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Introduction

Brett G. Scharffs

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Proceedings of the 2004 AALS Annual Meeting
Section on Law and Religion

Jane Rutherford, DePaul University, Section Chair
Brett G. Scharffs, Brigham Young University, Program Chair

One Nation Under God?
Unity, Diversity, and Neutrality Under the
Religion Clauses

Moderator: Brett G. Scharffs, J. Reuben Clark Law School,
Brigham Young University

Speakers: Thomas C. Berg, University of St. Thomas School of
Law (Minnesota), *The Pledge of Allegiance and the
Limited State* (Professor Berg's presentation was based
in large part upon his article, *The Pledge of Allegiance
and the Limited State*, 8 TEX. REV. L. & POL. 41
(2003), which is not reproduced here.)

Frederick Mark Gedicks, J. Reuben Clark Law School,
Brigham Young University, *The Establishment Clause
Gag Reflex*

Steven G. Gey, Florida State University College of
Law, *Unity of the Graveyard and the Attack on
Constitutional Secularism*

Frank S. Ravitch, Michigan State University College of
Law, *The Supreme Court's Rhetorical Hostility: What Is
"Hostile" to Religion Under the Establishment Clause?*

Introduction

By Brett G. Scharffs*

It is my pleasure to welcome you to the American Association of Law Schools' 2004 Law and Religion Section Meeting and to thank our distinguished panel for being with us to address the topic, "One Nation Under God? Unity, Diversity, and Neutrality Under the Religion Clauses." We meet in interesting times, when questions about the proper place of religion in public life and public support for religious life are matters of deep and spirited national concern. The questions we address today are not esoteric matters of interest only to specialists, although our panelists bring a depth, care, and subtlety of thinking to these issues that is often lacking from the heated political and journalistic discourse that has been notable mostly for its volume, in the many senses of that word.

When the Ninth Circuit held in *Newdow v. United States Congress*¹ that California's policy of requiring the recitation of the Pledge of Allegiance in public school classrooms was an unconstitutional establishment of religion due to the Pledge's inclusion of the words "under God,"² the political reaction was swift and negative. Lawmakers on both sides of the aisle condemned the ruling as "ridiculous," "nuts," and "stupid,"³ and, in response, both houses of Congress passed resolutions by overwhelming margins in

* Professor of Law, J. Reuben Clark Law School, Brigham Young University; B.S.B.A., M.A., Georgetown University; B.Phil, Oxford University; J.D., Yale Law School. I would like to thank Tom Berg, Fred Gedicks, Steve Gey, and Frank Ravitch for their thoughtful and provocative contributions to the Law and Religion Section Meeting in Atlanta, Georgia, on January 3, 2004. I would also like to thank the editors of the *BYU Law Review* for publishing these proceedings. Professor Thomas C. Berg's presentation was based in large part upon his article, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003), which is not reproduced here.

1. 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

2. *Id.* at 607-12.

3. Steven G. Gey, "Under God," *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1866 (2003) (citations omitted) (quoting the statements of President Bush, Senate Majority Leader Tom Daschle, and Senator Byrd). For a summary of the political firestorm, see *id.* at 1866-68 & nn.2-5.

support of the Pledge.⁴ Upon reflection, however, many commentators weighed in with the view that the Ninth Circuit's analysis represented a faithful application of what can only be described as the Supreme Court's confusing and chaotic doctrine governing this area of the law.⁵ When the case went before the Supreme Court, dozens of amici lined up on each side of the issue.⁶ (Since the Section meeting in January 2004, the Supreme Court held that Michael Newdow, as a noncustodial parent, did not have standing in the case.⁷ The immediate effect of this holding was a reversal of the Ninth Circuit, but the outcome was widely viewed as a postponement of the Pledge issue.)⁸

While the Pledge case set off political shock waves, it was not the only recent case involving religion in public life to touch raw nerves. In the twelve months since last we met, the case reporters and headlines have been filled with controversies involving the Free Exercise Clause and the Establishment Clause. Even a brief and partial recitation of the issues and cases during the year 2003 makes clear that a deep and wide division exists in our country on matters involving public support of religion, the proper relationship of church and state, and the acceptable limits of religious expression in the public square.

4. *See id.* at 1867–68 nn.6–7.

5. *See, e.g., id.* at 1870, 1880–84; Linda P. McKenzie, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379 (2004). McKenzie describes the confusion of Supreme Court Establishment Clause doctrines:

The current Pledge of Allegiance predicament is the direct result of the U.S. Supreme Court's failure to provide adequate direction to the lower courts for determining whether a challenged government action violates the Establishment Clause. In fact, the Court itself has applied no less than three different tests to such challenges. The choice of which test to apply is further complicated by the fact that the Court continues to develop new tests without specifically overruling any of its prior Establishment Clause doctrines.

Id. at 383–84 (footnotes omitted).

6. *See* Brett G. Scharffs, *Is the Pledge of Allegiance an Unconstitutional Establishment of Religion?*, PREVIEW U.S. SUP. CT. CAS., Mar. 15, 2004, at 304, 310–11 (listing amici).

7. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2310–11 (2004).

8. *See, e.g.,* Joyce Howard Price, *Justices Refuse to Reopen Pledge Case*, WASH. TIMES, Aug. 24, 2004, at A07 (commenting that people both for and against the constitutionality of the Pledge as it exists were disappointed that the Supreme Court struck down the Ninth Circuit's ruling "on a technicality," leaving open the opportunity for other parents to pursue a similar case in the future).

For example:

- In Alabama, attorneys sued Chief Justice Roy Moore of the Alabama Supreme Court, alleging that he violated the Establishment Clause by placing a large stone monument engraved with the Ten Commandments in the Alabama State Judicial Building. The Eleventh Circuit Court of Appeals upheld a federal district court judge's conclusion that the display violated the Establishment Clause.⁹ A showdown over the rule of law ensued when Chief Justice Moore refused to remove the display, and an Alabama judicial ethics panel eventually removed him from office.¹⁰ Demonstrators, including one dressed as Moses carrying cardboard tablets, protested outside the state court building in support of Moore,¹¹ but the United States Supreme Court denied certiorari in the case.¹²
- In contrast, a Kentucky federal district court, the Fifth Circuit in a Texas case, and the Third Circuit in a Pennsylvania case each held that the display of the Ten Commandments in public buildings does not violate the Establishment Clause.¹³

9. *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003), *cert. denied*, *Moore v. Glassroth*, 124 S. Ct. 497 (2003). In a related case, *McGinley v. Houston*, 282 F. Supp. 2d 1304 (M.D. Ala. 2003), a federal district court held that the associate justices of the Alabama Supreme Court did not violate the Establishment Clause and unconstitutionally establish a religion of "nontheistic beliefs" by removing the monument depicting the Ten Commandments from the rotunda of the Alabama State Judicial Building in order to comply with a federal court injunction. For a discussion of the factual and legal issues in the Alabama Ten Commandments case, see Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 *BYU L. REV.* 535.

10. *See Alabama Chief Justice Removed from Office*, at <http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/index.html> (Nov. 14, 2003).

11. *See Supreme Court Rejects Ten Commandments Monument Appeal: Decision Lets Stand Alabama Decision to Remove Statue*, at <http://www.cnn.com/2003/LAW/11/03/scotus.tencommandments.ap/index.html> (Nov. 3, 2003).

12. *Moore v. Glassroth*, 124 S. Ct. 497 (2003).

13. *See* *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (reversing a district court holding that an eighty-two-year-old Ten Commandments plaque displayed on the façade of a county courthouse violated the Establishment Clause); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 2004 LEXIS 6691 (Oct. 12, 2004) (holding that a Ten Commandments monument on the grounds of the state capitol does not violate the First Amendment); *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003) (holding that the display of the Ten Commandments in a county courthouse does not violate the Establishment Clause).

- Other federal courts did find Establishment Clause violations in cases involving displays of the Ten Commandments in public places. In a case from Wisconsin,¹⁴ the city of La Crosse sold a small parcel of land containing a display of the Ten Commandments to a fraternal organization, built a fence around the monument, and posted a sign disclaiming endorsement of a religious message. Nevertheless, a federal district court judge held that the city had violated the Establishment Clause and compelled the resale of the land to the city and the removal of the monument.¹⁵
- Controversy also erupted when the National Park Service included in its Grand Canyon bookstore a book defending the creationist view that the Grand Canyon was formed as a result of the great flood described in the book of Genesis and is thus only a few thousand years old.¹⁶ Critics complained that “the book is the latest example that the National Park Service has caved to pressure from conservative and fundamentalist Christian groups, accommodating their requests to post or alter materials.”¹⁷ This controversy came on the heels of the National Park Service’s removing (after receiving complaints from civil libertarians) and then returning (while officials took a second look at the issue) public displays quoting the Bible, which a religious group placed at scenic overlooks of the South Rim of the Grand Canyon over thirty years ago.¹⁸ In that instance, the issue was turned over to the Justice Department to determine whether

14. *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003).

15. *Id.*; see also *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 2004 LEXIS 6693 (Oct. 12, 2004) (concluding that predominant purpose of Ten Commandments displays in county schools and courthouses was religious); *Chambers v. City of Frederick*, 292 F. Supp. 2d 766 (D. Md. 2003) (denying defendants’ motion to dismiss a suit against a city, mayor, and fraternal organization, alleging the violation of the Establishment Clause when the city sold to the fraternal organization a city park that contained a monument of the Ten Commandments).

16. See *Issue of Religious Displays Before National Park Service*, at <http://www.cnn.com/2004/LAW/01/07/religious.displays.ap> (Jan. 7, 2004).

17. *Id.*

18. *Id.*

the plaques should be taken down permanently or remain at the park.¹⁹

- In *Locke v. Davey*,²⁰ the Supreme Court upheld, against a Free Exercise challenge, a Washington State scholarship program that excluded divinity students from eligibility.²¹
- In Florida, a church successfully challenged a county's refusal to permit it to display an overtly religious display at the county's holiday festival. The court did order, however, that the display be modified to explicitly indicate that the message was from the church, not the county.²²
- Additionally, cases were decided holding that a Christian prayer offered by a school board member at a high school graduation ceremony was private speech, not state-sponsored speech,²³ that a suppertime prayer given by the college superintendent at a state-operated military college violated the Establishment Clause by coercing religious worship,²⁴ and that a county board policy of inviting only representatives of the Judeo-Christian tradition to offer invocations at public sessions violated the Establishment Clause and the Free Exercise rights of plaintiff, a Wiccan religion practitioner.²⁵
- Concerned with the Tenth Circuit's ruling in *Sumnum v. City of Ogden*²⁶ that a city cannot display the Ten Commandments while declining to display other monuments that espouse differing religious or political views, a city

19. See *Religious Displays Spur Debate in Nation's Parks*, at <http://edition.cnn.com/2004/TRAVEL/01/07/religious.displays.ap> (Jan. 7, 2004).

20. 124 S. Ct. 1307 (2004).

21. *Id.* at 1315.

22. *Calvary Chapel Church, Inc. v. Broward County*, 299 F. Supp. 2d 1295 (S.D. Fla. 2003).

23. *Doe ex rel. Doe v. Sch. Dist.*, 340 F.3d 605 (8th Cir. 2003). Under the circumstances in *Doe*, and given the board member's status as a parent, the school district was not held liable since the board member gave the prayer on his own initiative and not as part of a school policy or custom. *Id.*

24. *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

25. *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805 (E.D. Va. 2003).

26. 297 F.3d 995 (10th Cir. 2002).

council in Wyoming grappled with the issue of keeping a Ten Commandments monument on display in its city park.²⁷ The city council was uneasy because a Baptist minister had asked to place a monument in the park with an inscription amounting to “hate speech.”²⁸ To avoid the possible consequences of creating a free speech forum by keeping the Ten Commandments monument on city-owned property, the city considered selling a small chunk of the city park to a private party so that the monument could stay where it was.²⁹

- The Utah Supreme Court decided a case involving a constitutional challenge to a city’s refusal to allow the plaintiff to offer a prayer during the opening ceremony of a city council meeting.³⁰ The city claimed that it rejected the proposed prayer because it did not fall within the subject-matter restriction that the city had placed on the opening ceremony, not because the city disagreed with the plaintiff’s religious beliefs.³¹ The court held that the city’s means of

27. See Brendan Burke, *Ten Commandments Issue Divides Casper City Council*, at <http://www.casperstartribune.net/articles/2003/10/01/news/casper/3c81cea836ea342d0ac0d6e0cc0a4e06.txt> (Oct. 1, 2003).

28. See Michelle Dynes, *Monument May Get New Home: Phelps’ Threat Spurs Mayor’s Plan to Relocate Ten Commandments*, WYO. TRIB.-EAGLE, Nov. 8, 2003, at A1. Reverend Fred Phelps of the Topeka-based Westboro Baptist Church proposed placing a memorial to the homosexual University of Wyoming student killed in 1998, with the following inscription: “Matthew Shepard Entered Hell Oct. 12, 1998 at age 21 In Defiance of God’s Warning: ‘Thou shalt not lie with mankind as with womankind; it is an abomination’ Leviticus 18:22.” *Id.*

29. *Id.*

30. *Snyder v. Murray City Corp.*, 2003 UT 13, 73 P.3d 325 (Utah 2003). A related case, *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998), had previously gone all the way to the Tenth Circuit.

31. *Snyder*, 2003 UT 13 ¶ 29, 73 P.3d at 331. A portion of the text of Snyder’s proposed opening prayer is as follows:

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman’s form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the

selecting those entitled to offer the prayer at the opening of its city council meetings was discriminatory and not neutral; therefore, the city's practice constituted a direct benefit to the exercise of religion in violation of the Utah Constitution.³²

In a society that is increasingly diverse, and in which the nature of religious allegiances is very different than it was even a generation ago, this Section meeting was designed to focus a critical eye on the continuing adequacy of some of the key doctrinal concepts in Free Exercise and Establishment Clause jurisprudence, including neutrality, hostility, coercion, separation, and endorsement.

In his presentation, Tom Berg argues that the strongest rationale for the constitutionality of the phrase "under God" in the Pledge is that the phrase reinforces the idea that our nation's government is an institution of limited power and must recognize inalienable rights that transcend any human authority.³³ Historically—from the founding of the Republic, to the abolitionist arguments against slavery, to the civil rights movement—religious viewpoints have been important to policy debates, and the Establishment Clause allows the state to rely on religious rationales for political assertions. Thus, the phrase "under God" may be viewed as a permissible statement of a rationale for human rights and limited government. Professor Berg also argues that removing "under God" from the Pledge would not further neutrality, since omitting—or worse, eliminating—an affirmation is not neutral. Rather, it is an assertion that the state recognizes no authority above itself. While some may find it difficult to pledge allegiance to the idea that we are a nation "under God," others would find it difficult to pledge allegiance to a state that recognizes no limits on its power. Thus, while including "under God" may represent a burden to atheists, excluding "under God" would burden religious believers.

Fred Gedicks identifies what he calls a "constitutional gag reflex," or the "instinctive intellectual revulsion one might feel in

people believe that bureaucrat's decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings
Snyder, 2003 UT 13 ¶ 5 n.1, 73 P.3d at 327 n.1.

32. *Id.* ¶ 30, 73 P.3d at 331–32.

33. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003).

response to the doctrine or holding of a case.”³⁴ Professor Gedicks argues that over the last twenty years, the central question of Establishment Clause jurisprudence has shifted from a concern with the meaning of “separation” of church and state to a concern with “treating religion neutrally or equally with respect to secular activities.”³⁵ The problem with neutrality, Professor Gedicks argues, is that, taken to its logical extreme, neutrality could justify outcomes that would trigger an Establishment Clause gag reflex, and he provides a series of illustrative examples.³⁶

Steven Gey suggests that while the Supreme Court has talked about neutrality in Establishment Clause cases, its deeper concern is with unity.³⁷ Professor Gey argues that only a truly secular government can lead to stable civic unity. Religion, by its very nature, is exclusionary, and thus religion is not a promising basis for creating political unity. Professor Gey urges that the Court should recognize that political unity in the United States means unity among people whose views of the ultimate good are different. While religion is sometimes viewed as a unifier of the American people, religion and religious differences create deep conflicts as well. Professor Gey concludes that “[p]roponents of a religious form of national unity are fooling themselves. If we ever achieve unity through religion it will be a false unity, a unity of coercion and intolerance and mandatory obeisance to the God representing influential and politically dominant religious groups.”³⁸

Frank Ravitch offers a searing critique of the way the Supreme Court has used the concepts of “neutrality” and “hostility” in its recent jurisprudence.³⁹ Professor Ravitch argues that the concept of neutrality is problematic because, at least in the Establishment Clause context, neutrality does not and cannot exist. In contrast, hostility towards religion can exist, but “the fact that hostility can exist does not mean that the Court’s use of the concept is accurate.”⁴⁰

34. Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 996.

35. *Id.* at 999.

36. *Id.* at 1000–04.

37. Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1005–06.

38. *Id.* at 1029.

39. Frank S. Ravitch, *The Supreme Court’s Rhetorical Hostility: What Is “Hostile” to Religion Under the Establishment Clause?*, 2004 BYU L. REV. 1031.

40. *Id.* at 1034–35.

Professor Ravitch maintains that when the Court employs the term “hostility” it presumes that the lack of formal neutrality is hostile to religion, and he argues that “this is not an adequate or accurate definition of ‘hostility.’”⁴¹

The panel’s viewpoints and arguments are indicative of the deeply perplexing and difficult issues that arise in this area of the law. While the panelists’ views do not reflect a convergence of opinion, they do reflect a high degree of respect for, and an attitude of seriousness towards, conflicting points of view. In an area where emotions tend to run high, this is itself an accomplishment worth praising.

41. *Id.* at 1047.

