The Judicial Mistreatment of Religion: Promoting a Religion-Free America

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At a winter holiday party held every year in a New Jersey elementary school, the children often exchange gifts. But when one five year-old boy started handing out candy canes, he was immediately restrained. Attached to each candy cane was a religious story relating to Christmas. Later, in the subsequent litigation, *Wigg v. Egg Harbor Board of Education*, a court upheld the school's right to restrict the boy from giving those candy canes as presents. The basis for that ruling was the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion."

In a Texas school district, a program called "Clergy in Schools" placed clerical volunteers in the district's primary and secondary schools to provide student counseling and mentoring on secular topics. But when some parents sued, the court in Oxford v. Beaumont ruled that the program violated the Establishment Clause. Another court in *Rusk v. Crestview* used the Establishment Clause to bar the distribution on school premises of flyers announcing the community activities of local churches. Elsewhere, a court held that a school choir's singing of "The Lord's Prayer" was unconstitutional. And in *Barense v. Town of Barrington*, a New Hampshire judge ruled that a town's practice of providing free snowplowing for religious organizations amounted to a state establishment of religion.

Religious liberty is the first freedom protected in the Bill of Rights, followed by free speech. Both are fundamental freedoms, and yet the courts treat the two in substantially different ways. The law, for instance, allows regulatory burdens on religious exercise that would not be tolerated in connection with speech activities. Zoning regulations can restrict the ability of churches and synagogues to accommodate the religious needs of their congregations, even though similar restrictions on the expressive activities of political or cultural groups would not be allowed. Religious speech may be curtailed if found to have an unwelcome effect on nonbelievers, even though profane or indecent speech cannot usually be restricted no matter how offensive it is to unwilling listeners. Government scholarship programs can refuse to cover a student pursuing a degree in

theology studies, even though such programs could never make such a refusal regarding a degree in radical Marxism. And religious proselytizing in public venues can be restricted in ways that raw, violent rap lyrics cannot be.

The primary reason religious expression can be so regulated is the Establishment Clause. As most high school students of American history learn, the constitutional framers intended the Establishment Clause to prevent the new federal government from setting up and enforcing an exclusive national religion, as the English had done with the Anglican Church. But contrary to this original intent, American courts in the latter half of the twentieth century began applying the Establishment Clause not to the big issue of an exclusive, state-mandated religion, but to the small issues of candy canes at school and free snowplowing for religious organizations. By employing the Establishment Clause at the fringes of religious life, where religion intersected with some government program or public venue, the courts effectively corralled religious expression into a kind of social closet. At the same time, however, those same courts were using the Equal Protection Clause to facilitate the "coming out" of various minorities, such as gender-identity and sexual-preference groups.

Wall of Separation

In the 1960s and 1970s, after nearly two centuries of the First Amendment, the Supreme Court began using the Establishment Clause as a trowel in the building of a "wall of separation" between church and state. But this wall of separation ran counter to the American historical experience. In colonies founded by people wishing to live where they could publicly declare their religious beliefs and use those beliefs to shape their society, a strict wall of separation between church and state was unimaginable. In a young nation that entrusted its educational systems to clergy and religious groups, and in which presidents designated national days of prayer, an impregnable wall of separation between religion and government would have been seen as ludicrous. And in a country whose citizens believed that a necessary ingredient to democracy were the moral values fostered by religious beliefs, a constitutional mandate that confined religion to a private sphere or pushed religion to the fringes of civil society would have been seen as self-destructive.

As a way of building this wall of separation, late twentieth century judges began reading into the First Amendment an inherent conflict between the Establishment Clause and the Free Exercise Clause, which forbids Congress from making any law infringing on the “free exercise” of religion. Courts interpreted the Establishment Clause as a brake on the Free Exercise Clause, a muffle on the public presence of religion, aimed at keeping religion from exerting too much influence on America’s civil society. It was as if the framers had intended the two clauses to cancel out each other, producing a kind of zero-sum result with regard to religion.

Not surprisingly, this conflict-oriented approach has bred litigation in every area of interaction between religion and state, leading in Mary Ann Glendon’s words to “a constant battle over the degree and extent” of the religious presence in public life. Moreover, this litigation has produced a legacy of inconsistency, resulting in large part from the fact that the courts were taking a hostile view of religion that was sharply con-

tradictory to the nation's history.

This inconsistent legacy, according to legal scholar Mark Chopko, has "had the profound effect of leading to results which cannot be reconciled with either history or tradition." For instance, although the court had previously held in Board of Education v. Allen that states could lend textbooks to religious schools, in Lemon v. Kurtzman it ruled that states could not supplement the salaries of religious school teachers who taught the same subjects offered in public schools. Though the court in Wolman v. Walter has allowed book loans from public to parochial schools, it has prohibited states from providing to religious schools various instructional materials, such as maps and lab equipment. Though permitting states to provide busing for students to and from religious schools, the court has forbidden states from paying for the busing costs of field trips for those same students. In one case, the court struck down the state's provision of remedial instruction and guidance counseling to parochial school students, only to later uphold a state's provision of speech and hearing services to such students. Although some courts have permitted states to furnish religious schools with standardized tests and scoring services, others have prohibited the state from helping finance the administration of state-required exams in religious schools. Nativity scenes at city hall are constitutional if surrounded by reindeer and clowns, but not if standing alone. And within the span of one year, a student-led prayer at football games was ruled in *Sante Fe School District v. Doe* to be an illegal establishment of religion, but a student-delivered religious message at graduation ceremonies was upheld in *Adler v. Duval School Board* as constitutional.

Public Professions

Contrary to the claims of the separationists, there has been a long national experience of intermingling religion and politics. Public buildings all across America were inscribed at the time of their construction with religious references and phrases. During the eighteenth century and well into the nineteenth century, public funds supported religious schools, hospitals, and even churches. Public expression of religious beliefs was as common as politicians' speeches. George Washington asserted that "it is impossible to rightly govern the world without God and the Bible." Noah Webster, the educator and lexicographer, announced that "the moral principles and precepts contained in the scriptures form the basis of all our civil constitutions and laws." Abraham Lincoln proclaimed that "it is the duty of nations, as well as of men, to own their dependence upon the overruling power of God." And President Theodore Roosevelt warned that a churchless community "is a community on the rapid downgrade."

Responding to widespread criticism of its wall of separation metaphor, the Supreme Court has tried to move away from a rigid rule of separationism by asking in each case whether an observer would perceive a particular government action as endorsing religion. But this endorsement test only burrowed the Court deeper into minutia. Outcomes of constitutional challenges now depended on the psychological perceptions of individuals. Under this approach, even a public school choir's rehearsal of a religious song was ruled to be an unconstitutional establishment of religion. Even a child's distri-

bution of religious messages attached to candy canes was seen to be a state endorsement of religion.

Double-barrel Flyswatter

The confusing and often incomprehensible nature of the Court's decisions stem in large part from the fact that the Establishment Clause has been thrust into the center of a wider cultural conflict over the role of religion in contemporary society. Within this conflict, the Establishment Clause has been employed to try to reverse the course of American history and help transform the nation's culture into a more secular one. But this use of the Establishment Clause was possible only because of previous decisions by the Supreme Court, in which the Court had used a shotgun to kill a fly.

In drafting the First Amendment, the framers intended to prohibit what in their experience was one of the most basic causes of religious coercion—a central government's enforcement of a state-dictated religion. The monopoly status and abuses of the Church of England constituted the primary reason for the Pilgrims' settlement in the Massachusetts Bay Colony. A century and a half later, the Establishment Clause was drafted to prevent a Church of England scenario from occurring in America. But throughout the centuries following ratification of the First Amendment, this big harm—a national imposition of a governmentally controlled religion—has never come close to taking place. Instead, the Establishment Clause has been invoked in cases involving very small issues of marginal church-state connections. Many of those issues were more appropriately governed by the Free Exercise Clause, but the Court nonetheless applied the Establishment Clause, just because the government was seen to be giving some small benefit or concession to some religious group. The Court was so concerned with preventing any temporary governmental assistance to religion that it completely ignored the larger concern of the First Amendment—the preservation of religious liberty. It became so focused on using the Establishment Clause to build a wall of separation between church and state that it lost sight of the actual freedom being accorded to religious expression.

The Free Exercise Clause

In a case illustrating the Court's improper use of the Establishment Clause, the Supreme Court in Lee v. Weisman held as unconstitutional the inclusion in a public high school graduation ceremony of a prayer given by a local rabbi. Since the prayer was initiated by the school, the Court concluded that it constituted a violation of the Establishment Clause. But this case should have been decided under the Free Exercise Clause, since the government, according to the Court, was coercing free exercise rights by compelling the attendees at a graduation ceremony to essentially participate in a religious ceremony, even if that ceremony lasted only seconds. There was nothing in the school's behavior that amounted to an establishment of religion, and yet the Court extended a constitutional provision aimed at preventing an American equivalent of the Church of England to a brief religious message uttered during a public ceremony. Later,

in Roberts v. Madigan, a federal appeals court held that the Establishment Clause barred a public school teacher from laying a Bible on his desk during the school day and from keeping two Christian religious books on his classroom shelves. And in Bishop v. Aronov, a professor at a public university was sanctioned for making various religious remarks to his class and for organizing an after-class meeting on religious topics. But all these cases, because coercion was allegedly at issue, should have fallen under the jurisdiction of the Free Exercise Clause, not the Establishment Clause.

By employing the Establishment Clause in cases where the Free Exercise Clause should have applied, the Court vastly overextended the reach of the former. It used a constitutional command focused on preserving the institutional autonomy of religious organizations to govern a single activity involving individual freedom. The Court's remedy was overkill. It used a shotgun to kill a fly, setting a course in which the Establishment Clause would be applied to every minute instance of religious activity occurring on public property. The result has been a jurisprudence of minutia.

Jurisprudence of Minutia

Contrary to the eighteenth century view of establishment as government-supported religion whose articles of faith are mandated by the state, the modern notion of establishment involves any point at which religion and state intersect. In Albuquerque, New Mexico, administrators of a city-owned senior center cited the Establishment Clause when prohibiting a church from showing a film on the Christian faith. In New Jersey, school officials prevented a student from reading to the class his favorite story, which happened to come from the Bible. And in Pennsylvania, a teacher's assistant filed suit after she was suspended for failing to remove a cross she wore on a necklace. The lawsuit revolved around the claim that the perceived religious actions of any individual state employee, no matter what position of authority the individual may or may not occupy, can rise to the level of an official state establishment of religion.

Of course, none of today's little establishments are anything like the creation of a national church, as warned of in 1947 by Justice Hugo Black, in one of the first Establishment Clause cases to be decided by the Supreme Court. Most involve governmental actions that are substantially smaller in scope, such as erecting holiday displays, transporting parochial students to extracurricular events, and asking students to engage in a moment of silence for meditation, all of which the Court has found in one form or another to be an impermissible establishment of religion. Yet because of this jurisprudence of minutia, the Establishment Clause has experienced a kind of creeping evolution. It has crept from one small issue to another, building a wall of separation between church and state, one brick at a time. If it was applied in a comprehensive way, laying out in advance the architectural plans for the entire wall, the courts might have been forced to adopt a theory of the Establishment Clause that addressed the real underlying concern of the framers.

Not What They Had in Mind

The Establishment Clause is not a protection from religion, nor is it a protection given to a secular society. Rather, like the Free Exercise Clause, it is a constitutional guaranty of religious freedom. Whereas the Free Exercise Clause protects the individual autonomy of religious believers, the Establishment Clause protects the institutional autonomy of religious organizations. Whereas the Free Exercise Clause insulates individuals from religious coercion by the state, the Establishment Clause protects religious institutions from governmental intrusion and discrimination. During the eighteenth century, an establishment of religion was seen to be a governmental preference for one or more specific religious sects. On the other hand, government support of all religion, as in nondiscriminatory aid to all religious schools, was unquestionably accepted.

Because the Establishment Clause has evolved into a jurisprudence of minutia, it has slowly become a tool in the secularization of American culture. Consequently, the Establishment Clause has been used to try to halt the singing of Christmas carols like "Silent Night" and "Away in a Manger" in public buildings, to deny the tax-exempt status of all churches (but not for various occult groups), to remove the words "In God We Trust" from the national currency, and even to prohibit census questions about religious affiliation.

Marginalizing Religion

It is hardly surprising that the increased litigation of religion issues has corresponded with the rise of social movements opposing traditional religious values. Religion seems to have become the counterweight to the expanded freedoms brought on by the feminist, sexual liberation, and gay rights movements, which have often ended up focusing on religion as the embodiment of all that they oppose. But the judicial acquiescence in the marginalization of religion contradicts the purpose of the First Amendment, which aims to protect fundamental liberties from whatever political or cultural forces might oppose them. During the Vietnam War, for instance, the Court upheld the speech rights of protestors to voice their profanity-laced anti-war messages to unwilling audiences. Courts have also upheld the rights of Nazi groups to march in Jewish neighborhoods, the rights of artists to display in public museums art that denigrates sacred beliefs, and the rights of radio shock-jocks like Howard Stern to broadcast their sexually explicit dialogues. Religious expression, however, has not been so immune from oppositional cultural currents.

As the reach of the Establishment Clause broadened, with judges taking an expansive view of what constitutes an establishment, the case law began reflecting certain political attitudes toward religion more than it did historical precedent or constitutional principles. The cultural criticisms of religion became increasingly echoed by judges. In the Cleveland school voucher case, for instance, justices John Paul Stevens and Stephen Breyer argued that public aid to religion would foster political discord and tear the social fabric underlying American democracy. Drawing on experiences from the Balkans, Northern Ireland, and the Middle East, Justice Stevens wrote: "Whenever we

remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."

Surprisingly, this view exists amidst a heightened multicultural sensitivity in America. Differences in ethnic, racial, and cultural identities are being celebrated and encouraged. Tolerance for divergent and opposing attitudes and lifestyles is being valued far more than assimilation of those differences into one uniform culture. But not so with religion. Instead, it is seen as a divisive force, with the courts serving as cultural supervisors, quelling any conflicts that might arise from the religious practices of a diverse people.

The Only Acceptable Discrimination

Throughout the years of a jurisprudence of minutia, the purpose of the Establishment Clause has been diverted into something the framers feared—the promotion of a religion-free America. Yet the fact that the religion clauses are even included in the First Amendment proves that, to the framers, religion was something special, deserving of extra protection—a protection that was to be constant, irrespective of the changing winds of cultural and political attitudes.

During an era in which gays are seeking the ability to get married under state law, and transgendered individuals are seeking the right to have employers accommodate their change of gender, and artists like Janet Jackson are pushing ever further the bounds of public decency, it seems odd that the Establishment Clause is being interpreted in ways that keep religious groups in a cultural closet. Indeed, religious discrimination is the only type of discrimination permitted by current constitutional doctrines. Though tolerance has become the most extolled of public virtues, judges still wrestle with how much of a religious presence American civil society should have to tolerate.

A tendency exists to think that all the bizarre cases and claims are behind us, that the extreme and unintended theories are all part of some reactionary past. But without a clearer understanding of the Establishment Clause, those extremist positions will continue to exert themselves. In 1994, historian Leonard Levy, himself a separationist, admitted that certain public references to God or religion are an accepted part of the nation's civic life. One such reference is contained in the Pledge of Allegiance. Not even the most ardent separationist would challenge such a longstanding reference, Levy argued. And yet, just ten years later, such a challenge was heard by the U.S. Supreme Court. ■