

**Gus Solomon Inns of Court
April 19, 2011**

**Freedom of Religion Presentation by Scott Sorensen-Jolink
“The Great Skinner Butte Cross Case”**

Skinner Butte is a prominent hill on the north edge of downtown Eugene. It is a municipal park, and is named after Eugene Skinner, the founder of Eugene. A cross on the top of Skinner Butte was taken down in 1997, following years of litigation.

From the record and various cases:

From the 1930s to 1964, various folks erected crosses in the park, replacing one after another as they aged. In 1964 private parties erected the cross at issue in the litigation, a 51-foot concrete Latin cross with neon inset tubing, at the crest of the butte, making the cross permanent and huge. Permission was not requested of the City to build the cross beforehand, but subsequently the parties applied for and received a building permit and an electrical permit.

The cross was illuminated for major holidays thereafter, but was taken down eventually in 1997, after the final litigation in the 9th Circuit.

In 1969, after a suit for declaratory relief, a trial in State Circuit Court wherein the Court directed taking down the cross without reaching constitutional questions, the proponents of the cross appealed directly to the Oregon Supreme Court.

On first ruling (Lowe v. City of Eugene, 451 P2d 117 (1969)) in February 1969 the Supreme Court reversed the trial court. The losers petitioned for reconsideration. The court became engaged in a debate with proponents of the cross regarding a *pro tem* judge sitting on the decision-making panel of the court who would not be sitting on the second panel. The court went forward after issuing an opinion regarding the makeup of the court (459 P2d 222 (1969)).

As you can see by the Oregon constitutional provisions we are dealing with today, the Oregon constitution does not have a specific “establishment” clause. The trial court had found that the City of Eugene did not authorize or consent to the placement of the cross. It skirted dealing with the constitutional questions.

The Oregon Supreme Court originally analyzed the Oregon constitution looking at other sister constitutions and found that the raising and maintenance of the cross did not amount to a religious activity violating either the Oregon or U.S. constitution (First and Fourteenth Amendments). Justice Denecke took the position throughout all of these cases that the cross raising and maintenance did not

violate the establishment clause, essentially because it was private behavior and the City's behavior was unrelated to the religious expression behind the cross.

In the final Oregon case, the Supreme Court on reconsideration in October of 1969 withdrew its earlier majority opinion and affirmed the trial court in adopting in substance the previous dissent of the opinion of the court. A further rehearing was allowed, briefed, and argued, and the decision stood.

The Oregon Supreme Court opinion was appealed to the United States Supreme Court and cert was denied (397 US 1042) and rehearing was denied (398 US 944). *Comment: These people were focused!*

The essence of the final opinion was to treat Section 5 of the Oregon Bill of Rights as equal to the establishment clause of the U.S. Constitution and to hold that the City action violated both.

Thereafter, the City held a charter amendment election, and in May of 1970 a wide margin of voters approved a charter amendment designating the cross a "war memorial" attempting to fit the cross into a type of allowable display on public property. The losers in Lowe sued to have Lowe set aside. The Oregon Supreme Court set aside its earlier decision, holding that the cross no longer violated the state and local constitutions (Eugene Sand & Gravel Inc. v. City of Eugene, 276 Or 1007 (1976)). This was appealed by the folks objecting to the cross, to the United States Supreme Court, cert denied (434 US 876 (1977)).

Finally, the objectors formed a committee called The Separation of Church and State Committee and brought suit in federal court (the prior cases having been attempts to appeal from state Supreme Court to the U.S. Supreme Court). On summary judgment, the District Court granted the City's motion, and the cross was still standing. The court agreed with the original Oregon Supreme Court ruling that the cross has a secular purpose, and did not advance religion and did not foster an entanglement with religion.

In the shortest opinion of all of these, the 9th Circuit held that the cross represented government endorsement of Christianity. The maintenance of the cross in the public park "may be reasonably perceived as providing official approval of one religious faith over others."

The court ignored the City's argument that the cross was no longer a religious symbol but now a war memorial. The Court of Appeals quickly disposed of the argument stating that, even so, the cross would be seen as government action endorsing Christianity, citing Lemon (Lemon v. Kurtzmann, 403 US 602 (1971)).

At the time of the abandonment of the quest to save the cross at the top of Skinner Butte, Lemon was still good law. The cross thereafter was moved to private property.