associate Justice of the United States Supreme Court (ret.)
- 8:45 a.m. **Prelude to the Endorsement Test:
Toiling in the Lemon Groves**
William M. Janssen
Associate Professor of Law, Charleston School of Law
- 9:15 a.m. **Religious Symbols:
From Crèches and Menorahs to Crosses and Mottos**
- Moderator:**
William M. Janssen
- Introductory Speaker:**
Lisa Shaw Roy
*Jessie D. Puckett, Jr., Lecturer and Associate Professor of Law,
University of Mississippi School of Law*

Symposium Agenda

Religious Symbols: From Crèches and Menorahs
to Crosses and Mottos (*continued*)

Discussants:

Patrick M. Garry

*Professor of Law, University of South Dakota School of Law,
and Director of the Hagemann Center for Legal
& Public Policy Research*

Allyson Ho

Partner, Morgan, Lewis & Bockius, LLP

Andrew Koppelman

*John Paul Stevens Professor of Law and
Professor of Political Science, Northwestern University*

Lisa Shaw Roy

Rodney A. Smolla, President, Furman University

10:30 a.m. **Break**

10:45 a.m. **Public Prayer:**
“Insiders,” “Outsiders,” Pledges, and Invocations

Moderator: Jorge Roig

Assistant Professor of Law, Charleston School of Law

Introductory Speaker:

Leslie C. Griffin

*William S. Boyd Professor of Law, University of Nevada,
Las Vegas, William S. Boyd School of Law*

Discussants:

Leslie C. Griffin

Marci A. Hamilton
*Paul R. Verkuil Chair in Public Law,
Benjamin N. Cardozo School of Law, Yeshiva University*

Christopher C. Lund
Assistant Professor, Wayne State University Law School

Noon Lunch on Your Own

1:15 p.m. **Funding Challenges:
Minding the “Three-Pence” Boundary**

Moderator:

The Honorable Richard M. Gergel
United States District Court for the District of South Carolina

Introductory Speaker:

Edward McGlynn Gaffney, Jr.
Professor of Law, Valparaiso University Law School

Discussants:

Carl H. Esbeck
*R.B. Price Professor and Isabelle Wade & Paul C. Lyda
Professor of Law, University of Missouri School of Law*

Edward McGlynn Gaffney

Steven K. Green
*Fred H. Paulus Professor of Law and Director
of the Center for Religion, Law and Democracy,
Willamette University College of Law*

Daniel Mach
Director, ACLU Program on Freedom of Religion and Belief

Symposium Agenda

2:30 p.m. **The Endorsement Test as Candidate for the “Grand Unified Theory”:** Observations and Predictions

Moderator:

The Honorable P. Michael Duffy

United States District Court for the District of South Carolina

Discussants:

Edward McGlynn Gaffney

Leslie C. Griffin

Allyson Ho

Rod Smolla

3:30 P.M. **Keynote Address**
The Honorable Sandra Day O’Connor

5:00 P.M. **Closing Remarks**
Andrew L. Abrams
Dean, Charleston School of Law

Keynote Speaker



Sandra Day O'Connor was born in El Paso, Texas, on March 26, 1930. She married John Jay O'Connor III in 1952 and has three sons—Scott, Brian, and Jay. She received her B.A. and LL.B. from Stanford University, where she served as an editor for the *Stanford Law Review*. She served as Deputy County Attorney of San Mateo County, California from 1952 to 1953 and as a civilian attorney

for Quartermaster Market Center, Frankfurt, Germany, from 1954 to 1957. From 1958 to 1960, she practiced law in Maryvale, Arizona, and served as assistant attorney general of Arizona from 1965 to 1969. She was appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms. During her terms in the senate, Justice O'Connor served as Senate Majority Leader from 1972 to 1975. In 1975, she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. President Ronald Reagan nominated her as an associate justice of the Supreme Court, and she took her seat September 25, 1981.

Justice O'Connor retired from the Supreme Court on January 31, 2006. In 2009, she founded iCivics, Inc., a non-profit organization that prepares young Americans to become knowledgeable, engaged twenty-first century citizens by creating free and innovative educational materials.

Speakers, Moderators & Panelists

P. Michael Duffy received his undergraduate degree in 1965 from The Citadel and his law degree in 1968 from the University of South Carolina School of Law. He was also awarded an Honorary Doctor of Law degree from The Citadel in 2000, and an honorary degree from the Charleston School of Law in May 2011. From 1969 until 1972, Judge Duffy served on active duty with the U.S. Army in Germany and, from 1973 to 1974, was the assistant county attorney for Charleston County, South Carolina. Judge Duffy was a partner in the law firm of Hollings & Hawkins and later a principal in the McNair Law Firm until his appointment to the federal bench on December 27, 1995. Judge Duffy is a permanent member of the Fourth Circuit Judicial Conference, and serves on the Information Technology Committee of the Judicial Conference of the federal courts. Judge Duffy is a past president of the Charleston YMCA, the Optimist Club of Charleston, and was the charter president of the South Carolina Irish Historical Society in 1979. He is a senior bencher of The Citadel Inn of Court, and he has also served on the board of numerous civic organizations. Judge Duffy has written and lectured widely on various litigation topics, and he teaches at the National Advocacy Center on a recurring basis. Judge Duffy is married to the former Katherine Hostetter, and they have three children, Katie, Patrick, and Brian, and seven grandchildren.

Carl H. Esbeck is the R.B. Price and Isabelle Wade & Paul C. Lyda Professor of Law at the University of Missouri. After serving as an editor on the *Cornell Law Review*, he held a clerkship with the Honorable Howard C. Bratton, chief judge of the U.S. District Court in New Mexico. For five years, Professor Esbeck practiced law in the firm of Rodey, Dickason, Sloan, Akin & Robb in New Mexico, where he was an equity partner when he left for academia. He has published widely in the area of religious liberty and church-state relations. Professor Esbeck is recognized as the progenitor of “Charitable Choice,” an integral part of the 1996 Federal Welfare Reform Act, later made a part of additional federal social-service programs and executive orders under Presidents Bush and Obama. And he has taken a lead in recognizing that the modern Supreme Court has often applied the Establishment Clause not as a right, but as a structural limit on the government’s authority in explicitly religious matters. While on leave from 1999 to 2002, Professor Esbeck directed the Center for Law & Religious Freedom (CLRF) and then served as Senior Counsel to the Deputy Attorney General at the U.S. Department of Justice. While directing the CLRF, Professor Esbeck was a central part of the congressional advocacy behind the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

Edward McGlynn Gaffney, Jr. studied theology at the Gregorian University and the Pontifical Biblical Institute in Rome, and law and theology at the Catholic University of America in Washington, and at Harvard. He has taught at Loyola (Los Angeles), Notre Dame, Penn, Pepperdine, and Valparaiso. He served as the founding director of content at the National Constitution Center in Philadelphia. With Judge John T. Noonan he co-authored *Religious Freedom* (3d ed. 2010) and has authored many articles and dozens of briefs in appellate cases involving religious freedom or restitution of Nazi-looted art. He was a columnist for *Commonweal* and a founding editor of the *Journal of Law and Religion*. He is the producer-director-writer of *Holy Land: Common Ground* (a documentary on Israeli and Palestinian peace-builders) and *Empty Boxcars* (a documentary on mass murder and mass rescue of Jews in the Shoah in Bulgaria). His current projects are *War and Peace* (materials on history, moral reasoning, and international law on the misuse of force) and *The Stranger and the Neighbor* (biblical stories of hospitality).

Patrick Garry is a professor of law at the University of South Dakota School of Law. Professor Garry received his J.D. and Ph.D. in Constitutional History from the University of Minnesota. He is the author of *Wrestling With God: The Court's Tortuous Treatment of Religion*, as well as numerous law review articles on the Establishment Clause. He has testified to Congress on law and religion issues, and has contributed to *The Oxford Companion to the U.S. Supreme Court and the Encyclopedia of the First Amendment*. His latest book is *Limited Government and the Bill of Rights* (University of Missouri Press).

Richard Mark Gergel is a native of Columbia, South Carolina, and is a graduate of the Richland School District No. 1 public schools. He attended New College, Oxford University, and Duke University, where he graduated in 1975 *summa cum laude*. Judge Gergel attended the Duke University School of Law and graduated in 1979. While at Duke Law School, Judge Gergel was a member of the Editorial Board of the *Duke Law Journal*. He was sworn in as a member of the South Carolina Bar in November 1979, initially practicing with the law firm of Medlock and Davis. He subsequently began his own law firm in 1983 and practiced with the firm, Gergel, Nickles and Solomon, until 2010. Judge Gergel was nominated as a United States district judge for the District of South Carolina by President Barack Obama in December 2009, and was confirmed by a unanimous vote of the United States Senate on August 5, 2010. Judge Gergel has a longstanding interest in the history of his native state and has written a book and numerous articles and book chapters on South Carolina history. He is married to Belinda Friedman Gergel, and they have two sons, Richie and Joseph.

Speakers, Moderators & Panelists

Steven K. Green is the Fred H. Paulus Professor of Law and adjunct professor of history at Willamette University in Salem, Oregon. He also serves as the director of the interdisciplinary Willamette Center for Religion, Law and Democracy. Before joining the Willamette faculty in 2001, Professor Green served for ten years as legal director and special counsel for Americans United for Separation of Church and State in Washington, D.C. Professor Green has participated in many of the leading church-state cases before the U.S. Supreme Court, including serving as co-counsel in *Zelman v. Simmons-Harris*, the Cleveland voucher case. He is the author of *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* (Oxford University Press, 2012), *The Second Disestablishment: Church and State in the Nineteenth Century* (Oxford University Press, 2010), co-author of *Religious Freedom and the Supreme Court* (Baylor University Press, 2008), a casebook in church-state law, and author of more than thirty scholarly articles on religion, history, and the law.

Leslie C. Griffin is the William S. Boyd Professor of Law at the University of Nevada, Las Vegas, William S. Boyd School of Law. Professor Griffin, who teaches constitutional law, is known for her interdisciplinary work in law and religion. She holds a Ph.D. in Religious Studies from Yale University and a J.D. from Stanford Law School. She is author of the Foundation Press casebook, *Law and Religion: Cases and Materials*, editor of *Law and Religion: Cases in Context*, and author of numerous articles and book chapters about law, religion, politics and ethics. Her most recent law review article, "The Sins of Hosanna-Tabor," about the Supreme Court's recent First Amendment decision, will be published by the *Indiana Law Journal*.

Marci A. Hamilton holds the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in church/state issues and the dynamics of child sex abuse in institutional settings. She is an advocate for child sex abuse victims, collaborates with numerous organizations dedicated to helping survivors and their families, leads efforts for legislative reform, and represents survivors of abuse in a wide variety of institutional settings. Professor Hamilton is the author of *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012); *God vs. the Gavel: Religion and the Rule of Law* (Cambridge University Press

2005, 2007); and the co-editor of *Fundamentalism, Politics, and the Law* (Palgrave Macmillan 2011). She is currently a bi-monthly columnist for www.justia.com and was a bi-monthly columnist for www.findlaw.com for ten years. Professor Hamilton was lead counsel for the City of Boerne, Texas, in *Boerne v. Flores*, 521 U.S. 507 (1997), before the United States Supreme Court in its seminal federalism and church/state case holding the Religious Freedom Restoration Act unconstitutional. She has been a visiting professor at Princeton University, New York University School of Law, Emory University School of Law, and the Princeton Theological Seminary. Professor Hamilton clerked for Associate Justice Sandra Day O'Connor of the United States Supreme Court after graduating from the University of Pennsylvania Law School; the Graduate School of Pennsylvania State University; and Vanderbilt University.

Allyson Ho co-chairs Morgan Lewis's U.S. Supreme Court and Appellate Litigation Practice. Ranked in *Chambers* as one of the nation's top appellate litigators, she has successfully litigated high-stakes cases for *Fortune* 500 clients in state and federal trial and appellate courts nationwide. Ho has held senior positions in the White House, as special assistant to the President, and at the Department of Justice, as counselor to the Attorney General. She served as law clerk to Associate Justice Sandra Day O'Connor of the United States Supreme Court and Judge Jacques L. Wiener Jr. of the United States Court of Appeals for the Fifth Circuit. She received her J.D., with high honors, from the University of Chicago Law School, where she was named to the Order of the Coif and was a member of *The University of Chicago Law Review*. Ho received her M.A. and Ph.D. in English from Rice University, where she was a Mellon Fellow in the Humanities and a Vaughn Fellow. She received her B.A., *magna cum laude*, from Duke University, where she was elected to *Phi Beta Kappa*. She has litigated Establishment Clause and Free Exercise Clause cases on behalf of states, veterans' organizations, and students. She is currently lead counsel to the Mount Soledad Memorial Association in litigation challenging the constitutionality of the Mount Soledad Veterans Memorial, and recently served as counsel to the Veterans of Foreign Wars in litigation over the Mojave Desert Veterans Memorial Cross.

Speakers, Moderators & Panelists

William M. Janssen is an associate professor of law at the Charleston School of Law, where he teaches civil procedure, products liability litigation, and first amendment (church/state) law. He co-briefed and co-argued the *Freethought Society v. Chester County* appeal to the United States Court of Appeals for the Third Circuit which defended the constitutionality of a nearly century-old Ten Commandments plaque displayed on a historic courthouse in a suburban Philadelphia community. He is one of three co-authors of several leading resources on federal civil procedure, *Federal Civil Rules Handbook*, and its companion version for law students, *A Student's Guide to the Federal Rules of Civil Procedure*. He is the sole author of *Federal Civil Procedure Logic Maps*, now in its second edition. Before his appointment to the full-time faculty in Charleston, Professor Janssen was a litigation partner in the AmLaw 200 law firm of Saul Ewing LLP, where he served as chair of his law firm's Life Sciences Practices, and as a member of the firm's seven-member governing executive committee. Janssen attended law school at the American University in Washington, D.C., after which he clerked for the Honorable James McGirr Kelly of the United States District Court for the Eastern District of Pennsylvania, and for the Honorable Joseph F. Weis, Jr. of the United States Court of Appeals for the Third Circuit. He is a proud "Hawk"—a graduate of Saint Joseph's University in Philadelphia.

Andrew Koppelman is John Paul Stevens Professor of Law and professor of political science at Northwestern University. His scholarship focuses on issues at the intersection of law and political philosophy. His latest books are *The Tough Luck Constitution and the Assault on Health Care Reform* (Oxford University Press, March 2013) and *Defending American Religious Neutrality* (Harvard University Press, 2013). He has also published more than 80 articles in books and scholarly journals. His article, "Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform," is the most viewed article in the history of the *Yale Law Journal Online* (over 100,000 hits in the first month of posting). He is also an occasional contributor to the Balkinization blog.

Christopher C. Lund is an assistant professor of law at Wayne State University Law School, where he has won the Professor of the Year award three times. His church-and-state work has been published in law reviews like the *Minnesota Law Review*, the *North Carolina Law Review*, and the *Northwestern University Law Review*, peer-reviewed legal journals like the *Journal of Law and Religion*, and peer-reviewed interdisciplinary journals, like *History of Religions*. He is the past chair (2009-10) of the Law and Religion Section of the Association of American Law Schools.

Daniel Mach is the Director of the ACLU Program on Freedom of Religion and Belief. He leads a wide range of religious-liberty litigation, advocacy, and public education efforts nationwide, and often writes, teaches, and speaks publicly on religious freedom issues. Prior to his work at the ACLU, Mach was a partner in the Washington, D.C., office of Jenner & Block, where he specialized in First Amendment law.

Jorge R. Roig is an assistant professor of law at the Charleston School of Law. He obtained his B.A. from Harvard University, and his J.D. from the University of California at Berkeley, Boalt Hall School of Law. Upon graduation, he served as law clerk to then associate justice, now chief justice, Federico Hernández Denton, at the Puerto Rico Supreme Court, and after that as law clerk to United States District Judge Salvador E. Casellas at the United States District Court for the District of Puerto Rico. Roig's primary areas of teaching and research are constitutional law, intellectual property law, and Internet and technology law.

Lisa Shaw Roy is the Jessie D. Puckett, Jr., Lecturer and an associate professor of law at the University of Mississippi School of Law, and is presently a visiting associate professor of law at the University of Memphis Cecil C. Humphreys School of Law. Professor Roy's main areas of scholarly interest involve questions of church and state and the interaction between religion and law. Her articles have been published in the *Michigan State Law Review*, *Penn State Law Review*, *Pepperdine Law Review*, *Oregon Law Review*, and the *Harvard Journal of Law and Public Policy*. Professor Roy is a member of the Law and Religion Section of the Association of American Law Schools, and she is a past co-chair of that section. Before entering legal academia in 2001, she practiced business litigation and public entity representation in Los Angeles, California. Prior to practicing law, Professor Roy was a judicial clerk for the Honorable Henry Lee Adams, Jr. of the United States District Court for the Middle District of Florida. She received her J.D. from the University of Southern California and her B.A. from the University of California, Riverside. Professor Roy has taught or is teaching Law and Religion, Constitutional Law, Legal Profession, Jurisprudence, and Contracts.

Speakers, Moderators & Panelists

Rodney A. Smolla is president of Furman University. He graduated from Yale College and Duke Law School. He has been a law professor and scholar, and twice a law school dean, and is the author of many books, treatises, and articles on constitutional law, media law, the first amendment, and civil rights. His book, *Free Speech in an Open Society* (Alfred A. Knopf, 1992) won the William O. Douglas Award as the year's best monograph on freedom of expression. He is also the author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988) and *Deliberate Intent* (Crown Publishers, 1999). Smolla's latest book, *The Constitution Goes to College*, (New York University Press, 2011) describes the constitutional principles and ideas that have shaped American higher education. He has participated as counsel or co-counsel in litigation matters in state and federal courts throughout the nation, having presented oral argument in numerous state and federal courts, including the Supreme Court of the United States.

Co-Presenters

Charleston Law Review is a general interest publication committed to the finest scholarship and research across a broad range of topics in the law. Its primary objective is to foster the knowledge and insight of students, practitioners, scholars and the judiciary through a traditional forum dedicated to augmenting the pursuit of innovative legal expression, composition and scholarship. Members of the Law Review contribute to this objective by editing articles, writing notes and actively participating in all aspects of the publication process.

The Charleston Law Review is an independent organization composed entirely of second and third year students at the Charleston School of Law. In order to gain membership on the Charleston Law Review, students must compete in a writing competition that begins after spring semester finals have concluded. After completion of the writing competition, offers for membership are made to students based on a combination of grades and the scored writing piece. By participating in the publication process, members of the Charleston Law Review receive invaluable analytical skills and extensive legal writing and editing experience.

The Riley Institute at Furman is a non-partisan organization affiliated with the Department of Political Science at Furman University. Named for former Governor of South Carolina and United States Secretary of Education Richard Riley, the institute engages students in politics, public policy and public leadership through collaborative research, study abroad opportunities and internships.

Since its inauguration in 1999, the Riley Institute also has developed community leadership programs, symposia and conferences designed to promote discussion and analysis of public policy issues. Through its promotion of engaged learning, leadership development and conferences featuring internationally recognized speakers, the Riley Institute has established itself as an innovator in policy and public leadership education.

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