

## INDETERMINACY AND THE ESTABLISHMENT CLAUSE

*Frederick Mark Gedicks\**

Since Professor Greenawalt criticizes my own approach to the religion clauses (pp. 434–39),<sup>1</sup> I will focus my comments there. Professor Greenawalt fairly summarizes my position as follows:

Professor Gedicks's main thesis is that the Supreme Court's dominant "discourse" has been "secular" and "individualist," but that many of its decisions can be adequately explained only by an older "religious communitarian" discourse that allows governments to exercise their power to encourage people to accept the foundational morality of conservative religion. Gedicks concludes that were the Supreme Court to make the doctrinal changes that would render the law of the religion clauses "a coherent expression of secular individualism," that would be highly unpopular. And, at this stage in the country's history, "[r]eligious communitarian discourse is not a viable alternative to secular individualism." The Court cannot develop a compromise position because the two discourses are "mutually exclusive." (p. 435) (alteration in original) (footnotes omitted).<sup>2</sup>

Conceding that this is an accurate summation of the conceptual incoherence of establishment clause jurisprudence, Greenawalt nevertheless argues that some viable discourse might yet emerge if courts were more transparent about how they weigh conflicting establishment clause values (p. 436). This seems unlikely. There's little evidence that the pockets of coherence that periodically appear in establishment clause doctrine are anything more than way stations on a road to nowhere.

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1. Discussing FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* (1995).

2. Quoting *id.* at 11, 121, 123.

Take, for example, “neutrality” analysis of financial aid to religion under the establishment clause. So long as financial aid to religion is disbursed directly to individuals who have qualified on the basis of religiously neutral criteria, such aid does not violate the establishment clause.<sup>3</sup> Indeed, it was widely thought that denying such aid under these circumstances amounted to impermissible discrimination against religion.

Enter *Locke v. Davey*,<sup>4</sup> which reviewed the constitutionality of a state-funded scholarship program that uses religiously neutral criteria to fund the college education of individual college students, unless they’re studying for the ministry. It’s hard to see this refusal as anything but a religious classification deployed precisely to deny a state financial benefit to students whose study, we may safely assume, is a “religious” activity. Nevertheless, the Court found that this denial was permitted by the “play in the joints” of the superstructure that connects the establishment clause with the free exercise clause.<sup>5</sup> Ironically, this same looseness permits the Court to lean in the opposite direction, when it is so inclined, as when it rejected an establishment clause challenge to prayers offered by denominational ministers at the opening of a state legislative session.<sup>6</sup> Like the joints of an old rocking chair, these connections are so loose that they leave room for state action that purposefully advantages or disadvantages particular religious activities without somehow violating the antidiscrimination principles of either religion clause.

At present, the religious antidiscrimination principle under the establishment clause is that a state cannot advantage or disadvantage religious practice by the use of religious classifications . . . except when it can. To sum up the financial aid cases, states may not depart from religious neutrality by employing religious classifications that deny state benefits to believers, except when the benefit is not too big and disallowing it would be historically incongruous or politically controversial, even though the state may grant a similar benefit, if disallowing this other benefit would likewise be historically incongruous and politically controversial, because a core historical purpose of the establish-

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3. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

4. 540 U.S. 712 (2004).

5. *Id.* at 718–19.

6. *Marsh v. Chambers*, 463 U.S. 783 (1983).

ment clause is to prevent state support of ministers, except sometimes.<sup>7</sup> God bless America.

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Which brings us to the other major doctrinal vein of the establishment clause, cases involving government adoption of religious symbols or practices. The rule here initially required that the states be neutral or even-handed between “religion” and “non-religion,”<sup>8</sup> which logically meant that the states could not use any symbols or practices, or must use all symbols and practices. The former is impossible, while the latter is, well, *really* impossible. Or maybe it’s the other way around.

The Court slipped this trap by assuming that sometimes religious symbols used by the states mean nothing. Happily, the states are not required to be neutral among religiously meaningless symbols. Less happily, the same symbol can be both meaningful and meaningless. How to tell the difference? (Paging Justice O’Connor.)

The Court has answered this question in a line of cases that starts with Christmas Nativity scenes, and rests for the moment with monuments of—or is it to?—the Ten Commandments, while waiting for the arrival of the Pledge of Allegiance. The rule that has emerged requires a suspension of common sense, rather like rational basis review: If one can construct some imaginable basis for arguing that a religious symbol is not really religious, then its deployment by the state doesn’t violate the establishment clause, even when it’s obvious that the symbol in fact retains substantial religious content. Thus has a Nativity scene commemorating the virgin birth of the Christian savior been reduced to the commercialism of the candy canes that surrounded it,<sup>9</sup> a minor Jewish holiday inflated to the theological significance of the most important Christian holiday,<sup>10</sup> the Ten Commandments incorporated into the “our nation’s heritage,”<sup>11</sup> and, in a preview of the Pledge, “under God” transformed into an histori-

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7. A new AALS “best-practices” gloss on academic freedom prohibits law professors who defend this rule from criticizing Governor Palin’s syntax. Ha, just kidding. Sort of.

8. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

9. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

10. *County of Allegheny*, 492 U.S. at 617 (plurality opinion); *id.* at 633 (O’Connor, J., concurring in part and concurring in the judgment).

11. *Van Orden v. Perry*, 545 U.S. 677, 683, 687, 688 (2005).

cal marker of more pious days gone by.<sup>12</sup> As statements of cultural fact these holdings are all, shall we say, slightly off the mark.<sup>13</sup>

To sum up, the Court has clearly stated that the states may not adopt religious symbols or practices, except in contexts where one might plausibly imagine that the symbols have lost their religious content, even when it's apparent that the symbols remain religiously potent, which would seem to make the purportedly plausible loss of symbolic religious content implausible, but never mind.

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Professor Greenawalt eventually retreats to the familiar last refuge of doctrinal coherentists, “hard cases make bad law,” suggesting that cases requiring difficult line-drawing at the margin of a rule should not be taken to undermine the essential stability of the paradigm situations governed by the rule’s core meaning (pp. 437–38). The peculiarities of the Court’s financial aid and religious symbol and practice cases, however, do not stem from unusual fact situations whose problematic resolution at the margins has left undisturbed some stable central meaning. In both lines of cases, the inconsistencies go directly to those supposedly stable cores. In *Locke*, for example, there is no serious question that the ministerial scholarship applicant was otherwise fully qualified to receive the scholarship, that a religious classification was used to deny him the scholarship, and that the applicant thus suffered targeted religious discrimination by the state. These considerations go directly to what was thought to be the core meaning of both religion clauses—that states may not purposefully disadvantage citizens on the basis of their religious beliefs or practices. In the religious symbol and practice cases, one can imagine situations in which a once-religious symbol truly retains no appreciable religious significance—a Christmas tree might be an apt example. But there remains no serious question that Christian Nativity scenes and monuments to quotations from the most theologically conservative Protestant Bible are authentically *religious* symbols, regardless of who or what may be loitering in the vicinity. The only way for the Court to avoid

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12. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rhenquist, C.J., concurring in the judgment).

13. See Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 289–304 (2007) (demonstrating the sectarian Christian meanings projected by monuments to the Ten Commandments and other purportedly inclusive religious symbols).

the core establishment clause rule that government may not endorse or prefer one religion above another is to adopt the fiction that these religious symbols are not religious.

Sense can be made of both lines of cases, however, by looking at them as the interplay of a "religious communitarian" discourse that understands the United States as a (theologically conservative) Christian nation that merely tolerates religious difference, and a secular individualist discourse that understands religious belief as just another taste or preference about which the state should express no opinion.<sup>14</sup> Religious communitarianism became the dominant discourse in the United States in the early 19th century, and it has remained culturally potent even as its conceptual foundations have been eroded by decades of secular individualist religion clause holdings. Religious communitarianism accounts for both the Court's move to neutrality in the financial aid cases, and its refusal to invalidate state appropriation of obvious religious symbols despite the supposed constitutional rule that bans state endorsements of religion. Secular individualism was present at the founding and also retains its potency, which accounts for the Court's visceral invalidation of what should have been a paradigm application of religious neutrality in *Locke*, and its invalidations of state-adopted religious symbols when a rational basis for religious meaninglessness cannot be imagined.

Professor Greenawalt accurately notes my skepticism about the determinacy of language in general, and legal reasoning in particular, labeling this a dramatic overstatement (p. 437).<sup>15</sup> Whether that's an overstatement is an argument for another day. What is clear today is the apparent stability at the surface of establishment clause doctrine belies the indeterminacy that's lurking just beneath, waiting for the case that upsets everything. *Locke* and *Van Orden* functioned in precisely this manner, unexpectedly decentering apparently stable doctrinal resolutions. On this score, the safer bet is that incoherence in establishment clause doctrine is the rule rather than its exception.

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14. See GEDICKS, *supra* note 1.

15. Quoting GEDICKS, *supra* note 1, at 45.