# Constitutionality of the Proposed Portland Eruv

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## I. Oregon Constitutional Standards and Caselaw

An *eruv* is clearly constitutionally permissible and poses no problems of church-state separation under the Oregon Constitution.

The Oregon Constitution guarantees the free exercise of religion, but also prohibits public funds from being appropriated for the benefit of religious institutions:

> **Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience….
> **Section 5. No money to be appropriated for religion.** No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.

Even if the caselaw requires a "wall of separation" between church and state which is "'high and impregnable' to meet the demands of Article I, Section 5" (Dickman v. Sch. Dist. No. 62C, 232 Or. 236, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962); *see also* Priest v. Pierce, 314 Or. 411, 840 P.2d 65 (1992)), the Portland *eruv* would clearly meet this high standard since no public funds will be expended to benefit a religious institution.

Indeed, as we have stated previously, the Portland Eruv Committee will be responsible for all of the costs associated with setup and maintenance of the *eruv*, and neither the city nor any other public body will contribute financially in any way to it. Thus, there is no tenable argument that the *eruv* would lead to the City of Portland "drawing money from the Treasury for the benefit of a religious institution".

In addition, the *eruv* would only require the attachment of tiny plastic PVC poles ("*lechis*") to some utility poles in some locations. These *lechis* would be indistinguishable from plastic attachments currently attached to utility poles. Thus, lechis would not qualify as the prohibited "signs" or "markings", as those terms would be understood in the relevant city regulations.

Furthermore, and as discussed further below in connection with Federal Constitutional caselaw, unlike the possible case of signs which might be attached to utility poles, the *lechis* are not "speech" as that term is understood in church-state separation cases; the *lechis* send no religious message to anyone, whether or not they

would be a user of the *eruv*. Rather, *lechis* are merely physical instruments used as a functional device to denote an area of the public domain within which observant Jews believe they may carry items on the Sabbath.

In light of all of the above, the erection of an *eruv* and the symbolic lease of the enclosed public domain from the City presents no issue of establishment of a religious institution by the city under the Oregon Constitution.

## II. Federal Constitutional Standards and Caselaw

Under the clear and consistent caselaw regarding church-state separation under the Federal Constitution, construction of an *eruv* on public property is constitutionally permissible.

### a) Standard of Review

One preliminary point must be made. Many constitutional experts have observed that a significant shift in Establishment Clause jurisprudence has occurred over the past several years. For nearly three decades, since 1971, the primary framework for analyzing church-state questions was the one set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971). In that case the Court ruled that government action will survive Establishment Clause scrutiny as long as it: (1) has a secular purpose; (2) has a primary effect that does not advance religion; and (3) does not foster excessive entanglement with religion. *Id.* at 612-613, 91 S.Ct. at 2111-12.

In recent years, however, the Court appears to have moved away from *Lemon*, though the test has not been explicitly overruled. The new approach emphasizes the concept of neutrality, and examines with great scrutiny the degree to which government treats religion equitably as compared to other societal interests. *Mitchell v. Helms* , 120 S.Ct.2530 (2000). This shift in no way changes our conclusion, as the constitutionality of the *eruv* is firmly establish under both the *Lemon* and "neutrality" tests.

### b) Lemon Test

Using the 3-prong *Lemon* test, two earlier lower court rulings – one federal, one state – have directly considered and affirmed the constitutionality of constructing or maintaining an *eruv* on public property.

In the first case, *Smith v. Community Board No. 14*, 128 Misc.2d 944, 491 N.Y.S.2d 584,587(Sup.1985), *aff'd* 518 N.Y.S.2d 356 (N.Y.App.Div.1987), Plaintiffs filed a motion in state court to permanently enjoin defendants, on Establishment Clause grounds, from further constructing, maintaining and using the *eruv* in Belle Harbor, NY. Prior to this action, the Community Board had approved building of the *eruv* and two New York City agencies granted permission to use sixty-three city lamp poles and to increase the height of sea fences covering ten city blocks.

The second case, *A.C.L.U. v City of Long Branch*, 670 F. Supp.1293 (D.NJ.1987), was brought two years later in federal district court. There, plaintiffs sought, on similar grounds as above, a preliminary injunction to prevent any further steps toward the creation of the *eruv*. The City of Long Branch, NJ, had passed a resolution establishing the *eruv* and authorizing the local synagogue to erect two additional poles, extend a fence and raise a pole at the end of a fence. Aside from these additions, the *eruv* consisted of existing utility poles, telephone poles, and fences connected by wires.

In *Community Board*, the court found "secular purposes" both in the fact that construction of the *eruv* involved raising sea fences that had fallen into disrepair and in the fact that the Department of Parks routinely allowed for community groups, at their own expense, to make such involvements. *Id.* at 587. Recognizing New York City's policy of granting equal access to public lands for both religious and nonreligious purposes, the court (citing Supreme Court precedent) found an additional basis for satisfying *Lemon.*

It would be a mistake to conclude, however, that the first prong can be met in the *eruv* context only by physical improvement to public property. The *Long Branch* ruling takes a markedly different approach. The court there did not look at the effect the city's actions had on the property *per se,* but on the effect those actions had in regard to enabling observant Jews to engage in secular activity on the Sabbath. The court writes:

> [T]he secular purpose of this resolution is that it allows a large group of citizens access to public properties. Within the eruv district they may go to the park, push a baby carriage on public streets, and visit friends. The eruv which the city has allowed the congregation to create is not a religious symbol. Neither the boundary markers of the eruv nor the eruv itself have any religious significance. They are not objects of worship nor do they play any theological role in the observance of the Sabbath. Under Jewish law the eruv does not alter the religious observance of the Sabbath, it merely allows observant Jews to engage in secular activities on the Sabbath. [*Id*. at 1295]

This rationale diverges from Community Board's apparent emphasis on the specific actions taken and whether those actions signified an enhancement of the property. Instead, it looks broadly to the import of the *eruv* and its impact upon a Jew's activities on the Sabbath – and through this lens is secularly grounded in all cases.

In regard to the second prong of the *Lemon* test, both courts followed similar approaches in finding that the "primary effect" of the *eruv*'s construction was not to advance any particular religion, or religion in general. First, as in the *eruv* that we propose to erect, neither *eruv* was constructed at public expense. *Community Board* at 587; *Long Branch* at 1296. Second, as noted in quotation above, was the fact that the *eruv* itself carries with it no religious significance or symbolism, and is not part of any

religious ritual. Perhaps most compelling, however, were the courts' observation relating to the effect the *eruv* had on other residents in the community. *Smith*, at 587, states:

Plaintiff's argument that the *eruv* "enclosed" and "separated" the area and that the *eruv* is a "wall" is simply not true. The *eruv* is a virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area.

Similarly observing that "the existence of the eruv does not impose the Jewish religion on other residents," the *Long Branch* court, at 1296, concurs:

> The eruv is basically invisible to residents…(and) will not significantly alter the existing environment… The eruv sends no religious message to the rest of the community. Its existence could be not discerned by anyone who has not been shown the boundaries. An eruv does not in any way force other residents to confront daily images and symbols of another religion.

It is also worth noting that both rulings put particular emphasis – especially in the context of analyzing the second prong of the *Lemon* test – on the constitutional fact that government may, and sometimes must, accommodate religious practices and institutions. The *eruv* represents an accommodation by the government "in substantially the same manner as it has accommodated the religious beliefs of other(s)" (*Community Board* at 587). It is no different than allowing houses of worship at airports or enabling individuals (through police and fire protection, traffic safety, additional lighting, sidewalk repair, etc.) to enter or exit their places of worship safely. In such cases, government may provide some services and access to public property to make it possible for these persons to enjoy the free exercise of religion. *Long Branch* at 1295-6. In sum, the courts make it clear that an *eruv* is a thoroughly appropriate – perhaps even mandated – accommodation.

Finally, the courts address the issue of "excessive entanglement." Smith dismisses this concern by simply pointing to the fact that the permission sought here (i.e. stringing cords and raising fences) was routinely granted for commercial purposes, and that public land was routinely permitted to be used for a variety of secular or religious functions. Morever, as noted above, construction and maintenance of the eruv would be financed totally by private funds. *Smith* at 587. Terming the aid provided by the government as de minimus, the *Long Branch* court declared that there was no improper assignment of government power or authority to a religious group. Nor was there need for detailed monitoring or close, day-to-day contact. Initial concerns that necessitated a number of city-community meetings early in the process were worked out and an original proposal that involved erecting some fifty or sixty poles was revised under the final plan. Maintaining and insuring the *eruv* was the complete responsibility of the community. Whatever necessary contact the government may have with the community would be minimal and in no way out of the ordinary. *Long Branch* at 1297.

While questions involving "excessive entanglement" are generally answered on a case-by-case basis, it is clear from the above that city-community *eruv* agreements can be structured in such a way so as to steer clear of potential problems.

As long as financial responsibility and upkeep of the *eruv* remains private, and as long as government cedes no substantial power or authority, then the likelihood of entanglement is miniscule. That there exist numerous *eruvim* in the United States without a single problem or complaint of government interference is testament to the fact that interaction between religion and state is minimal, if at all, and quite ordinary.

c) **Neutrality Test**

In October 2002, the Third Circuit Court of Appeals considered the District Court's denial of preliminary injunctive relief in a case that involved the construction of an *eruv* in Tenafly, NJ.

Beginning in June 1999, two residents of the Borough of Tenafly met with the mayor to discuss creating an *eruv* in the Borough. The mayor said she lacked the authority to issue a ceremonial proclamation "renting" the area for a nominal fee, but promised to bring the matter to the Borough council, which she did at the next council meeting the next month. At the meeting, the *eruv* was debated, and many of those present expressed strong objections, stating that the *eruv* would encourage Orthodox Jews to move to Tenafly. The council demanded a formal, written proposal, but the mayor nonetheless advised the two parties who had requested that an *eruv* be allowed to be constructed that it was unlikely to be approved. The same two men then went to the Bergen County Executive, who had jurisdiction over Tenafly, and he issued the necessary ceremonial proclamation. *Tenafly Eruv Assoc. v. Borough of Tenafly*, 309 F.3d 144 (C.A.3 N.J. 2002).

Upon advice of its in-house counsel that additional approval from the Borough council was not necessary, Verizon, the local telephone company, allowed the Eruv Association, with the assistance of the cable company Cablevision, to construct the *eruv* on its telephone poles. The *eruv* was completed sometime in September 2000. *Id*.

In the meantime, the Borough council learned that the *eruv* was being erected in August, and in October they required Cablevision to take down the attachments made to the telephone poles. On November 7, 2000, the Tenafly Eruv Association filed an official application with the Borough council, which was discussed at two subsequent council meetings. At the second meeting, on December 12, 2000, the mayor informed those present that there was an ordinance, Ordinance 691, which apparently prohibited the hanging of anything from telephone poles. This was the first time that this ordinance was discussed at any of the meetings or that its existence was made known to the Eruv Association. The council then voted to require the removal of attachments made to the poles for the purpose of the *eruv*. The plaintiffs responded by filing suit in the District Court on December 15, 2000. *Id.*

Under a First Amendment Free Speech analysis, the District Court decided that the act of affixing the attachments, or "*lechis*", to the utility poles should be considered "symbolic speech". The court also determined that the utility poles are a nonpublic forum, and that the Borough did not discriminate against the plaintiffs' religious views in ordering the *lechis* removed. *Tenafly Eruv Assoc. v. Borough of Tenafly*, 155 F. Supp. 2d 142, 173-180.

The court acknowledged that the Borough had expressly or tacitly permitted various facial violations of Ordinance 691, such as attaching holiday displays, church directional signs and house numbers; nonetheless, the court stated that these were not religious in nature but rather served commercial or functional purposes, and were not intended to be affixed permanently. *Id. at 176-78*.

The Court of Appeals first discussed the plaintiffs' free speech arguments, deciding that the attachment of *lechis* was not "speech" within the meaning of the First Amendment, but rather that the "eruv serves a purely functional, non-communicative purpose indistinguishable, for free speech purposes, from that of a fence surrounding a yard or a wall surrounding a building….the eruv simply demarcates the space within which certain activities otherwise forbidden on the Sabbath are allowed." 309 F.3d 144 (C.A.3 N.J. 2002). Thus, the plaintiffs' free speech claim failed.

However, under a "free exercise" analysis, the court stated that if a law is not neutral or is not generally applicable, "strict scrutiny applies and a burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Id.*, *citing* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 542 (1993). Furthermore, neutrality prohibits government from "'deciding that secular motivations are more important than religious motivations.'" 309 F.3d 144 (C.A.3 N.J. 2002).

While Ordinance 691 was neutral and generally applicable on its face, the Borough did not enforce it uniformly. It had tacitly or expressly granted exemptions from the ordinance for both secular and religious purposes. Thus, according to the court, "the Borough's selective, discretionary application of Ordinance 691 against the lechis violates the neutrality principle of Lukumi and Fraternal Order of Police because it 'devalues' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons,' and thus 'singles out' the plaintiffs' religiously motivated conduct for discriminatory treatment." *Id.*, *citing* Lukumi, 508 U.S. at 537; Fraternal Order of Police v. City of Newark, 170 F.3d 359, 364-65 (3d Cir. 1999).

The court went on to say that the plaintiffs were not requesting preferential treatment. Rather, they asked only that the Borough not invoke an ordinance from which others were exempt to deny the plaintiffs access to the utility poles simply because it was for a religious purpose. Thus, there is no danger of the Borough violating the Establishment Clause by allowing the erection of the *eruv*. 309 F.3d 144 (C.A.3 N.J. 2002).

## III. Conclusion

The existing caselaw, therefore, provides ample precedent supporting the constitutionality, under both Article I, Section 5 of the Oregon Constitution and the Free Exercise and Establishment Clauses of the U.S. Constitution, of constructing and maintaining an *eruv* on public property.