

# Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?

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## Abstract

The crisis in Establishment Clause interpretation consists in the Supreme Court's unwillingness to enforce the promise of government neutrality toward religion made in *Everson* in 1947 and its inability to offer an alternative interpretation that would gain majority support among the Justices and the American people. The crisis is symbolized by the Court's reversal on standing grounds of the Ninth Circuit's judgment that the words "under God" in the Pledge of Allegiance violate the Establishment Clause, thus "ducking" the case and the principle involved. The government speech doctrine would redeem *Everson*'s promise of neutrality without imposing a purely secular public realm on an American people unwilling to accept that kind of public life. Government may endorse the concept of higher law, and may do so using certain religious symbols, images and language, without establishing religion. Without specifying the relationship to the Establishment Clause, the Court used the government speech doctrine to decide the *Pleasant Grove Ten Commandments* case, thus suggesting the doctrine's utility in this field. The government speech doctrine suggests changes in some, but by no means all, of the caselaw in Establishment Clause jurisprudence.

## Introduction

In introducing a recent symposium entitled, "Is There a Higher Law; Does it Matter?" Professor Robert Cochran Jr. told a story about his law student days at the University of Virginia. In the story, Cochran's professor of jurisprudence, Calvin Woodward, illustrated through the University of Virginia's architecture a kind of moral thinking that was disappearing in twentieth century American law:

Above the columns at the entrance to Clark Hall...carved in stone was the statement: "That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice."

From the front, we walked into a massive entry hall, adorned on either side with murals. On one side was Moses presenting the Ten Commandments to the Israelites. On the other was what appeared to be a debate in a Greek public square. As we gazed up at the larger-than-life figures, they seemed to represent the higher aspirations of the law.<sup>1</sup>

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The key to the story for Professor Cochran was the word “justice” in the inscription. Once, all or most American lawyers would have agreed that justice is an objective value—something built into the fabric of the universe. Thus, assertions about justice could be regarded as true or false in some sense and law could be measured against that objective standard as either just or unjust. One name for this understanding of reality is the doctrine of higher law, of which the best known exemplar is natural law. This was the point of the story in terms of the Symposium topic. According to the jurisprudence professor, this way of thinking was in decline and was being replaced by various forms of moral and legal relativism. Cochran was taught that this trend toward relativism was the major jurisprudential shift of the twentieth century.

In terms of the Establishment Clause of the Constitution,<sup>2</sup> there are two other important aspects of the story. First, the University of Virginia, a public university, and hence the government, was supporting one side in this controversy over the nature of morality. The government was asserting, symbolically but quite definitely, that justice is real. That was the government’s message in the inscription and in the murals. Second, the government was using a traditional religious image—the giving of the Ten Commandments to Israel—to illustrate this government message about the nature of morality.

There would probably be widespread agreement that this public university architecture does not violate the constitutional prohibition against the establishment of religion. For some people, the fact that the architecture had been there for awhile, and without controversy, would itself eliminate any Establishment Clause problem.<sup>3</sup> But I think that many people, including many nonbelievers, would feel that way even if the University were to put the image up anew.

The reason that this display of the Ten Commandments would probably not be thought to raise establishment of religion concerns is the presence of Greek philosophical debate as part of the display. That reference to Athens demonstrates that the government is using a religious symbol, along with a nonreligious symbol, to make a moral claim that transcends the particular message of either symbol. The government is asserting that justice is real. The use of the murals suggests that both the Hebrews and the Greek philosophers believed that message and that we observers should believe it too.

The monotheistic religious believer—Christian, Jew, Muslim or other—who looks upon this display understands that it is asserting that justice is real and agrees with that position. But she also thinks that the Greek philosophers were mistaken in imagining that human reason by itself could reveal ultimate justice.

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<sup>1</sup> Robert F. Cochran, *Is There a Higher Law? Does it Matter?* Introduction 36 *Pepperdine Law Review* i (2009).

<sup>2</sup> U.S. Const. Amend. 1: “Congress shall make no law respecting an establishment of religion... .”

<sup>3</sup> This was Justice Breyer’s approach in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005)(concurring in the judgement.): “the Establishment Clause seeks to avoid...social conflict... .”

A higher law secularist has a different reaction to the display. This secularist agrees that justice is real, but believes that Moses was mistaken in thinking that there can be a supernatural revelation of justice. Instead, she holds that reason, or history, or nature is adequate to bring us an understanding of what justice requires. Thus, for both observers, the display may be understood as presenting a purportedly universal message transcending any one religious tradition, and as presenting religiously sectarian meanings as well.

Now imagine a skeptical secular observer. Many modern thinkers, especially among the nonreligious, dispute the assertion that justice is real as either a false, or even a meaningless, claim. Such a person, looking at this architectural display, would claim that both the Ten Commandments and the conclusions of Greek philosophy turned out to be highly culturally conditioned, in both cases in their view of women just as one example. Nothing of the conclusions in the Bible or in Greek Philosophy turned out to be eternal. The message of the display is thus mistaken

Yet, despite this profound disagreement with the message of the display, probably no one thinks that this secular relativist has a legal right to prevent the government from making the claim that justice is real. The government constantly makes assertions that many people dispute, but this does not violate anyone's constitutional rights. That authority has a name in constitutional jurisprudence. It is called the doctrine of government speech.

This article suggests that there might be in Professor Cochran's simple story a resolution of today's Establishment Clause crisis. The doctrine of government speech may justifiably permit many seemingly religious government messages. These religious messages might be permitted as plausible assertions of a higher law.

Part I of the article introduces the crisis of the Establishment Clause. In over a half century since *Everson v. Board of Education*<sup>4</sup> first introduced the norms of government neutrality and separation from religion there is still no broad consensus among the American people concerning the proper role of religion in the public square. Nor is there basic agreement among the Justices on the United States Supreme Court as to this matter. There are details that are shared, such as the anti-coercion principle, but there is not agreement as to foundations. The key question—whether we must be a genuinely secular society—has not been answered. Part II shows that the various attempts that have been made to resolve the crisis do not work.

Part III of this article introduces the doctrine of government speech and suggest both why, and why not, it might serve to resolve the crisis of the Establishment Clause. What would be needed is a government message that transcends religion as such, but partakes of religious traditions.

Part IV sets forth in general terms what kinds of government messages might satisfy both those who wish for a more religious, and those who wish a less religious, public square. Professor Cochran's story points in the direction of such a message. This Part examines

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<sup>4</sup> 330 U.S. 1 (1947).

such hypothetical government speech messages from the perspective of religion and secularism. From the point of view of religion, the government message is, in the words of the great Christian scientist and mystic, Pierre Teilhard de Chardin, “in essence religious”<sup>5</sup> and thus acceptable. From the point of view of a new and growing secularism, such a government message fills a gap of meaning that some secularists feel acutely.

Finally, in Part V, the article takes a look at various Establishment Clause issues other than the foundational one of the basic role of religion in public life. The government speech approach recommended here does not necessarily change much in the current caselaw, but it does give a coherent standpoint from which to begin analysis.

That coherence is important. When the government is using religious symbols in a way that can be understood as making claims that transcend religion, or is using public resources to promote such claims, the Justices have already suggested that the government is not violating the Establishment Clause. Thus, as early as *Everson*, government was permitted to bus students to all secondary schools, including religious ones, in the interests of the nonreligious value of public safety.

But the Justices have avoided acknowledging the deep moral and ontological commitments, shared by many religious believers and nonbelievers, which government may be asserting in its use of religious symbols. The unwillingness of the Justices to enter deeper philosophical and religious realms has led to an odd disconnection. Public religious displays and imagery are routinely upheld by the courts, but without convincing explanation. This article aims to move us toward one possible explanation of what we are already doing.

## I. The Establishment Clause Crisis

The Establishment Clause crisis consists in the following. For years the Supreme Court promised, pursuant to its interpretation of the Establishment Clause, that we would have a secular state, defined roughly as one neutral between religion and irreligion and neutral as well among different religions. This commitment was not trivial and most Americans believe that, in many important ways, it is a proper interpretation of the Constitution. Nevertheless, in equally important ways, the commitment to neutrality was never carried to fulfillment by the Court and many millions of Americans passionately dispute it.

The Establishment Clause crisis may be illustrated simply: the addition by Congress of the words “under God” in the Pledge of Allegiance in 1954<sup>6</sup> seemed to violate the promise of government neutrality toward religion made by the Supreme Court—

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<sup>5</sup> Pierre Teilhard De Chardin, *The Divine Milieu*, 116 (2004)(Orig. pub. 1957).

<sup>6</sup> Pub. L. No. 83-396, 68 Stat. 249 (codified as amended at 4 U.S.C. Section 4 (2000 & Supp. III 2003)) (adding the words “under God” after the word “nation” in the Pledge of Allegiance).

unanimously on this point<sup>7</sup>—in *Everson* in 1947. That promise of neutrality has been repeated by majorities on the Court on numerous occasions after *Everson*. Yet, when the Ninth Circuit held that this “under God” language was unconstitutional<sup>8</sup>, everyone knew that the decision would have to be reversed by the Supreme Court.<sup>9</sup> A decision upholding the Ninth Circuit would have led to a serious, and possibly successful, effort to amend the Constitution, with an amendment of uncertain scope. It was not likely that the Court would invite such a struggle, if for no other reason than what Justice Scalia called in a related context, the Court’s “instinct for self preservation”.<sup>10</sup> The Ninth Circuit decision was in fact reversed, but on standing grounds that did not attempt to resolve the underlying merits.

Perhaps the tensions that led to the crisis in Establishment Clause doctrine could simply have been accepted as inevitable if America had remained overwhelmingly religious, and basically Christian. However, there is reason to think that this is not going to be the case. Increasingly there will be nonbelievers and non-Christians who will be calling upon the Court to redeem fully its pledge of government neutrality toward religion and among religions.

Thus, we have today the following situation: the American people as a whole seem to have rejected important aspects of the Court’s fundamental vision of the proper relationship of government and religion—government neutrality; the Justices seem unwilling or unable to defend and insist on their vision; and no alternative understanding of the Establishment Clause has emerged to take the place of government neutrality. It is not the existence of the Pledge itself that suggests a crisis, but the Pledge as a symbol of the failure of the secular state paradigm to achieve a settled position as part of our constitutional jurisprudence. Using a variety of stopgaps and exceptions, the Court has upheld a variety of government religious symbols and images, including Ten Commandments displays<sup>11</sup> and legislative prayers,<sup>12</sup> in the face of its promise of neutrality. Thus, the law of the Establishment Clause is, in the words of John Bickers, in “current chaos”.<sup>13</sup>

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<sup>7</sup> The four dissenters in the case wanted to go even further toward the separation of church and state than did the majority and would have struck down the busing program at issue. See *Everson*, 330 U.S. at 18 (Jackson, J., dissenting).

<sup>8</sup> *Newdow v. U.S. Congress*, 328 F.3d 466 (9<sup>th</sup> Cir. 2003), *Judgment Reversed by Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (U.S. 2004).

<sup>9</sup> An Associated Press poll in March 2004 reported that 87% of Americans supported retaining the words “under God” in the Pledge of Allegiance. <http://www.firstamendmentcenter.org/news.aspx?id=12989> As Steven Shiffrin put it, “one need not have been a constitutional lawyer to predict that the Court would find a way to overturn the Ninth Circuit... .” Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 *Cornell L. Rev.* 9, 65 (2004).

<sup>10</sup> *McCreary County of Ky. v. American Civil Liberties Union of Ky.* 545 U.S. 844, 892 (2005)(Scalia, J., dissenting)(pointing out that the Court occasionally ignores the government neutrality principle in Establishment Clause cases without legitimate justification).

<sup>11</sup> See *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>12</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>13</sup> John M. Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 *Kan. L. Rev.* 371, 405 (2009).

Describing all this as a crisis might seem to be an overstatement. Is the Pledge of Allegiance that important? Even taking the Pledge as representative of all public expressions of religion, which it really is not, those public expression cases are just a part of Establishment Clause jurisprudence.

But, as Steven Gey has persuasively argued, the language of the Pledge of Allegiance is not trivial in its own right and is also a marker of the overall place of government sponsored religion.<sup>14</sup> Judge Goodwin's opinion for the Ninth Circuit put the matter well when it described what it means to be a nation "under God":

In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.<sup>15</sup>

When this case came before the Supreme Court, Justice Stevens held that the plaintiff, the noncustodial father of a school child subject to a school district's policy of requiring daily teacher-led recitation of the Pledge, lacked prudential standing to challenge the district's policy. The major ground of this holding was that the custodial parent had filed a motion to intervene or dismiss on the ground that as a matter of state law, only she was legally entitled to represent her child's best interests.<sup>16</sup> Chief Justice Rehnquist, joined by Justice O'Connor and joined largely on this point by Justice Thomas, called this standing holding "novel", which it may well have been.<sup>17</sup>

Whether the standing holding was persuasive, it remains true that if the Justices wanted to hear a challenge to the daily recitation of the Pledge of Allegiance in public schools, a case raising the issue certainly could have been found since 2004. That fact, even more

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<sup>14</sup> Steven G. Gey, "Under God," *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L.Rev. 1865 (2003).

<sup>15</sup> *Newdow*, 328 F.3d at 487.

<sup>16</sup> *Elk Grove*, 542 U.S. at 12-18. A later California Superior Court decision stated that the two parents have "joint legal custody" but that the mother "makes the final decisions if the two...disagree." *Id.*, at 14.

<sup>17</sup> *Id.*, at 18 (Rehnquist, CJ., concurring in the judgment).

than the strained standing conclusion, suggests that the Court was ducking, and continues to duck, the Pledge of Allegiance issue. Apparently a majority of the Justices do not wish either to uphold or strike down the words “under God” in the Pledge of Allegiance.

Because they would have upheld standing, these same three Justices had occasion to indicate their views on the merits. Justice Thomas concluded that while he does not believe that the Pledge of Allegiance violates the Establishment Clause, the opinion below holding that it does, was “based on a persuasive reading of our precedent.”<sup>18</sup> Justice Thomas quoted *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* to the effect that “the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief.”<sup>19</sup> Since the “under God” language in the Pledge affirms that God exists, the Pledge violates that precept of government neutrality. Justice Thomas, who disputes the thrust of precedent in this field, stated that he would begin “the process of rethinking the Establishment Clause.”<sup>20</sup> Justice Thomas made good on that promise, concluding that even if the Establishment Clause were held to be incorporated against the states, a violation would have to involve an “element of legal coercion” by the government.<sup>21</sup> No such coercion is present in the wording of the Pledge.

Chief Justice Rehnquist and Justice O’Connor would both have upheld the “under God” language in the Pledge of Allegiance. They presented visions of the Establishment Clause broadly congruent with the mix of religious and secular elements present in current American public life and they claimed that this mix is generally consistent with existing precedent. Presumably, then, they would not have agreed that there is a crisis in Establishment Clause interpretation. But their views have an ad hoc quality that fails to explain what the role of religion is to be in American public life.

Chief Justice Rehnquist relied primarily on the presence in American history “of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history... .”<sup>22</sup> From numerous examples, such as the national motto, “In God We Trust” and the opening of Supreme Court sessions with the language “God save the United States and this honorable Court” Chief Justice Rehnquist concluded that “our national culture allows public recognition of our Nation’s religious history and character.”<sup>23</sup>

Chief Justice Rehnquist’s examples, however, prove much more than mere recognition of the nation’s religious history and character. These references to God were presumably believed. Justice Thomas is right that the language in the Pledge reflects the belief that God actually exists, not that people used to believe that God exists. By calling this language patriotic rather than religious, Chief Justice Rehnquist seems to be asserting that the language means very little. That conclusion is belied by the determination of many

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<sup>18</sup> *Id.*, at 45 (Thomas, J., concurring in the judgment).

<sup>19</sup> *Id.*, at 48 (Thomas, J., concurring in the judgment)(quoting from *Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* 492 U.S. 573, 594 (1989)).

<sup>20</sup> *Id.*, at 45.

<sup>21</sup> *Id.*, at 52.

<sup>22</sup> *Id.*, at 26 (Rehnquist, C.J., concurring in the judgment).

<sup>23</sup> *Id.*, at 30 (Rehnquist, C.J., concurring in the judgment).

religious believers to retain the words “under God” in the Pledge and the equal determination of many nonbelievers to remove it.

Justice O’Connor, in addition to joining the Chief Justice, would have upheld the “under God” language under the rubric of “ceremonial deism.” Such references to God and other religious symbols “‘serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society’”.<sup>24</sup> This minimal reference to God “cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority.”<sup>25</sup> While the reference to God does seem to contradict nontheistic religious belief, and thus might violate the core Establishment Clause prohibition against preferring one religion to another, “one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief by any citizen of this Nation.”<sup>26</sup>

Justice O’Connor did not seem enthusiastic about upholding the words “under God.” She called the language a “tolerable attempt” to use religious language to acknowledge religion and to solemnize public occasions.<sup>27</sup> Fundamentally, she believes that this language is not really religious and indeed that it must not be genuinely religious. If public references to God were actually intended to induce a “‘penitent state of mind’” or were “‘intended to create a spiritual communion or invoke divine aid’” they would violate the Establishment Clause.<sup>28</sup> To be acceptable, public religious language must therefore either remind us that we were once religious or must have no more than a formal, rather than a substantive, character.

Again, however, as is the case with Chief Justice Rehnquist’s view, Justice O’Connor is denying meanings that both sides in the struggle attribute to the words “under God” in the Pledge. Her hypothetical observer does not intuit genuine religious meaning in these words. But many believers and nonbelievers do. She can uphold the ‘under God’” language only by denying its authoritativeness.

I admit that the word “God” might mean many different things, some of which might not be regarded as religious at all. Indeed, later in this article I rely on that conclusion. The problem with Justice O’Connor’s assertion is that she attributes *no* substantive meaning to the word “God”. The public use of that word is to be regarded as merely inducing the room to be quiet. That is what she means by solemnizing occasions.

America will continue to have a crisis in Establishment Clause jurisprudence until the Court can forthrightly confront the question whether a majority of the people of the United States may formally assert, through their government, that God exists and that the

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<sup>24</sup> Id., at 36 (O’Connor J., concurring in the judgment)(quoting concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984)).

<sup>25</sup> Id., at 40 (O’Connor J., concurring in the judgment)

<sup>26</sup> Id., at 42 (O’Connor J., concurring in the judgment)

<sup>27</sup> Ibid.

<sup>28</sup> Id., at 40 (O’Connor J., concurring in the judgment).

United States is subject to divine authority. One would hope that the Court's answer to that question, one way or the other, would convince a majority of the people of the soundness of its justifications. But whether that occurs or not, the Justices have an obligation to offer an interpretation that confronts the depth of the issue. We have a cultural war of religion today in America in part because the Court has failed in this obligation. In the next section, we will examine some of the alternatives that the Court or the legal literature have offered thus far to resolve this Establishment Clause crisis.

## II. Alternative Interpretations of the Establishment Clause

In order to deal with the crisis in the interpretation of the Establishment Clause it will be necessary to come to a principled understanding, or perhaps a satisfyingly pragmatic one, that will put the pervasive public religiosity of American life in a coherent context. The words "under God" in the Pledge of Allegiance are not going away anytime soon. Neither are displays of the Ten Commandments, prayers opening legislative sessions, references to God at Presidential inaugurations, Christmas displays and all the rest of it. Americans seem to be doomed to constant litigation over these matters, with some religious believers, usually Christians, trying to attach genuine religious meaning to them, and nonbelievers and non-Christian believers challenging all of it in the name of a general principle of government religious neutrality that is honored on some instances but not in others. Can anything be made of all this?

### A. History, Historical Practices and Plain Meaning

There are several approaches to interpreting the Establishment Clause that are sometimes used to avoid taking responsibility for the essentially normative obligation to imagine and present a model of the proper relationship of religion and public life under Establishment Clause limits, whatever they turn out to be. Three such short-circuits are the resort to history, to historical practices and to plain meaning.

The resort to history began, of course, in *Everson* itself, by reference to Jefferson's metaphor of the wall of separation between church and state and Justice Black's account of colonial and early American history culminating in its "dramatic climax in Virginia in 1785-86" when "Madison wrote his great Memorial and Remonstrance."<sup>29</sup> Justice Black famously concluded that "[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>30</sup>

The full counter attack against this version of history was made years later, in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, the public school silent prayer case.<sup>31</sup> Justice Rehnquist explained that he was expressly challenging a "mistaken understanding of constitutional history."<sup>32</sup> He concluded that Madison in particular, in introducing the precursor language to the Establishment Clause, "did not see it as requiring neutrality on

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<sup>29</sup> *Everson*, 330 U.S. at 11.

<sup>30</sup> *Id.*, at 15.

<sup>31</sup> 472 U.S. 38 (1985)

<sup>32</sup> *Id.*, at 92 (Rehnquist, J., dissenting).

the part of government between religion and irreligion.”<sup>33</sup> This historical counter-attack has continued ever since, most recently with Justice Scalia’s reference in his dissent in the McCreary County Ten Commandments case to “the demonstrably false principle that the government cannot favor religion over irreligion.”<sup>34</sup> What made the principle *demonstrably* false was historical fact and current practices that the Court has been unwilling to strike down.

For several reasons, this use of history by both the neutrality and anti-neutrality camps has not been decisive. First, that history is contentious. Justice Rehnquist, in referring to Madison’s role in drafting the religion clauses was forced to distinguish between

James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution.<sup>35</sup>

To derive a crucial interpretive conclusion from this kind of distinction is just not history. It is a debater’s move.

The second problem with this use of history is that the concept of irreligion is not an 18<sup>th</sup> century concept. The invention of the secular in the sense intended in this context is a 19<sup>th</sup> century conceptual change.<sup>36</sup> Trying to interpret the failure of the framers to have anticipated the secular and to have made it clear how large-scale cultural irreligion relates to nonestablishment, makes as much sense as trying to figure out their views on whether heat imaging devices represent searches.<sup>37</sup>

But most significantly, the problem with using history in this way ignores the changes that have occurred demographically in America in terms of religion. The atheist may today plausibly construct the following principled syllogism in arguing for the protection of the Establishment Clause. When the religious divisions among Americans concerned differing interpretations of Protestantism, the Establishment Clause was understood as prohibiting the endorsement of any one of these Protestant interpretations. When Catholic immigration grew, the Establishment Clause came to be understood as prohibiting the preference among any interpretations of Christianity. When Jews came to be understood as full members of the political community, the Establishment Clause came to be understood as not allowing the endorsement of Christianity itself in preference to Judaism. When Muslims came into national consciousness, the Establishment Clause came to be understood as permitting only the endorsement of monotheism. As the numbers of Hindu and Buddhist believers grow, the Establishment Clause must change to allow only the preference of religion itself rather than the

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<sup>33</sup> Id., at 98 (Rehnquist, J., dissenting).

<sup>34</sup> 545 U.S. at 893 (Scalia, J., dissenting).

<sup>35</sup> Jaffree, 472 U.S. at 98 (Rehnquist J., dissenting).

<sup>36</sup> See Catharine Cookson, Encyclopedia of Religious Freedom, 436 (2003): “It is in the nineteenth century that the thread is taken forward again and the term secularism begins to be used... .”

<sup>37</sup> Cf. *Kyllo v. United States*, 533 U.S. 27 (2001).

endorsement of monotheism. And, finally, as society becomes more secular, so that a substantial community of genuine nonbelievers exists for the first time, the Establishment Clause must come to be understood as prohibiting the endorsement even of religion itself and as requiring instead government neutrality between religion and irreligion. This would be a plausible interpretation that is consistent with our history. And it would suggest that the Establishment Clause should now be interpreted to require government neutrality between religion and irreligion.

The use of historical practices to measure current applications of the Establishment Clause is a second avoidance method, somewhat different from the use of history to illustrate broad starting points. Deciding cases by reference to historical practices was succinctly defended by Justice Kennedy in the *Allegheny County crèche* case.<sup>38</sup> In his opinion concurring in the judgment in part and dissenting in part, Justice Kennedy explained the significance of the Court's upholding legislative prayers in *Marsh*, given the long American tradition of such prayers:

*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.<sup>39</sup>

It is important to note what is and is not being claimed here by Justice Kennedy. The existence of historical practices does not excuse the interpreter from a coherent understanding of the meaning of the Establishment Clause. Nor does such a history insulate a specific practice, or an analogous practice, from constitutional challenge. Admittedly, Justice Kennedy's last sentence introduces some ambiguity about that latter claim. But Justice Scalia some years later, in his dissent the *McCreary County*<sup>40</sup> made the point plainly. Also referring to *Marsh*, Justice Scalia scorned the tendency of Court majorities to ignore the principle of government neutrality in some cases but not others:

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. That would be a good reason for finding the neutrality principle a mistaken interpretation of the

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<sup>38</sup> *County of Allegheny*, 492 U.S. 573 (1989).

<sup>39</sup> *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>40</sup> *McCreary County*, 545 U.S. 844 (2005).

Constitution, but it is hardly a good reason for letting an unconstitutional practice continue.<sup>41</sup>

Thus, all that the existence of historical practices can properly do is to suggest the general outline of a coherent approach to interpretation of a constitutional provision. For Justice Rehnquist, for example, that coherent approach was nonpreferentialism, the view that the government may legitimately prefer and promote religion over irreligion. We will deal below with that perspective. The point here is that historical practices alone generally do not resolve any constitutional disputes, including our current crisis in understanding the Establishment Clause.

We can be thankful that plain meaning, the third avoidance device, has not been relied upon in Establishment Clause cases. Presumably the reason for this is that religious establishments in Europe and the American states had certain identifiable characteristics, such as government taxation to pay for clergy, that no one today seriously suggests should be adopted in America. All of our disputes have been based on analogies to historical instances of religious establishments. They have not been based on assertions of plain meaning.

Nevertheless, there is a troubling comment by Steven Gey, possibly the most zealous of American legal separationists,<sup>42</sup> in his textbook on the subject of the law of church and state.<sup>43</sup> Writing in the Preface, Professor Gey states,

“Of course, if the Supreme Court had adopted and enforced the literal meaning of the First Amendment’s terms, there would be little need for an entire casebook on the subject of church/state jurisprudence. As Justice Black argued frequently in the free speech context, the First Amendment’s admonition that Congress may pass “no law” regarding religion would mean literally **NO** law. Under this literal interpretation of the Amendment, the courts would be obligated to strike down any law having the slightest tendency to favor religion, and would likewise be obligated to uphold any law restricting religious practice unless that law had the effect of outlawing the practice altogether.<sup>44</sup>

It is worrying that this comment might actually reflect the thinking of such a prominent proponent of the secular state. The comment is a breathtakingly odd formulation to suggest in the name of the literal reading of the text. The relevant First Amendment

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<sup>41</sup> 545 U.S. at 892 (Scalia, J., dissenting).

<sup>42</sup> Douglas Laycock calls Professor Gey “academia’s most able and most prominent defender of absolutely no aid to religion”. Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Vrg. L. Rev. 51, 54 (2007).

<sup>43</sup> Steven G. Gey, *Religion and the State* (2d ed. 2006).

<sup>44</sup> *Id.*, at iii.

language is that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... .” The amendment does not refer to a law “regarding” religion but to an “establishment of” religion. Therefore, if one were going to argue a literal reading, one would ask what the word “establishment” meant when the Amendment was adopted. Since religious establishments at the time had well understood attributes, only those kinds of government practices would be barred. Most of the caselaw disfavoring religion in the public square might go the other way under such a formulation.<sup>45</sup>

Separationists like Gey may not understand how much the secular state concept stretches both constitutional language and American history. If someone like Gey really thinks that any religion at all in the public square is going “beyond the First Amendment’s text”, then it may be hard to find common ground in resolving the Establishment Clause crisis.

One would have thought that it would be the opponents of separation of church and state who would resort to a plain meaning argument in order to render obvious and easy what are actually subtle and difficult legal judgments. It should be pro-religion groups who argue in the courts that only those practices literally a part of religious establishments are foreclosed by the First Amendment. Fortunately, proponents of religion in the public square have generally not rested on such arguments.<sup>46</sup>

All in all, history and language will not resolve, by themselves, the crisis in the Establishment Clause. A normative vision of the proper relationship of church and state is needed.

## B. Separation, Neutrality and Equality<sup>47</sup>

This section refers generally to those Justices and law professors who support the overall thrust of the promise of government neutrality toward religion associated with the Everson regime. My impression is that this category takes in by far the majority of legal academics writing in the field of law and religion. This section ignores most of their quite important internal doctrinal disagreements. The reason I can do that is because there is a widespread similarity in how such persons respond to the failure of the Court to apply the tenet of neutrality consistently.

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<sup>45</sup> This is aside from two other questions in terms of literal meaning. First, doesn’t establishment of religion have to mean establishment of a religion, since no other meaning could have been understood by the framers? Second, doesn’t the word “free” exercise suggest that any government restriction on religion practice is unconstitutional rather than only those laws outlawing religious practice altogether?

<sup>46</sup> An example of what such an argument would look like, although it is not pressed as determinative, is suggested by Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play*, 12 *Roger Williams U. L. Rev.* 1, 58-64 (2006). Similarly, Justice Thomas wrote of “[r]eturning to the original meaning” of the Establishment Clause in his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 694 (2005)(Thomas, J., concurring), but he was referring to one particular aspect of that original meaning, legal coercion.

<sup>47</sup> There are various ways of describing this legal mainstream. For example, Arnold H. Loewy writes of separationist, accommodationist and neutrality in characterizing theories of the Establishment Clause: *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 *Brandeis L. J.* 533 (2003).

Not surprisingly, many leading figures in this mainstream expressly oppose public religious expressions and symbols, such as the words “under God” in the Pledge of Allegiance. Obviously this is so with regard to leading separationists, such as Steven Gey<sup>48</sup> Isaac Kramnick and R. Laurence Moore,<sup>49</sup> Suzanna Sherry<sup>50</sup> and Kathleen Sullivan<sup>51</sup> since the absence of such public religious imagery is largely the point of the Wall of Separation metaphor. But it is also true of neutrality theorists like Douglas Laycock<sup>52</sup> and Arnold Loewy<sup>53</sup> and the various strands of equality theory—equal liberty in Christopher Eisgruber and Lawrence Sager,<sup>54</sup> equal protection in Susan Gellman and Susan Looper-Friedman<sup>55</sup> and equal liberty of conscience as religious equality in Martha Nussbaum.<sup>56</sup>

There is not such unanimity with regard to what should be done about the obvious attachment of a politically significant majority of Americans to public religious expression, in particular to the words “under God” in the Pledge of Allegiance. Steven Gey writes that there is a great deal at stake in the Pledge controversy and that theorists have no business surrendering to illegitimate and even unconstitutional political pressure. He refers to “the growing conflict over the most basic principle of Establishment Clause jurisprudence: Does the Constitution continue to mandate a secular government, or has the subtle sectarian dominance of government become an accepted constitutional fact?”<sup>57</sup>

On the other hand, most theorists are leery of taking on something like the Pledge and of course Gey acknowledges that tendency by writing to try to counter it. Loewy sounds the kind of note of resignation that Gey is criticizing: “sadly, the majority likes the endorsement so much, that there would be hell to pay if we were to remove it.”<sup>58</sup> Kramnick and Moore write about separationists living “more or less easily with the accumulated chinks in the wall of separation. . . .”<sup>59</sup> Sullivan is not ready to take up arms

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<sup>48</sup> Steven G. Gey, *Rewriting the Establishment Clause for One Nation Under (A) God*, 41 *Tulsa L. Rev.* 737 (2006).

<sup>49</sup> Isaac Kramnick and R. Laurence Moore, *The Godless Constitution*, 196-97 (1996).

<sup>50</sup> Suzanna Sherry, “Without Virtue There Can Be No Liberty”, 78 *Minn. L. Rev.* 61, 82 (1993).

<sup>51</sup> Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. Chi. L. Rev.* 195, 207 n. 59 (1992).

<sup>52</sup> Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *Harv. L. Rev.* 155, 156 (2004).

<sup>53</sup> Arnold H. Loewy, *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 *Brandeis L.J.* 533, 542-43 (2003).

<sup>54</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, 277-78 (2007)(Pledge of Allegiance only constitutional if accompanied by secular alternative).

<sup>55</sup> Susan Gellman and Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 *U. Pa. J. Const. L.* 665 (2008).

<sup>56</sup> Martha C. Nussbaum, *Liberty of Conscience*, In *Defense of America’s Tradition of Religious Equality*, 308-14 (2008).

<sup>57</sup> Gey, “Under God,” *supra* n. 14; see also, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 *Colum. L. Rev.* 2083 (1996).

<sup>58</sup> Loewy, *supra* n. 53, at 542.

<sup>59</sup> Kramnick and Moore, *supra* n. 49, at 197.

either, although she is not certain.<sup>60</sup> Nussbaum suggests that, “given public feeling on the issue” the Court “should avoid the issue as long as possible... .”<sup>61</sup>

The crisis in the interpretation of the Establishment Clause cannot be resolved by pointing to the political obstacles preventing enforcement of constitutional norms. The reality of such political obstacles is just another way of restating that there is a crisis. To resolve the crisis we have to turn to understandings of the Establishment Clause that suggest why such public support might not be a threat to constitutional values.

One such suggestion comes from someone basically in agreement within the neutrality paradigm: Noah Feldman in his book, *Divided by God*.<sup>62</sup> Feldman proposes essentially reversing the current trend in Supreme Court caselaw toward acceptance of public money going to religious institutions—such as educational vouchers—but careful review of public religious expression, especially in public schools. Feldman would reverse these tendencies by permitting more government religious expression through the elimination of the requirement that government action have a secular purpose and not endorse religion, but, at the same time, limiting public subsidies to religious institutions. Feldman defends this reversal both on historical grounds of the core concerns of the religion clauses and because, as a Jew and thus an outsider himself, he has not felt excluded by broad Christian references in American public life.

As someone who also grew up as a Jew educated in an orthodox environment, I agree with Feldman that a person ought not to feel uncomfortable at manifestations of a country’s majority religion. However, I think that Feldman’s Jewish experience actually blinds him to the American context he is describing. Orthodox Jewish education constantly reminds a Jewish person that he or she is in exile. Thus a Jew educated in that tradition perhaps expects to be treated at a certain level as an outsider. This might even be true of non-Jewish immigrants who come to the United States knowing that it is a predominantly Christian country.

But this is not necessarily the case with a person who is born in the United States and grows up either a nonbeliever or a believer in a minority religious tradition. That person may absolutely feel what Feldman and I do not—exclusion in a deeply political sense by certain public majoritarian religious displays. It is ironic that Justice Scalia in his dissent in *McCreary* is careful not to distinguish among Jews, Christians and Muslims but endorses instead a kind of supra-biblical monotheism.<sup>63</sup> Justice Scalia is apparently not as sanguine as is Feldman at accepting majoritarian religious expression. In any event, the mainstream legal account can basically only tell us that we have a crisis, not how to resolve it.

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<sup>60</sup> Sullivan, *supra* n. 51: “Rote recitation of God’s name is easily distinguished as a *de minimis* endorsement in comparison with prayer or the seasonal invocation of sacred symbols. The pledge of allegiance is a closer question.”

<sup>61</sup> Nussbaum, *supra* n. 56 at 314.

<sup>62</sup> Noah Feldman, *Divided by God* (2005).

<sup>63</sup> *McCreary County*, 545 U.S. at 893 (Scalia J., dissenting).

### C. Civil Religion

Borrowing largely from Robert Bellah, Frederick Gedicks and Roger Hendrix define “civil religion” as

a set of nondenominational values, symbols, rituals, and assumptions by means of which a country interprets its secular history. Civil religion aims to bind citizens to their nation and government with widely shared religious beliefs, thereby supplying a spiritual interpretation of national history that suffuses it with transcendent meaning and purpose.<sup>64</sup>

Although they oppose current efforts to impose civil religion status on Judeo-Christian symbols such as displays of the Ten Commandments, Gedicks and Hendrix acknowledge that in the past shared Protestantism, shared Christianity, and shared Judeo-Christian heritage have formed the basis of a kind of civil religion in the United States.

As I have pointed out elsewhere,<sup>65</sup> there is a debate in American politics and jurisprudence over just how religious American “civil religion” is or has been. For some observers, civil religion retains some of the trappings of religion—references to God at Presidential inaugurations, for example—but substitutes entirely secular meanings for religious ones. Conversely, in Bellah’s use of the term, there is a surprising amount of actual piety.<sup>66</sup> As we shall see below, in part Bellah is using the term civil religion to describe the higher law tradition that I believe can contribute to a resolution of the Establishment Clause crisis.

Gedicks and Hendrix object to the use of Judeo-Christian symbols in civil religion on the grounds that such symbols have been taken over, rather recently, by “Christian conservatives”<sup>67</sup> and thus can no longer partake of whatever universal appeal they used to have. Therefore, public displays of the Ten Commandments, should not be defended as constitutional on the ground of a widely shared civil religion.

Steven Smith objects to Gedicks and Hendrix’s conclusion, arguing that the interpretation of the meaning of a symbol by some particular group cannot be thought to exhaust the totality of the meaning of that symbol.<sup>68</sup> A religious symbol is not hijacked in this way unless a majority of people begin to interpret the symbol in the same terms as does the sectarian group. This is a matter of “perceived social meaning” and Smith claims that, at

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<sup>64</sup> Frederick Mark Gedicks and Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. Vrg. L. Rev. 275, 276 (2007).

<sup>65</sup> Bruce Ledewitz, *American Religious Democracy* (2007)

<sup>66</sup> See *id.*, at 46.

<sup>67</sup> Gedicks and Hendrix, *supra* n. 64 at 278.

<sup>68</sup> Steven D. Smith, “Sectarianizing” Civil Religion? A Comment on Gedicks and Hendrix, 110 W. Vrg. L. Rev. 307, 308-09 (2007).

least until now, a transference of meaning in religious imagery along the lines described by Gedicks and Hendrix has just not taken place.<sup>69</sup>

Smith is right that Judeo-Christian symbols have not become an inappropriate carrier of civil religion because of some conservative plot. But civil religion has lost some or most of its universality all the same. The problems for civil religion in the United States today can be illustrated by what occurred with regard to predictions made by Ira Lupu in 2001.

Lupu was trying to describe the overall trends of Establishment Clause jurisprudence.<sup>70</sup> He concluded that, during the 1990's, the Court had come to distinguish government message cases from government money cases, regarding government religious messages as of "dubious constitutionality" while allowing government "substantial room to provide resources to religious entities engaged in projects of secular value."<sup>71</sup> Lupu's description of the prevailing caselaw here paralleled those of Noah Feldman, though of course Feldman wanted to reverse the trend. Like Feldman, Lupu noted how unhistorical the Court's emphases had become. Lupu noted in particular that reviewing government religious messages skeptically, "rather dramatically undo[es]" "the general understanding of the late-eighteenth century that religious speech on behalf of the branches of government...constituted a universally accepted part of the political culture..."<sup>72</sup>

At the end of the article, Lupu considered the future of Establishment Clause jurisprudence in the twenty-first century. He thought that government would be kept "from taking positions on matters of religious faith, celebration, and observance."<sup>73</sup> But Lupu concluded that this would lead to "preservation, not condemnation of significant aspects of the 'civil religion' by which government and its officials acknowledge a religious force in the society."<sup>74</sup> Lupu thought that such civil religion would include the In God We Trust motto, National Prayer Day and so forth, but that our civil religion would "become more abstract, more generically theist, and not necessarily more monotheist..." In particular, he predicted that displays of the Ten Commandments would be "perceived as Judeo-Christian, and therefore sectarian, and therefore constitutionally inappropriate."<sup>75</sup>

Lupu's prediction about Ten Commandment displays has proven dramatically false and his more general prediction that Judeo-Christian tradition would appear sectarian has certainly not yet occurred., at least in Supreme Court majorities. The failure of reality to match these reasonable predictions says a great deal about the inability of civil religion to resolve the crisis in Establishment Clause jurisprudence.

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<sup>69</sup> Id.

<sup>70</sup> Ira Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 *Wm & Mary L. Rev.* 771 (2001).

<sup>71</sup> Id., at 803-04.

<sup>72</sup> Id., at 803.

<sup>73</sup> Id., at 817.

<sup>74</sup> Id. It should be noted that the Court has expressly refused to permit government to establish "an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds..." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

<sup>75</sup> Lupu, *supra* n. 70, at 817-18.

Lupu's predictions were reasonable because of demographic changes that were occurring in American religious life. In March 2009, the American Religious Identification Survey published results that emphasized two trends, both of which supported Lupu's assumptions: America was becoming more secular and less Christian. The two figures were first, that 15% of respondents nationwide responded "none" when asked their religion affiliation. The figure in 1990, in contrast, had been 8.2%. Second, the number of people calling themselves Christian fell to 76% of the population, from 86% in 1990.<sup>76</sup> This is the figure that caused Newsweek Magazine to proclaim "The End of Christian America".<sup>77</sup>

Since the point of civil religion is the use of "widely shared" symbols and language, these trends away from religion, and specifically away from Christian identification, could well have been expected to weaken judicial acceptance of biblical images like the Ten Commandments and monotheistic appeals in general, just as Lupu predicted. Instead, since Lupu's article appeared, the Court has upheld public displays of the Ten Commandments<sup>78</sup> and has reversed a challenge to the "under God" language in the Pledge of Allegiance. In addition to those actions, Justice Scalia, joined on this point by Chief Justice Rehnquist and Justice Thomas, practically endorsed monotheism as our national religion in his dissent in *McCreary County*,<sup>79</sup> contrary to Lupu's expectations.

To accomplish its goal of widespread consensus, civil religion must be unexceptional rather than controversial. Clearly, there could be some dissent from ritualized invocations of watered-down religious imagery, but it would have to be genuinely marginalized dissent for civil religion to accomplish its inclusive goal. But objections to biblical symbols and even objections to God-language can no longer be reasonably described as marginal. The invocation of the term civil religion to embrace language where there is no consensus is not an escape from the crisis of the Establishment Clause, but another manifestation of it.

An example of the attempted use of a genuinely new form of civil religion, according to Wade Clark Roof, was President Barack Obama's express recognition of "nonbelievers" in his inaugural address:

this past January we saw a president in his Inaugural Address openly and honestly wrestling with the nation's diversity—a "patchwork," as he described it, "of Christians

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<sup>76</sup> Summary of results at [http://livinginliminality.files.wordpress.com/2009/03/aris\\_report\\_2008.pdf](http://livinginliminality.files.wordpress.com/2009/03/aris_report_2008.pdf)

<sup>77</sup> Jon Meacham, "The End of Christian America", Newsweek, April 4, 2009, <http://www.newsweek.com/id/192583>

<sup>78</sup> See *Van Orden v. Perry*, 545 U.S. 679 (2005) and *Pleasant Grove City v. Sumnum*, 129 S.Ct. 1125 (2009). While *Sumnum* was not before the Court on an Establishment Clause claim, undoubtedly it will be read as allowing Ten Commandments displays as long as the government is silent about the message of the display, as was the case in *Sumnum*. Such silence will serve to distinguish any future case from the finding of unconstitutionality in *McCreary County*. Given that likelihood, City Attorneys may be expected to insist on silence from their clients when embarking on something like a Ten Commandments display.

<sup>79</sup> *McCreary County*, 545 U.S. 900 (Scalia, J., dissenting).

and Muslims, Jews and Hindus, and non-believers.” Non-believers? Their inclusion in the same breath with religious communities, especially on civil religion’s holiest of days, unsettled some, inspired others. Clearly, Obama would like to defuse this tension. More than just carefully chosen words, his was a performative act aimed at uniting believers and non-believers in a common citizenship.<sup>80</sup>

Considering our traditional invocations in light of our increasing diversity, Roof asks, “[I]s this God symbolism expandable?” That is, is there a kind of symbolism that can be the equivalent of the invocation of God for a society in which substantial numbers of people do not believe in God? Or, as another possibility, can the word “God” be reinterpreted for such a context? These are the questions for a renewed civil religion. But they are not questions the Justices are as yet asking in the Establishment Clause context.

#### D. “Actual Legal Coercion”

In his concurrence in *Elk Grove*, Justice Thomas stated that “[t]he traditional ‘establishments of religion’ to which the Establishment Clause is addressed necessarily involve actual legal coercion.”<sup>81</sup> Although the degree of Justice Thomas’ concentration on coercion is an interpretation unique to him on the Supreme Court, coercion has been a consistent theme in Establishment Clause cases.

One example of coercion as a factor in Establishment Clause analysis has been religion in the public schools. Coercion there has been a particular concern to the Court because of the pressure to conform inherent in mandatory school laws.<sup>82</sup> But even in the school cases, coercion has not been considered to have exhausted Establishment Clause factors.<sup>83</sup>

Coercion has sometimes functioned as an alternative theory for decision in Establishment Clause cases. For example, in *Santa Fe Independent School Dist. v. Doe*,<sup>84</sup> a case holding that student-led prayer at before a high school football game violates the Establishment Clause, Justice Stevens’ majority opinion held that the policy at issue was not genuinely student speech, but constituted speech encouraged by the School. In so holding, the opinion stated that “[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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

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<sup>80</sup> Wade Clark Roof, *The Primacy of Practice, The Immanent Frame*, [http://www.ssrc.org/blogs/immanent\\_frame/2009/06/08/the-primacy-of-practice/](http://www.ssrc.org/blogs/immanent_frame/2009/06/08/the-primacy-of-practice/)

<sup>81</sup> *Elk Grove*, 542 U.S. at 52.

<sup>82</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)(likelihood of coercion in public schools because of mandatory attendance laws, emulation of teachers and peer pressure); see also *Lee v. Weisman*, 505 U.S. 577,592 (1992)(particular risk of coercion in school context).

<sup>83</sup> Thus in *Lee*, the Court found coercion at high school graduations, but also noted government’s involvement in the prayers at issue. See 505 U.S. at 587-88.

<sup>84</sup> 530 U.S. 290 (2000).

political community.’”<sup>85</sup> Clearly, this by itself would have been sufficient to strike down the policy. The Court had held as early as *Engel v. Vitale* that government may not sponsor a religious exercise.<sup>86</sup> Nevertheless, Justice Stevens then went on to dispute the School District’s argument that there was in the school program “no impermissible government coercion.”<sup>87</sup>

Justice Thomas’ understanding of the Establishment Clause differs from that of the caselaw. Justice Thomas stated in his opinion in *Elk Grove* that “the Establishment Clause is best understood as a federalism provision”<sup>88</sup>—that is, that when passed, it protected existing State establishments of religion from interference from Congress, but did not protect any individual right. In that respect, the Establishment Clause differs from the Free Exercise Clause, which does protect individual rights.

But Justice Thomas then went on to explain why, in his view, the Pledge policy at issue in *Elk Grove* would not constitute an establishment of religion in any event. It was in that context that Justice Thomas noted that there was no “legal coercion” present in the school’s Pledge recitation policy.<sup>89</sup>

It is extremely unlikely that the Court as a whole would ever adopt the actual coercion test as the full and exclusive measure of the Establishment Clause. Under such a test, Congress would be free to rewrite the Pledge of Allegiance to declare the United States to be one nation “under Christ” or simply to be a “Christian nation”. Justice Thomas was aware of that possibility and tried to forestall it. He acknowledged that there is “much to commend the view” that the Establishment Clause bars government from preferring one religion to another.<sup>90</sup> But Justice Thomas suggested that legal compulsion would generally be part of any preference for one religion over another, or, perhaps alternatively that such a policy might be unconstitutional under the Free Exercise Clause.

Undoubtedly the absence of coercion will always be considered a factor in determining whether an Establishment Clause violation has taken place. But the Justices have not always been able to agree as to whether coercion is present in a particular context.<sup>91</sup> In any event, although Justice Thomas’ suggestion would resolve the crisis in Establishment Clause jurisprudence, it is not a resolution that is likely to attract majority support.

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<sup>85</sup> *Id.*, at 309-10 (quoting *Lynch*, 465 U.S. at 688).

<sup>86</sup> *Engle v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

<sup>87</sup> *Santa Fe*, 530 U.S. at 310.

<sup>88</sup> 542 U.S. at 50 (Thomas, J., concurring in the judgment).

<sup>89</sup> *Id.*, at 54.

<sup>90</sup> *Id.*, at 53.

<sup>91</sup> This was particularly true in the high school graduation prayer case, *Lee*. Compare Justice Kennedy’s majority opinion, 505 U.S. at 588 (in high school graduation context “subtle coercive pressures exist” and there are “no real alternative[s] which would have allowed [the student] to avoid the fact or appearance of participation”) with Justice Scalia’s dissent, 505 U.S. at 640 (“The deeper flaw in the Court’s opinion does not lie in its wrong answer to the question whether there was state-induced ‘peer-pressure’ coercion; it lies, rather, in the Court’s making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*”) (italics in original)).

## E. Nonpreferentialism

Then-Justice Rehnquist's dissent in *Wallace v. Jaffree* in 1985 was meant to challenge the foundation of the Court's Establishment Clause neutrality jurisprudence since *Everson* by rejecting the implications of Thomas Jefferson's "wall of separation between church and state metaphor."<sup>92</sup> From a reexamination of the history of the adoption of the Establishment Clause, Rehnquist concluded that the amendment was "designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. ...[not as] requiring neutrality on the part of government between religion and irreligion".<sup>93</sup>

This position—that government is permitted under the Establishment Clause to aid and endorse religion as against irreligion but is not permitted to discriminate among religions—is known as nonpreferentialism.<sup>94</sup> It is a position with serious support in the legal academy,<sup>95</sup> albeit with more critics.<sup>96</sup> Yet even critics of nonpreferentialism seem resigned that the Court will be moving toward nonpreferentialism in the future.<sup>97</sup>

I am not sure that this will occur. The most significant recent forays in Establishment Clause analysis have not been about public religious expression but about tangible aid. In these cases, education vouchers<sup>98</sup> and the inclusion of religious belief in the receipt of government support,<sup>99</sup> the emphasis in the opinions has been on neutrality and equality, even though religion has in a sense benefited from the results. In other words, these cases in no way bespeak nonpreferentialism.

Without regard to predictions about future trends, is nonpreferentialism sound? It would seem that nonpreferentialism might be one way that the crisis in Establishment Clause jurisprudence could be resolved. After all, the very existence of the Free Exercise Clause

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<sup>92</sup> 472 U.S. at 91-92 (Rehnquist, J., dissenting).

<sup>93</sup> *Id.*, at 98-99.

<sup>94</sup> See Lee, 505 U.S. at 613: "Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion." (Souter, J., concurring).

<sup>95</sup> See e.g., Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 Fla. L. Rev. 1 (2005), Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 St. John's L. Rev. 245 (1991) and Martin Nussbaum, *A Garment for the Naked Public Square: Nurturing American Public Theology*, 16 Cum. L. Rev. 53 (1985). An important book supporting the position is Robert Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

<sup>96</sup> In a sense, all of the writers I identify above with separation, neutrality and equality are opponents of nonpreferentialism. See in particular, Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986).

<sup>97</sup> See Kelly S. Terry, *Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. Pub. Int. L.J. 67 (2008).

<sup>98</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)(voucher program upheld, in part, because any private school, religious or nonreligious may participate).

<sup>99</sup> See *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)(no Establishment Clause violation when school permits a Christian organization to use school facilities on the same terms as nonreligious groups addressing character development of children because such use is neutral toward religion).

suggests that the Constitution in some sense protects religion as a special case.<sup>100</sup> So, it might be reasonable to suppose that the Establishment Clause only prohibits discrimination among religions and that the Free Exercise Clause protects the practices of all religions. A case such as *Jaffree*, in which Justice Rehnquist's dissent expressly proposed the nonpreferentialist position,<sup>101</sup> seems like the perfect situation for allowing government to endorse religion. In that case, the government was endorsing "prayer"—a vague and broad concept that probably all religions share.

It turns out, however, that *Jaffree* was an anomalous case that masked the inherent contradiction within nonpreferentialism. As critics have noted,<sup>102</sup> in practice nonpreferentialism cannot resolve the tension between endorsing religion over nonreligion and not discriminating among religions. Unfortunately preference for religion over nonreligion usually leads to discrimination among religions.

The dilemma can be seen in Justice Scalia's dissent in *McCreary County*. Based on a fairly one-sided reading of American history, Justice Scalia argued in favor of nonpreferentialism in much the same way that Justice Rehnquist had done in *Jaffree*. As a kind of summary, Justice Scalia described the "principle that the government cannot favor religion over irreligion" as "demonstrably false".<sup>103</sup>

But immediately after that assertion, Justice Scalia was forced to confront the criticism that upholding a publicly owned Ten Commandments display "violates the principle that the government may not favor one religion over another."<sup>104</sup> Obviously this was a more significant challenge in the context of a biblical symbol like the Ten Commandments than of the silent prayer at issue in *Jaffree*. There are obviously religions that do not revere the Ten Commandments.

In responding to the religious discrimination challenge, Justice Scalia stated that the nondiscrimination principle is binding in some contexts but that it "necessarily applies in a more limited sense to public acknowledgment of the Creator."<sup>105</sup> Even though some religions do not acknowledge such a divine Creator, "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>106</sup>

Lest the reader imagine that Justice Scalia could not have meant what he seemed to be saying and that he surely meant to reinterpret God language more broadly, along the lines suggested by Wade Clark Roof,<sup>107</sup> Justice Scalia emphasized that he did indeed mean to privilege essentially the God of the Bible and, to be fair, maybe the God of the Qur'an as

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<sup>100</sup> This is more or less the position that Eisgruber and Sager oppose in *Religious Freedom and the Constitution* (2007). See *supra*, n. 54.

<sup>101</sup> See *supra* n. 93.

<sup>102</sup> See e.g., *Terry*, *supra* n. 97.

<sup>103</sup> 545 U.S. at 893 (Scalia, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Roof, *supra* n. 80.

well. Justice Scalia responded to the criticism in the majority opinion that his understanding of God was too small by observing:

[t]his reaction would be more comprehensible if the Court could suggest what other God (in the singular, and with a capital G) there *is*, other than “the God of monotheism.” This is not *necessarily* the Christian God (though if it were, one would expect Christ regularly to be invoked, which He is not); but it is *inescapably* the God of monotheism.<sup>108</sup>

I will deal in the next section with Justice Scalia’s proposal of biblical monotheism as the answer to the crisis of the Establishment Clause. Here it need only be noted that Justice Scalia put a candid stake in the heart of nonpreferentialism. According to Justice Scalia’s approach, the words “under God” in the Pledge of Allegiance would not be understood as including all believers, let alone nonbelievers. Seven million Americans nonmonotheistic religious believers would be expressly excluded from our “One nation”. Whatever this position is, it is certainly not nonpreferentialism. Justice Scalia is proposing a quite different resolution of the Establishment Clause crisis and his proposed resolution demonstrates the failure of nonpreferentialism.

F. “honoring God through public prayer”<sup>109</sup>

Although I think he has gone horribly wrong, Justice Scalia is the only Justice on the Court today who seems to grasp the depth and significance of communal expressions of reverence. There is a kind of deep politics at work here that most of the Justices, as well as most of legal academia, have overlooked.

Justice Scalia presented his analysis of communal religious expression better in his dissent in *Lee* than in his dissent in *McCreary*, with its dismissive tone for atheists and polytheists. In *Lee*, Justice Kennedy’s majority opinion struck down nonsectarian prayer at a high school graduation. The majority opinion sounded the usual notes of coercion and neutrality. Justice Scalia’s dissent, on the other hand, looked at the context of the case in a different way:

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge

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<sup>108</sup> *McCreary County*, 545 U.S. at 894 n. 3 (Scalia J., dissenting).

<sup>109</sup> *Van Orden v. Perry*, 545 U.S. 677, 692 (2005)(Scalia, J., concurring).

and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the “Great Lord and Ruler of Nations.” One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.<sup>110</sup>

In Justice Scalia’s way of looking at these religious images, any prohibition against government religious expression becomes, in effect, a ban against biblical religion. And there is a sense in which he is right about this. The Bible tells the story of the fate of a people, not the fate of individuals. In the Old Testament, that people is Israel. In the New Testament, that people is the “new” Israel of the Church. Public, that is communal, expression of worship and thanks is a necessary practice according to the Bible. If the Establishment Clause prohibits this, there is nothing “neutral” about it. The Constitution would then be read as banning religion of this type.<sup>111</sup>

For Justice Scalia, really alone among the Justices, the clash of interests between the believing majority on the one hand, and the nonbelievers and minority believers on the other, cannot be avoided. It is a tragedy of constitutional dimensions. He returned to this clash in *McCreary*:

Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority. It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon

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<sup>110</sup> Lee, 505 U.S. at 645 (Scalia, J., dissenting).

<sup>111</sup> This point is similar to an important admonition by Michael McConnell that the absence of religion is not per se neutral:

If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not ‘neutral.’ Studious silence on a subject that parents may say touches all of life is an eloquent refutation.

Neutrality Under the Religion Clauses, 81 Nw. U. L. Rev. 146, 162 (1986).

remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: “God watches over little children, drunkards, and the United States of America.”<sup>112</sup>

Justice Scalia suggests in *Lee* that, while the blessings of God may be irrelevant, the government may allow these expressions at communal events because many people believe in them. This is the meaning of the word “accommodate” in his *Lee* dissent. But in *McCreary*, there is a shift in Justice Scalia’s thinking in which it now appears that the Court would act to bar communal supplication of God at its peril because disaster might follow as surely as did the plagues in Egypt follow from disobedience of God’s will. Clearly, these are high stakes.

Other Justices have acknowledged the communal desire in America for public expressions of reverence, but they have not take account of its depth. In *Lynch v. Donnelly*,<sup>113</sup> which upheld a city’s nativity scene as part of a Christmas display, Justice O’Connor’s concurrence referred to various government “acknowledgments of religion”, such as the motto *In God We Trust*, as serving secular purposes.<sup>114</sup> As we saw above, Justice O’Connor would have upheld the words “under God” in the Pledge of Allegiance by means of a similar “occasion solemnizing” rationale. But, as Justice O’Connor expressly stated, these religious-sounding words are not a “serious invocation of God.”<sup>115</sup> Justice Brennan, dissenting in *Lynch*, described the same phenomena of the public use of religious language as “ceremonial deism,”<sup>116</sup> a term Justice O’Connor also has used. Justice Brennan agreed with Justice O’Connor that rote repetition of these phrases had deprived them of “any significant religious content.”<sup>117</sup>

Presumably, if Justice Scalia had not recused himself from the *Elk Grove* case, his justification of the words “under God” in the Pledge of Allegiance would have been almost diametrically the opposite—that these words represent a genuine attempt by the majority to express gratitude for, and acknowledgment of, God’s blessings. Justice Scalia would thus presumably not be surprised that although Justices O’Connor and Brennan find this religious language to be devoid of genuine meaning, they both acknowledge that the language cannot be discarded because it has no substitute.<sup>118</sup> Justice Kennedy objected in the courthouse crèche case<sup>119</sup> that he failed to see “why

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<sup>112</sup> *McCreary County*, 545 U.S. at 900 (Scalia J., dissenting).

<sup>113</sup> 465 U.S. 668 (1984).

<sup>114</sup> *Id.*, at 693 (O’Connor J., concurring).

<sup>115</sup> *Elk Grove*, 542 U.S. at 40 (O’Connor, J., concurring in the judgment).

<sup>116</sup> *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (quoting a book review that had quoted Dean Rostow).

<sup>117</sup> *Id.*

<sup>118</sup> “[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases.” 465 U.S. at 717 (Brennan, J., dissenting); “Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Id.*, at 693 (O’Connor J., concurring).

<sup>119</sup> *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989).

prayer is the only way to convey these messages... .”<sup>120</sup> If the messages are so devoid of meaning, why is their religious form so crucial?

Justice Kennedy seems to have a feel for the importance of the communal expression of reverence that is akin to that of Justice Scalia. In *Lee*, although he wrote the majority opinion striking down communal prayer at high school graduations, Justice Kennedy sounded as if he had almost decided the case the other way:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. ... If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.<sup>121</sup>

It also sounds as if Justice Kennedy would like to find a mechanism for communal expression of reverence that would not involve state action.

Even Justice Stevens, who is certainly the staunchest separationist on the Court today, has had to admit the importance that these shared expressions have for people: “We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.”<sup>122</sup>

Despite the power of Justice Scalia’s analysis, I doubt that his proposed resolution to the Establishment Clause crisis will ever be accepted by a majority of the Supreme Court. The reason for this is that Justice Scalia is much less inclusive than are the American people. For example, whereas Justice Scalia is ready to “disregard” Buddhists and Hindus from prayerful occasions, as he wrote in *McCreary County*, there is absolutely no reason to think that most Americans agree with him about this. I am certain that most Americans would welcome the addition of representatives from polytheistic religions on occasions like high school graduations.

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<sup>120</sup> *Id.*, at 673 (Kennedy, J., concurring in the judgment in part).

<sup>121</sup> *Lee*, 505 U.S. at 589. We will return to this formulation below as a form of higher law. See *infra* n. 192.

<sup>122</sup> *Santa Fe*, 530 U.S. at 307.

There is an underlying reason for this gap between Justice Scalia and what I assume to be the views of most Americans. Justice Scalia is too narrow in his understanding of what public expression of reverence is about. For Justice Scalia, God is exclusively the “benevolent, omnipotent Creator and Ruler of the world.”<sup>123</sup> That God is what Justice Scalia is referring to in his McCreary dissent as the God of monotheism. But this image of God is too specific to the Bible and indeed is too specific to a particular kind of reading of the Bible. It neglects all sorts of theological expansions of the meaning of God, even within the Judeo-Christian tradition.<sup>124</sup> And it certainly also neglects formulations like the God of pantheism.<sup>125</sup> Americans probably are looser in what they mean by the invocation of the divine than is Justice Scalia. This is why I say that Justice Scalia’s defense of the words “under God” in the Pledge of Allegiance will probably never redefine the meaning of the Establishment Clause.

Before leaving Justice Scalia’s proposal, however, I must add that something along the lines of what he is asserting is necessary if the American experiment in self-government is to be genuinely continued. The Declaration of Independence, after all, grounded universal human rights in their bestowal by the Creator. Unless that reference to God is reinterpreted to be consistent with the requirements of the Establishment Clause, the Declaration of Independence runs the risk of becoming historically quaint. Indeed, Justice Black dared to refer to the Declaration of Independence in just such a dismissive tone in *Engle v. Vitale*.<sup>126</sup> But the understanding that rights are inherent and are not the gifts of government is not merely “historical”. It is a view of government that must be hard won anew in every generation. If the word “Creator” cannot be legitimately confined to one literal understanding of the God of the Bible, it must nevertheless mean something significant or we have lost our connection to our founding.<sup>127</sup>

## G. Avoiding Divisiveness and Avoiding Formulas

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<sup>123</sup> Lee, 505 U.S. at 641 (Scalia J., dissenting).

<sup>124</sup> The theologian Paul Tillich, for example, wrote of “the God above the God of theism”. Paul Tillich, *Systematic Theology*, 12 (1957)(referring to another of his books, *The Courage to Be* (1952)).

<sup>125</sup> How could a sophisticated legal thinker like Justice Scalia could be so theologically naïve as to ask what other kind of God there is other than the God of monotheism? This is not the place to go into the matter in any depth, but let me just remind the reader of how broadly we often use the word “God”. Here, for example, is Robert Pogue Harrison describing the life of the environmentalist John Muir: “Reflecting on God, man, and nature during his weeks of convalescence in Florida, he came to the conclusion that if God was anywhere, He was here on earth, in all of creation. In short, Muir became a pantheist.” “The Ecstasy of John Muir”, *New York Review of Books*, March 12, 2009, at 20, 21. (Volume LVI, Number 4).

<sup>126</sup> 370 U.S. 421, 435, n. 21 (1962): “There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

<sup>127</sup> I suggest *infra* that the necessary understanding can be inferred from the higher law tradition. See *infra*, nn. 190-92, and accompanying text.

In casting the deciding vote in *Van Orden v. Perry*,<sup>128</sup> upholding a Ten Commandments display on the grounds of the Texas State capital, Justice Breyer introduced a kind of situational judging in Establishment Clause cases. He did this in the name of avoiding social division. But it is unlikely that this kind of judging is the way the Supreme Court brings peace. The opposite is probably true. Clear principles acceptable to a consensus of Americans are the constitutional path to peace.

Justice Breyer insisted in *Van Orden* that “no single mechanical formula” can draw the constitutional line of separation of church and state in every case.<sup>129</sup> “[G]overnment must avoid excessive interference with, or promotion of, religion” but this does not imply that government must “purge the from public sphere all that in any way partakes of the religious” for that would “tend to promote the kind of social conflict the Establishment Clause seeks to avoid.”<sup>130</sup>

In a way, Justice Breyer was simply acknowledging the crisis in Establishment Clause jurisprudence that is the subject of this article. No test proposing separation or neutrality can really explain why the Court has upheld so much religious expression. In a borderline case, which Justice Breyer thought this case represented, one must consider the context.

Despite the opinion’s emphasis on the inapplicability of any test or rule, two themes predominate. First, the message of the Ten Commandments display in the case is “predominantly secular”. The Ten Commandments themselves combine religious meaning with “a secular moral message” and their display can convey a historical connection of the moral and the legal. There was nothing in the history of this display or of its physical setting to suggest that anything sacred was either intended by the government or has had any religious effect.

The second theme is that the absence of any previous challenge to the Ten Commandments display during its 40-year history shows that the display is not “divisive.” This absence of strife distinguished *Van Orden* from the *McCreary County* case decided the same day, in which Justice Breyer joined the four *Van Orden* dissenters to strike down two courthouse Ten Commandments displays. In *McCreary County*, “the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them.”<sup>131</sup> To hold that a Ten Commandment display must be removed simply because of its religious content, “might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation” thus creating the “very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”<sup>132</sup>

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<sup>128</sup> *Van Orden v. Perry*, 545 U.S. 677, 698 (2005)(Breyer, J., concurring in the judgment). Chief Justice Rehnquist, joined by Justices Scalia, Kennedy and Thomas voted to uphold a Ten Commandments display in the case. Justices Stevens, O’Connor, Souter and Ginsburg dissented.

<sup>129</sup> *Id.*, at 699.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, at 703.

<sup>132</sup> *Id.*, at 704.

It should not be hard to see that the result of this situational judging might be precisely the opposite of what is intended by Justice Breyer. One rational response to his opinion would be to stimulate strife. A dedicated separationist would want to show that there is a lot of opposition to the Texas monument. One way to do that would be to organize demonstrations on the capital grounds. To put this another way, you don't obtain peace by ruling in favor of one party to a dispute on the basis of the absence of strife. Doing that teaches that the wages of strife are a better chance of winning your lawsuit.

Undoubtedly, nondivisiveness is a goal of the entire constitutional system. But it is not case-by-case judging that brings peace. The principle of separate-but-equal, for example, invited litigation about particulars of segregated institutions in a way that the principle of no segregation did not.

What is needed to bring peace is an *answer* to the crisis of the Establishment Clause. The Court's obligation is to present to the American people a vision of the proper relationship of religion to public life that the people can understand and accept. The secular state has not proved to be such a principle. Separation and neutrality have led us down the path of culture war and constant litigation.

Perhaps there is no principle that will reconcile most Americans. America has a long history of public religious expression along with a growing secular commitment. We have been overwhelmingly Protestant and now we are fragmenting into a country predominantly Christian but with many religions and much secularism. In this context, conflict may be inevitable.

But the Justices should at least keep clarifying their conflicting visions so that the people will have choices put before them.<sup>133</sup> And legal academics have a similar role to play. This article constitutes one such attempt. It is to be hoped that common ground can eventually be reached.

### III. How the Doctrine of Government Speech Might, or Might Not, Help Resolve the Establishment Clause Crisis

#### A. The Government Speech Doctrine

In its essence, the government speech doctrine is simple: "when the State is the speaker, it may make content-based choices."<sup>134</sup> This discretion in the government to discriminate in the messages it chooses to disseminate distinguishes government speech contexts from

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<sup>133</sup> Although not precisely the same, this suggestion of essentially political choices by the Justices and the people is a kind of "political jurisprudence" along the lines suggested by L. Scott Smith, *Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?*, 10 *Chap. L. Rev.* 299, 355 (2006).

<sup>134</sup> *Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995).

the usual free speech content restrictions that apply when the government is, for example, regulating the speech of private parties or overseeing a public forum.<sup>135</sup>

Although Justice Stevens called the government speech doctrine “newly minted” in *Pleasant Grove City, Utah v. Summum*,<sup>136</sup> he was referring to a particular set of controversies that have emerged since 1991.<sup>137</sup> Justice Alito’s majority opinion in *Pleasant Grove*, in contrast, traced the doctrine back to a concurrence by Justice Stewart in 1973.<sup>138</sup> And, if Justice Scalia is correct that “[i]t is the very business of government to favor and disfavor points of view”, as also quoted by Justice Alito’s opinion,<sup>139</sup> the substance of the doctrine must go back much further than that.

The application of the government speech doctrine is best illustrated in what Mary Jean Dolan calls “‘speech selection’ judgments by government entities”.<sup>140</sup> Although case outcomes in this field can be controversial, the basic premise is not. In a pair of such cases decided in 1998, *Arkansas Educational Television Commission v. Forbes*<sup>141</sup> and *National Endowment for the Arts v. Finley*,<sup>142</sup> the Court held, respectively, that public broadcasters enjoy substantial editorial discretion in programming decisions<sup>143</sup> and that the same is true of the government decision to fund particular art exhibits.<sup>144</sup> When the government is choosing among messages to disseminate, it must enjoy something like the discretion that any speaker would have and its choices cannot be judged by viewpoint discrimination standards.

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<sup>135</sup> For the relationship of government speech to public forum analysis, see generally, Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 *Hastings Const. L.Q.* 71 (2004).

<sup>136</sup> 129 S.Ct. 1125, 1139 (2009)(Stevens, J., concurring).

<sup>137</sup> See discussion of those issues, *infra*, nn. 145-52 and accompanying text.

<sup>138</sup> *Pleasant Grove*, 129 S.Ct. at 1131: “Government is not restrained by the First Amendment from controlling its own expression”. (quoting Justice Stewart’s concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7 (1973)).

<sup>139</sup> *Id.* (quoting Justice Scalia’s concurrence in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998)).

<sup>140</sup> Dolan, *supra* n. 135, at 102.

<sup>141</sup> 523 U.S. 666 (1998).

<sup>142</sup> 524 U.S. 569 (1998).

<sup>143</sup> The Court held in *Forbes* that a televised debate by a state-owned public television station was actually an exception to the general rule of government editorial discretion, but that the standard used to limit candidate participation in the nonpublic forum of the debate—lack of support—was reasonable: “The broadcaster’s decision to exclude *Forbes* was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.” 523 U.S. at 683.

<sup>144</sup> “The agency may decide to fund particular projects for a wide variety of reasons, ‘such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form.’” 524 U.S. at 585 (quoting brief of petitioners). Justice O’Connor’s opinion suggested that not all free speech limits were inapplicable to art funding decisions, but it is not clear from the opinion what those limits would be. The actual holding of the case was that a legislatively imposed funding restriction requiring “consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public” was not unconstitutional on its face.

The government speech issue that emerged in 1991, in *Rust v. Sullivan*,<sup>145</sup> concerned the free speech rights, if any, of recipients of government funding. In *Rust*, a statutory provision limiting federal funding for family planning services to those that did not offer advice concerning abortions was challenged as violating “the free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients... .”<sup>146</sup> The provision was upheld. Although Chief Justice Rehnquist’s majority opinion appeared to rely on government funding discretion, later cases have viewed *Rust* as squarely within the government speech doctrine, despite the use by the government of private speakers to convey the government’s message.<sup>147</sup>

One issue in this field is that, in a variety of contexts, there may be a question whether speech should be characterized as government speech or as something else. In *Legal Services Corp. v. Velazquez*,<sup>148</sup> the Court held that speech by government funded attorneys is not government speech, but private speech on behalf of a client and in *Rosenberger*<sup>149</sup> the Court held that university subsidies for printing costs of student organization likewise did not constitute government speech, but instead an encouragement of a wide variety of private views. In contrast, in *Johanns v. Livestock Marketing Association*,<sup>150</sup> a case involving a mandatory assessment supporting a beef advertising campaign,<sup>151</sup> the Court upheld the program as government speech against a facial challenge, but reserved an as-applied challenge. In dissent, Justice Souter, joined by Justices Stevens and Kennedy, would have required the government to label the speech it claims to be government speech as its own, at least in targeted tax cases.<sup>152</sup>

The issue of characterizing speech as either government speech or private speech also arose in *Peasant Grove*,<sup>153</sup> a case closely related to Establishment Clause issues. In that case, the City of Pleasant Grove maintained a public park with a number of privately donated displays, including a Ten Commandments display. Summum, a religious organization, requested that the City erect a monument containing the “Seven Aphorisms of Summum”, which amounted to an alternative account—a “Gnostic” Christian one—of the Sinai story.<sup>154</sup> The City denied this request and Summum sued.

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<sup>145</sup> 500 U.S. 173 (1991).

<sup>146</sup> *Id.*, at 192 (quoting brief for petitioners).

<sup>147</sup> See e.g., *Rosenberger*, 515 U.S. at 833.

<sup>148</sup> 531 U.S. 533 (2001).

<sup>149</sup> *Rosenberger*, 515 U.S. 819 (1995).

<sup>150</sup> 544 U.S. 550 (2005).

<sup>151</sup> Justice Scalia’s majority opinion made clear that taxation could be compelled in support of a government message with which one disagreed, but that doing this to fund a private message might raise serious First Amendment issues, at least if the unwilling speaker were clearly identified with the message. *Id.*, at 565 n. 8.

<sup>152</sup> *Id.*, at 571.

<sup>153</sup> *Pleasant Grove City, Utah, v. Summum*, 129 S.Ct. 1125 (2009).

<sup>154</sup> Justice Alito’s majority opinion set forth the Church’s account as follows: “‘The Summum church incorporates elements of Gnostic Christianity [...]. According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai .... Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.’” *Id.*, at 1129-30, n. 1 (quoting Respondent’s brief).

Summum claimed that by accepting the privately donated Ten Commandments display while rejecting its offer, the City was violating its free speech rights. Thus, Summum was arguing that the existing Ten Commandments display was a form of private speech and that the City was in effect preferring one entity's private speech over that of another in what should be treated as a public forum. A panel of the Tenth Circuit agreed with this argument and ordered the City to accept the proffered monument,<sup>155</sup> but the Supreme Court reversed—unanimously on this point—viewing the Ten Commandments display—and indeed, by implication, all the monuments in the public park—as forms of government speech, however they came into possession by the City.

In the posture the case came to the Supreme Court the decision was an easy one on the surface. After all, if monuments in public parks were treated as private speech in a public forum, government might have to accept any such monument, which would be impossible and would inevitably lead to exclusion of all such monuments.

But underneath the surface, the case was being litigated “in the shadow...of the *Establishment Clause*”, as Justice Scalia put it in his concurrence.<sup>156</sup> If the existing Ten Commandments display represented private speech, it was immune from Establishment Clause challenge. On the other hand, if the Ten Commandments display were the government's own message, then the next challenge by Summum would amount to a replay of the Establishment Clause Ten Commandments challenges previously litigated to split decisions in McCreary County and Van Orden.

Summum sharpened this tension by asking the City to “adopt a resolution publicly embracing ‘the message’ that the monument conveys.”<sup>157</sup> Such a resolution might easily have run afoul of the Establishment Clause in any later litigation. If the City had admitted, for example, that the message it meant to convey by accepting the Ten Commandments display was acknowledgment of the God of monotheism, as Justice Scalia had argued is permissible in his dissent in McCreary County,<sup>158</sup> there might later have been five Justices on the Supreme Court who would find an Establishment Clause violation.<sup>159</sup>

Justice Alito's majority opinion, avoiding this controversy, stated that monuments do not have “simple” messages, but “may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”<sup>160</sup> Justice Alito illustrated this theme by reference to the “Imagine” display “donated to New York City's Central Park in memory of John Lennon”.<sup>161</sup> Justice Alito even quoted the lyrics of the Lennon song, *Imagine*. Thus, government may speak a mixed and rich message.

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<sup>155</sup> 483 F.3d 1044 (10<sup>th</sup> Cir. 2007).

<sup>156</sup> *Pleasant Grove*, 129 S.Ct. at 1139 (Scalia, J., concurring).

<sup>157</sup> *Id.*, at 1134.

<sup>158</sup> See *supra*, II, F.

<sup>159</sup> Justice Scalia's *McCreary County* dissent on this point was joined by only by Chief Justice Rehnquist and Justice Thomas.

<sup>160</sup> *Pleasant Grove*, 129 S.Ct., at 1135.

<sup>161</sup> *Id.*

This was pretty fancy footwork by Justice Alito. It is noteworthy that in a case about a Ten Commandments display, he quoted a pop song rather than the Ten Commandments themselves. If he had quoted those lyrics, he would have had to begin with something like, “I AM the LORD thy God.”<sup>162</sup> Justice Alito did not wish to acknowledge this possibility, so he was content to leave the record silent as to the content of Pleasant Grove’s government speech.

There is no certainty yet about the limits of the government speech doctrine. Although free speech content restrictions do not apply to government speech, other constitutional restrictions do apply, most notably “the Establishment and Equal Protection Clauses.”<sup>163</sup> Several Justices have suggested, in addition, that the government may not “promote candidates nominated by the Republican Party”<sup>164</sup> or “communicate...partisan messages”,<sup>165</sup> but if the content limits of free speech do not apply, it is not clear why this is so. Years ago, Robert Kamenshine argued there might be a kind of Political Establishment Clause preventing the government from interfering with the democratic process,<sup>166</sup> and Kent Greenawalt has suggested that such government speech might violate a principle “of our Constitution taken more broadly in its assurance of free voting”<sup>167</sup> but certainly these constitutional intuitions have not yet been worked out. I will return to this issue because the communication of controversial ideas—ideas like the existence of higher law—is the sort of government speech I suggest can contribute to the resolution of the crisis in Establishment Clause jurisprudence.

#### B. The Inapplicability and Applicability of Government Speech Doctrine in the Establishment Clause Context

Before specifying in the next section the content of government speech that I am proposing as a resolution of the Establishment Clause crisis, I must first deal generally with the relationship of the government speech doctrine to the Establishment Clause. I will do that in terms of an obvious objection to such a use of the government speech doctrine as well as several benefits that such an application would engender.

The obvious problem with the use of the government speech doctrine in the Establishment Clause context is that, as Justice Alito pointed out in his Pleasant Grove opinion, “government speech must comport with the Establishment Clause.”<sup>168</sup> In effect, this means that the government speech doctrine cannot aid in defining the reach of the Establishment Clause because one must already know the contour of the Establishment

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<sup>162</sup> See *Sumnum v. Ogden*, 297 F.3d 995, 997 (10<sup>th</sup> Cir. 2002).

<sup>163</sup> *Pleasant Grove*, 129 S.Ct., at 1139 (Stevens, J., concurring).

<sup>164</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569, 599 n.3 (1998)(Scalia, J., concurring in the judgment).

<sup>165</sup> *Pleasant Grove*, 129 S.Ct. at 1139 (Stevens J., concurring).

<sup>166</sup> Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104, 1110 (1979).

<sup>167</sup> Kent Greenawalt, *Book Review, How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 Tex. L. Rev. 1217, 1233-34 (2007).

<sup>168</sup> *Pleasant Grove*, 129 S.Ct. at 1132.

Clause before one can have a sense of what government may permissible affirm under the government speech doctrine. Undoubtedly, given the primacy of history, government speech must conform to the Establishment Clause, rather than looking at things the other way round.

This is not an insurmountable problem, however, because, as we have seen, the reach of the Establishment Clause is itself unsettled. That is the crisis that is the subject of this article. And, in relation to the Establishment Clause, the same is true of the government speech doctrine. As Justice Souter observed in *Pleasant Grove*, “The interaction between the ‘government speech doctrine’ and Establishment Clause principles has not...begun to be worked out.”<sup>169</sup>

One advantage of the government speech doctrine in the Establishment Clause context is that it emphasizes that speech on official public occasions is not private speech. Invocations at Presidential inaugurations, prayers to open legislative sessions and student addresses at high school graduations are all carefully orchestrated by government officials. Just because such speech partakes of religion to various extents is no reason to confuse analysis by thinking of it as private.

Another advantage of the government speech doctrine is that it reminds us that there is no general requirement that there be universal agreement with government expression. As *NEA v. Finley* suggests, the government may propose that a work of art is a genuine masterpiece, even though I know it to be a piece of junk. As *Rust* holds, I can as a government employee or public grant recipient, be forced, at the risk of my livelihood, to tell people that this piece of art is a masterpiece. As *Johanns* makes clear, I can be compelled by the government to subsidize an award to this false artist, all in the name of government speech.

The government speech doctrine thus corrects what is surely an over-emphasis in Justice O’Connor’s endorsement test that one emblem of forbidden establishment of religion is that such endorsement “sends a message to nonadherents that they are outsiders”.<sup>170</sup> The government speech doctrine reminds us how much an outsider the socialist must feel, for example, as the government praises capitalism.

Of course Justice O’Connor did not mean “outsider” in any general sense, but specifically added, “not full members of the political community”. But surely the socialist knows that to be true as well. And, assuming that such government speech would not run afoul of the political speech exception mentioned above, a government advertising campaign, not aimed at any referendum, that touted marriage as a bond between a woman and a man, would certainly send a message to gay men and women that they are not, or at least not as

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<sup>169</sup> *Id.*, at 1141 (Souter, J., concurring in the judgment). It should be pointed out, however, that the interaction of these two legal concepts—government speech and establishment—does rule out one approach to establishment, that of actual coercion. By joining Justice Alito’s opinion in *Grove City* that government speech must comply with the Establishment Clause, Justice Thomas was impliedly acknowledging that mere speech by the government could indeed constitute a violation of the Establishment Clause. The actual coercion approach might be thought to imply otherwise.

<sup>170</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)(O’Connor, J., concurring).

viewed by the majority, full members of the political community. But, of course, such advertisements would not represent an establishment of religion, whatever other constitutional issues they might raise.

The government speech doctrine forces us to confront just how deep our disagreements can be with our own government. Opposition to public religious messages undoubtedly is a part of such a realization, but only a part. Majoritarian religious expressions may especially cast the nonbeliever and the minority believer into the category of outsider, but all government expression does that to some people to some extent.

Thus, the use of the government speech doctrine in the context of the Establishment Clause may cause us to reshape our understanding of the religion clauses of the Constitution. However special the treatment to which religion is either benefited or subjected by the Constitution, it is still the case that religion is part of larger constitutional categories.

We may think of both religion clauses—Establishment and Free Exercise—as lying next to each other along a continuum. On the right, we may put Free Exercise. On the left, Establishment. The right side is some kind of protection. The core of that protection is free exercise of religion. But to the right of free exercise is a larger category that is suggested by the Free Exercise Clause, but is not protected by it. That realm is the realm of conscience. All religious practices are undoubtedly exercises of conscience, but there are exercises of conscience that do not partake of religion. Free exercise of conscience may sometimes be protected by other aspects of the Constitution, but not by the Free Exercise Clause.

On the left side of the continuum—no establishment—there is also a core area of religion, which in this context government may not establish, and a larger realm to the left of establishment of religion. That larger realm is the realm of government expressions of meaning, referred to in this article as higher law. All religions may partake of at least aspects of the higher law tradition and these the government may not establish, either in individual religions or in all of them together. But there are expressions of meaning that do not constitute religion, which government is free to establish. And government can establish that realm of meaning, whether called higher law or something else, through government speech.

We now see how the doctrine of government speech may function in the context of interpreting the Establishment Clause. But all this has been rather abstract. In the next section, we come to define the content of government speech promoting higher law.

#### IV. Government Endorsement of Higher Law and its Relationship to the Establishment of Religion

##### A. Can the Government Endorse Higher Law?

The short answer to this question is that of course the government can endorse higher law principles. That is the kind content, even viewpoint, discrimination that the government speech doctrine allows government to engage in.

There are disputes and different approaches to what the higher law doctrine actually encompasses. These disputes do not greatly affect the point I am making here. Edward Corwin, who introduced or reintroduced the term higher law to American jurisprudence, was referring to the way in which certain principles of common law became superior in the sense of judicial enforceability.<sup>171</sup> I don't mean that by my reference to higher law. Nor do I mean, in any strict sense, the Thomist synthesis of natural law.<sup>172</sup> I don't even mean the roots of the doctrine of substantive due process.<sup>173</sup>

Closer to what I mean here is what Oliver Wendell Holmes called a “naïve state of mind”—that there is something binding on all human beings everywhere.<sup>174</sup> C.S. Lewis described this something-that-is-binding in the lecture that became the book, *The Abolition of Man*.<sup>175</sup> Lewis began by examining a classic instance of debunking of objective value that is readily familiar to a modern, or post-modern—reader. Lewis tells of two authors of a book—he doesn't name them or the book—who themselves quote a well-known story about the poet Samuel Taylor Coleridge at an impressive waterfall along with two tourists. One tourist calls the waterfall “sublime” and the other, “pretty”. Coleridge endorses the one judgment and rejects the other.

Lewis is interested in what the authors make of this story. These authors write, “When the man said That is sublime, he appeared to be making a remark about the waterfall. ...Actually...he was not making a remark about the waterfall, but about his own feelings.”<sup>176</sup> Lewis has much to say about this comment, but he concludes with a challenge to Holmes:

Until quite modern times all teachers and even all men believed the universe to be such that certain emotional reactions on our part could be either congruous or incongruous to it—believed, in fact, that objects did not merely receive, but could *merit*, our approval or disapproval, our reverence, or our contempt.<sup>177</sup>

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<sup>171</sup> Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* 42 Harv. L. Rev. 367 (1928).

<sup>172</sup> See Patrick McKinley Brennan, *Persons, Participating, and “Higher Law”*, 36 *Pepperdine L. Rev.* 475, 481 (2009).

<sup>173</sup> See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-law Constitutionalism, and the Fifth Amendment*, 58 *Emory L.J.* 585 (2009).

<sup>174</sup> “The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and by their neighbors as something that must be accepted by all men everywhere.” Oliver Wendell Holmes, *Natural Law*, in *Collected Legal Papers*, 310, 312 (1920).

<sup>175</sup> C.S. Lewis, *The Abolition of Man* (Macmillan 1950)

<sup>176</sup> *Id.*, at 2.

<sup>177</sup> *Id.*, at 9.

This understanding that our feelings could respond to something real, in contrast to asserting that everything is a matter of opinion, is sometimes referred to as the theory of objective value—that certain things really are pleasant and unpleasant and, more importantly, just and unjust. Lewis knew well that this was not the modern temper in 1950. Certainly it is not today.

The rejection of the theory of objective value has been particularly significant in American law. Charles Black described that rejection as

the widespread modern view that only delusion beckons when we conceive of “justice” as having anything remotely like the objective reality which invests the positive institutions of law. We have no warrant, say the followers of this view, for supposing that there exists any “justice” which can be “discovered”; “justice” is merely a name for our own reactions.<sup>178</sup>

It was this same rejection of the objective theory of justice that Robert Cochran was introduced to at the University of Virginia.

In contrast, Lewis traces the objective understanding of reality in a number of classic traditions, including the *Tao*, “the Way in which the universe goes on... .” Lewis then suggests that, apart from its manifestation in individual traditions, there is an overall tradition to this way of thinking:

[t]his conception in all its forms, Platonic, Aristotelian, Stoic, Christian, and Oriental alike, I shall henceforth refer to for brevity simply as ‘the Tao.’ ...It is the doctrine of objective value, the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are.<sup>179</sup>

Notice that Lewis is not limiting this tradition to religions. Certain kinds of philosophy are also included. Alfred North Whitehead, for example, once wrote of philosophy giving “a sense of the worth of life.”<sup>180</sup> That conception would be a part of the theory of objective value.

This tradition of objective value is why I stated in the last section that the religion clauses in the Constitution are part of a continuum. Government may not establish religion, but government may endorse, and in that sense establish, the tradition of objective value, or in the law context, higher law. This tradition comprises the rejection of all forms of relativism and nihilism.

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<sup>178</sup> Charles L. Black, Jr., *The Humane Imagination*, 37 (1986).

<sup>179</sup> *Abolition of Man*, supra n. 175, at 12.

<sup>180</sup> Alfred North Whitehead, *Adventure of Ideas*, 125 (1933).

Some separationists—Steven Gey, for example—seem to believe that “modernist skepticism” is part and parcel of secularism itself.<sup>181</sup> If that is the case, then all assertions of objective value are religious assertions and thus presumably violations of the Establishment Clause if made by government. Such a violation, of course, could not constitute government speech. At one point in his magnum opus, *A Secular Age*, Charles Taylor appears to agree with Gey and the implied criticism of any secular account of higher law, though Taylor does not use that term. Taylor says that a secular account does not fit “our favoured ontology”:

[W]e are starting from Hume’s attempt to understand morality as a species of “natural” human sentiment among others, rather than as something that reason perceives as an intrinsically higher demand. The issue I raise here, without definitively answering, is whether such a “naturalist” account can make sense of the phenomenology of universalism... .<sup>182</sup>

But this criticism of the foundation of a secular defense of higher law does not render such an account of higher law religious. Any such criticism just points out that such a secular account might not succeed. In other words, if government asserts that justice is real but does not assert that God exists, government may be speaking nonsense, but it is not speaking religion. There is no requirement in the government speech doctrine that government speech be true, or even coherent, to be constitutional.

Another criticism of the theory of objective value is that the rejection of relativism and nihilism is a straw man attack.<sup>183</sup> It is certainly the case that, as Howard Lesnick observes, “[t]he truth of a moral claim cannot be established by an objection to relativism.”<sup>184</sup> But I am pointing here to a positive assertion of objective value by government. Again, such an assertion may not be convincing, but it is within the constitutional authority of government to assert it all the same.

If the government speech doctrine allows the government to assert an understanding of reality to the effect that justice and other values are real, then government may teach this understanding of reality even to impressionable young minds in public school. There has been a controversy of sorts over the constitutionality of patriotic education in the public schools<sup>185</sup> and there have been suggestions that inculcation of values in public school violates the First Amendment.<sup>186</sup> While such objections strike me as a misunderstanding of what education is, their refutation is beyond my scope here. For our purposes, I doubt

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<sup>181</sup> See Steven G. Gey, *Life After the Establishment Clause*, 110 W. Va. L.Rev. 1, 34 (2007).

<sup>182</sup> Charles Taylor, *A Secular Age*, 609 (2007).

<sup>183</sup> See Howard Lesnick, *The Rhetoric of Anti-Relativism in a Culture of Certainty*, 55 Buff. L.Rev. 887 (2007).

<sup>184</sup> *Id.*, at 889.

<sup>185</sup> See generally Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in the Public Schools*, 43 Ga. L.Rev. 447 (2009).

<sup>186</sup> See e.g., Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 Harv. C.R.-C.L. L.Rev. 309 (1980).

anyone would accuse the government of unconstitutional indoctrination simply because its teachers assert that there is such a thing as truth.

There is one last point, though, about endorsing a theory of higher law. If it is conceded that government may teach such a doctrine, then there is a sense in which what could be called the spiritual life of the citizenry must be a concern of the government. The government would prefer that citizens not be relativists and nihilists. And, government here includes school boards. The significance of this will become apparent in the final section of this article, in terms of the teaching of evolution in public schools.

An endorsement by government of the theory of objective value, and its related principle of higher law, is constitutional under the government speech doctrine, at least as long as the government stays away from the utilization of religious symbols to accomplish that end. The next question, though, is whether this endorsement can be accomplished through the use of religious symbols, images and language? Would that be constitutional?

#### B. May the Government Use Religious Symbols to Endorse Higher Law?

The use by government of religious symbols is a very different issue than is simple government endorsement of higher law. The Pledge of Allegiance says One Nation under God, not One Nation under the essential unity of all things. If the Pledge said the latter, not many people, and certainly no judges, would call it unconstitutional as a violation of the Establishment Clause. The question is, then, whether the use of religious language, such as the word God, is constitutional if used to endorse higher law and, indeed, how one could determine whether religious language was being used in a secular way?

Clearly, in some contexts, the use of religious imagery to endorse higher law principles is constitutional, almost no matter what one's understanding of the Establishment Clause. This is the point I was making with regard to the display of the Ten Commandments on the building at the University of Virginia.<sup>187</sup> Given the secular inscription on the front of the building, and given the nearby display of the Greek philosophers, the Ten Commandments are pretty clearly being used to make a nonreligious point about justice. This point about justice satisfies the requirements of secular purpose and effect and thus conforms to the Lemon test.<sup>188</sup> In addition, any reasonable observer of the building and the two displays would also come to the conclusion that an essentially secular point was being made and that the government was not endorsing religion. Thus, the building

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<sup>187</sup> See supra n. 1, and accompanying text.

<sup>188</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)(to be constitutional in the context of an Establishment Clause challenge, an action by government must satisfy three criteria—"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] finally, the statute must not foster 'an excessive government entanglement with religion.'" (citations omitted)).

would also satisfy the endorsement test associated with Justice O'Connor's concurrence in *Lynch v. Donnelly*.<sup>189</sup>

I am not suggesting that these two tests any longer define the reach of the Establishment Clause. The crisis in Establishment Clause jurisprudence precludes any certainty about what test currently defines forbidden establishment of religion for a majority of the Justices. But the Lemon and endorsement tests are as restrictive of the public use of religious imagery as the Court is likely to get, at least any time soon. If the building satisfies these tests, it is certainly constitutional.

What if the Ten Commandments display were present without the display of the Greek philosophers? Would it still be constitutional? In that instance, the motto at the front of the building might still preserve the Ten Commandments display from constitutional invalidation, without having to rely on the approval of a Ten Commandments display in Van Orden. The reason for this is that the Ten Commandments display could still be interpreted as illustrative of the motto, rather than as endorsement of any particular religious theme.

Finally, and this really restates the question of this section, what if the Ten Commandments display appeared by itself at the Law School? In that hypothetical situation, the display might still represent a view of the law as embodying the thesis of objective value, but might in contrast also be interpreted as promoting the view that American law reflects God's will.

I am suggesting in this section that the standard by which public religious expression should be judged is whether it is plausible to view the religious language, imagery or symbols at issue as endorsing the principle of higher law. If so, the government use is constitutional. If not, the use is unconstitutional. The use of the Ten Commandments to endorse a higher law approach satisfies this understanding of the Establishment Clause.

I will explain below how plausibility works, why I suggest it, and how it differs from purpose analysis and from observer analysis. At this point, let me delineate two operating assumptions. First, the crisis in Establishment Clause interpretation probably means that no current approach to interpretation will achieve a settled constitutional consensus. I am specifically including in that observation both nonpreferentialism and Justice Scalia's endorsement of the God of monotheism. Neither of these is going to be the future of the Establishment Clause.

Second, the ceremonial deism approach associated with Justice Brennan, and to a lesser extent with Justice O'Connor, is too secular and too thin to apply successfully to public religious expression. Despite what Justice Brennan suggested, public religious expression retains genuine religious meaning even when it can be interpreted plausibly along secular lines. And, despite what Justice O'Connor suggested, that religious language communicates a variety of deep meanings and not just vapid generalizations. I

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<sup>189</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1983)(O'Connor, J., concurring). Five Justices utilized the endorsement perspective in *Allegheny County v. ACLU* 492 U.S. 573, 595-97 (1989).

think the general thrust of Establishment Clause precedent will remain valid and that government will not be permitted to endorse religion as such, but that this commitment will be applied in such a way that much religious expression in the public square will be permitted.

So, let us go back to the original question. Can the words “under God” plausibly mean anything other than an endorsement of the God of the Bible? American sociologist Robert Bellah provides a surprisingly strong answer to that question. Bellah, who popularized Rousseau’s term, civil religion, in Chapter 9 of his 1970 book, *Beyond Belief*,<sup>190</sup> argued that the use of the word God on public occasions was precisely an invocation of higher law thinking. Despite the American commitment to majority rule, the invocation of God means that “the will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong.”<sup>191</sup>

Bellah’s understanding of the use of the word God is not so different from the use of the word “Creator” in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights... .” Naturally, some religious people look at that language as if it were an argument about the existence of God. But that is not a fair reading. Rather, the Declaration is making a political point about the nature of rights. They do not come from men. And thus, as Bellah says of right and wrong, no positive political power has the authority to revoke rights with which all human beings are endowed.

This is precisely the “common ground” that Justice Kennedy’s majority opinion in *Lee* was seeking—“the shared conviction that there is an ethic and a morality which transcend human invention”.<sup>192</sup> Since that conviction—the higher law—is not itself uniquely “religious” why not allow government to express it with religious symbols that do embody it?

The secularist has no reason to abandon the objective theory of value behind these assertions. Certainly many, probably most, secularists agree both that majority will may be objectively wrong and that government, though supported by the will of the majority, might violate our fundamental rights. The word God has been recognized in these contexts to serve as a kind of shorthand for these sentiments.

But why use religious language for an assertion that could be made directly and through purely secular appeals? This is indeed a crucial objection. There are several unique attributes to traditional religious language that recommend the use of religious imagery to represent higher law. First, for many religious believers, overwhelmingly Christian in our history, the phrases “under God” or “by their Creator” serve a dual role. God is the foundation, the ontological basis according to Taylor, for the truth of the claims that right and wrong are real and that human rights are not gifts of government. Like the believing

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<sup>190</sup> Robert N. Bellah, *Beyond Belief: Essays on Religion in a Post-Traditional World* 168 (1970).

<sup>191</sup> *Id.*, at 183.

<sup>192</sup> *Lee*, 505 U.S. at 589.

and secular observers I described in the Introduction, the believer and the nonbeliever draw both similar secular conclusions, along with disparate religious ones, from this type of religious language. The important point here is that the secular conclusions are just as sincerely held by the believer as they are by the nonbeliever. They both believe that justice and rights are real.

The second reason to use religious language is that even for the nonbeliever, a word like God can serve as a stand-in for the Absolute. Because our culture in the West is Christian in its origin, our secularism also has the shape of the Christian universe. In other words, even though some of us do not believe in God, we know approximately the kind of God we do not believe in. Thus, our nonbelief has a Christian shape. When nonbelievers say a nation “under God” they know that this phrase can represent overweening pride—as in we are a Nation that faithfully obeys God—or can mean a nation subject to judgment for its wrongdoing. And that judgment can reflect the Absolute in history.

It should never be forgotten that John Dewey did not give up the use of the word God, though he did not believe in his mature thinking in the traditional God of monotheism. In *A Common Faith* in 1934 Dewey refers to “God” as “a unification of ideal values that is essentially imaginative in origin.” Dewey does not mean by imaginative, unreal. He adds, so there is no mistake, “the reality of ideal ends as ideals is vouched for by their undeniable power in action.”<sup>193</sup> The pale image of this is Justice O’Connor’s reference to confidence in the future.<sup>194</sup> But Dewey meant so much more than that.

This leads to the final reason to use religious language on these public occasions and events. The use of that language provides needed symbolic continuity with our past. As long as this religious language can plausibly refer to an ideal such as the objective theory of value, the fact that some believers regard the language as meaning even more than that, and that in the past most people may have regarded the language that way, does not matter. That is not a reason to give up such powerful rhetorical resources.

But isn’t it really religion that is being endorsed when many people hear the words “under God” and believe that it affirms the biblical God, and when that might even have been, and might even continue be, the motive of the government officials who chose to use the religious language? Because I have here expressly abandoned the purpose test and the endorsement test, a court challenge will not even be permitted to raise the question of the motivation behind the religious words or even how the religious language is understood by observers. Am I therefore allowing a sham?

I recommend the plausibility standard, combined with the continued prohibition on the endorsement of religion, in order to force government officials to state for the record that particular instances of religious symbolism are being utilized for their secular meaning, as, for example, in promoting the doctrine of higher law. I don’t ask whether such an

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<sup>193</sup> John Dewey, *A Common Faith* (1974 ed.)

<sup>194</sup> *Lynch*, 465 U.S. at 36 (O’Connor, J., concurring).

assertion is true in the sense that this was in fact the motive, nor whether it is true in the sense that this is how the language is received.

When a government official claims plausibly that religious language is being used for a deep secular purpose, that statement becomes self-authenticating. The religious symbolism continues to have real religious content; in fact it is used, in part, because that very religious content serves to make a broader, more inclusive and secular point. So, the language, image or symbol remains genuinely religious. But, by forcing government officials to affirm a more universal justification for its use, the Court would be creating the broad community of believers and nonbelievers to which the justification refers.

Such a justification prohibits religious believers from asserting that these religious symbols endorse their beliefs uniquely. Instead, the religious believer is forced to find common ground with the nonbeliever. In turn, the nonbeliever is forced to admit that her commitments are in large part shared by the believing community and that this traditional religious language emphasizes that shared belief. In other words, the government official claims that “under God” refers to universal moral standards, the believer acknowledges that the concept of God does imply that and the nonbeliever acknowledges that universal moral standards are being affirmed.

The reader should note that the secular message being affirmed is not actually universal. No doubt millions of Americans dispute the objective theory of value and deny the existence of higher law. These Americans may well feel like outsiders in terms of their skepticism. But since the government is by definition not establishing religion through the use of these religious symbols, the government speech doctrine allows precisely this kind of content discrimination.

The Establishment Clause limit on government—that the claim of secular meaning must be plausible—represents the outer boundary of government use of religious imagery. It is conceivable, for example, to use a crèche at Christmas-time as a symbol of recurring hope. But, in a context in which only the crèche is used for such purposes during the year, this is not a plausible claim. A judge would conclude that Christmas is being endorsed and that this use of religious imagery is unconstitutional.

The goal at the end of the day is to find common ground where that is possible. Despite the growth of secularism, this is not yet a secular society. The effort to force religious imagery out of the public square promises political and legal strife for years to come. But recognizing that traditional religious language is rich in its connotations and can be understood as promoting very broad claims about reality might allow a new kind of consensus to emerge. We might come to accept that much religious expression could be accepted for its secular content and not prohibited despite its continuing and genuine religious content.

### C. Objections and Defenses

Although there are clearly numerous objections that will be made to this article's proposal to resolve the crisis in the Establishment Clause, I want to mention in particular four such objections, two from the religious believer's side, one from the secular side, and one general objection.

#### 1. The higher law justification robs religious symbols of their religious content

Justice Scalia's interpretation of the Establishment Clause promises religious believers that they may worship God through communal expression organized and sponsored by the government<sup>195</sup> and that this is constitutional. Believers may feel that, although the higher law proposal in this article retains some of the religious forms that Justice Scalia endorses, it undermines their meaning by requiring an official commitment to secular interpretations of those forms of religious expression.

This criticism is certainly an accurate description of the proposal. The only way that the Establishment Clause can allow what is essentially communal monotheistic worship is, as Justice Scalia candidly admits, by the "disregard of polytheists"<sup>196</sup> as well of course as the disregard of atheists and other nonbelievers. This callous disregard is not justified by Justice Scalia's appeals to "our Nation's historic practices".<sup>197</sup> America is demographically not what it used to be. It is not as Christian and not even as religious. Those changes must be recognized. By declaring monotheism to be the winner in the culture wars, Justice Scalia is ensuring that those wars of religion will continue. America is currently 15% nonbelievers with a small additional portion of polytheists. But those numbers may change. If the Constitution does not aid us in finding common ground among all these groups, we will end up voting for and against God in all future elections. This promises deep political strife.

Believers should be satisfied that their preferred forms of life will be largely retained under this article's proposal. For example, if the words "under God" are kept in the Pledge of Allegiance, believers are free to experience devotion to God in reciting the Pledge. And they are free to do this not just as individuals but in group settings. They may not insist, however, that their understanding of God be adopted as the official meaning of such a text. According to my proposal, government need not deny that a religious meaning is present on an official occasion, as long as it may plausibly be asserted that a nonreligious meaning is present as well.

I expect that religious believers will come to see that secularists who share the commitment to higher law are participants in some sense in the religious traditions, as C.S. Lewis stated. These secular expressions are akin to those described by Teilhard de Chardin, who thought the Christian should "share those aspirations, in essence religious, which make the men and women of today feel so strongly the immensity of the world, the greatness of the mind and the sacred value of every new truth."<sup>198</sup>

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<sup>195</sup> See *supra* II F.

<sup>196</sup> *McCreary County*, 545 U.S. at 893 (Scalia J., dissenting).

<sup>197</sup> *Id.*

<sup>198</sup> Chardin, *supra* n. 5.

## 2. The higher law justification allows government to hijack religious symbols

This criticism might be thought of as the mirror image of the former one. Some religious believers find the use of religious symbols, images and language by government to be harmful to genuine religion and generally offensive. Religious symbols used in this way become “Bleached Faith”, as Steven Goldberg puts it in the title of his recent book.<sup>199</sup> Goldberg argues that religious symbols are only “real” when they can be affirmed in their fullness and not as some watered down version acceptable to secularists as well as believers.<sup>200</sup> Justice Brennan made a similar point in his dissent in the Pawtucket crèche case, *Lynch v. Donnelly*:

the crèche is far from a mere representation of a “particular historic religious event.” It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely “traditional” and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of “history” nor an unavoidable element of our national “heritage.”<sup>201</sup>

But the Ten Commandments display that helped introduce Professor Cochran to the theory of higher law did not demean or trivialize the biblical account. Nor did the word Creator in the Declaration of Independence demean or trivialize God. Some secular uses of religious language, images and symbols are true, even though they do not exhaust or even really touch the full religious meaning that is potentially present.

This criticism of government use of religion is justifiable since politicians do like to claim divine approval for themselves and their policies. But applied rigorously to cleanse the public square of all such references, the criticism treats religion and society as separate realms, which they are not. The Bible, for example, must have lessons to teach to the most secular among us.

## 3. Higher law expressed through religion is still religion

Some secularists are likely to complain that the word God is a religious word—or that the Ten Commandments is a religious image—and has no business in an official public setting. But this criticism amounts to an ideological objection. To deny that religious

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<sup>199</sup> Steven Goldberg, *Bleached Faith: The Tragic Cost When Religion is Forced Into the Public Square* (2008).

<sup>200</sup> *Id.*, at 81, 130.

<sup>201</sup> *Lynch*, 465 U.S. at 711-12 (Brennan, J., dissenting).

symbols can carry deep secular meaning is foolish and represents an unmerited hostility to any hint of religion.

The richness of religious imagery was evident in the story with which this article began. Professor Cochran, admittedly not focusing on issues of religion as such, had no trouble understanding the nonreligious, jurisprudential point being made by the Ten Commandments display in the context in which he encountered it. The doctrine of higher law that he associated with the Ten Commandments display is not a religious doctrine. If a religious image can be used to express higher law principles without objection when the nonreligious meaning is very clear, as in the University building, there is no reason why a religious image cannot also be so used when the context is more ambiguous and both religious and nonreligious meanings are present.

Noah Feldman suggested in his book, *Divided by God*, that the minority religious observer, and perhaps by extension the nonbeliever, makes an “interpretive choice” whether to feel like an outsider when confronted by majority religious symbols in the public square.<sup>202</sup> That seems unduly harsh and more than a little unrealistic. But in the context of a government commitment to higher law, the higher law secularist is being invited to participate in a commitment that she shares—the commitment to higher law. The only fair secular objection in such a context would be that a nonreligious interpretation of a particular religious symbol is impossible. In that instance the higher law justification would not be plausible and there would in fact be a constitutional violation.

Other than that situation, the secularist is only objecting that, while she views the religious image in secular terms, religious believers see and hear something quite different, something genuinely religious. Put this way, it really would seem that offense here is merely chosen.

To be fair, the secularist may feel that she is simply presenting the other side of the criticism that religious believers have often made of ceremonial deism. Some of the Justices have said that certain uses of religious imagery have lost their religious authenticity through repetition in the public square. The believer who finds this same religious image quite authentic is offended at being told in effect that she is wrong. Now, under my higher law proposal, the secularist is being told she should accept the proposition that plainly religious words have a nonreligious meaning. Why shouldn't the secularist be offended by that?

But no one is denying the obviously religious meaning of religious language, images and symbols in the public square. The higher law justification merely asserts that secular meanings are also present. When we say, for example, one Nation under God, we are saying many things. That richness of meaning should satisfy the secularist that religion is not being established.

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<sup>202</sup> Feldman, *supra* n. 62, at 242.

Clearly, it may not satisfy secularists. Despite my hope for finding common ground, ill-will may continue. The problem is the usual one in law of looking for winners and losers. It will be a hard change for the religious and nonreligious sides to admit that a kind of compromise between them is possible. Nevertheless, compromise is possible.

#### 4. The higher law justification is unnecessary

Although there has been no convincing explanation as to why, Establishment Clause caselaw is obviously moving in the direction of allowing most of what the government speech doctrine would permit the government to do. As shall be seen below, this might not be so with regard to prayer at high school graduations, but passive nonsectarian government religious expression is probably now going to be upheld by the Supreme Court as constitutional. So, why bother with an elaborate justification of something that is already settled? Granted, Establishment Clause doctrine is incoherent, but why not just ignore that?

There are several reasons why the Establishment Clause crisis is worth resolving. First, the caselaw is not settled but is just at equipoise. President Barack Obama may have an opportunity to unsettle the uncertain majority that will currently uphold “under God” and Ten Commandments displays. President Obama’s first nominee for a Court of Appeals position was District Judge David Hamilton who had once strongly suggested in an opinion that Justice Brennan had been right in his Marsh dissent that legislative prayer is unconstitutional.<sup>203</sup> It is possible that President Obama is a separationist whose judicial nominees will reopen the debate over the secular state.

More important than this desire to forestall future disagreements on the Court, is the need for a constitutional interpretation of establishment that will win popular acceptance. Religious believers will not insist on the primacy of their religious commitments in the public square if they are given an interpretation of the Establishment Clause that does not endorse the secular state. I think religious believers will understand and accept higher law justification for religious symbols in the public square and will be willing to abandon more grandiose religious claims.

As for secularists, there is an even greater need for acceptance of the higher law justification. As the example of Steven Gey shows, secularism in America has been drawn unthinkingly toward relativism. Part of the reflexive opposition to all things religious has included opposition to the objective theory of value. This unthinking relativism has been attacked by Austin Dacey, in his book *The Secular Conscience: Why Belief Belongs in Public Life*.<sup>204</sup> I have elsewhere also written about the need for a new kind of secularism as America grows more secular.<sup>205</sup>

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<sup>203</sup> *Hinrichs v. Bosma*, 400 F.Supp.2d 1103, 1125 (S.D.Ind., 2005), judgment reversed by *Hinrichs v. Speaker of House of Representatives of Indiana General Assembly*, 506 F.3d 584 (7th Cir., 2007)(calling the Brennan dissent a “powerful argument”).

<sup>204</sup> Austin Dacey, *The Secular Conscience: Why Belief Belongs in Public Life* (2008).

<sup>205</sup> See Bruce Ledewitz, *Hallowed Secularism* (2005) and Bruce Ledewitz, *The New New Secularism and the End of the Law of Separation of Church and State*, \_\_ *Buff. J. Pub Int.* \_\_ (2010)(upcoming).

While this article is not the place to delve into that issue, certainly it can be said that a secularism that can hear in the word God a commitment to objective value, and can accept that commitment, will more easily serve as the foundation for a healthy secular society than one that flees from such a commitment.

## V. Some Applications of Government Endorsement of Higher Law

Since passive symbolic displays of religious imagery are just one kind of Establishment Clause issue, although a kind that indicates the broadest principles of the role of religion in public life, it will be helpful to suggest how the government speech doctrine affects other issues in Establishment Clause jurisprudence. The suggestions here must be brief, amounting only to sketches. The five issues I will describe are: religious exemptions, religious accommodations, aid to religion, public prayer and religion in the public schools.

### A. Religious Exemptions

Religious exemptions refer to religious excuses from generally applicable laws. Probably the most famous such exemption was the exemption for the use of wine for sacramental purposes during Prohibition.<sup>206</sup>

Exemptions from generally applicable laws have generally been upheld by the Supreme Court against Establishment Clause challenge, perhaps on the theory that the Free Exercise Clause sometimes requires government to exempt religion from laws that burden religious practice.<sup>207</sup> Now that the Court's interpretation of the Free Exercise Clause no longer requires religious exemption from generally applicable laws,<sup>208</sup> the justification for allowing religious exemptions is not so obvious. Of course, exemptions that apply broadly to both religious and nonreligious organizations, such as charitable tax exempt status, do not favor religion and thus are not establishments of religion.<sup>209</sup> But exemptions favoring only religion do seem at least to raise establishment clause concerns.<sup>210</sup>

Without attempting to answer questions in this area, it is clear that the government speech proposal does not implicate this caselaw. Government speech endorsing higher law is constitutional because it is not religion. It is nonreligious speech, even when it utilizes

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<sup>206</sup> See Prohibition of Intoxicating Beverages, ch. 85 § 6, 41 Stat. 305, 311 (1919).

<sup>207</sup> “[G]overnment may (and sometime must) accommodate religious practices and ... may do so without violating the Establishment Clause.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987). The Court is using the term accommodate here in roughly the way I am using the term exemption. In the next part, I use accommodation in a slightly different way.

<sup>208</sup> See *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>209</sup> See *Walz v. Tax Com’n*, 397 U.S. 664 (1970)(upholding real property tax exemption for “religious, educational or charitable purposes”).

<sup>210</sup> See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)(invalidating sales tax provision for books and periodicals “published or distributed by a religious faith”)

religious symbolism. Therefore, this approach says nothing about the circumstances under which government may legitimately favor religion.

## B. Religious Accommodations

This category refers to the situation in which the general shape of law is determined in part by reference to religion. A good example is closing government offices on Sundays. Presumably the decision not to work seven days a week is taken for nonreligious reasons, such as the welfare of the workforce. Once that decision is made, government may choose Sunday as opposed to any other day on the ground that in a substantially Christian majority society, Sunday is a day more desired to be free from work than any other day.

Slightly different, but still an accommodation, is the decision to make Christmas a national holiday. Unlike the Sunday example, there is no expectation that there would be any kind of holiday in December. The justification is simply that so many Christians would want the day off, that it would be impractical, as well as burdensome on nonChristians who would have to substitute, to try to have a normal work day on Christmas.

Again, as in the area of religious exemptions, the government speech doctrine would not change existing law. The general prohibition against government preference for religion over irreligion still applies, but accommodations and exemptions are often allowed.

## C. Aid to Religion

One of the principle commitments of Establishment Clause jurisprudence is that government may not directly support the religious mission of any or all religious denominations. For this reason, general government aid to private elementary and secondary schools raises Establishment Clause issues. A general rule that has emerged over time is that government may directly support the secular functions of such schools, but not their sectarian functions.<sup>211</sup>

This approach to aid to private schools was expanded and changed by the *Zelman v. Simmons-Harris* decision in 2002,<sup>212</sup> which upheld the Cleveland school district's tuition voucher program. Despite the fact that almost all of the public funds ended up going to support Catholic schools for general tuition subsidy without regard to any secular/religious distinction, the private choice of parents was held to obviate government responsibility for the religious mission of the schools.<sup>213</sup>

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<sup>211</sup> *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973) (“These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian.”)

<sup>212</sup> 536 U.S. 639 (2002).

<sup>213</sup> *Id.*, at 650-52.

A related area of direct public support of religion is charitable choice, the funding of religious institutions to provide social welfare benefits.<sup>214</sup> Like school funding, the fundamental distinction is made in this field between government support for religious activities per se, which is not permitted, and government support to accomplish secular, social welfare-oriented goals, which is.<sup>215</sup> Unlike the school cases, however, it is not clear whether, and if so to what extent, the religious providers in question may use religious approaches to accomplish these secular goals. Undoubtedly a pure voucher approach would be constitutional in this field, as in education, but few social welfare programs function in that way.

Unlike religious exemptions and accommodations, the government speech approach might lead to greater permissibility for religious approaches to solving social problems. The government might conclude that “meaning-oriented” or “spiritual” approaches to problems like addiction are more effective than any other approach. Public funding, then, would go to this general category, which in theory could be religious or nonreligious. Though most of the money would undoubtedly go to religious organizations and most of the spiritual instruction would end up being traditionally religious, the program might be upheld much as the higher law approach to government expression includes both religious and nonreligious language.<sup>216</sup>

#### D. Public Prayer

The government speech approach provides a more satisfying justification for public prayer than does the current caselaw. Unlike Marsh, the practice of legislative prayer would not be upheld as currently as a historic practice, but as government speech that promotes higher law principles. Of course this would require a legislature to feature not only a variety of minority religious offerings but nonreligious “prayers” as well. There would not have to be anything like equal proportions of these, just enough so that the nonreligious message of the overall program were plausible. Most of the prayers would be monotheistic, and some might well be completely sectarian. Since there are many prayers being offered, the issue would be the whole package of prayers rather than any one prayer.

Prayer itself could be a favored activity since the spiritual depth that it promotes goes beyond any one religious tradition. It is indeed possible to think of prayer as not necessarily religious at all, as in certain forms of meditation. The government speech approach recommended here allows government to be concerned about the spiritual condition of citizens, including school students. Thus a case like *Wallace v. Jaffree*<sup>217</sup> would certainly be decided differently under this article’s approach.

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<sup>214</sup> See generally, Michele Estrin Gilman, *Fighting Poverty With Faith: Reflections on Ten Years of Charitable Choice*, 10 *J. Gender Race & Just.* 395 (2007).

<sup>215</sup> See *Bowen v. Kendrick*, 487 U.S. 589 (1988)(upholding Adolescent Family Life Act).

<sup>216</sup> A distinction might be made here on the ground that the religious symbolization at issue in public expression is ambiguous and can plausibly be interpreted along nonreligious lines. A social welfare provider who utilizes religious conversion to overcome addiction, in contrast, is advancing religion alone.

<sup>217</sup> 472 U.S. 38 (1985).

It is a closer question whether *Lee v. Weisman*<sup>218</sup> would also be reversed. Unlike legislative prayers that go on all the time, a high school graduation is a one-time event. Therefore, prayer would probably have to be nonsectarian in order to be plausibly endorsing higher law. Alternatively, the school board might host a variety of prayer traditions, but then clearly someone would have to be altogether nonreligious in the traditional sense and probably minority religion would have to be represented.

The question to put directly to Justice Kennedy's opinion in *Lee* is why the government cannot assert the "conviction that there is an ethic and a morality which transcend human invention"?<sup>219</sup> Was he not aware that the Declaration of Independence asserts that very conviction? Is it just the religious form that invalidates the assertion? Surely the head of the school board could start the graduation ceremony with a simple statement: America stands for the proposition that there is a morality that is not a human invention. This is indeed the power of the higher law position. And it is a fully American creed.

The coercion holding in *Lee* is just a distraction. Granted the government speech doctrine is not an exception to the general free speech prohibition against coercion. But, as Justice Scalia noted in his dissent, everyone in the audience stood for the Pledge of Allegiance, which immediately preceded the invocation prayer that was struck down.<sup>220</sup> If prayer were viewed as government speech rather than as religious establishment, coercion would not have been found in *Lee*.

#### E. Religion in Public Schools

The last observation above raises the question of the continuing validity of *Engel v. Vitale*<sup>221</sup> and *School District v. Schempp*.<sup>222</sup> Are we now going to be bringing Bible reading and prayer back to the public schools? As to Bible reading, the answer is no, since the government speech doctrine in no way permits endorsement of the biblical tradition.

As for *Engel v. Vitale*, the prayer at issue was pretty literally monotheistic: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."<sup>223</sup> The government speech doctrine does not allow the government to foster in students, or citizens generally, a personal relationship with God.

But, a different school prayer might better invoke the higher law tradition. Government need not be indifferent to the spiritual lives of the citizenry. And this is especially and inevitably true of education. It should be remembered that in *Schempp*, the Pennsylvania Superintendent of Public Instruction testified that Bible reading constitutes "a strong

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<sup>218</sup> 505 U.S. 577 (1992).

<sup>219</sup> *Id.*, at 589.

<sup>220</sup> *Id.*, at 638 (Scalia, J., dissenting).

<sup>221</sup> 370 U.S. 421 (1962).

<sup>222</sup> 374 U.S. 203 (1963).

<sup>223</sup> *Engel*, 370 U.S. at 422.

contradiction to the materialistic trends of our time.’’<sup>224</sup> That is a goal that I hope all public schools are pursuing.

Government opposition to relativism, nihilism and materialism also is relevant to the controversy over teaching evolution. The journalist and author Robert Wright recently reported in an interview in the New York Times magazine that he began to doubt his Baptist upbringing in his sophomore year in high school when he encountered evolutionary theory.<sup>225</sup> Wright’s reported skeptical response is neither eccentric nor wholly the result of his parents’ creationist religious commitment. Here is what Richard Dawkins, perhaps the best scientist among current atheist writers, has said about evolution: “The universe we observe has precisely the properties we should expect if there is, at bottom, no design, no purpose, no evil and no good, nothing but blind pitiless indifference.”<sup>226</sup> According to Dawkins, it is not just God that goes out the evolutionary window, but “evil” and “good”. This is an attack, and understood to be an attack, on the objectivity of values, which, as we have seen, is not something about which government should be indifferent.

I don’t have any doubt about the facts of evolutionary theory. But, I would not have wanted my children to conclude from biology class that life has no meaning. And, since the presentation of evolutionary theory in school invariably emphasizes its randomness, biology class is likely to carry a hidden message of meaninglessness.

This is what is bothering most of the people who oppose evolution, whether they put it this way or not. For most opponents, evolution is not a problem because they want the literal truth of Genesis taught in school or don’t believe an eye could come together naturally. The dispute is about whether the universe is mere mechanism.

I have a suggestion for a new disclaimer for biology class, which, unlike the disclaimer in the celebrated Dover Pennsylvania case,<sup>227</sup> could be viewed as constitutional even today and might reassure some of these parents. My disclaimer would run as follows:

Some people believe that evolution is a random process. Others believe that it is directed by God. Biology class is the place for you to see how evolution works. This class is not the place to judge whether evolution serves any larger purpose.

Evolution is a messy process, with many dead-ends. But, in the end, evolution has produced beings with ever more curiosity and capacity for gratitude; ever more caring and capacity for self-sacrifice; ever more interiority and

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<sup>224</sup> Schempp, 374 U.S. at 279 (Brennan, J., concurring).

<sup>225</sup> New York Times Magazine, 22 (May 31, 2009).

<sup>226</sup> Richard Dawkins, *River Out of Eden: A Darwinian View of Life*, 133 (1995).

<sup>227</sup> *Kitzmiller v. Dover Area School Dist.*, 400 F.Supp.2d 707 (M.D.Pa 2005).

capacity for expanding the circle of empathy. You should reflect on that reality.

To come up with a statement like this one, school boards would have to be given the right to care whether their students become nihilists. Obviously, school board members do care about this now, though they feel they have to deny it because of the Establishment Clause. It would be far better to face the potential implications of evolutionary theory straightforwardly. To do that, we must allow government to endorse the higher law tradition openly and then, of course, open matters up in school for real debate.

### Conclusion

As the dispute over evolution shows, there is a big, unfocussed and heretofore unfaced question beneath disputes over the content of Establishment Clause jurisprudence. The question is, when—and if—we finally do have a secular society, by which I mean one that does not rely on traditional religion for the framework of meaning, how will shared meaning be transmitted? I would never say that we need religion for this purpose, but I'm not sure I have seen alternatives yet.

The stakes riding on the answer to this question are higher than we usually acknowledge. Winston Churchill illustrates the stakes far better than can I. In Volume 3 of his history of World War II, *The Grand Alliance*,<sup>228</sup> Churchill describes his first meeting with President Roosevelt, in Placentia Bay, Newfoundland, during the summer of 1941. The day after Churchill's arrival, on Sunday, August 10,

Mr. Roosevelt came aboard H.M.S. *Prince of Wales* and, with his Staff officers and several hundred representatives of all ranks of the United States Navy and Marines, attended Divine Service on the quarterdeck. This service was felt by us all to be a deeply moving expression of the unity of faith of our two peoples, and none who took part in it will forget the spectacle presented that sunlit morning on the crowded quarterdeck—the symbolism of the Union Jack and the Stars and Stripes draped side by side on the pulpit; the American and British chaplains sharing in the reading of the prayers; the highest naval, military, and air officers of Britain and the United States grouped in one body behind the President and me; the close-packed ranks of British and American sailors, completely intermingled, sharing the same books and joining fervently together in the prayers and hymns familiar to both. ...It was a great hour to live. Nearly half those who sang were soon to die.<sup>229</sup>

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<sup>228</sup> Winston Churchill, *The Second World War*, "The Grand Alliance" (1950).

<sup>229</sup> *Id.*, at 431-32.

A moment like the one Churchill described could not happen that way today. It required an unselfconscious religiosity that we do not have and that, frankly, I do not miss. It was excluding, even though Churchill would not have realized that.

If we are to have a healthy political life, we must have a substitute for the depth of commitment that Churchill, Roosevelt and all their company felt that long-ago day. It was not a martial spirit they shared. They were not glorifying war. It was a shared commitment to values that Hitler was felt to threaten. There were no skeptics in that crowd.

It will require the same kind of deep, shared commitment to build an environmentally sustainable world of peace. This article represents a first step toward that end. It is an attempt to bring the secular world into closer and more amiable contact with traditional symbols of meaning. Those symbols can serve to bind us together rather than separating us among religious and secular lines.