

**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,<sup>1</sup> one that strikingly resembled the Equal Protection Clause's prohibition of racial, ethnic, and other suspect classifications.<sup>2</sup> 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.<sup>3</sup>

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 LAW] ("[R]eligion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."). Professor Kurland first made this argument in a law review article of the same title published the prior year. See Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. 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,<sup>4</sup> to one of religious neutrality,<sup>5</sup> 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.<sup>6</sup> 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,<sup>7</sup> the elaboration of a “government speech” principle under the Speech Clause,<sup>8</sup> and the likely replacement of “endorsement” by “coercion” as the principal test of government action going forward under the Establishment Clause.<sup>9</sup> 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,<sup>10</sup> mostly because there were hardly any Religion Clause precedents at all in the early 1960s.<sup>11</sup> Nor

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4. See *infra* Part I.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part III-A.

8. See *infra* Part III-B.

9. See *infra* Part III-C.

10. KURLAND, RELIGION AND THE LAW, *supra* note 2, at 16 (observing that religious neutrality was a “doctrine in search of authority”) (initial capitals deleted).

11. After incorporating the Religion Clauses against the states in the 1940s, see *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause), the Court decided only two additional cases under the Clauses prior to the 1960s. See *Zorach v. Clawson*, 343 U.S. 306 (1952) (upholding released-time program of off-campus religious instruction for public school students); *McCullum v.*

did Kurland's endorsement of neutrality look very prophetic at first, because in the following decades the Court took precisely the opposite doctrinal turn. Under the Establishment Clause, the Court imposed special restrictions on government interactions with religious individuals and institutions, restrictions that were generally not imposed on its interactions with secular individuals and institutions. The Court denied religious individuals and institutions access to many social welfare benefits that were available to secular individuals and institutions,<sup>12</sup> it prohibited government taxation of church property on the basis of a "nonentanglement" prophylactic that applied only to religious institutions,<sup>13</sup> it prohibited the delegation of government authority to religious institutions (though not to secular ones),<sup>14</sup> and it prohibited government sponsorship of religious beliefs, practices, or symbols, while imposing no restrictions on government use of their secular analogues.<sup>15</sup> Finally, the Court placed internal church governance decisions wholly beyond judicial review,<sup>16</sup> while leaving intact judicial review of the internal governance decisions of secular

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Board of Educ., 333 U.S. 203 (1948) (striking down program of on-campus religious instruction for public school students).

12. *E.g.*, *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

13. *See* *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

14. *See* *Village of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

15. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating, under the Establishment Clause, invocations at public high school football game delivered by a student who was chosen by a majority vote of the student body); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (same with respect to state requirement that creationism be taught in public high schools whenever evolution is taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same with respect to public school-sponsored moment of silence for voluntary student prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (same with respect to stand-alone public school display of Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same with respect to state initiative prohibiting the teaching of evolution in public schools); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (same with respect to public school-sponsored prayer and Bible-reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (same with respect to public school-sponsored recitation of prayer composed by state board of education).

16. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (holding that First Amendment requires absolute judicial deference to internal church rules for selecting and removing archbishops); *Presbyterian Ch. v. Mary Elizabeth Hull. Mem. Presbyterian Ch.*, 393 U.S. 440 (1969) (same with respect to internal church rules for holding title to property). The Court has never specified whether these decisions are rooted in the Free Exercise Clause or the Establishment Clause.

organizations.<sup>17</sup> The Free Exercise Clause of this era was also separationist, although it is not always conceptualized in that manner. The Court's extension of a special benefit to religious exercise in the form of exemptions from otherwise valid and applicable laws—a benefit not generally afforded to morally comparable secular conduct—functionally separated religious exercise from normal, baseline categories of conduct subject to government regulation.<sup>18</sup>

By the 1980s, the Court had built a doctrinal regime for the Religion Clauses that contradicted religious neutrality. With few exceptions,<sup>19</sup> Religion Clause doctrine approached religious belief and practice as constitutionally distinct activities that called for constitutionally distinct rules when they interacted with government.<sup>20</sup> This separationist doctrine created a certain symmetry between the two Clauses: the special burdens on religion imposed by the Establishment Clause were balanced by the special benefit of exemptions afforded religious practices under the Free Exercise Clause.<sup>21</sup>

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17. See, e.g., ROBERT CHARLES CLARK, CORPORATE LAW § 3.4, at 123–24 (1986) (observing that the management decisions of corporate directors are subject to judicial review when “tainted by fraud, conflict of interest, or illegality,” or rising to “gross negligence”).

18. See, e.g., *Frazee v. Ill. Dep’t of Employment Sec.* (*Unemployment Compensation Cases*), 489 U.S. 829 (1989) (holding that decision to withhold unemployment benefits from claimant terminated for religiously motivated conduct subject to strict scrutiny); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987) (same); *Thomas v. Review Bd. of Ind. Employment Sec. Division*, 450 U.S. 707, 718 (1981) (same); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (same); *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972) (holding that decision not to exempt Amish parents who refused to send high-school age children to school from compliance with compulsory school attendance law subject to strict scrutiny). As Professor Tushnet has observed, the so-called exemption doctrine was more apparent than real; during this period, the Court rejected all exemption claims by non-Christians, and many such claims by Christians. See Mark Tushnet, “*Of Church and State and the Supreme Court*”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 379.

19. See, e.g., *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (holding reimbursement of private religious schools for performing state mandated diagnostic and test services did not violate Establishment Clause); *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (same with respect to inclusion of private religious schools in state textbook loan program along with public and private secular schools).

20. Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 91–94.

21. Abner Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1634–39 (1993).

## II. NEUTRALITY AMONG RELIGIONS AND BETWEEN BELIEF AND UNBELIEF

Change, however, was afoot. In a series of decisions beginning in the 1980s, the Court moved steadily away from the strict separation of church and state until, by the end of the 1990s, it appeared that Kurland's view had swept the doctrinal field. The strict separation of church and state was displaced by the new Religion Clause norm of religious neutrality—*i.e.*, government must not take sides between particular religions or denominations, or between belief or unbelief. The Court transformed the Free Exercise Clause into a subdivision of the Equal Protection Clause, holding that it protected against overt religious discrimination, but gave believers no right to exemptions from religiously neutral, generally applicable laws, even when such laws prohibited or otherwise burdened their religious practices.<sup>22</sup> As for the Establishment Clause, the Court recast it from a largely separationist limit on government interactions with religion into a largely permissive guarantee of religious neutrality in those same interactions. It did so by affording religious institutions access to social welfare benefits on an equal basis with secular institutions,<sup>23</sup> justifying church tax exemptions by an anti-discrimination rather than a nonentanglement rationale,<sup>24</sup> and creating a “neutral principles”

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22. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–35 (1993) (finding animal protection ordinances violated Free Exercise Clause as applied to religious sect practicing animal sacrifice because statute permitted virtually every species of animal killing except those practiced by sect); *Employment Div. v. Smith*, 494 U.S. 872, 888–89 (1990) (holding that state refusal of unemployment benefits to native American who used peyote as religious sacrament in violation of neutral and general criminal law was not subject to strict scrutiny).

23. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (upholding tuition voucher program in which ninety-six percent of the voucher funds were directed to religiously affiliated schools); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (upholding provision of remedial education, guidance, and job counseling services by public school employees to low-income students attending qualified private elementary or secondary school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (upholding provision of state-salaried sign language interpreter to deaf student attending Roman Catholic high school); *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481, 489 (1986) (upholding payment of state vocational rehabilitation grant on behalf of blind recipient studying for ministry at Bible college); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (upholding income tax deduction for tuition, textbook, and transportation expenses incurred in sending child to public or qualified private elementary or secondary school).

24. See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989) (invalidating special sales tax exemption for religious magazines); cf. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–09 (1985) (invalidating state law mandating that religious employees be excused from working on their Sabbath, but granting no such right to employees wishing to be excused for

exception to the rule of nonjusticiability that previously governed internal church disputes.<sup>25</sup>

Even the theretofore strict prohibition on government appropriation of religious beliefs, practices, and symbols was somewhat relaxed by neutrality principles. The Court protected private religious speech in public schools (including even some forms of religious devotion) by importing the Speech Clause prohibitions on content- and viewpoint-based government discrimination that have long protected speech in public forums and on other government property.<sup>26</sup> Notably, the Court emphasized that permitting religious speech in a public forum did not constitute government endorsement of religion, so long as the forum was equally open to nonreligious and anti-religious speech.<sup>27</sup>

The displacement of separation by neutrality solved a host of doctrinal problems. The new no-exemption rule under the Free Exercise Clause eliminated the need to identify and police the definitional boundaries of “religion” and “religious” belief and practice in an environment in which they are fast losing their distinctiveness, while also eliminating the unfairness of preferring religiously motivated activities over secular ones that are of equal moral seriousness.<sup>28</sup> The prohibition on participation by religious (but not secular) organizations in the many benefits of the social welfare state had prevented religion from competing on an even footing with secular ideologies and organizations; removing that prohibition also removed this distortion in the marketplace of ideas.<sup>29</sup> Finally, the application to private religious speech of content- and viewpoint-based neutrality from Speech Clause forum doctrine

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secular reasons); *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 389–90 (1990) (religious organization not entitled to exemption from general sales tax).

25. *Jones v. Wolf*, 443 U.S. 595, 604 (1980) (holding that courts may decide internal church property and other disputes under the First Amendment when they can do so by reference to “neutral principles” of secular law).

26. *See, e.g., Good News Club v. Milford Ctr. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

27. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–43 (1995).

28. *See Frederick Mark Gedicks, Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1226–28 (2005); Tushnet, *supra* note 19, at 380.

29. *See FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE* 56–59 (1995).

eliminated special penalties on such speech, and similarly eliminated another obstacle to the fair competition of religious beliefs and practices with their secular counterparts.<sup>30</sup>

Despite its many doctrinal advantages, the implementation of neutrality proved to be doctrinally complicated in cases involving government sponsorship of religious worship or appropriation of religious symbols. When religious worship or symbols are unambiguously appropriated by government, rather than by a private person or organization, it is impossible in a practical sense for the government to sponsor the worship or to use the symbol while remaining neutral among particular religions, and impossible even in principal for the government to remain neutral between belief and unbelief. This is because neutrality requires that government sponsor all versions of the worship or symbol, as well as all analogous secular practices or symbols. If the government sponsors a prayer, for example, it cannot select one prayer among the many theological possibilities; it acts neutrally only if it does not discriminate theologically on the basis of the content or the prayer or who delivers it, by affording literally every variety of believer an opportunity to pray in his or her own religious way, and giving nonbelievers the chance to deliver secular messages analogous to prayers.<sup>31</sup> In addition to the practical limitations of such a regime, governments are simply loathe to cede the message-control that is required by Speech Clause forum analysis.

So, the triumph of neutrality created a challenging doctrinal problem for government association with religious worship and symbols. How could their sponsorship or appropriation by government be squared with the über-norm of neutrality? The Court developed two approaches. The first might be called “historical secularization,” as when the Court characterizes religious practices or symbols appropriated by government as having lost their contemporary theological significance and become predominantly secular; any theological meaning that they retain signifies the

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30. *See id.* at 59–61.

31. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (Government may impose restrictions on time, place, or manner of speech in public forums so long as they are content-neutral, are narrowly tailored to serve significant government interest, and leave open ample alternative channels of communication); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (Government may impose reasonable subject-matter and speaker-identity restrictions on speech in nonpublic forums and other government property to preserve such property for its principal use so long as they are viewpoint neutral).

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;<sup>32</sup> 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.<sup>33</sup> This was also the justification chosen by Pleasant Grove City—rather disingenuously<sup>34</sup>—to exclude Sumnum Bonam’s Seven Aphorisms from a city park that included a decalogue monument.<sup>35</sup> 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.<sup>36</sup>

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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. Sumnum*, 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 because he did not reach the merits, see *Salazar v. Buono*, No. 08-472, slip op. at 1–7 (U.S. Apr. 28, 2010) (Scalia, J., concurring in the result on standing grounds), but the point was still made by Justice Kennedy. See *Salazar v. Buono*, No. 08-472, slip op. at 17 (U.S. Apr. 28, 2010) (plurality opinion of Kennedy, J.) (“[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in the history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.”).

The second approach might be called “contemporary neutralization,” or, more cynically, the “three-reindeer rule,” according to which even a religious practice or symbol with potent contemporary theological content may be sponsored by the government if it is surrounded by enough secular symbols to balance or neutralize that content. Using contemporary neutralization, the Court has upheld government displays of Christian nativities,<sup>37</sup> Jewish menorahs,<sup>38</sup> and the ubiquitous Ten Commandments.<sup>39</sup>

Government sponsorship or appropriation of religious practices and symbols has deep and widespread popular support, so there has always been tremendous political and social pressure on the Court to apply the Establishment Clause in a way that upholds them. Progressive secularization and contemporary neutralization enable governments to claim that sponsorship or use of religious symbols does not violate the requirements of religious neutrality.<sup>40</sup> However, some of the Court’s judgments of secularization or neutralization are hard to take seriously. It is evident, for example, that some religious symbols whose religious significance the Court has placed safely in the past, such as “under God” or the Ten Commandments, retain potent contemporary theological meaning.<sup>41</sup> Similarly, it is unclear how the deep theological significance of, say, a nativity commemorating the birth of the Son of God and the Christian Savior is cancelled or obscured by placing it next to three reindeer, two

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*See also* Bernadette A. Meyler, *Summum and the Establishment Clause*, 104 NW. U.L. REV. 95, 107 (1995).

37. *See* *Lynch v. Donnelly*, 465 U.S. 665, 671, 681–83 (1984) (holding that Christian nativity surrounded by Santa, reindeer, carolers, clowns, animals, and a Christmas tree had the secular purpose and primary secular effect of celebrating both the secular and religious dimensions of Christmas holiday, as well as depicting its religious origins).

38. *See* *Allegheny v. ACLU*, 492 U.S. 573, 616 (plurality opinion of Blackmun, J.) (concluding that city display of Christmas tree, Jewish menorah, and sign “saluting liberty” did not endorse the Christian and Jewish faiths but “merely recognize[d] that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society”).

39. *See* *Van Orden v. Perry*, 545 U.S. 677, 701–02 (Breyer, J., concurring in the judgment) (concluding that the decalogue monument’s placement among 17 secular monuments and 21 secular historical markers conveys “not simply a religious message, but a secular message as well”).

40. *Cf.* Tushnet, *supra* note 19, at 399 (“[W]here the Justices feel pressure to validate a religious activity, they are likely to respond by treating it as essentially nonreligious.”).

41. *See, e.g.*, Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 292–99 (2007) (demonstrating the thick, contemporary sectarian significance of the Commandments).

clowns, and a partridge in a pear tree.<sup>42</sup> 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.<sup>43</sup> 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

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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.<sup>44</sup>

Justice Scalia buttresses this constitutional principle of “monotheistic acknowledgment” by noting that nearly 98% of American believers are monotheists,<sup>45</sup> 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.”<sup>46</sup> He makes no mention of the 10 to 15 percent of Americans who are unbelievers,<sup>47</sup> thereby implicitly 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?<sup>48</sup> Indeed, why doesn’t the overwhelming predominance of

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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 *Id.* at 304 n.139 (quoting Jack Balkin, *Justice Scalia Puts His Cards on the Table*, BALKANIZATION, June 27, 2005, available at <http://balkin.blogspot.com/2005/06/justice-scalia-puts-his-cards-on-table.html>).

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?<sup>49</sup>

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.<sup>50</sup> 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*,<sup>51</sup> 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

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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* and the Court’s developing position on government speech, and, on the other, the Court’s general move in the direction of equality-based reasoning in the religious liberty area”).

51. 129 S. Ct. 1125 (2009)

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.<sup>52</sup>

### B. *The Coercion Test*

Nevertheless, the *Sumnum* majority made it unmistakably clear that the Establishment Clause applies to government speech, even if the Speech Clause does not.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> As Justice

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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 *Sumnum*, 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 the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.”)).

53. See *Sumnum*, 129 S. Ct. at 1131–32. No Establishment Clause issue was raised in *Sumnum*. See *id.* at 1129.

54. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

55. See *ACLU of Pittsburgh v. City & Cty. of Allegheny*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“I submit that the

Kennedy then noted, even a potent theological symbol like the Christian nativity does not compel anyone “to observe or participate in any religious ceremony. . . . Passersby who disagree with the message conveyed by the displays are free to ignore them, or even to turn their backs, just as they are free to do so when they disagree with any other form of government speech.”<sup>56</sup> A statue of Moroni in a park owned and administered by an overwhelmingly Mormon city is clearly an endorsement of Mormonism by the city, but it is not coercive, and thus apparently not a constitutional violation under Justice Kennedy’s favored Establishment Clause test.<sup>57</sup> Justice Kennedy’s tepid application of the endorsement test in *Salazar v. Buono* suggests that he may indeed be prepared to send it down the road to irrelevance.<sup>58</sup>

### C. “Acknowledgment” of Judeo-Christianity

Appearances to the contrary notwithstanding, Justice Kennedy might find it coercive for government to appropriate a sectarian religious practice or symbol like the hypothetical statue of Moroni in Pleasant Grove’s city park.<sup>59</sup> Like Justice Scalia, however, he has no apparent Establishment Clause objection to government use of the theologically diffuse practices and symbols of American civil

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endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.”).

56. *Id.* at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

57. *Id.* at 662 (“Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”). One caveat: since, for Justice Kennedy, even the mildest psychological discomfort counts as “coercion,” it is possible that, in practice, his application of a coercion test may overlap substantially with the Court’s prior application of the endorsement test. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (majority opinion by Kennedy, J.) (holding that social pressure on unbelievers to remain quiet and to stand respectfully during junior high school graduation prayer constituted government coercion in violation of the Establishment Clause).

58. *See Salazar v. Buono*, No. 08-472, slip op. at 11, 12 (U.S. Apr. 28, 2010) (plurality opinion) (holding that a large, unadorned cross on World War I memorial signified honor for the sacrifices of military veterans rather than endorsement of Christianity); *see also id.*, slip op. at 6 (Alito, J., concurring in part and concurring in the result) (arguing that even if the “so-called ‘endorsement test’” were applicable, no government endorsement of religion could arise from the presence of the cross at the memorial once it had been transferred to private ownership).

59. *See, e.g., Allegheny v. ACLU*, 492 U.S. 573, 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (observing that “[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case,” such as the “permanent erection of a large Latin cross on the roof of city hall”).

religion,<sup>60</sup> such as Christian nativities, Chanukah menorahs, “nonsectarian” legislative prayers, and displays of the Ten Commandments.<sup>61</sup>

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.<sup>62</sup>

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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 14, 15 (U.S. Apr. 28, 2010) (“The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. . . . The Constitution does not oblige government to avoid any public acknowledgement of religion’s role in society.”). Additionally, Justice Kennedy joined in the plurality opinion upholding the constitutionality of the decalogue monument in *Van Orden v. Perry*, 545 U.S. 677, 679 (2005), and joined Justice Scalia’s dissent (although not its most pointed part) from the Court’s invalidation of the monument in *McCreary County v. ACLU*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).

62. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006) (providing that federal government action that substantially burdens the free exercise of religion must satisfy strict scrutiny even when the action is generally applicable and religiously neutral); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006) (same with respect to state action that burdens the religious free exercise of those held in state custody, and state land use regulations that burden the construction and operation of places of worship and other religious property uses); 1 WILLIAM W. BASSETT, ET. AL., RELIGIOUS ORGANIZATIONS AND THE LAW §§ 2:57, 2:58 (updated 2009) (listing 25 states that mandate strict or heightened judicial scrutiny to generally applicable and religiously

In short, any semblance of balance between anti-establishment and free exercise doctrine is long gone. Religion is once again preferred to secular moral commitments under the Free Exercise Clause, and under the Establishment Clause the best that separationists can now hope for is religious neutrality. Given how dramatically the limitations of the Establishment Clause were relaxed during the last twenty-five years, one must wonder how much will be left of them in another twenty-five.