UNDOING NEUTRALITY?

FROM CHURCH-STATE SEPARATION TO JUDEO-CHRISTIAN TOLERANCE

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Nearly 50 years ago, Philip Kurland proposed that the Religion Clauses be read as a flat prohibition on religious classifications,[1] one that strikingly resembled the Equal Protection Clause's prohibition of racial, ethnic, and other suspect classifications.[2] This reading of a "religious neutrality" norm into the Clauses understood the Establishment Clause to prohibit the distribution of government benefits, and the Free Exercise Clause to prohibit the distribution of government burdens, on the basis of religious classifications.[3]

The dominant norm of Religion Clause doctrine is now the very religious neutrality that Kurland urged more than half a century ago.

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1. *See* PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 17–18 (University of Chicago Press 1962) [hereinafter KURLAND, RELIGION AND THE , CHI. L. REV. 1 (1961).

2. *See* KURLAND, RELIGION AND THE LAW, *supra* note 2, at 5.

3. *See* KURLAND, RELIGION AND THE LAW, *supra* note 2, at 18 ("[T]he freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.").

But it took a generation for the doctrine to get there, and it's not clear that it will stay there very long.

Post-incorporation Religion Clause doctrine is the story of a long shift from a dominant norm of strict separation of church and state,[4] to one of religious neutrality,[5] to the brink of a new norm of "Judeo-Christian tolerance"—the constitutionalization of American civil religious practices like references to deity in government and patriotic settings, so-called "nonsectarian" prayer, and government-sponsored religious displays and symbols.[6] The possibility that tolerance might displace neutrality arises from the convergence of three doctrinal developments: the emergence of "acknowledgment" of religion as permissible government action under the Establishment Clause,[7] the elaboration of a "government speech" principle under the Speech Clause,[8] and the likely replacement of "endorsement" by "coercion" as the principal test of government action going forward under the Establishment Clause.[9] The displacement of neutrality by tolerance would eliminate most Establishment Clause constraints on government use of religious symbols and worship, and would threaten to undo the apparently stable resolution of the question of financial assistance to religion. In short, the boundaries of mainstream Establishment Clause doctrine have shifted to the right: Whereas neutrality was once the best that *accommodationists* could hope for, it is now the best that *separationists* can hope for.

I. STRICT SEPARATION OF CHURCH AND STATE

There was little precedential support for a "doctrine" of religious neutrality when Kurland announced it,[10] mostly because there were hardly any Religion Clause precedents at all in the early 1960s.[11]

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exception to the rule of nonjusticiability that previously governed internal church disputes.[25]

Even the theretofore strict prohibition on government

understanding of past American societies rather than the current one. Religious neutrality, in other words, is not violated when government appropriates symbols whose religiosity is merely historical. The Court has upheld Sunday closing laws and government-sponsored Christmas trees in this manner;[32] some Justices have also chosen this tack to justify government use of "under God" in the Pledge of Allegiance and government displays of the Ten Commandments.[33] This was also the justification chosen by Pleasant Grove City—rather disingenuously[34]—to exclude Summum Bonam's Seven Aphorisms from a city park that included a decalogue monument.[35] And, as Justice Scalia insisted in *Salazar v. Buono*, it may also apply to the Latin crosses displayed in military cemeteries and on veterans memorials.[36]

32. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); McGowan v. Maryland, 366 U.S. 420 (1961).

33. *See* Van Orden v. Perry, 545 U.S. 677, 690 (2005) (concluding that although the Ten Commandments have contemporary religious significance, they "have an undeniable historical meaning" as symbols of the belief of past Americans that God blesses and guides the United States); *id.* at 692 (Thomas, J., concurring) ("[The plurality opinion] properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history."); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26 (2004) (Rehnquist, J., concurring) ("The phrase 'under God' in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders . . . ."); *id.* at 41 (O'Connor, J., concurring) ("Whatever the sectarian ends [the Pledge's] authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.").

34. While Latter-day Saints believe in the Old Testament and thus in the Ten Commandments, the Commandments are neither an important nor a common symbol of either contemporary Mormonism or of the Mormon pioneers who founded and settled Pleasant Grove.

35. Pleasant Grove City v. Summum, 129 S.Ct. 1125, 1129–31 (2009) (City restricts park monuments to those that "directly relate to the history of Pleasant Grove" or that "were donated by groups with longstanding ties to the Pleasant Grove community").

36. *See* Transcript of Oral Argument at 38–39, *Salazar v. Buono*, 2010 WL 1687118, (No. 08-472) (assertion by Justice Scalia that Latin cross is a traditional symbol honoring all military dead, including Jewish, Muslim, and other non-Christian veterans, and not just Christian veterans). Justice Scalia did not repeat this assertion in his *Salazar* concurrence

clowns, and a partridge in a pear tree.[42] Even so, hypocrisy is the tribute that vice pays to virtue, and if there have been some questionable uses of these approaches during the normative predominance of religious neutrality, the Court has nevertheless often used them to strike down government appropriation of religious symbols and practices when it did not believe that their religious significance was merely historical or was balanced by secular activities or signs in the vicinity.[43] Although religious neutrality seems not to work very well in principle when applied to government appropriation of religious worship or symbols, the Court has nevertheless developed a working approximation of neutrality in practice.

III. JUDEO-CHRISTIAN TOLERANCE AND THE CONSTITUTIONALIZATION OF CIVIL RELIGION

The Court's approximation of religious neutrality was not sufficient for some of the Justices, notably Justice Scalia, who made this remarkable argument in a dissent from the Court's recent invalidation of a Decalogue monument:

> [T]oday's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot

42. *See* GEDICKS, *supra* note 30, at 77 (observing that in the Court's decisions in Allegheny County v. ACLU and Lynch v. Donnelly, "it is the separationist opinions that take the creche and the menorah seriously as *religious* symbols, and the accommodationist opinions that strive to empty them of their spiritual content and replace it with secular meaning"). *Compare* County of Allegheny v. ACLU, 492 U.S. 581 (1989) (Brennan, J., dissenting) (characterizing the menorah as the symbol of a Jewish "celebration that has deep religious significance") *and* Lynch v. Donnelly, 465 U.S. 668, 711 (1984) (Brennan, J., dissenting) (characterizing the Christian nativity as "a mystical recreation of an event that lies at the heart of the Christian faith," whose symbolic content prompts "a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent his Son into the world to be a Messiah") *with Allegheny County*, 492 U.S. at 613, 615–617 (opinion of Blackmun, J.) (characterizing Chanukah as an American "cultural tradition" analogous to Christmas and forming part of the same "winter-holiday season") *and Lynch*, 465 U.S. at 681, 685 (characterizing the nativity as a commemoration of the "historical origins" of the Christmas holiday which engenders a "friendly community spirit of goodwill in keeping with the season") *and id.* at 691 (O'Connor, J., concurring) (characterizing the meaning of the nativity as a "celebration of the public holiday through its traditional symbols").

43. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844 (2005) (courthouse display of Ten Commandments along with historical and other religious documents); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (student invocations at high school football games); Lee v. Weisman, 505 U.S. 577 (1992) (nonsectarian junior high school graduation prayer).

> favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.[44]

Justice Scalia buttresses this constitutional principle of "monotheistic acknowledgment" by noting that nearly 98% of American believers are monotheists,[45] and draws from this the conclusion that the trappings of the American civil religion do not discriminate on the basis of religion, but are merely "publically honoring God."[46] He makes no mention of the 10 to 15 percent of Americans who are unbelievers,[47] thereby implicity rejecting the requirement of government neutrality between belief and unbelief that has long been a component of Establishment Clause doctrine.

From the standpoint of conventional Establishment Clause wisdom, Justice Scalia has articulated a doctrinal principle whose apparent lack of limits would render the Establishment Clause largely inapplicable to government use of religious practices and symbols. For example, if an overwhelming majority of American monotheists justifies government appropriation of monotheistic practices and symbols, why doesn't an overwhelming majority of American Christians justify government appropriation of Christian practices and symbols?[48] Indeed, why doesn't the overwhelming predominance of

44. *McCreary County*, 545 U.S. at 893 (Scalia, J., joined by Rhenquist, C.J., and Thomas, J., dissenting) (citations omitted).

45. *Id.* at 894 (Scalia, J., dissenting).

46. *Id.*

47. *See* Gedicks & Hendrix, *supra* note 43, at 285.

48. *See*

Latter-day Saints in Pleasant Grove City justify a city-sponsored statue, not of the Ten Commandments but of Moroni, an angel from whom Mormons believe their founding prophet Joseph Smith received the Book of Mormon?[49]

The idea that a city government could sponsor a Mormon symbol because the vast majority of its constituents are Latter-day Saints, or even a more diffuse Judeo-Christian symbols because that majority is overwhelmingly Jewish and Christian, turns the Establishment Clause on its head: the Clause exists precisely to prevent combinations of government and majoritarian religious authority.[50] But when one combines the so-called "government speech doctrine" under the Speech Clause, a likely shift in the doctrinal focus of the Establishment Clause from endorsement to coercion, and the emerging principle Establishment Clause doctrine of permissible "acknowledgment" of belief by government, Justice Scalia's doctrinally impossible principle progressively morphs to a possibility, a plausibility, and even a probability.

A. Government Speech

In *Pleasant Grove City v. Summum*,[51] the Supreme Court squarely held that permanent monuments and markers installed in a city-owned park constituted the city government's own message and were thus exempt from the neutrality and other constitutional requirements that protect private speech in government forums. "Government speech," in other words, is wholly exempt from Speech Clause restrictions. With this development, Justice Scalia's seemingly impossible notion has become possible: Government may properly take account of the religious preferences of an overwhelming

49. *See* JOSEPH SMITH, THE PEARL OF GREAT PRICE, *Joseph Smith---History* 1 (The Church of Jesus Christ of Latter-day Saints, 1971) (Smith's personal account of his calling and mission). Unlike monuments of the Ten Commandments, depictions of Moroni are ubiquitous in Latter-day Saint culture; a representation appears, for example, on the spire of every Mormon temple. Of the almost 90% of the population of Pleasant Grove who are affiliated with a religious congregation, 97% are affiliated with an LDS congregation. *See* Pleasant Grove, Utah, Religion Statistics for Pleasant Grove, http://www.city-data.com/city/Pleasant-Grove-Utah.html (last visited May 30, 2010).

50. *See* Tushnet, *supra* note 19, at 386–87; *see also* Meyler, *supra* note 38, at 105 (noting the "fundamental contraction between, on the one hand, both the decision in *Van Orden*

demographic majority. Were it to have installed an unambiguously Mormon icon in its city park, for example, Pleasant Grove City would have merely acknowledged the demographic obvious, that the city has been, remains, and is likely always to be overwhelmingly composed of Latter-day Saints.[52]

B. The Coercion Test

Nevertheless, the *Summum* majority made it unmistakably clear that the Establishment Clause applies to government speech, even if the Speech Clause does not.[53] Would not government sponsorship or recognition of sectarian practices or symbols constitute unconstitutional endorsement of such practices or symbols in violation of the Establishment Clause? In Justice O'Connor's classic formulation, the endorsement test prohibits all government action that would cause a "reasonable observer" to feel like a favored insider or a disfavored outsider.[54] There is little doubt that government sponsorship of a sectarian religious practice or symbol constitutes an endorsement of the particular religion with which the practice or symbol is associated.

But of course, Justice O'Connor is no longer on the Court. Its ideological center on Establishment Clause issues, as on so much else, has shifted to Justice Kennedy the very same Justice Kennedy who stridently criticized the endorsement test and called for its replacement by a coercion test nearly a generation ago.[55] As Justice

52. *Cf.* Meyler, *supra* note 38, at 107–08 ("[A] governmental entity may, counter-intuitively, face less fear of constitutional challenge if it simply presents a Ten Commandments monument or another relic of the Judeo-Christian tradition than if it provides a more ecumenical set of religious icons. . . . [W]hen speaking on its own behalf, the government could contend that it is allowed to prioritize some religions over others." (discussing *Summum*, 129 S. Ct. 1125, 1142) (Souter, J., concurring in the judgment) ("[T]he government could well argue, as a development of the government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between

religion,[60] such as Christian nativities, Chanukah menorahs, "nonsectarian" legislative prayers, and displays of the Ten Commandments.[61]

If the power of government to endorse religious practices and symbols under the government speech doctrine is limited to the non-coercive practices and symbols of a purportedly diffuse Judeo-Christian or Abrahamic monotheism, as Justices Scalia and Kennedy have suggested, then the constitutionality of such endorsements under the Establishment Clause is not merely possible or plausible; it is probable.

When I first began writing in this area 25 years ago, the most permissive construction of Establishment Clause limitations was religious neutrality, and the most restrictive such construction was strict separation, though the strictures of the latter were balanced by the then-dominant regime of constitutionally compelled exemptions that gave special protection to religion under the Free Exercise Clause. Separationism is now dead, and neutrality under attack; the most permissive mainstream construction of the Establishment Clause now permits endorsement of various non-coercive civil religious practices, while the Court's apparent move to neutrality under the Free Exercise Clause has been largely reversed by a statutory return to the special protection of religion afforded by exemptions.[62]

60. *See, e.g.*, *id.*

61. *Id.* at 662–64; *see id.* at 657 ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role that religion plays in our society.") (Kennedy, J., concurring in the judgment in part and dissenting in part); *accord* Salazar v. Buono, No. 08-472, slip op. at