

Oklahoma Law Review

Volume 63 | Number 1

Symposium: Signs of the Times: The First Amendment and Religious Symbolism

2010

Religious Displays and the Voluntary Approach to Church and State

Thomas Berg

University of St. Thomas School of Law, tberg@stthomas.edu

Follow this and additional works at: <http://digitalcommons.law.ou.edu/olr>

 Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Thomas Berg, *Religious Displays and the Voluntary Approach to Church and State*, 63 OKLA. L. REV. 47 (2017), <http://digitalcommons.law.ou.edu/olr/vol63/iss1/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

RELIGIOUS DISPLAYS AND THE VOLUNTARY APPROACH TO CHURCH AND STATE

THOMAS C. BERG*

Introduction

My first, gut reaction to Establishment Clause cases about religious displays is that they are unimportant and it is irritating to see so much effort, emotion, and paper spent on them. From the standpoint of serious religion, it is hard to imagine that any display of the Ten Commandments does anything to make this a more Christian or religious nation, more inclined to live according to biblical values, or indeed that such a display affects anyone's behavior. It seems an entirely symbolic statement, and people are far too ready to settle for symbolic statements that distract them from the real work of trying to advance moral values in government and society.

But there are also reasons to question putting so much effort into challenging these displays. The simple posting of a display in a public building is among the least oppressive things a religious majority can do to carry out its beliefs through government. Expressions of the Jewish and Christian traditions appear throughout public buildings, such as the U.S. Supreme Court building itself,¹ and they have not led to any restrictions on those who disagree. These contexts differ from public schools, for example, where impressionable children may be pressured, subtly or otherwise, into participating in or affirming religious activity.² Wouldn't it be more sensible, one could ask, for the ACLU to lighten up and let these non-coercive displays go? Longtime ACLU litigator Burt Neuborne made just that suggestion in a group blog discussion I participated in after the Supreme Court's decisions on Ten Commandments displays in 2005.³

* St. Ives Professor of Law and Associate Dean for Academic Affairs, University of St. Thomas School of Law (Minnesota).

1. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 688-89 (2005) (cataloging religious elements in displays throughout federal buildings, including the Supreme Court courtroom frieze of Moses holding the Ten Commandments).

2. See *Lee v. Weisman*, 505 U.S. 577, 587-88 (1992) (finding that prayer at a public-school graduation ceremony imposed "subtle coercive pressures" on students); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (finding that prayer in public-school classrooms imposed "indirect coercive pressure" on students).

3. See *Should We Care About Religious Symbols Cases?*, posting of Thomas C. Berg to Mirror of Justice, <http://mirrorofjustice.blogspot.com/2005/06/page/2/> (June 29, 2005, 6:13 PM) (noting Neuborne's comments in group discussion on SCOTUSblog regarding *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545

This is only my first reaction, however. On further reflection, I usually remember Justice Felix Frankfurter's remark that "[w]e live by symbols."⁴ Symbols sometimes distract people from real issues and challenges, but sometimes they embody those issues and challenges. In the latter cases, we ignore symbols at our peril.

I believe, however, that we need to ask just why First Amendment values demand that we care about non-coercive displays of the Ten Commandments and other religious content. Professor Irons, like the panel in *Green v. Haskell County Board of Commissioners*,⁵ goes into detail to show that a Ten Commandments display has a religious purpose and that the Commandments have not served as a significant source of American law.⁶ But focusing only on those considerations as grounds for finding displays unconstitutional is unsatisfying. It begs the question why, in a nation with a tradition of such generalized, non-coercive displays, courts should be invalidating them at all. That requires more discussion of foundational principles in America's tradition of religious freedom.

I argue here that the distinctive constitutional approach to church-state relations in America is the "voluntary" approach, under which government leaves religious practice to the free decisions and energies of individuals and groups. Several principles within that approach call for invalidating official displays that endorse the religious truth of propositions such as the Ten Commandments. But another key component of the American approach is that religion remains important to public life. Indeed, in America a primary argument for religious freedom and other human rights has been a religious argument that rights are God-given and therefore have priority over government authority. Thus, although religious voluntarism calls for invalidating many government-sponsored religious displays, the rationale for invalidating them must recognize the multiple ways in which religion is relevant to public life at the most fundamental levels. This paper suggests three means of recognizing that relevance.⁷

U.S. 677 (2005)).

4. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940) (quoting OLIVER WENDELL HOLMES, *John Marshall: In Answer to a Motion That the Court Adjourn on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice*, in COLLECTED LEGAL PAPERS 266, 270 (1921)).

5. 568 F.3d 784, 800-03 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

6. See Peter Irons, *Curing a Monumental Error: The Presumptive Unconstitutionality of Ten Commandments Displays*, 63 OKLA. L. REV. 1 (2010).

7. See discussion *infra* Part II.B.

I. Religious Symbols and the Paradox of Religious Voluntarism

A substantial body of historical and legal-historical writing concludes that America's distinctive approach to church-state relations developed during the founding era and early Republic, and is best characterized as the "voluntary" approach. Writing in the 1840s, America's first great religious historian, Robert Baird, described the "voluntary principle" under which government would neither suppress nor promote worship:

In every state liberty of conscience and liberty of worship is complete. The government extends protection to all. . . . The proper civil authorities have nothing to do with the creed of those who open such a place of worship. . . . On the other hand, . . . neither the general government nor that of the States does any thing directly for the maintenance of public worship. . . . [Religion relies] upon the efforts of its friends, acting from their own free will.⁸

This approach was evident in the founding era in some states, such as Virginia, but it did not gather a national consensus until the early Republic, when New England states eliminated their tax-financed support of clergy and houses of worship.⁹ The process of securing full rights of religious exercise and ending tax support of clergy and worship was driven at least as much by Protestant evangelicals like Baptists, with their leaders Isaac Backus and Elder John Leland, as by Enlightenment-influenced statesmen like James Madison and Thomas Jefferson. The statesmen wrote enduring documents such as Madison's "Memorial and Remonstrance Against Religious Assessments."¹⁰ But evangelicals wrote popular pamphlets and provided the largest share of the votes for disestablishment.¹¹

8. ROBERT BAIRD, *RELIGION IN THE UNITED STATES OF AMERICA* 287-88 (Edwin S. Gaustad ed., Arno Press & The New York Times 1969) (1844).

9. For an extensive review of the elimination of establishments and religious taxes in various states, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. REV.* 1385.

10. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 49 (2d ed. 2006).

11. Examples of leading Baptist writings include ISAAC BACKUS, *AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY* (1773), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 303 (William G. McLoughlin ed., 1968) [hereinafter BACKUS ON CHURCH, STATE]; JOHN LELAND, *The Rights of Conscience Inalienable*, in *THE WRITINGS OF THE LATE ELDER JOHN LELAND* 179 (L.F. Greene ed., Arno Press 1969) (1845).

By the 1830s, historian Timothy Smith writes, America with its voluntary system had “created a new pattern of church-state relations, unknown since the first century.”¹² Many other historians concur that the voluntary approach is America’s “singular” tradition concerning religion and the state.¹³ In the field of constitutional history, Carl Esbeck has done as much as any scholar to document the development of voluntarism and describe its premises and principles.¹⁴

The voluntary approach tracks the First Amendment’s two religion provisions: it combines basic freedom for all faiths (free exercise) with government non-involvement in the distinctive sphere of religious life and in churches (non-establishment).¹⁵ But the relationship between the voluntary approach and the Constitution is complex. Because voluntarism had not gained a consensus by 1791, when the Bill of Rights was adopted, the First Amendment reflected this approach only in part: the Establishment Clause rested at least as much on federalism, a desire to bar the new federal government from interfering with arrangements concerning religion in the states.¹⁶ For this reason, one can draw only limited lessons from the First Amendment’s specific history. But matters were different by 1868, when the Fourteenth Amendment was passed and (let us assume for these purposes) applied the restrictions of the Religion Clauses to the states as “privileges and immunities” of U.S. citizens. By that time, the voluntary approach had won consensus throughout the states, and the First Amendment was taken to reflect that approach.¹⁷

12. TIMOTHY L. SMITH, *REVIVALISM AND SOCIAL REFORM IN MID-NINETEENTH-CENTURY AMERICA* 35 (1957).

13. *See, e.g.*, MARK NOLL, *AMERICA’S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 174-75* (2002); *see also* WILLIAM G. MCLOUGHLIN, *SOUL LIBERTY: THE BAPTISTS’ STRUGGLE IN NEW ENGLAND, 1630-1833*, at 246 (1991) (describing America’s approach of voluntarism as “*sui generis* in Western civilization”). *See generally* WINTHROP S. HUDSON, *THE GREAT TRADITION OF THE AMERICAN CHURCHES* (1953); SIDNEY MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* (1963).

14. *See, e.g.*, Esbeck, *supra* note 9.

15. For a similar formulation, see *id.* at 1580-81.

16. For the argument that preserving the power of the states was the only meaning of the original Establishment Clause, see, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17-34 (1995); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371. For arguments that the Establishment Clause reflected in part (or even largely) substantive principles against establishment, see, e.g., Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761 (2005).

17. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1141 (1995) (describing how a substantive principle of non-establishment achieved consensus and was taken as part of the meaning of the

The voluntary approach included several more specific principles. First was the proposition that government should not impose upon private citizens' choice in matters of religion. As Madison put it in the "Memorial and Remonstrance" against Virginia's tax support for clergy, the duty to worship the Creator is "precedent, both in order of time and degree of obligation, to the claims of Civil Society"; thus, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man."¹⁸ This principle reflects the importance and sensitivity of both the religious conscience for the person and the proposition, repeatedly emphasized by Baptists like Backus, that "[n]othing can be true religion but a [fully] voluntary obedience [to God's] revealed will."¹⁹ The principle covered cases of coercion through legal sanctions but also more subtle pressures on religious choice. Congressman Daniel Carroll, for example, remarked during the debates on the First Amendment that "[t]he rights of conscience . . . will little bear the gentlest touch of governmental hand."²⁰

A second principle was a separation of church and state that emphasized the exclusion of the state from religious institutions and from core religious activities so as to protect the autonomy of religious life and the vitality and independence of religious groups. For example, Madison argued that "ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."²¹ Prominent clergyman Lyman Beecher, at first a defender of Connecticut's religious establishment, ultimately concluded that "a union of church and state . . . [has] never existed without corrupting the church . . . , by making the ministry . . . a sinecure aristocracy of indolence and secular ambition."²² Beecher famously came to describe disestablishment as "*the best thing that ever happened to the State of Connecticut*" because it "cut the churches loose from dependence on state support[and] threw them wholly on their own resources and on God."²³ American separationism was hospitable to religion, unlike the version that

First Amendment).

18. MADISON, *supra* note 10, para. 2.

19. ISAAC BACKUS, *A Declaration of the Rights, of the Inhabitants of the State of Massachusetts-Bay, in New England*, in BACKUS ON CHURCH, STATE, *supra* note 11, app. 3, at 487.

20. 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1834) (statement of Rep. Carroll, Aug. 15, 1789).

21. MADISON, *supra* note 10, para. 6.

22. LYMAN BEECHER, *A PLEA FOR THE WEST* 78 (Cincinnati, Truman & Smith 1835).

23. 1 LYMAN BEECHER, *THE AUTOBIOGRAPHY OF LYMAN BEECHER* 253 (Barbara M. Cross ed., 1961), *as reprinted in* 1 *A DOCUMENTARY HISTORY OF RELIGION IN AMERICA* 318 (Edwin S. Gaustad ed., 1982) [hereinafter DOCUMENTARY HISTORY].

grew out of the French Revolution, which was founded in suspicion of religion and a desire to protect society from religious oppression.²⁴

A third principle was that government should treat varying denominations equally in order to reduce the resentment and division caused by favoritism. Elder John Leland, a leader among Baptists in fighting for disestablishment, summarized the argument when he stated that the pattern of “religious laws and test oaths” favoring some “raises the uniformists to arrogance and superiority, and sinks the non-conformists into disgrace and depression; and, thereby, destroys that confidence and friendly equality, which is essential to the happiness of any state.”²⁵ By 1791 “[e]very one of the 12 state constitutional provisions protecting religious liberty contained language referring to denominational equality (though in two states this equality was extended only to Christian denominations).”²⁶ The equality principle also helped bring about the end of tax-financed clergy support, which tended to favor majority religious views.²⁷

Looking only at these principles of voluntarism, one might be surprised to find American governments in the nineteenth century sponsoring religious exercises or symbols such as legislative prayers, Thanksgiving proclamations, and prayers and Bible readings in public schools.²⁸ Such practices constituted government involvement in religious matters; they did not leave religion purely to voluntary initiative. They did carry, however, at least the risk of teaching a diluted religion, attuned more to political values than to the values of the various faiths the practices were supposed to represent.²⁹ And the prayers and symbols at least indirectly treated as less equal any religious view other than the generalized theism they expressed—which was often a generalized Christianity or even a generalized Protestantism.³⁰

24. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* 32-35, 60-72 (2009) (contrasting the predominate views toward religion espoused in the two revolutions); NOLL, *supra* note 13, at 53-54 (noting that Americans found republicanism and religion compatible while Europeans, especially the French, found them incompatible).

25. JOHN LELAND, *Fast-Day Sermon*, in *THE WRITINGS OF THE LATE ELDER JOHN LELAND*, *supra* note 11, at 240-42, 251-52, as reprinted in 1 *DOCUMENTARY HISTORY*, *supra* note 23, at 319, 320-21.

26. MCCONNELL ET AL., *supra* note 10, at 261-62.

27. See MADISON, *supra* note 10, para. 4.

28. For catalogs of such practices in Supreme Court opinions, see, e.g., *Lee v. Weisman*, 505 U.S. 577, 633-36 (1992) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 100-06 (1985) (Rehnquist, J., dissenting).

29. See discussion *infra* Part II.A.2 (discussing critics' charge that “civil religion” practices of 1950s promoted diluted, complacent religion).

30. For example, government-sponsored religion in the early public schools blatantly disfavored Catholicism. For just one summary of such discriminatory patterns, see John C.

But these government practices were pervasive in nineteenth-century America, and some continue today. They reflect a fourth principle in America's church-state tradition: even though religion was to be voluntary, it was also deemed relevant to public matters and public morality. To take just a couple of the many examples, George Washington in his Farewell Address said that

[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.³¹

John Adams added that “[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”³² In eliminating religious establishments, Americans did not reject the proposition that religion, authentically followed by individuals, was crucial to public matters and civil society. They only rejected the proposition that religious establishments would contribute to authentic religion.

Just what this importance of voluntary religion entailed, however, was disputed. Everyone agreed it would mean that religious values would affect society indirectly through the actions of individuals and voluntary associations: Alexis de Tocqueville wrote in the 1830s that religion exercised great influence on American political society because “it directs mores, and it is in regulating the family that it works to regulate the state.”³³ Moral behavior by individuals would benefit society, as would the efforts of voluntary Bible societies to teach biblical literacy, independent religious colleges to educate young people, or voluntary charities to assist orphans and others in need.³⁴ But it was also widely recognized that individuals would bring their religious

Jeffries, Jr. & James A. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-305 (2001).

31. President George Washington, Farewell Address (Sept. 17, 1796), as reprinted in MCCONNELL ET AL., *supra* note 10, at 41-42.

32. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), reprinted in 9 WORKS OF JOHN ADAMS 228, 229 (Charles F. Adams ed., Boston, Little, Brown & Co. 1854).

33. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).

34. On the importance of voluntary societies, see, e.g., NOLL, *supra* note 13, at 197-99 (discussing “social benevolence,” educational, evangelistic, and other societies); see also HUDSON, *supra* note 13, at 71-74, 77-78 (discussing similar categories of voluntary societies).

values into political debate and legislation, as was the case, for example, in the movements to abolish polygamy, slavery, and alcohol.³⁵

In addition, however, many proponents of the voluntary tradition said that government could also endorse Christian norms through explicit ceremonies, statements, or symbols. For example, although Baptist Isaac Backus fought tooth and nail against Massachusetts's compulsory support of clergy, he endorsed a whole range of state measures to support Christianity.³⁶ Supporters often rationalized such practices, as Carl Esbeck has noted, by saying that they were purely ceremonial and not coercive (even though that was not always true).³⁷ Other great proponents of religious liberty like Madison, Jefferson, and John Leland argued against virtually every form of state support for religion. But the host of government practices endorsing religion on into the twentieth century shows, as the great religious historian William McLoughlin remarked, that Americans "preferred the pietistic vision of Backus to the secularistic one of Jefferson."³⁸

I believe that many of these practices were inconsistent with the underlying principles of the voluntary approach to religion and that the Supreme Court has been correct to invalidate them in recent times—and correct to refuse to uphold them merely because they traditionally have enjoyed wide acceptance.³⁹

But in some cases, invalidating a religious statement by government may pose a serious conflict with the voluntary tradition. It may undermine the government's ability to explain one of the most important rationales for religious freedom itself, namely, a religious rationale. Professor Steven Smith, for example, has argued that the "principal" justification for religious freedom in America has been the religious argument mentioned above—that duties to God must be left to voluntary conscience, without government pressure, because they come prior to duties to society and because faith coerced by

35. See, e.g., Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1124-28, 1130-31 (1994) (discussing the rise of "religious social activism" in the early Republic).

36. See Esbeck, *supra* note 9, at 1435-37.

37. *Id.* at 1400 n.39.

38. MCLOUGHLIN, *supra* note 13, at 259.

39. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (finding unconstitutional a courthouse display featuring the Ten Commandments); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (finding unconstitutional a crèche displayed alone in county courthouse); *Stone v. Graham*, 449 U.S. 39 (1980) (invalidating a statutory requirement for public-school classroom displays of the Ten Commandments); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating a statutory requirement for public-school classroom Bible readings); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down school-board mandated classroom prayers in a public school).

government cannot be real or effective.⁴⁰ Madison led off the “Memorial and Remonstrance Against Religious Assessments” with such an argument: “It is the duty of every man to render to the Creator such homage . . . as he believes to be acceptable to him,” a duty that is prior to the claims of government.⁴¹ Thomas Jefferson’s preamble to Virginia’s 1786 Religious Freedom Statute similarly invokes theological rationales, asserting that “Almighty God hath created the mind free; [and] that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations[] . . . are a departure from the plan of the Holy Author of our religion.”⁴² The religious justification not only was central historically, Smith argues, but also constitutes the most convincing normative reason for giving special solicitude to religious freedom: secular rationales cannot explain why religion is distinctive from other human activities.⁴³

But the religious justification for religious freedom is undermined by a broad interpretation of the Establishment Clause that prohibits government from endorsing or expressing any religious propositions. A government that cannot endorse any religious statement cannot explicitly endorse the religious justification for religious freedom. As Smith puts it, the constitutional commitment to religious freedom becomes “self-canceling”; it is “disabled from acknowledging the principal historical justification for its existence.”⁴⁴ As a result, the commitment to religious freedom may be weakened because the government cannot effectively explain why religion calls for special treatment as compared with other human activities.

Religious freedom is not the only human right that, in the American tradition, rests in part on a religious rationale. The Declaration of Independence claims that rights to life, liberty, and property are inalienable because they are conferred on humans by “their Creator.”⁴⁵ The implicit argument, made explicit in other sources, is that rights are more secure in a society that believes they stem from a source higher than any human authority.⁴⁶ Thus, as Michael Perry has said, no secular argument in America for human rights “will begin to have the power of an argument that appeals at

40. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154-56 (1991); MADISON, *supra* note 10, para. 2; see also *supra* text accompanying note 18.

41. MADISON, *supra* note 10, para. 1.

42. VA. CODE ANN. § 57-1 (2010).

43. See Smith, *supra* note 40, at 223.

44. *Id.* at 150, 188.

45. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

46. For a fuller explication and analysis of this argument, see Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 52-58 (2003).

least in part to the conviction that all human beings are sacred and ‘created equal and endowed by their Creator with certain inalienable Rights.’”⁴⁷

One familiar religious statement by government arguably expresses the religious rationale for religious freedom, among other human rights. When Congress added “under God” to the Pledge of Allegiance in 1954, the House report justified the legislation as an affirmation that government was a limited institution and that rights came from a higher source. The report stated that “[o]ur American Government is founded on the concept of the individuality and dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.”⁴⁸ In contrast, the report said, “the atheistic and materialistic conceptions of communism” lead to the “subservience of the individual” to the state.⁴⁹ Given the prominence of this idea in both early and recent American history, it would be problematic if the Establishment Clause forbade government to express it in a non-coercive manner.⁵⁰

The American voluntarist tradition, then, contains a paradox. The tradition says that government should not define an orthodox or preferred religious position. But a significant justification for that principle is itself a religious justification, which entails government taking a position on a religious matter. How to resolve this paradox, if at all—to find a principle that gives room to both of these affirmations—is a challenge for Establishment Clause doctrine.

II. Religious Symbols, Voluntarism, and the Relevance of Religion to Public Life

A. Official Symbols and Voluntarism

If the first three principles of the voluntary approach are applied vigorously,⁵¹ it should be unconstitutional for the state to sponsor a display that endorses the religious truth of the Ten Commandments, either by displaying it alone or by making statements endorsing its religious truth even while including it in a broader display.

47. Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, 27 U. RICH. L. REV. 1023, 1073 (1993).

48. H.R. REP. NO. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

49. *Id.*

50. See Berg, *supra* note 46, at 59-69; Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 569-75 (2003); see also discussion *infra* Part II.B.1.

51. See *supra* text accompanying notes 18-27.

1. Government Influence on Religious Choice

A display endorsing the Commandments' religious truth injects government influence into religious life and the debate over religious ideas. Although it does not coerce religious dissenters, it can inflict more subtle harms on them. As Justice O'Connor noted, explicit endorsement of particular religious views "sends a message to nonadherents that they are outsiders, not full members of the political community."⁵² Such harms are relevant because of the special sensitivity of matters of religious conscience.

2. Corruption of Religion

What is more, official displays can pose the threat to religion that the American tradition of separation seeks to avoid: the loss of independence and integrity from too close an association with government. Official religious statements are likely to water down the faith, or to coopt it as support for nationalism, consumerism, or other political interests. Such dynamics happened in the Haskell County dispute: the Ten Commandments display was flanked by American flags,⁵³ and a poster to raise funds for the display "depicted a young girl praying before an American flag with the caption 'One Nation Under God.'"⁵⁴ In his remarks at this symposium, Carl Esbeck aptly noted the irony in the girl's praying before the flag to raise money for a monument that proscribes worshiping idols.⁵⁵ Or consider *Lynch v. Donnelly*, where the downtown merchants' association, in cooperation with the City of Pawtucket, erected a Christ-child crèche display to encourage the right kind of attitude in holiday consumers.⁵⁶

Concerns about the dilution of religion were present when the Court in the early 1960s began to strike down public-school prayers and other official religious exercises. The first of these decisions, *Engel v. Vitale*, emphasized among other things the proposition that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."⁵⁷ It is no coincidence, I believe, that at that time more and more prominent voices

52. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

53. See *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 app. B, at 811 (10th Cir. 2009), cert. denied, 130 S. Ct. 1687 (2010).

54. *Id.* at 792.

55. See Panel Discussion, *Signs of the Times: The First Amendment and Religious Symbolism*, 63 OKLA. L. REV. 67, 69 (2010).

56. See *Lynch*, 465 U.S. at 699 (Brennan, J., dissenting) (noting the City's contention that it sought "to attract people to the downtown area in order to promote pre-Christmas retail sales").

57. 370 U.S. 421, 432 (1962).

were declaring frustration with the civil religion of the 1950s that had manifested itself in widespread but relatively generalized official religious practices.

The critics in the 1960s raised two objections to the practices of civil religion, echoing the objections to established churches in the early Republic. One was that the practices by nature watered down religion to make it “negotiable to the widest possible public,” and thereby deprived it of energy.⁵⁸ One writer lamented the “opening prayers, Bible breakfasts,” and other “general, inoffensive, and externalized [practices] . . . put together for public purposes,”⁵⁹ which tended to represent not “a faith integral to the participants’ lives, but rather the prudent recollection by a functionary of what the public would expect.”⁶⁰ Another objected that the effort “to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God’s name on our money,” and so forth simply “cheapened and degraded” the “sacred symbols,” often producing the same effect as “a television commercial on a captive audience—boredom and resentment.”⁶¹

The other criticism was that civil religion produced self-satisfaction and complacency—what Madison might have called “pride and indolence”⁶²—encouraging the illusion that America was a “Christian nation” simply because it displayed symbols, not because it maintained justice. Robert Alley, a leading opponent of school prayers from the 1960s to the present, testified to Congress in 1966 that official prayers were “more akin to a national cult . . . than to the faith of the New Testament.”⁶³ Reflecting later, he added that “the Sermon on the Mount was generally ignored by white citizens in the wake of [*Brown v. Board of Education*]. . . . Nothing in our recent past so clearly identifies the shallowness of the public religious sentiments of the era than does the fundamentally unjust treatment of black citizens.”⁶⁴ The Episcopal bishop of Chicago praised the *Engel* decision precisely because it

58. WILLIAM LEE MILLER, *PIETY ALONG THE POTOMAC: NOTES ON POLITICS AND MORALS IN THE FIFTIES* 45 (1964).

59. *Id.* at 41, 46.

60. *Id.* at 44.

61. Dean M. Kelley, *Beyond Separation of Church and State*, 5 J. CHURCH & STATE 181, 190-91 (1963).

62. MADISON, *supra* note 10, para. 7.

63. *School Prayer: Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 2d Sess. 565, 567 (1966) (statement of Robert S. Alley, University of Richmond Professor and Virginia Baptist Convention Representative), reprinted in ROBERT S. ALLEY, *SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT* app. B, at 250 (1994).

64. ALLEY, *supra* note 63, at 104-05.

“dissipates the myth that ours is a Christian country. . . . [and] should clear the air and put the challenge squarely up to the churches and Christian parents.”⁶⁵ A theologian whose books were popular in mainline Protestant churches celebrated the “removal of the scaffolding of Christendom and establishment and the deliverance of the Christian fellowship into an open world” to seek justice and freedom for all people through efforts such as the civil rights movement.⁶⁶

3. Inequality Among Competing Religious Ideas

Finally, to single out the Commandments for endorsement also treats religious faiths unequally by endorsing propositions that are particular to the Jewish and Christian traditions, such as the prohibition on graven images and the injunction to keep the Sabbath holy.⁶⁷ The framers of the First and Fourteenth Amendments were mostly concerned with equality among Christian denominations; those were the religious controversies familiar to them. But the principle of equality among competing religious ideas, applied in today’s more pluralistic conditions, should extend further. The Court’s recent decisions striking down official religious pronouncements extend equality for dissenters beyond minority or dissenting Christian denominations to non-Christians and those with no religious faith at all.⁶⁸ This extension reflects the fact that as religious pluralism has increased, more and more official religious statements have come to be partial and to exclude a significant number of views on religious questions.

B. The Relevance of Religion to Public Life

But what about the final important principle in the American tradition, the relevance of religion to public life and public matters? Does it require that non-coercive displays of the Commandments be upheld? My answer is no. In the remainder of this section, I consider three ways to recognize the relevance of religion to public life while still invalidating official displays that endorse the religious truth of the Ten Commandments.

1. The Religious Rationale for Rights

First, even if the government has power to recognize a religious rationale for religious freedom and human rights—through a statement like “under God”

65. *Id.* at 122 (quoting Bishop Gerald Burrill).

66. COLIN W. WILLIAMS, *WHAT IN THE WORLD?* 64 (1964).

67. *See infra* note 70 and accompanying text.

68. *See, e.g.,* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 880 (rejecting claim that Establishment Clause permits any and all government endorsements of monotheism).

in the Pledge, for example⁶⁹—this does not provide a justification for Ten Commandments displays. The government’s ability to articulate the religious rationale for rights must be subject to limits or else it could seriously undermine religious voluntarism itself. Government’s power to acknowledge a higher power that grounds human dignity and rights does not, for example, give government the power to make statements about the proper way of worshipping that God. If voluntarism is to be preserved, a permissible government statement must directly tie a religious justification to a political proposition, and it must be general in its religious content.

The Ten Commandments do not satisfy either of these criteria. True, the Commandments’ second table contains moral commands without explicit theological assertions, and the phrase “Thou shalt have no other gods before me” could be taken as a simple statement of the priority of God over all human authorities, including governments. But other Commandments in the first table—the prohibitions against graven images, Sabbath work, or taking the Lord’s name in vain—bear no relation to political morality; they concern only religious matters of ritual, worship, or relationship with God. They also reflect particular or disputed positions on such matters: not all faiths recognize a sabbath or understand the role of images of a deity in the same way.⁷⁰

“Under God” in the Pledge of Allegiance is different on both scores. The phrase is embedded in a statement about the nation’s political aspiration to “liberty and justice,” and under one major interpretation—that asserted in the 1954 congressional report⁷¹—the phrase aimed to express precisely the limited nature of government and the inalienability of rights founded in a higher authority.⁷² “Under God” is also short and general enough that it arguably avoids taking positions on any disputed religious question other than the proposition that a divine authority exists above human government.

69. See *supra* text accompanying notes 48-49.

70. Even among Jews, Catholics, and various Protestants, the prohibition on “graven images” is placed differently in the biblical text, reflecting different positions on the potential value—or potential danger—of visual representations of the divine. See Paul Finkleman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1486-87, 1493-94 (2005). Although Hindus do not understand themselves as worshipping the images of deities or any power in the image themselves, see JOHN RENARD, *THE HANDY RELIGION ANSWER BOOK* 270 (2002), the prohibition on “graven images” obviously stems from and continues to reflect Jewish and Christian concerns that Hinduism and many other faiths do not precisely share, Finkleman, *supra*, at 1499. Similarly, Hindus and many other faith groups do not have a weekly Sabbath. *Id.*

71. See H.R. REP. NO. 83-1693, at 1-2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340; see also *supra* text accompanying notes 48-49.

72. For elaboration, see Berg, *supra* note 46, at 52-58, 67.

There are still problems with “under God” in the Pledge, since in most contexts it does not simply assert the religious rationale but asks individuals to affirm it as part and parcel of their affirmation of loyalty to the nation. When the individuals are children in a school classroom the phrase is coercive, and even when they are not the phrase leaves the suggestion that atheists, because they cannot affirm this loyalty oath fully, are “outsiders, not full members of the political community.”⁷³ But I also think that simply excluding “under God” from the Pledge is unsatisfactory. That does not just exclude an important rationale for religious freedom. It may also imply, or be taken to imply, that the state cannot acknowledge any no possible higher limits on its authority—an implication that many other citizens will find unacceptable as part of a loyalty oath.⁷⁴

If simply barring “under God” from the Pledge is unsatisfactory too, how can the problem be resolved? One sensible solution is that offered by Christopher Eisgruber and Lawrence Sager: a school or other government entity administering the Pledge may include “under God” if it also offers the option to say a secular alternative, such as “one Nation, *of equals*, indivisible. . . .”⁷⁵ I have proposed a different solution, a pause in the Pledge into which students could insert “under God” or some other phrase chosen by themselves or their parents.⁷⁶ But whatever solution is best for the Pledge of Allegiance problem, the permissibility of including “under God” does not entail the permissibility of official displays endorsing the Ten Commandments.

2. Acknowledging Religion in an Overall Display

For the reasons above, the tradition of voluntarism, best understood, does call for invalidating government displays that endorse the religious truth of the Ten Commandments. Nor can the government endorse the truth of the Commandments even when they are included as part of a broader display with other documents or components. The panel in *Green v. Haskell County Board of Commissioners* was correct in this holding,⁷⁷ and the Supreme Court in *McCreary County v. ACLU of Kentucky* was correct to determine that the final of the three displays, which included the Commandments among historic legal

73. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 228 n.468 (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000)).

74. Berg, *supra* note 46, at 69-71.

75. Brief of Christopher L. Eisgruber & Lawrence G. Sager as Amici Curiae Supporting Respondent Michael A. Newdow 15, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (No. 02-1624), 2004 WL 314155, at *15.

76. Berg, *supra* note 46, at 74-75.

77. *See* 568 F.3d 784, 804-07 (10th Cir. 2009).

documents, was unconstitutionally tainted by the first two displays' clear favoritism for religion.⁷⁸ Unlike Professor Irons, however, I would not adopt the presumption that all displays of the Commandments are unconstitutional.⁷⁹ The government ought to be able to include religious content as a relevant component in an overall display serving a secular goal or making a historical or other secular statement. Thus, I see no inherent bar to including the Ten Commandments in a display of sources of law generally, or even just American law.

The reason for upholding such displays is, again, that America's voluntary approach recognizes the relevance of religion to public life and does not support artificial secularization of public life.⁸⁰ It is simply empirical fact that religion has played an important role in many topics on which government speaks,⁸¹ and to forbid government to acknowledge that role would skew understanding in a secularist direction. The same is true with displays about sources of law. It is true, as Professor Irons notes, that many historians have contested the direct historical relevance of the Ten Commandments to American law.⁸² I do not quarrel with their conclusions, but I would not subject the historical role of the Commandments to microanalysis when they are displayed not alone but among a large collection of documents.

The historians' objection has been to treating the Commandments as a "seminal" or uniquely important document in the development of American law.⁸³ Even Steven Green, one of the leading historical critics, writes that

[f]ew people, if any, would dispute that the Ten Commandments—and its parallels from other ancient cultures—as well as other directives contained in the Pentateuch of the Hebrew and Christian Scriptures, inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part.⁸⁴

Including the Commandments in a broader display can reflect, however imperfectly, the strong influence of the Christian and Jewish traditions on

78. See 545 U.S. 844, at 868-70 (2005).

79. Cf. Irons, *supra* note 6, at 1, 42-43.

80. See *supra* text accompanying notes 31-38.

81. For documentation of this fact throughout American history, see Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986).

82. See Brief Amicus Curiae of Legal Historians & Law Scholars on Behalf of Respondents, *McCreary*, 545 U.S. 844 (No. 03-1693), 2005 WL 166586; see also Finkelman, *supra* note 70.

83. See Finkelman, *supra* note 70, at 1500-16.

84. Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & RELIGION 525, 525 (1999-2000).

American notions of public morality and of law. And while including a passage from the Koran along with the Commandments—as Mohammed is included with Moses among great lawgivers on the frieze of the Supreme Court courtroom⁸⁵—would broaden a display’s inclusiveness, I think that it is permissible for the display to reflect the proposition that Christianity and its Jewish roots have played a greater historical role in American law and public morality than have other faiths.

The Court’s precedents on holiday displays plainly allow government to acknowledge religion’s role in history and culture. *Lynch v. Donnelly* and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* permitted, respectively, a crèche in an overall Christmas display with secular symbols⁸⁶ and a menorah with a Christmas tree in an overall display conveying a “message of pluralism and freedom of belief during the holiday season.”⁸⁷ In both decisions, Justice O’Connor’s endorsement test, which Professor Irons commends in his paper,⁸⁸ led to permitting the religious content in the display. The endorsement test served as the basis for O’Connor’s crucial concurring opinion in *Lynch* upholding the crèche,⁸⁹ and for a majority opinion, however fractured, in *Allegheny* upholding the menorah and Christmas tree.⁹⁰ Indeed, the crèche and menorah were approved even though they are core religious symbols, tied to worship and ritual rather than to civil government’s core concerns of moral and political values. In both cases, O’Connor concluded that although the overall setting did not neutralize “the religious and indeed sectarian significance” of the crèche or menorah, it did “change[] what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.”⁹¹

Permitting a religious display on the ground that it communicates a secular message creates a real danger of eviscerating the display’s religious meaning—and producing just the kind of watered-down faith that makes establishments objectionable from the perspective of the voluntary approach to church and state. As I’ve already suggested, decisions like *Lynch* probably

85. See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part).

86. See *Lynch v. Donnelly*, 465 U.S. 668, 671-72 (1984).

87. See *Allegheny*, 492 U.S. at 635 (O’Connor, J., concurring in part and concurring in the judgment).

88. Irons, *supra* note 6, at 3, 44.

89. See *Lynch*, 465 U.S. at 690-94.

90. See *Allegheny*, 492 U.S. at 578-79.

91. *Id.* at 635 (O’Connor, J., concurring in part and concurring in the judgment) (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)).

compromise religious meaning by finding that religious symbols such as the crèche simply communicate a message of holiday cheer.⁹² What most threatens religious integrity is when courts strain to find a secular message in order to uphold a display. In *Green*, the panel avoided this danger; it concluded that the display endorsed the Ten Commandments' religious truth because, even though it was accompanied by other monuments, there was no "unified exhibit" with a "unifying, cohesive secular theme."⁹³ In my view, such a standard strikes the proper balance. Under it, government may acknowledge the historical role of religion, in a museum, a legitimately educational exhibit, or other contexts. But the government must show that the context has such secular integrity or cohesion. Under this standard, the government may not display the Commandments in a way that emphasizes their religious and moral value and then turn around and deny that religious content in order to uphold the display. That is what strips an expression of its religious content and implicates the voluntarist concern that the government is diluting the faith by supporting it.

3. Religion's Public Relevance in Other Contexts

Finally, there are other church-state issues where the government can affirm both the principles of voluntarism and the principle that religion is relevant to public life. The rationale for invalidating official religious displays is crucial because it will affect these other issues. It is not problematic to invalidate religious displays on the basis that they conflict with the fundamental principles of voluntarism in religion: special respect for choice in religious matters, the autonomy of religious life and ideas from interference or cooption by government, and equality among religions in an increasingly pluralistic society.⁹⁴ These arguments are consistent with the American tradition of voluntarism. But it is problematic if displays are invalidated on the basis that the public sphere must be secular and religion must be kept separate from it. That rationale conflicts with the premise that religion remains relevant to public life.⁹⁵ Religious autonomy is the right rationale; secularism the wrong one.

Religious autonomy and secularism produce the same results in cases about official displays (at least in many of them). But they produce differing results on other important religious-freedom issues. So I want to turn attention to those issues for a moment. At the end of his paper, Professor Irons asks some

92. See discussion *supra* Part II.A.2.

93. *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 805-06 & n.16 (10th Cir. 2009).

94. See *supra* text accompanying notes 18-27.

95. See *supra* text accompanying notes 31-38.

good questions of Kevin Theriot, the advocate for the Haskell County Ten Commandments display.⁹⁶ But in light of what I've said, I would like to ask a couple of questions of Professor Irons as well.

First, although the government should not adopt and favor religious ceremonies or symbols, shouldn't religious arguments be able to play a significant role in political debate and legislation about matters within government's jurisdiction? The voluntary tradition certainly says so. The very same antebellum religious revivals that replaced old-line established churches with growing, voluntaristic sects also gave birth to the abolitionist movement that campaigned to change laws and eliminate slavery.⁹⁷ Religious groups and arguments have played central roles in political reform movements ever since. Some proponents of a more absolutist church-state separation take that principle to mean that religious arguments may play little or no role in the passage of legislation.⁹⁸ But isn't this religious involvement instead a natural part of our political system?

Second, if the courts should protect dissenters from the special harms caused by government endorsement of religion, shouldn't they also protect dissenters from the special harms caused by government burdens on their religion? The Supreme Court held in *Employment Division v. Smith* that the Free Exercise Clause permits government to prohibit religious exercise as long as it does so by applying a "neutral law of general applicability."⁹⁹ In my view, this rule fails to recognize the special sensitivity and importance of religious choice in individuals' lives—which is one of the main premises for striking down government sponsorship of religious symbols like the Ten Commandments.

Moreover, recognizing the importance of religious matters to people entails protecting religiously motivated conduct, not only when it is private and cordoned off from others, but also when it is "public"—not in the sense that it is done by government, but rather in the sense that it occurs in and affects the broader civil society. One important implication is that religious social-service organizations should presumptively be able to follow their tenets and maintain their identities while providing assistance to others. Take, for

96. Irons, *supra* note 6, at 43.

97. See Lash, *supra* note 35, at 1124-28, 1130-31.

98. See, e.g., Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 690-702 (1993) (requiring not just that individuals and groups in political debate have and offer secular reasons for legislation, but that the secular reasons be sufficient, without religious reasons, to motivate them to seek the legislation).

99. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

example, the recent dispute in Massachusetts where Catholic Charities ceased providing adoption services because the state was mandating that it place children with same-sex couples on the same terms as opposite-sex married couples.¹⁰⁰ If we intend seriously to protect the free exercise of religion—which means extending protection to religious conduct that occurs in civil society—then Catholic Charities should have a presumptive right to follow its tenets. This right would cease to exist only upon a showing that imposing on Catholic Charities was necessary in order to ensure the availability of adoption services to same-sex couples.¹⁰¹

Protecting religious exercise in such settings reflects the American voluntary tradition. Religion remains highly relevant to social life, but its effect comes through voluntary organizations whose autonomy the government respects.

Conclusion

Symbols matter. The grounds on which courts explain their treatment of Ten Commandments displays can symbolize their approach to Religion Clause disputes in general. Official religious displays should not be invalidated on the basis that religion is a private matter and the public sphere must be secular. Displays can be invalidated in many cases on the basis of the voluntarist approach. Although religion may be highly relevant to public life, its influence should normally operate through independent, private religious institutions and through individuals who bring their values to bear on political questions—not through explicit government assertion of religious truths.

100. See Patricia Wen, *Calif. Charity Ends Full Adoptions*, BOSTON GLOBE, Aug. 3, 2006, at B2, available at 2006 WLNR 13455817.

101. There was no need for such a mandate in Massachusetts, because “[g]ay couples could still adopt through dozens of other private agencies or through the state child-welfare services department itself, which places most adoptions in the state.” Dale Carpenter, *Let Catholics Discriminate* (Mar. 31, 2006), <http://igfculturewatch.com/2006/03/31/let-catholics-discriminate/>.