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# RELIGIONS, FRAGMENTATIONS, AND DOCTRINAL LIMITS

Frederick Mark Gedicks\*

The title of this symposium, “Religion, Division, and the Constitution,” suggests certain presuppositions: there is a set of activities captured by the term “religion;” these activities might be politically or socially or culturally divisive (though maybe not); and constitutional law should do something about this (or, again, maybe not). Together, these assumptions form a thesis to be explored or interrogated: “Religion Clause doctrine should mediate the political, social, and cultural divisions caused by religion.”

The title also implies some less obvious assumptions. One is that the term “religion” is meaningful or useful or, at least, uncontested in this context, a concept that uncontroversially holds within its essential characteristics of a certain kind of activity. Another is that some sort of unity exists in the United States that “religion” might (or might not) threaten to divide, some political or social or cultural consensus that religion undermines (or not). Still a third assumption is that Religion Clause doctrine is capable of eliminating or mitigating threats to this unity.

All three assumptions are flawed. First, the term “religion,” as used in our title and by many commentators, lumps together attitudes that are irreconcilably different. The problem here is not “religion,” but rather a certain kind of “religion,” so the emphasis should be on “religions,” not “religion.”<sup>1</sup> Second, “division” implies a unity or an order that “religion”—whatever it is—threatens to divide, which I think gets the problem exactly backwards: “Religion” is not threatening to divide an existing social or cultural consensus; rather, a certain kind of religion is seeking to impose unity on a society and a culture that are already radically divided.<sup>2</sup> And finally, there is little that Religion Clause doctrine can do about this state of affairs; at the least, this problem cannot be resolved on the basis of any plausible neutral principle.<sup>3</sup>

## PART I

To begin, let me summarize some reports on American and European attitudes about religious belief and worship that appeared in the popular press in 2004 and 2005. The Barna Research Group reported that “88% of [American] teens say they are

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* Part III.

Christians,” “60% believe that ‘the Bible is totally accurate in all of its teachings,’” and “56% feel that their religious faith is very important in their life.”<sup>4</sup> This, I suppose, was the good news. On the other hand, “slightly more than half of all U.S. teens also believe that Jesus committed sins while he was on earth,” “two-thirds say that Satan is just a symbol of evil, not really a living being,” and “[o]nly 6% believe that there are moral absolutes.”<sup>5</sup>

Now, lest you think that Barna surveyed only the bad blue-state teenagers, consider this: Evangelical youth minister Josh McDowell has reported that “[n]inety-one percent of *born-again* teenagers surveyed a few years ago proclaimed that there is no such thing as absolute truth,” that a “slight majority” of evangelical teens “say that the bodily resurrection of Jesus Christ never occurred,” and that “[n]early 60% of evangelical Christian teenagers now say that all religious faiths teach equally valid truths.”<sup>6</sup> Even so, a recent UCLA study of college freshmen “showed [that] 80 percent are interested in spirituality and discuss it with friends; 79 percent believe in God and 76 percent are searching for meaning and purpose in life. In addition, 81 percent say they attend religious services.”<sup>7</sup>

David Barton, a Christian reconstructionist and Republican activist, has argued that because eighty-eight percent of Americans “call themselves Christians,” there is a “fairly good basis” for calling the United States “a Christian nation.”<sup>8</sup> Similarly, former Alabama Chief Justice Roy Moore (who I trust needs no introduction), has argued that American judges “have become arbitrary in depriving Americans of life by legal abortion or starvation, by snatching property rights for private economic gain[, and] by restricting our freedom to acknowledge God.”<sup>9</sup> As a corrective, Moore calls for passage of the Constitution Restoration Act of 2005 which, among other things, “would enjoin the federal courts and the Supreme Court . . . from interfering with the right of public officials to acknowledge God.”<sup>10</sup>

Pope Benedict recently “lamented the weakening of churches in Europe, Australia, and the U.S.A. There’s no longer evidence for a need of God, even less of Christ,” he told an assembly of Italian priests.<sup>11</sup> “The so-called traditional churches look like they

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<sup>4</sup> Dale Buss, *Houses of Worship: Christian Teens? Not Very*, WALL ST. J., July 9, 2004, at W13.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> Carrie A. Moore, *Spirituality in Vogue on College Campus*, DESERET MORNING NEWS, Sept. 17, 2005, at E1.

<sup>8</sup> Deborah Caldwell, David Barton and the ‘Myth’ of Church-State Separation, BELIEFNET, (Oct. 21, 2004), [http://www.beliefnet.com/story/154/story\\_15469.html](http://www.beliefnet.com/story/154/story_15469.html).

<sup>9</sup> Roy S. Moore, *A Higher Authority*, WALL ST. J., Jun. 30, 2005, at A12.

<sup>10</sup> *Id.*

<sup>11</sup> Noelle Knox, *Religion Takes a Back Seat in Western Europe*, USA TODAY, Aug. 11, 2005, at A1.

are dying.”<sup>12</sup> Emma Bonino of Italy’s Radical Party confirms Benedict’s diagnosis with this back-handed compliment: “Everybody thinks that the Pope is the only moral figure in [Italy] as far as war and social justice go. . . . But on personal behavior, meaning sex, meaning divorce, meaning motherhood and pregnancy, people frankly do not care.”<sup>13</sup> Benedict, of course, is the same person who, as Cardinal Ratzinger, oversaw the issuance of a Vatican document that characterized non-Christian faiths as “deficient.”<sup>14</sup>

A recent *Newsweek* poll found that eight percent of Americans describe themselves as neither spiritual nor religious, and that another twenty-four percent describe themselves as “[s]piritual but not religious.”<sup>15</sup> Fifty-five percent describe themselves as “religious and spiritual.”<sup>16</sup> The same poll found that seventy-nine percent of all religious Americans, and sixty-eight percent of evangelical Protestants, believe that a “good person who doesn’t share [their] religious beliefs [can still] attain salvation or go to heaven.”<sup>17</sup> Interpreting these results, Martin Marty described three “parallel but often divergent routes” taken by contemporary American religion during the last half-century: “First, most people pursue their search in traditional sanctuaries, though often in untraditional ways. . . . A second path takes the spiritual-minded into activism. . . . The third path would have been the biggest surprise [fifty years ago]: millions speak of their being ‘spiritual but not religious.’”<sup>18</sup>

There are numerous observations and conclusions that one might draw from these data points, but the one I want to highlight is that, while they all refer to “religion” and “belief” and “worship” in some fashion or another, the different meanings borne by these terms in the various reports are broad and incommensurate. For example, it would appear that conservative Christian leaders and activists have a rather different idea of what their respective theologies demand than do their parishioners and fellow congregants, especially those in their teens.

Two basic approaches or understandings of “religion” are evident in these popular accounts, “spirituality” and “fundamentalism.” I cannot give a complete account of these religious types here,<sup>19</sup> but “spirituality” is accurately described as the attitude of

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<sup>12</sup> *Id.*

<sup>13</sup> Ian Fisher, *Italy’s Church and State: A Mostly Happy Union*, N.Y. TIMES, Dec. 1, 2004, at A4.

<sup>14</sup> Ian Fisher, *Benedict XVI and the Church That May Shrink. Or May Not.*, N.Y. TIMES, May 29, 2005, at WK3.

<sup>15</sup> Jerry Adler, *In Search of the Spiritual*, NEWSWEEK, Aug. 29–Sept. 5, 2005, at 48.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 49.

<sup>18</sup> Martin Marty, *A Scholar’s View: The Long and Winding Road*, NEWSWEEK, Aug. 29–Sept. 5, 2005, at 65.

<sup>19</sup> For a detailed summary, see Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1215–25 (2005). For comprehensive examinations of spirituality, see ROBERT C. FULLER, *SPIRITUAL BUT NOT RELIGIOUS* (2001); Peter L. Berger, *Reflections on the Sociology of Religion Today*, 62 SOC.

one struggling to understand how his or her life relates to a greater cosmic scheme,<sup>20</sup> though not necessarily in a denominational or dogmatic context. Indeed, one manifestation of spirituality is anti-creedal.<sup>21</sup> For many American believers, the catechisms and the creeds of denominational religion are obstacles to their personal quests for spiritual meaning.<sup>22</sup> They describe themselves as “spiritual,” but not “religious.”<sup>23</sup> Sociologists have suggested that between twenty percent and twenty-five percent of all Americans understand their beliefs in this way,<sup>24</sup> percentages that are confirmed by polling data.<sup>25</sup>

Even among those who retain a denominational affiliation, there are many who are shifting the weight of their religious commitment away from strict adherence to the dogmas and doctrines of their denomination. These would be those people who describe themselves as “religious *and* spiritual,” and comprise about half of all American believers.<sup>26</sup> This attitude seems to describe the theologically flexible attitudes of many young evangelical Protestants reflected in the news reports I discussed above.<sup>27</sup> These young people understand their faith therapeutically rather than dogmatically, so they avoid or elide the hard truths of denominational orthodoxy.<sup>28</sup>

“Fundamentalism” is a word more used than understood. The term originated in the reaction of evangelicals to the secularization and permissiveness of the American 1920s.<sup>29</sup> A “fundamentalist” in those days signified one who was ready to fight these trends by returning to the “fundamentals” of evangelical Protestantism.<sup>30</sup> This original American Protestant fundamentalism was characterized by militant resistance to

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RELIGION 443, 448 (2001); Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127 (2003); Charles Trueheart, *Welcome to the Next Church*, ATLANTIC MONTHLY, Aug. 1996, at 37. For comprehensive examinations of fundamentalism, see KAREN ARMSTRONG, *THE BATTLE FOR GOD* (2000); GILLES KEPEL, *THE REVENGE OF GOD* (Alan Braley trans., Pa. State Univ. Press 1995); BRUCE B. LAWRENCE, *DEFENDERS OF GOD: THE FUNDAMENTALIST REVOLT AGAINST THE MODERN AGE* (1989); GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* (1991).

<sup>20</sup> See, e.g., FULLER, *supra* note 19, at 8 (distinguishing spirituality from secularism).

<sup>21</sup> See Trueheart, *supra* note 19, at 37–38 (discussing the reorganization of church life and the emergence of a new, possibly “market driven” church organization in the U.S.).

<sup>22</sup> FULLER, *supra* note 19, at 4.

<sup>23</sup> *Id.*; see also Berger, *supra* note 19, at 448.

<sup>24</sup> E.g., FULLER, *supra* note 19, at 4–5; see also ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* 183 (2003) (observing that there are nearly as many spiritually unchurched people in the United States as there are members of any single denomination).

<sup>25</sup> See, e.g., Adler, *supra* note 15, at 48–49.

<sup>26</sup> *Id.*

<sup>27</sup> See *supra* notes 4–6, 15–16 and accompanying text.

<sup>28</sup> See WOLFE, *supra* note 24, at 155–84 *passim*.

<sup>29</sup> KEPEL, *supra* note 19, at 105; MARSDEN, *supra* note 19, at 50–56.

<sup>30</sup> See ARMSTRONG, *supra* note 19, at 171, 174; LAWRENCE, *supra* note 19, at 168–69; MARSDEN, *supra* note 19, at 57.

modernism, deep commitment to Biblical literalism and an exceptionalist conception of truth, and nostalgia for an earlier, mythic era in which Protestant faith and morality were widely shared among the populace and reinforced by government.<sup>31</sup>

American fundamentalism is now only one manifestation of a global fundamentalist movement that seeks to overturn secular society and to refill the ensuing vacuum with a revitalized public religion.<sup>32</sup> Contemporary global fundamentalists mirror American fundamentalists, as literalists who subordinate their individual interests to the absolute authority of a larger spiritual community that is believed to embody the one true religion.<sup>33</sup> Rather than restricting themselves to the Bible as the sole authoritative text, however, contemporary global fundamentalism includes any religion that regards its texts, doctrines, and other sources of authority as absolute, plain, and unchangeable guarantors of truth.<sup>34</sup> Bruce Lawrence nicely encapsulates the characteristics of contemporary global fundamentalism when he defines it as “the affirmation of religious authority as holistic and absolute, admitting of neither criticism nor reduction,” combined with “the collective demand that specific creedal and ethical dictates derived from scripture be publicly recognized and legally enforced.”<sup>35</sup>

## PART II

Beyond their reflection of spirituality and fundamentalism, the news reports about religious attitudes also show the extent to which postmodern sensibilities have penetrated even conservative religion, especially those reporting large majorities who disclaim that truth is absolute or that their religion is exclusively true. “Postmodernism” is a slippery word that requires clear definition; the meaning I intend is from Lyotard, who describes the attitude of the postmodern as “incredulity toward metanarratives.”<sup>36</sup> Metanarratives are grand, sweeping, unified conceptions of the world that purport to be general accounts of human nature or history independent of time, place, culture, and other contexts.<sup>37</sup>

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<sup>31</sup> ARMSTRONG, *supra* note 19, at 172, 174, 177, 181; KEPEL, *supra* note 19, at 105–06; MARSDEN, *supra* note 19, at 66–67; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–306 (2001).

<sup>32</sup> LAWRENCE, *supra* note 19, at 3.

<sup>33</sup> *See id.* at 5–6, 108–09, 118.

<sup>34</sup> Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 14 (1993–94).

<sup>35</sup> LAWRENCE, *supra* note 19, at 27.

<sup>36</sup> JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984).

<sup>37</sup> *See* GIANNI VATTIMO, *AFTER CHRISTIANITY* 15–19, 86 (Luca D’Isanto trans., 2002); *see also* JOHN LUKACS, *AT THE END OF AN AGE* 40 (2002) (“[B]ehind the employment of the ‘post-modern’ category we can detect the uneasy and long overdue recognition that such fixed categories as Objectivism, Scientism, Realism, Naturalism are now passé.”).

The myth of Christian Europe was one such metanarrative. This myth envisioned the unification of the world through the church. We owe a great deal to this myth,<sup>38</sup> including many of the foundations for our contemporary understanding of law.<sup>39</sup> We can also say, however, that the myth of Christian Europe was also responsible for the Church's long fight against science and Enlightenment,<sup>40</sup> for the dreadful treatment of the indigenous peoples of the New World and Africa,<sup>41</sup> and for the suppression of numerous ideas that eventually proved critical to the emergence of liberal democracy in the West.<sup>42</sup>

It was the myth of Enlightenment, of course, that displaced the myth of Christian unity. Enlightenment supposed that we could overcome the world with knowledge and technology. The optimism of Enlightenment was that all worldly problems could be overcome if we just threw off the superstition of the church—that is, the myth of Christian unity.<sup>43</sup> One particularly telling phrase, first employed by Max Weber, characterized Enlightenment as the “disenchantment of the world.”<sup>44</sup>

<sup>38</sup> See generally RODNEY STARK, *THE VICTORY OF REASON: HOW CHRISTIANITY LED TO FREEDOM, CAPITALISM, AND WESTERN SUCCESS* (2005) (arguing that Christianity led to the emergence of “freedom” and capitalism in Europe).

<sup>39</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 22–24 (1983); see also Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 806–08 (1995) (arguing that it was Christianity's “individual-oriented, questioning, challenging, evangelical character” that drove the creation of the liberal state); Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483, 485–86, 490–92 (1997) (discussing the ecclesiastical origins of English courts of equity).

<sup>40</sup> Paul Valley, *A Sorry Business*, THE INDEPENDENT (London), Dec. 19, 1998, at F1 (discussing Pope John Paul II's apologies for the Catholic Church's historic hostility toward science and the Inquisition, where the church persecuted Jews and progressive reformers in the name of stamping out heresy).

<sup>41</sup> See William Bradford, *“With a Very Great Blame on Our Hearts”: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 19 (2002) (“Pope Clement called upon Spanish *conquistadores* to discover and conquer new lands in the Americas in order to draw ‘barbarous nations’ to the Christian faith.” (quoting WILCOMB E. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 5 (2d ed. 1995))); Gerald A. Foster, *American Slavery: The Complete Story*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 401, 410 (2004) (“[R]eligiously it was argued God ordained whites to conquer, then civilize and Christianize the African ‘heathen.’”).

<sup>42</sup> See generally Valley, *supra* note 40.

<sup>43</sup> See, e.g., Stanley Rosen, *Rethinking the Enlightenment*, 7 COMMON KNOWLEDGE 104, 105, 107–08 (1998).

<sup>44</sup> Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 155 (H.H. Gerth & C. Wright Mills ed. & trans., 1946) (“The fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’”); see also MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT*

Just as we owe a great deal of contemporary life to the myth of Christian unity, so we also owe much to the myth of Enlightenment. The explosion of knowledge led to almost unimaginable scientific and technological advances, of which computers and the digital world are only the most recent examples. But Enlightenment just like Christianity failed to deliver on its promise of a comprehensive unifying account of the world. We have not overcome nature, and many problems that did not exist before Enlightenment were in fact created by Enlightenment—think toxic waste, global warming, and atomic power.<sup>45</sup>

Enlightenment has now been displaced by postmodernity. This displacement, however, is different from the others, because postmodernism does not claim to be a metanarrative. When Enlightenment displaced Christianity, one grand account of the world was substituted for another.<sup>46</sup> When postmodernism dissolved Enlightenment, it did not replace it with yet another grand account, but with many, little accounts, because postmodernism rejects the possibility of all grand accounts.<sup>47</sup> The contemporary world—or, at least, the contemporary West—is now characterized by multiple, local, and irreconcilable accounts of truth. “Truth,” in other words, has been replaced with “truths.”<sup>48</sup>

The progression from Christianity to Enlightenment to postmodernism has had important consequences for the public status of religion. When Enlightenment displaced Christianity, it pushed religion to the margins of public life. Religion could only be taken seriously in public life if it conformed itself to scientific knowledge. Thus, there was a Christian Enlightenment during the 18th and 19th centuries, during

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3 (John Cumming trans., Herder & Herder 1972) (1944) (employing the same expression).

<sup>45</sup> See, e.g., MICHELE STENEHJEM GERBER, *ON THE HOME FRONT: THE COLD WAR LEGACY OF THE HANFORD NUCLEAR SITE* (2d ed. 2002); ERNEST J. STERNGLASS, *SECRET FALLOUT: LOW-LEVEL RADIATION FROM HIROSHIMA TO THREE MILE ISLAND* (1981); PRUE TAYLOR, *AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW* 14 (1998) (“[G]lobal warming can be compared only to nuclear war for its potential to disrupt a wide range of human and natural systems.” (quoting Christopher Flann, *Worldwatch Paper No. 91: Slowing Global Warming: A Worldwide Strategy*, Worldwatch Institute (Oct. 1989))).

<sup>46</sup> Gedicks, *supra* note 19, at 1207.

<sup>47</sup> *Id.*

<sup>48</sup> The political and social implications of this aspect of postmodernism are a focus of the work of Italian philosopher Gianni Vattimo. See, e.g., VATTIMO, *supra* note 37; Gianni Vattimo, *Dialettica, Differenza, Pensiero Debole* [Dialect, Difference, Weak Thought], in *IL PENSIERO DEBOLE* 12 (Gianni Vattimo & Pier Aldo Rovatti eds., 1983) (title translation by author). Richard Rorty has also explored this theme, from a more anti-clerical standpoint. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 7–9 (1989) (arguing that the path toward progressive change is the invocation of “increasingly useful metaphors rather than of increasing understanding of how things really are”); Richard Rorty, *What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719 (1992) (contrasting foundationalist truth claims with the suggestions of a “prophet without authority,” who views herself as just someone with a good idea).



which Christian intellectuals attempted, with varying degrees of success, to incorporate modern, scientific thinking into their theologies. Many failed, or declined to do so, or simply resisted the theological demands that modernity made. These religions became irrelevant, until the myth of Enlightenment was itself dissolved by postmodernism.

The displacement of Enlightenment by postmodernism created an ironic place for religion in contemporary public life. This displacement eliminated the scientific monopoly on knowledge, thereby reopening a public space into which religion could return from the margins of public life. The problem, however, is that religion cannot return as metanarrative, as the grand account of the world, but only as one of many local and contingent accounts. In a postmodern world that rejects the possibility of organizing the world by some grand myth or narrative, we no longer have one big story that explains the world, but only many little stories that do not necessarily apply beyond our own communities.<sup>49</sup>

The “postmodernization” of the world is a problem for fundamentalism. Religious fundamentalists attempt to enlist government support for a particular religious understanding of the world, one in which one or a few religions teach the Truth (as in “absolute truth”), and the others are misguided, false, and even evil. In the United States and Western Europe, at least, this understanding of the world is no longer widely shared, as evidenced by the remarkable increase in spiritual approaches to religion, and the equally remarkable rejection of theological absolutes.<sup>50</sup> Some conservative religious leaders, like Pope Benedict, are honest, if regretful, about this development.<sup>51</sup> Others, like Moore and Barton, play on the ambiguity of the term “religion” to misleadingly argue that overwhelming majorities of Americans still adhere to an absolutist religious world-view that has, in fact, passed away.<sup>52</sup> These latter employ a certain aggressiveness in their rhetoric that approaches brutality. For example, underlying fundamentalist insistence that the United States is a “Christian nation” whose Christian beliefs and practices ought to be supported and encouraged by government

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<sup>49</sup> See Gedicks, *supra* note 19, at 1206–08.

<sup>50</sup> See *supra* notes 4–6 and accompanying text.

<sup>51</sup> See *supra* note 11 and accompanying text.

<sup>52</sup> See *supra* notes 7–8 and accompanying text; see also *McCreary County v. ACLU*, 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting) (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, ‘a tolerable acknowledgment of beliefs widely held among the people of this country.’ The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.” (citations omitted)).

is the belief that one must believe as Christian fundamentalists believe or, quite literally, "go to hell."<sup>53</sup> Thus do we have a regular stream of intemperate rhetoric, emanating from conservative Christian leaders and pundits when, say, a local school district affirms the teaching of evolution and bans the teaching of intelligent design,<sup>54</sup> or a city enacts antidiscrimination laws that extend civil rights protections to gays and lesbians,<sup>55</sup> or a court removes a monument of the Ten Commandments,<sup>56</sup> or a national retailer refers to Christmas as the "holiday season."<sup>57</sup>

There are a variety of reasons why an argument for restoration of religious meta-narrative is likely to seem implausible and even dangerous these days. For example, one group that is forcefully making this claim, Islamic fundamentalists or Islamists, represent perhaps the most serious current threat to the personal freedom and liberal

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<sup>53</sup> See, e.g., Amy Frykholm, *Cadets for Christ*, CHRISTIAN CENTURY, Jan. 10, 2006, at 22 (reporting that a Protestant chaplain at the Air Force Academy instructed cadets at an Academy worship service that "if their bunkmates were not born again, they 'would burn in the fires of hell'"); Jori Lewis, *Good vs. Evil, Evangelical Church Play Has Weighty Message*, OSHKOSH NORTHWESTERN (Wisc.), July 7, 2005 (reporting on a performance put on by a local evangelical Christian church in which "people die suddenly in car crashes, shootings and plane accidents. . . . The characters either go to a happy heaven or to a hell full of fire and brimstone based on whether or not they have accepted Jesus as their personal savior.").

<sup>54</sup> For example, conservative evangelist Pat Robertson commented about the fact that the town of Dover, Pennsylvania voted out eight school board members who introduced "intelligent design" as an alternative theory of evolution, saying that "[i]f there is a disaster in your area, don't turn to God, you just rejected him from your city." *Pat Robertson in His Own Words*, RICHMOND TIMES-DISPATCH, Jan. 16, 2006, at A6.

<sup>55</sup> Conservative Utah State Senator Chris Buttars has criticized Salt Lake City's policy of extending domestic partnership benefits to same-sex couples, saying that "[The mayor] has attracted the entire gay community to come and live in Salt Lake County." Rebecca Walsh, *Many Utahns Favor Gay-Couple Benefits*, SALT LAKE TRIB., Oct. 21, 2005, at A1.

<sup>56</sup> Ann Coulter argued, "This is a country in which taxpayers are forced to subsidize 'artistic' exhibits of aborted fetuses, crucifixes in urine, and gay pornography. Meanwhile, it's unconstitutional to display a Nativity scene at Christmas or the Ten Commandments on government property if the purpose is to promote monotheistic religion." Ann Coulter, *On the Seventh Day, God Rested and Liberals Schemed*, Townhall.com (June 6, 2006), [http://www.townhall.com/columnists/AnnCoulter/2006/06/06/on\\_the\\_seventh\\_day\\_god\\_rested\\_and\\_liberals\\_schemed](http://www.townhall.com/columnists/AnnCoulter/2006/06/06/on_the_seventh_day_god_rested_and_liberals_schemed).

<sup>57</sup> See generally JOHN GIBSON, *THE WAR ON CHRISTMAS* (2005). It is not clear who actually declared war on Christmas, although the counterattack was ably managed by Bill O'Reilly, John Gibson, and the Fox News Channel. The "War on Christmas" apparently referred to the practice, especially by retailers, of eliminating "Christ" and "Christmas" from holiday displays and greetings, as in "Happy Holidays," or "Seasons Greetings." Stores, malls, and town squares are apparently filled with Santa, reindeer, candy canes, lights, and tinsel, but no Mary and Joseph, no Baby Jesus in the manger, no angels, and not even any shepherds. We have "holiday trees" but not "Christmas trees." Deploing this practice, Mr. O'Reilly and Fox subsequently called for boycotts of Wal-Mart and other retailers unless they started using "Christmas" in their store greetings and displays.

democratic government that are among the greatest achievements of the West.<sup>58</sup> There are, of course, others who make the argument for religious metanarrative in softer and more nuanced tones, urging the mere “acknowledgment” of Christianity or the “Abrahamic” religions,<sup>59</sup> for example; the advocates of this “kinder and gentler” Christian metanarrative are obviously willing to work within the liberal democratic systems of the West, rather than to overthrow them. Yet the doctrines and traditions of these religions are often saddled with a host of illiberal practices and beliefs that make them unlikely vehicles for world unification—the exclusion of women from the priesthood and other governing councils of their churches,<sup>60</sup> the condemnation of stem cell research that promises to cure heart-breaking disease,<sup>61</sup> the insistence that marriage and even basic rights be confined to heterosexuals,<sup>62</sup> the refusal to countenance the use of condoms even in the face of an epidemic of sexually transmitted diseases,<sup>63</sup> and the restriction of abortion even when the pregnancy results from rape or incest or threatens the mother’s health.<sup>64</sup>

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<sup>58</sup> See PAUL BERMAN, *TERROR AND LIBERALISM* 91 (2003); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 213 (1996).

<sup>59</sup> See, e.g., Acknowledge God, America!, <http://www.acknowledgegodamerica.com> (last visited June 16, 2006); National Legal Foundation, <http://www.nlf.net> (last visited June 16, 2006); Pass the Salt Ministries, Acknowledgement is not Establishment, [http://www.ptsalt.com/commentary/acknowledgement\\_is\\_not\\_establishment](http://www.ptsalt.com/commentary/acknowledgement_is_not_establishment) (last visited June 16, 2006); *supra* notes 9-10 and accompanying text.

<sup>60</sup> See, e.g., Michele Dillon, *Rome and American Catholics*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 124-25 (1998) (explaining the position taken by Roman Catholicism on the admissibility of women to the priesthood).

<sup>61</sup> See, e.g., Press Release, Focus on The Family, Dobson Says Embryonic Stem-Cell Research Not the Answer (June 15, 2004), <http://www.family.org/welcome/press/a0032509.cfm>.

<sup>62</sup> For example, numerous conservative religions have joined a campaign supporting the Marriage Protection Amendment, which would restrict the federal definition of marriage to a relationship between a man and a woman. *Unprecedented Religious Coalition Unites Behind Marriage Amendment*, U.S. NEWswire, Apr. 26, 2006, <http://releases.usnewswire.com/GetRelease.asp?id=64617> [hereinafter *Religious Coalition*]. The text of the letter of support can be found at <http://www.religiouscoalitionformarriage.org>.

<sup>63</sup> See, e.g., Laura Beil, *Cervical Cancer Vaccine Endorsed*, DALLAS MORNING NEWS, May 19, 2006, at 1A (reporting that some conservative religious groups oppose distribution of a vaccine for human papilloma virus, a sexually transmitted disease, which would greatly reduce the risk of cervical cancer in women, because reduction in the incidence of sexually transmitted disease may encourage sexual promiscuity); Loretta McLaughlin, *After 25 Years of AIDS, the News Only Gets Worse*, BOSTON GLOBE, June 5, 2006, at A11; John Thavis, *Vatican Preparing Document on Condom Use and AIDS, Official Says*, CATHOLIC NEWS SERVICE, Apr. 24, 2006, <http://www.catholicnews.com/data/stories/cns/0602330.htm>. The Catholic Church was recently reported to be considering approval of condom use for married couples when one spouse is infected with HIV. *Id.*

<sup>64</sup> Legislation backed by conservative Christians in South Dakota and Louisiana would criminalize all abortions except when the procedure is “intended to prevent the death of a pregnant mother.” Women’s Health and Human Life Protection Act, H.B. 1215, 81st Leg.,

## PART III

And finally, a word about the futility of hopes for doctrinal resolution. The big doctrinal news of the last twenty years of Religion Clause jurisprudence has been the triumph of neutrality. The three paradigm problems of Religion Clause jurisprudence are religious exemption, religious subsidy, and civil religion; neutrality has solved two of them, with more coherence than one can normally expect from constitutional doctrine. A series of free exercise decisions culminating in *Employment Division v. Smith* eliminated the unfairness inherent in granting exemptions to religious activity, but not to comparably serious secular moral activity, by making both equally subject to the law.<sup>65</sup> A series of religious funding decisions ending in *Zelman v. Simmons-Harris* and *Mitchell v. Helms* allow religious individuals and institutions to receive the same public welfare benefits as secular institutions, subject to some modest conditions.<sup>66</sup> There is a very real sense in which one can say that a neutrality “principle,” rather than a neutrality “pragmatic,” governs religious exemptions and religious subsidies.

Neutrality cannot, however, solve the problem of civil religion. “Civil religion” is widely used in the United States and elsewhere to refer to the collection of religious beliefs and references that function in the place of an established or state church.<sup>67</sup> In the eighteenth century, and also among many conservatives today, it was

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Reg. Sess. (S.D. 2006) (enacted); Terry O'Connor, *It's Hard To Understand Why Abortion Test Is State Priority*, NEW ORLEANS CITYBUSINESS, Apr. 24, 2006.

<sup>65</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not require that believers be excused from complying with religiously neutral, generally applicable laws that burden religious beliefs or practices); see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (holding that a California sales and use tax on the sale of religious materials did not offend the Free Exercise Clause); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that harvesting timber and constructing a road in a national forest, when permitted by the government, does not violate the Free Exercise Clause); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (holding that a state prison policy which served a security purpose but prevented Muslim inmates from attending a Muslim congregational service, did not offend the Free Exercise Clause).

<sup>66</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that inclusion of private religious schools in a state-funded tuition voucher program does not violate the Establishment Clause, so long as the voucher is directed to such schools by the decisions of parents or guardians, and such schools satisfy state accreditation standards); *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that provision of in-kind aid to private religious schools does not violate the Establishment Clause, so long as the aid is not actually diverted to sectarian purposes); see also *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>67</sup> See ROBERT N. BELLAH, *Civil Religion in America*, in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168, 171 (1970)[hereinafter BELLAH, *Civil Religion*]

believed that an established church is necessary to provide social unity among a nation's populace and to generate the moral teachings—the “virtue”—required to make of its people good citizens.<sup>68</sup> In the absence of an established or state church in the United States, this function was taken over by a range of generalized religious references and practices linked to American patriotism.<sup>69</sup>

For example, the American civil religion is the basis for the American exceptionalism that is so annoying to almost everyone else in the world. America is the “city on a hill,” which began with the Puritans, who understood themselves as a new covenant people modeled on ancient Israel.<sup>70</sup> This Puritan idea was gradually transferred to the United States as a whole, under which it became the exemplar to the world of orderly, non-monarchical, liberal democracy.<sup>71</sup> This broader conception resonated with a Protestant conception of the United States as the divine favorite that drew God's special intervention so as to bring forth and preserve a form of government both completely new and completely blessed.<sup>72</sup>

The belief that the American Constitution was divinely inspired is a tenet of many conservative religions, including evangelical Protestantism and Mormonism.<sup>73</sup>

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(“Although matters of personal religious belief, worship, and association are considered to be strictly private affairs, there are, at the same time, certain common elements of religious orientation that the great majority of Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere.”).

<sup>68</sup> See ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 30–35 (1975) [hereinafter BELLAH, *BROKEN COVENANT*].

<sup>69</sup> BELLAH, *Civil Religion*, *supra* note 67, at 175–76.

<sup>70</sup> See BELLAH, *BROKEN COVENANT*, *supra* note 68, at 15–16.

<sup>71</sup> *Id.* at 27, 38–39; see also President George W. Bush, Second Inaugural Address (Jan. 20, 2005) (transcript available at <http://www.bartleby.com/124/pres67.html>) (“From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of Heaven and earth. Across the generations we have proclaimed the imperative of self-government, because no one is fit to be a master, and no one deserves to be a slave. Advancing these ideals is the mission that created our Nation. It is the honorable achievement of our fathers. Now it is the urgent requirement of our nation's security, and the calling of our time.”).

<sup>72</sup> See BELLAH, *BROKEN COVENANT*, *supra* note 68, at 5; see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 140 (Harvard Univ. Press, enlarged ed. 1992) (observing that the idea that “America had from the start been destined to play a special role in history” was “deeply embedded in the colonists' awareness”); President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989) (transcript available at <http://www.reaganfoundation.org/reagan/speeches/farewell.asp>). Reagan referred to America as the “shining city on the hill,” describing his vision of the country as “a tall proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace, a city with free ports that hummed with commerce and creativity, and if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here.” *Id.*

<sup>73</sup> See, e.g., MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM*

It is reflected in many traditional American slogans and practices: “God Bless America,” “In God We Trust,” “under God” in the Pledge of Allegiance, and prayer at public events (and especially in public schools). One of the most popular accounts of the drafting and ratification of the 1787 Constitution calls it, without irony, the “miracle at Philadelphia.”<sup>74</sup>

The constitutional status of American civil religion is now the most controversial and unsettled area of American church-state law.<sup>75</sup> Many conservative Christians, who now control the Republican Party in the United States, are forcefully pushing for validation of civil religious practices that resonate with their evangelical Protestant beliefs.<sup>76</sup> On the one hand, one wonders whether a radically plural society like the United States can really have a civil religion with any meaningful substantive content. On the other hand, if civil religion does have substantive theological content, its adoption or use by government would seem to contradict the current doctrinal rule of religious neutrality.<sup>77</sup>

American church-state law solved the problems of religious accommodation and religious subsidy through a strategy of equality or neutrality: Religious institutions

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(2006); Dallin H. Oaks, *The Divinely Inspired Constitution*, ENSIGN, Feb. 1992, at 68.

<sup>74</sup> CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* (1966).

<sup>75</sup> The Supreme Court has admitted the confusion and discussed the tension that leads to the controversy in its opinion in *Van Orden*: “Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.” *Van Orden v. Perry*, 125 S. Ct. 2854, 2859 (2005).

<sup>76</sup> A few examples of policies advocated by religious conservatives include abstinence-only sexual education, see Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAGAZINE, May 7, 2006, at 48; restriction of same-sex relationships, see *Religious Coalition*, *supra* note 62; and teaching intelligent design in public school science courses, see Stephanie Simon, *Their Own Version of a Big Bang*, L.A. TIMES, Feb. 11, 2006, at A1.

<sup>77</sup> This conundrum is exemplified by the controversy surrounding the Ninth Circuit’s decision forbidding the Pledge of Allegiance. Some have suggested that the phrase “under God” in the Pledge is not violative of the Establishment Clause because, as “a religious affirmation [it] is so tepid, so diluted . . . that in fact it should be, in effect, beneath the constitutional radar.” *Excerpts from Arguments on the Meaning of ‘Under God’ in the Pledge of Allegiance*, N.Y. TIMES, Mar. 25, 2004, at A22 (quoting Justice Souter’s comments during oral arguments on *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)). While this argument would indeed save the Pledge, some would consider the victory hollow:

In the end, upholding the Pledge as it is on “ceremonial deism” grounds should be as offensive to people of faith as striking it down would be. That’s because such a holding would allow the words “under God”—and any other civic invocations of the Almighty—to be voiced only because, in truth, they are generally understood to mean nothing at all.

Carol Platt Liebau, *Destroying the Pledge in Order to Save It*, CAL. REPUBLIC ONLINE, Mar. 29, 2004, <http://www.californiarepublic.org/archives/columns/Liebau/20040329LiebauPledge.html>.

are treated no better by government and the law, *but also no worse*, than secular institutions and individuals in comparable situations. This strategy is of limited usefulness, however, in solving the problem of civil religion. Equality, or neutrality, or “even-handedness,” or “the market,” cannot mediate differences in the content of civil religion. By definition, civil religion is the unification of a limited but widely shared set of religious beliefs or attitudes, with loyalty to and love of country.<sup>78</sup> The symbols of civil religion thus have both a theological and a nationalist content, and invocation of a religious symbol by government necessarily invokes the theological as well as the nationalist content of that symbol.<sup>79</sup>

The irony of civil religion is that it is supposed to provide a substitute for the established church, a means of morally instructing and spiritually unifying the people so as to bind them to republican government. Yet, in a radically plural society like the United States, like most of the countries of Western Europe, there is no set of religious beliefs that is both sufficiently broad to command the assent of most citizens and, at the same time, sufficiently deep to contain serious theological content.

We can see this in the Establishment Clause injunction that government must remain neutral between “religion and irreligion,” or between “belief and unbelief.” This dictum, present at the birth of contemporary Establishment Clause doctrine in the *Everson* case in 1947,<sup>80</sup> is my personal candidate for the most frequently invoked incoherent constitutional rule. I mean, really, what sense can one possibly make of a rule that requires the government to remain neutral between a proposition and its negation? One may agree or disagree about what it could mean to be “neutral” between

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<sup>78</sup> See BELLAH, *Civil Religion*, *supra* note 67, at 175.

<sup>79</sup> *Id.*

<sup>80</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”). This dictum has been repeatedly invoked in Supreme Court opinions ever since the *Everson* decision. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (“[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”); *County of Allegheny v. ACLU*, 492 U.S. 573, 644 (1989) (Brennan, J., dissenting) (“We have . . . interpreted [the Establishment] Clause to require neutrality . . . between religion and nonreligion.”); *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring) (“State governments . . . have been required to refrain from favoring . . . religion over nonreligion.”); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (“Government in our democracy . . . may not be hostile to any religion or to the advocacy of no-religion.”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.”); *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) (“The day that this country ceases to be free for irreligion it will cease to be free for religion.”).

various religions, but it is at least possible to have a sensible conversation about this. By contrast, there has always been something decidedly weird about the requirement that the government be neutral between religion and nonreligion, or belief and unbelief. Indeed, the requirement seems to constitute empirical proof that even the dumbest things can start to make sense if they're repeated often enough.

Thanks to Chief Justice John Roberts and Special Prosecutor Patrick Fitzgerald, it is now *de rigeur* to supply a baseball metaphor to illustrate legal principles.<sup>81</sup> Consider then what government neutrality might mean in the context of professional baseball. It is, of course, completely sensible to require that Congress be neutral between the Red Sox and the Yankees, or that the California Legislature be neutral between the A's, the Angels, the Dodgers, the Giants, and the Padres, or, indeed, that Congress and all of the state legislatures be neutral with respect to all thirty major league baseball teams. But what could it possibly mean for Congress and the states to be neutral as between baseball and "not-baseball"?

For starters, I suppose, this would mean that baseball could not be treated any differently than not-baseball. So, Congress could not grant an exemption from the anti-trust laws to baseball unless not-baseball got one, too. It would, therefore, be crucial to ascertain the referent of not-baseball. Would it be the National Basketball Association? Well, it is clearly not-baseball. The American Ballet Theatre? Also not-baseball. Fly-fishing? Watching public television? Cutting my lawn? All not-baseball. The Southern Cal defensive team against Vince Young in the 2006 Rose Bowl? Still not-baseball (and also not-defense).

Logically, "not-baseball" encompasses everything except "baseball." Accordingly, neutrality between baseball and not-baseball requires that every activity in the United States be exempted, like baseball, from the anti-trust laws and more generally, that every activity in the United States be treated the same as baseball. Not only is this nonsensical from a policy standpoint, it is nonsensical from any standpoint.

To return from baseball to religion, it makes utterly no sense to talk about neutrality between religion and nonreligion, or no-religion, irreligion, or any other means of expressing the opposite of "religion."<sup>82</sup> There is no conceptual space between a proposition and its contradiction. The only position of neutrality between a part of the world and the rest of the world is, literally, out of this world (which means, I suppose, that only God could be neutral between religion and nonreligion, but that question is, as we say in the academy, "beyond the scope of this article").

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<sup>81</sup> Jeff Alexander & Matthew McGough, *Out to the Ballgame*, SLATE, Nov. 9, 2005, <http://www.slate.com/id/2129924/>.

<sup>82</sup> I have suggested elsewhere that the limits of Establishment Clause doctrine relating to civil religion may be more often felt instinctively than expressed in coherent judicial doctrine. See Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYUL REV. 995.



The response of the Supreme Court has been to permit government use of religious symbols and forms of worship in two circumstances. The first is actually a special application of broader Speech Clause principles. Religious symbols or forms of worship may be deployed on government property or otherwise in public life when their theological content is contained in the speech of individuals rather than that of the government. Thus, free periods in public school, which students are permitted to use for voluntary activities, may include voluntary prayer and Bible study.<sup>83</sup> Similarly, purely private religious ceremonies, such as the once-popular “meet at the flagpole” prayers organized by evangelical Christian students immediately before the beginning of the public high school day, have been held constitutional by the federal courts.<sup>84</sup> On the other hand, prayers composed by the state, or led by teachers or other state agents in state ceremonies, have been struck down because they constitute government speech, rather than speech by private citizens.<sup>85</sup>

The second circumstance in which government may use religious symbols reflects a more pragmatic doctrinal compromise. Government may use religious symbols or forms of worship when they appear or take place in a context that drains them of their theological content and significance. Thus, a crèche set amidst Santa and his reindeer,<sup>86</sup> or the Ten Commandments displayed amidst a sea of secular monuments,<sup>87</sup> have both been upheld as acceptable uses by the state of religious symbols. On the other hand, display of the crèche or the Ten Commandments by themselves,<sup>88</sup> or in contexts which suggest that the State’s purpose in using such symbols was to

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<sup>83</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that an after-school Bible study organization had a right to equal access to school facilities notwithstanding its religious message); *see also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

<sup>84</sup> *See* *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000).

<sup>85</sup> *See* *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that clergy are prohibited under the Establishment Clause from offering prayers as part of an official public school graduation ceremony); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that state officials cannot compose an official state prayer and force it to be recited by students in public schools each morning).

<sup>86</sup> *See* *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that the inclusion of a city-owned crèche in a privately-owned park did not violate the Establishment Clause).

<sup>87</sup> *See* *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (holding that a display of the Ten Commandments had historical significance and did not violate the Establishment Clause).

<sup>88</sup> *See* *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (holding that a display of the Ten Commandments violated the First Amendment because the County’s purpose was to emphasize the religious message of the Ten Commandments); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a display of the crèche violated the Establishment Clause because the display endorsed a Christian message); *Stone v. Graham*, 449 U.S. 39 (1980) (holding that a display of the Ten Commandments in a public school classroom violated the Establishment Clause because the purpose of the posting was religious in nature and served no educational function).

communicate that the United States is a Christian nation,<sup>89</sup> that Christians are “in charge,” so to speak, have been struck down as unacceptable.

In sum, the Supreme Court will allow government use of religious symbols only when they have no significant theological content, or when it is not really the government that is using them. This is yet another irony of church-state law: If you want to complain about the lack of Christ in Christmas, you cannot also complain about the lack of government-sponsored Christmas symbols.<sup>90</sup> The Court’s resolution of the problem of civil religion reflects the impossibility of using symbols or forms of worship neutrally; once the symbol or form is appropriated by the government, its theological meaning is necessarily deployed as well. The government can only deploy the symbol in such a way that its theological content is obscured or neutralized by secular symbols, or is unmistakably the speech of private citizens rather than government.

### CONCLUSION

I have long wondered why so many American believers feel the need to enlist the government in their efforts to encourage belief. As a believer myself, I am not interested in using the government to make over the world in the image of my church; I am merely interested in spiritual “elbow room”—or sufficient space in which I can live a life that honors and observes the truths of my own religion while still living in peace with those who do not share my views. This is an unambitious goal, a *religione debole*, to paraphrase Gianni Vattimo,<sup>91</sup> but it is enough for me, and eventually, I hope, for most other believers in the West.

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<sup>89</sup> See, e.g., *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (D. Ala. 2002), *aff’d*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003). Moore’s purpose in installing a 2.5 ton monument of the Ten Commandments was to affirm “the sovereignty of [the Judeo-Christian] God over the affairs of men.” *Id.* at 1294. Moore has contended that the First Amendment “was meant to protect, namely the sovereignty of God over civil government.” *Id.* at 1312–13. He further contended that Islam, Buddhism, or Taoism were not religions protected by the First Amendment. *Id.* at 1313 n.5.

<sup>90</sup> Gedicks, *supra* note 19, at 1231; see also VATTIMO, *supra* note 37, at 101 (“Christians cannot claim the right to expose the crucifix in public schools and at the same time adopt it as a sign of a particular, highly dogmatic religion. Or, Christmas can continue to be celebrated in Western societies as a holiday for all, but then it makes no sense to complain that it has become too lay, too mundane, that is, that it has been deprived of its original, authentic meaning.”).

<sup>91</sup> See *supra* note 48 and accompanying text.