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How to Be Religiously Neutral

Government may not endorse the majority's beliefs, but should not draw lines with exactitude.

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As readers of this newspaper surely know by now, the Supreme Court split the difference last week in two cases on government displays of the Ten Commandments.

Five justices, in an opinion by Justice David Souter in *McCreary County v. American Civil Liberties Union,* concluded that McCreary County, Ky., had posted the Commandments on the wall of the local courthouse for the purpose of promoting their religious content. That display had to go.

But Justice Stephen Breyer switched sides in *Van Orden v. Perry*, concluding that Texas had displayed the Commandments on the state Capitol grounds for a purpose, and with an effect, that was predominantly secular. So the Texas monument was allowed to stay.

The split decision, the emphasis on government purpose in *McCreary*, and Breyer's emphasis on the specific facts of *Van Orden,* mean that we will be litigating these cases one at a time for a very long time. Both sides in the culture wars will trumpet what they won and complain bitterly about what they lost.

DON'T TELL

On the specific issue—passive displays of the Ten Commandments or other familiar religious sentiments—the supporters of these displays won considerably more than they lost.

In *Van Orden,* Breyer's concurring opinion gave considerable weight to the fact that the Texas monument has been in place for 40 years. In effect, he created a rebuttable presumption that displays that have been in place for a long time can remain where they are. That grandfather clause covers a lot of statues, plaques, and religious quotations.

With respect to new religious displays, the lesson to politicians is never to mention the religious reasons that are, in fact, the only source of pressure to create such displays; to talk blandly of the display's alleged historical, cultural, or legal significance; to place some secular text or object nearby, whether or not it has any real relation to the religious display; and, whether plausible or not, to vigorously claim a predominantly secular purpose and effect.

Of course, there are occasions where a religious message is a legitimate part of some larger, secular message—in neutral treatments of comparative religion, the history of religion, or the role of religion in history, politics, or other fields of secular interest. But plaintiffs rarely sue over those kinds of government references to faith. The cases that get litigated present the bare display of a sacred text or symbol, as in the Texas case, or the display of a sacred text or symbol accompanied by conclusory, exaggerated, or pretextual claims of its secular significance, as in the Kentucky case. It remains to be seen whether Breyer will be as willing to accept the pretense of secular purpose and effect when the display is not also protected by his presumptive grandfather clause.

Despite the skeptical tone of these comments, we should recognize that in such cases it is inevitable that the Court will draw some essentially arbitrary line, distinguishing modest differences of degree. The Court has long said that government cannot endorse religious views, but that principle cannot be enforced absolutely. The Court is not, for example, going to rename cities in the Southwest—not even Corpus Christi or Santa Fe ("body of Christ" and "holy faith," respectively)—and it is not going to ban Thanksgiving proclamations or take "In God We Trust" off the coins. Both practically and politically, the Court must have a de minimis exception to its ban on government endorsement of religion.

The Court would do better to say that some endorsements of religion don't do enough harm to justify the costs of striking them down, rather than to implausibly deny that they are endorsements at all. But forthrightly or not, the Court must draw fuzzy and unprincipled lines.

The other side, if it were winning more of the cases, would have the same problem. Justice Antonin Scalia wrote that government can endorse religious views but it cannot proselytize. This vague distinction can only be a difference of degree. Scalia would let government display the Ten Commandments and Nativity scenes and lead prayers at graduations and football games. But even so, I think he would not let government send out daily e-mails or buy prime-time TV commercials urging us to dedicate our lives to Christ. He too, if he got his way, would be forced to draw fuzzy and unprincipled lines based on questions of degree. So we should not be too hard on Breyer.

NOT REALLY NEUTRAL

Subject to these inevitable limits of degree, the underlying issue is

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whether government must attempt to remain neutral on all questions of religious belief, or whether government may promote its preferred religious views so long as it does not impose legal penalties on religious dissenters.

On this question, the Supreme Court reaffirmed its deep-seated 6-3 split. That's 6-3, not 5-4, because Justice Anthony Kennedy does not share the more extreme views of Chief Justice William Rehnquist, Justice Clarence Thomas, or Scalia. The debate over fundamentals appeared mostly in Justice John Paul Stevens' dissent in *Van Orden* and Scalia's dissent in *McCreary,* and Kennedy refused to join the most ambitious part of the Scalia dissent (Part I).

The Scalia dissent said that government need not be neutral between religion and nonbelief—and that in its speech, government need not even be neutral between religions. Scalia wrote that government can endorse preferred religions.

This latter position has always been implicit in the support for government-sponsored prayers and religious displays. It is, as Scalia has now admitted, impossible for government to make statements endorsing religion in general without including some specific content that inevitably endorses some religious views and excludes others. But no justice had ever before argued this position explicitly. At least formally, the justices had found common ground on the idea that government must be neutral between religions.

The Ten Commandments cases forced the supporters of government-sponsored religion to abandon neutrality among religions. The Ten Commandments are part of the sacred text of a specific religion. "Thou shalt have no other gods before me" is unambiguously a claim of exclusivity by a particular God (or a particular tradition's conception of God).

But Scalia was still apparently unwilling to say that government can endorse Christianity. Conceding only as much as the facts required, Scalia said that government can endorse monotheism and that the Ten Commandments are sacred to each of the three great monotheistic religions—Christianity, Judaism, and Islam.

Government can endorse those three, to the exclusion of Hindus (polytheistic, at least at the surface), Buddhists (nontheistic), and, of course, nonbelievers. We must also infer that government can endorse the three favored monotheistic religions to the exclusion of other monotheistic religions, such as those of the Bahai, Sikhs, and Zoroastrians.

Thomas went further in his *Van Orden* concurrence. He treated government display of a cross as an easy case, so he believes that government can endorse Christianity, at least in passive displays. Probably Scalia does too, despite what he wrote in *McCreary County*. In 1989, Scalia voted to allow government to display a Nativity scene, with no pretense that it was neutralized by secular symbols of Christmas.

The justices debating whether the Constitution requires government to be neutral on religious questions fought with familiar materials from the founding generation. Washington issued Thanksgiving Proclamations. Jefferson didn't. Madison did, but only in wartime and he felt guilty about it. The moves and countermoves are all familiar.

Beyond the founders, one side argued judicial doctrine, and the other side argued political tradition. Neither side mentioned the elephant that should have been in the room—the 19th-century school wars.

SCHOOL SPEECH

What Souter in *McCreary County* and Stevens in *Van Orden* should have said is that the original understanding of the establishment clause required government to stay out of religious matters that were controversial. The principal controversy in the late 18th century was whether to finance churches with tax dollars. Because the nation was overwhelmingly Protestant, government speech endorsing basic tenets of Protestantism aroused little controversy.

But with the large Catholic immigration in the 19th century, government religious speech became controversial, first and most especially in the public schools. Catholics objected vehemently to Protestant religious exercises in the schools—to reading the King James translation ("the Protestant Bible") and to reading it "without note or comment." Protestants claimed that restricting comment kept the teachers out of denominational controversies; Catholics claimed it let the children misinterpret for themselves without the guidance of church tradition.

At the peak of the Protestant Bible controversy, mobs burned churches and left people dead in the streets. Under conditions of greater religious pluralism, familiar government speech about matters of faith turned out to be controversial indeed.

Religious diversity has increased steadily ever since, both within and beyond Christianity. The range of views on religious questions, and thus the range of disagreement when government endorses one view, grows ever greater. The *principle* of the Founders' understanding of the establishment clause—keep government out of religious controversies—now applies not just to financing churches and clergy with taxpayers' money, but also to government endorsement of religious teachings. Just as the increasing numbers of American Catholics meant that Protestantism was no longer a neutral position, so the rising numbers of non-Christian Americans (and even the deepening left-right split within Christianity) mean that endorsing Christianity is taking sides.

Of course, Scalia, Rehnquist, and Thomas would find reasons to reject this argument. They might say that the lessons of the 19th-century school wars apply only to the public schools or, less plausibly in my view, that nothing that happens after ratification can affect constitutional meaning or, as Thomas hints, that the Protestants won those school wars by sheer force of numbers and that is our constitutional tradition.

But at least this would be the right argument to have. The 19th-century school wars are the formative event in the debate over government speech about religion. The emphasis on originalism and the sense on both sides that the Founders left them lots of ammunition have diverted attention from an episode that speaks much more directly to the issue.

In a religiously diverse society, for government to endorse a local majority's faith is to inappropriately take sides in religious controversies. On this, six justices (including the departing Sandra Day O'Connor) have agreed. But enforcement can never approach the absolute. Passive displays of the Ten Commandments are now on the permitted side of the line—but only if government maintains a sufficient fig leaf of secular motivation.

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