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Commandments, Crosses, & Prayers: The Roberts Court's Approach to Public Religion

INTRODUCTION

Few topics divide the American public more than the government's use of religious expressions and symbols (i.e., public or civil religion). However, the American public is not alone in its disagreement over how to best resolve this perplexing issue of public or civil religion.¹ The Supreme Court has also struggled to determine a consistent approach to this matter,² striving to balance the requirements of the Establishment Clause of the U.S. Constitution³ with the need for a unifying belief system and the importance and prevalence of religion in the lives of American citizens and the United States as a whole.⁴

Most recently, the Roberts Court has attempted to find this balance through three cases: *Pleasant Grove City v. Summum*,⁵ *Salazar v. Buono*,⁶ and *Town of Greece v. Galloway*.⁷ In all three of these cases, the Roberts Court has allowed the government to include religious expressions in its activities as long as the activity's main purpose is not to promote religion. For reasons discussed below, this approach squarely rejects the argument that religious expressions should be completely excluded from government

1. Public religion and civil religion will be used interchangeably in this paper even though there might be slight differences in meaning.

2. Justice Scalia has previously said that the Court's approach to Establishment Clause cases is "neither a settled, nor a consistent, nor even a rational line of authority that you could rely on even if you wanted to." JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 69 (2009).

3. U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion . . .").

4. *See infra* Part III.B.

5. 555 U.S. 460 (2009).

6. 559 U.S. 700 (2010).

7. 134 S. Ct. 1811 (2014). In choosing these cases, others have been left out because they did not address the issue at hand. For example, *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007) (plurality opinion), was left out because it dealt with standing and not the merits of public religion. For a look at the Roberts Court's analysis of this case, see Carl H. Esbeck, *What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 *MISS. L.J.* 199 (2008).

activities.⁸ However, the Court also suggests that the government may not preclude any religion from expressing itself when another is allowed to do so. This second principle in the Court's analysis ensures that the government does not favor any religion over another in governmental expression. Despite vehement objections to any form of civil religion, this two-step approach best fosters an American community and allows formal recognition of religion's important influence on our government and our society without violating the Establishment Clause. It leads to a new type of public religion that allows for the governmental expression of all beliefs in pursuit of transcending our differences in the pursuit of the common good.

This Comment discusses the Court's approach in fostering the idea of a public religion. Part I gives a background on American civil religion, its purpose and form, and then explores some of the criticism and proposed alternatives offered by scholars, along with the defects of these alternatives. Part II then summarizes and analyzes three cases where the Roberts Court has looked at religion in the public square, showing how its approach squarely rejects the arguments against the government sanctioning religious expressions in its affairs. The Court's analysis also suggests that the government cannot force either the exclusion or the inclusion of non-Christians in these expressions. Part III argues that these principles effectively overcome the problems with civil religion raised by critics and addresses the defects found in the proposed alternatives instead of adopting any one of those alternatives. Part IV concludes.

I. AMERICAN CIVIL RELIGION

A. Background

Many have argued that in order for a nation to truly function it needs to have an identity and sense of community.⁹ In other words,

8. See *infra* Part II.

9. Steven D. Smith, "Sectarianizing" *Civil Religion? A Comment on Gedicks and Hendrix*, 110 W. Va. L. Rev. 307, 311 (2007) ("[A] political community . . . is composed of people who understand themselves—or imagine themselves—to be in some sense united by common ties or commitments."); see also Silvio Ferrari, *Civil Religions: Models and Perspectives*, 41 GEO. WASH. INT'L L. REV. 749 (2010)); Smith, *supra*, at 311 n.9 (quoting BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (rev. ed. 1991) ("[A]ll communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined." Such a community "is imagined because the members of even the smallest nation will never know

it must give citizens more than simply a legal status or right; it must give them an identity as members of a political community.¹⁰ This “entails sharing a common narrative, partaking in some foundational myths, and developing a sense of belonging, solidarity, and commitment.”¹¹ This community also requires a common set of values.¹² To create this community and identity, nations need to have “common ties and commitments . . . includ[ing] public, communal affirmations of what are widely taken to be important, unifying truths.”¹³ In the past, a state church usually filled this need, “linking senses of past, present and future with communal institutions and authority.”¹⁴ But when there is no such church, a civil religion often develops to meet “the need for some sense of transcendent unity,”¹⁵ and provides a “framework within which national identity is redefined, thus allowing changes to take place without breaking too sharply from the past.”¹⁶

The idea of civil religion traces back to the eighteenth-century writings of Jean-Jacques Rousseau¹⁷ but was reinvigorated more

most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”).

10. Ferrari, *supra* note 9, at 750 n.5 (quoting Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, in *CITIZENSHIP BETWEEN PAST AND FUTURE* 36, 37 (Engin F. Isin, Peter Nyers & Bryan S. Turner eds., 2008)).

11. *Id.* at 750. To support this idea, Ferrari gives the example of “the U.S. oath of allegiance for naturalized citizens,” which has the person renounce all previous allegiances, declare their willingness to “support and defend the Constitution” and its laws, and make these commitments freely, finishing with “so help me God.” *Id.* at 750 n.6 (quoting U.S. CITIZENSHIP & NATURALIZATION SERVS., No. M-476, A GUIDE TO NATURALIZATION 28 (2010)).

12. *Id.* at 749 (describing how nations “search for a nucleus of values able to create a cohesive group of individuals”).

13. Smith, *supra* note 9, at 311.

14. Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 *YALE L.J.* 1237, 1248 (1986).

15. *Id.* at 1251; *see also* Ferrari, *supra* note 9, at 749 (citing ROBERT BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 3 (1975)) (“When a particular religion or culture cannot perform this unifying role, civil religion takes its place by providing a set of values, symbols, and rituals upon which the spiritual unity and social cohesion of a nation can be rebuilt.”).

16. Ferrari, *supra* note 9, at 749.

17. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* bk.4, ch.8, at 130 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762) (“There is, therefore, a purely civil profession of faith, the articles of which are for the sovereign to establish, not exactly as religious dogmas, but as sentiments of sociability without which it is impossible to be a good citizen or a faithful subject.”).

recently by Robert Bellah.¹⁸ Bellah defined America's version as a "public religious dimension . . . expressed in a set of beliefs, symbols, and rituals,"¹⁹ such as prophets, martyrs, "sacred events and sacred places," and "solemn rituals and symbols."²⁰ He emphasized that it "is not the worship of the American nation but an understanding of the American experience in the light of ultimate and universal reality"²¹— in other words, a "vehicle of national religious self-understanding."²² It is "based on the idea that religion can play a helpful public role by fostering republican virtues."²³ However, it should be "neither sectarian nor in any specific sense Christian," nor is it "religion in general."²⁴ Thus, "[a]ll other religious opinions are outside the cognizance of the state and may be freely held by citizens."²⁵

In the United States, many of the colonies originally had some form of a state church that created their colony's identity and sense of community.²⁶ Near the early nineteenth century, a civil religion characterized as "'Nonsectarian' Christianity" began to develop and eventually replaced all state churches.²⁷ The United States distinguished itself from most European nations by formally separating church and state.²⁸ However, this "[s]eparation . . . does not affect the interaction of religion, politics, and society."²⁹ Over

18. See, e.g., Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

19. *Id.* at 4.

20. *Id.* at 18.

21. *Id.*

22. *Id.* at 8.

23. Ferrari, *supra* note 9 at 756 (citing Robert N. Bellah, *The Revolution and the Civil Religion*, in RELIGION AND THE AMERICAN REVOLUTION 55, 60 (Jerald C. Brauer et al. eds., 1976).

24. Bellah, *supra* note 18, at 8.

25. *Id.* at 5.

26. See Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 279 (2007) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–11 (2003)); see also Bellah, *supra* note 18, at 8 (explaining the status of state churches in each of the colonies).

27. *Id.* at 280–81 (citing Bellah, *supra* note 18, at 4.) (describing a "'civil religion,' which linked American citizenship and loyalty to a 'nonsectarian' Christian understanding that the United States has a divine origin and destiny"); see also Ferrari *supra* note 9, at 756 (labeling it a "non-denominational civil religion").

28. Ferrari, *supra* note 9, at 756.

29. *Id.* at 756 (citing Bellah, *supra* note 18, at 3). Ferrari gives two examples of such separation. First, "[w]hile it prevents the teaching of religion in public schools, it does not

time, this civil religion expanded into a Judeo-Christian version that included Catholics and Jews.³⁰ The United States has kept this Judeo-Christian civil religion, with little alteration, since the 1950s.³¹ However, mass immigration from Asia has increased the number of non-monotheistic religious people, in addition to the increase in the number of Americans who are atheist or agnostic or who do not belong to any particular church.³² Thus, American civil religion has existed in one form or another since the founding of the nation, and—like all traditions—it has been the subject of much criticism, especially over what form it should take³³ and if it should be followed at all.³⁴

B. Problems and Alternatives

Critics have specified many problems with the current American civil religion. First, in attempting to keep civil religion, the U.S. Supreme Court uses unprincipled, inconsistent approaches that do not adhere to traditional Establishment Clause tests.³⁵ Second, public religion undermines our “commitment to pluralism” by having the government favor certain religions’ symbols and terminology over others,³⁶ specifically by ignoring and alienating those who do not believe in monotheism.³⁷ Third, by allowing this civil religion, the government is placing religion at the head of public discussions.³⁸ Fourth, civil religion contaminates sectarian religion and puts pressure on the government to interpret religious symbols as lacking

prohibit the teaching about religions.” *Id.* Second, “it does not ban wearing religious symbols in public institutions.” *Id.*

30. Gedicks & Hendrix, *supra* note 26, at 281–84.

31. *See id.*

32. *See, e.g.*, *id.* at 285.

33. *See, e.g.*, Mirsky, *supra* note 14.

34. *See, e.g.*, Gedicks & Hendrix, *supra* note 26, at 284.

35. Mirsky, *supra* note 14, at 1243–46.

36. *Id.* at 1240, 1246.

37. Gedicks & Hendrix, *supra* note 26, at 276, 301–02, 305; *see also* Ferrari *supra* note 9, at 757 (arguing that American civil religion’s “challenge is building a coherent and functioning civil religion from different religious (and non-religious) sources. . . . [making it] difficult to foresee how non-believers and followers of non-monotheistic religions can be incorporated in the arena of full citizenship if it is crowded with symbols that are not theirs”).

38. Mirsky, *supra* note 14 at 1240 (“[Public religion] could clearly operate as a vehicle for the establishment of a religious hegemony over the symbols and rhetoric of public discourse.”).

religious significance.³⁹ Fifth, and finally, conservative Christians are increasingly advocating that the reach of public religion only include their beliefs and ideas.⁴⁰

With all of these problems, some have argued that Americans should modify or abolish civil religion entirely.⁴¹ Indeed, the following four alternatives have been either suggested or attempted, ranging from significant involvement of religion in public affairs to no involvement. The first alternative is to have a state church, such as Catholicism.⁴² In Italy, Catholic values “govern the ethical, cultural, and religious plurality of the country.”⁴³ As an example, public schools must hang a crucifix in every classroom,⁴⁴ because it is both a “symbol of Italian identity,” “manifest[ing] the historical and cultural tradition of Italy and . . . a sign of a value system based on freedom, equality, human dignity, and religious tolerance.”⁴⁵

The second alternative comes from legal scholar Yehudah Mirsky. He proposed adopting a civil religion farther removed from specific religions.⁴⁶ This civil religion would be based on five core beliefs: 1) “[the] transcendent principle of morality to which [the] polity is, or ought to be, responsible”; 2) “democracy as a way of life for all people and a concomitant belief in an American mission

39. *Id.* (“[Public religion] poses a significant threat to the purity of ecclesiastical institutions and to the transcendence of religious beliefs by its vague hallowing of public and political life.”); *see id.* at 1247 (“[P]ublic religion’s legitimacy [is based] on its irrelevance.”); *see also* Lynch v. Donnelly, 465 U.S. 668, 711–12 (1984) (Brennan, J., dissenting) (footnotes omitted) (“To suggest, as the Court does, that [the crèche] symbol is merely ‘traditional’ and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of ‘history’ nor an unavoidable element of our national ‘heritage.’”); Bellah, *supra* note 18, at 15; Ferrari *supra* note 9, at 757 (citing R. Jonathan Moore, *Civil Religion*, in THE ENCYCLOPEDIA OF RELIGIOUS FREEDOM 63 (Catharine Cockson ed., 2003)) (asserting that an enlargement of American civil religion’s border “is bound to dilute its content”).

40. Gedicks & Hendrix, *supra* note 26, at 278, 296–97, 300–01.

41. *See id.* at 285; Mirsky, *supra* note 14.

42. *See* Ferrari *supra* note 9, at 753–56. As previously mentioned, there have been some efforts by conservative Christians in the U.S. to establish something similar to the Italian version. *See* Gedicks & Hendrix, *supra* note 26, at 278, 296–97, 300–01.

43. Ferrari *supra* note 9, at 753 (citing Camillo Ruini, President, It. Episcopal Conf., *Quale spazio per il cristianesimo nella nuova Europa* [Is There Room for Christianity in the New Europe] (Feb. 11, 2005), <http://chiesa.espresso.repubblica.it/articolo/23170>).

44. *Id.* at 754 (citing Regio Decreto 30 aprile 1924, n. 965, art. 118, in G.U. 25 giugno 1924, n. 148 available at <http://www.edscuola.eu/wordpress/?p=17510>).

45. *Id.*

46. Mirsky, *supra* note 14, at 1249, 1252, 1256.

to spread it the world over”; 3) “civil piety, that exercising the responsibilities of citizenship is somehow a good end in itself”; 4) “American religious folkways”; and 5) “Destiny ha[ving] great things in store for the American people.”⁴⁷ To arrive at this form of civil religion, he suggests changing current traditions and terminology to remove any sign of sectarian elements.⁴⁸ For example, he would replace legislative prayer with “the very evocative ritual of a moment of silence,” and the National Day of Prayer with a “National Day of Reflection.”⁴⁹ The key is that this civil religion focuses on the political, not the sacral.⁵⁰

For the third alternative, Professors Frederick Mark Gedicks and Roger Hendrix challenge the need for civil religion today.⁵¹ They argue that the U.S. should abandon civil religion entirely and instead develop “thin, procedural values, which permit individuals to pursue their own conceptions of the good so long as they do not interfere with that pursuit by others.”⁵² In other words, they want civil religion to be replaced by “purely secular beliefs”⁵³ or “thin, procedural values” as the basis for our government and community.⁵⁴ They argue that this would both remove any alienation felt by non-monotheists and avoid a national identity controlled by the majority religions.

Finally, in a version similar to Gedicks and Hendrix’s approach, the fourth alternative of civil religion seeks to follow the French’s approach of *laïcité*.⁵⁵ “*Laïcité* is seen as a cluster of universal and abstract values—such as liberty, equality, and tolerance—that every

47. *Id.* at 1252.

48. *Id.* at 1256.

49. *Id.* He also suggests replacing “In God We Trust” with “a less sacral alternative” and “distinguishing the Nativity of Christ from the pledge of allegiance and other practices of civil religion that we are willing to accept by pointing to the essentially political character of the pledge, couched in religious terminology though it may be.” *Id.*

50. *Id.* at 1249.

51. Gedicks & Hendrix, *supra* note 26.

52. *Id.* at 305; *see also* Ferrari, *supra* note 9, at 763 n.66 (quoting Jan-Werner Müller & Kim Lane Scheppele, *Constitutional Patriotism: An Introduction*, 6 INT’L J. CONST. L. 67, 67 (2008)) (“The concept of constitutional patriotism designates the idea that political attachment ought to center on the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution.”).

53. Smith, *supra* note 9, at 312–13.

54. Gedicks & Hendrix, *supra* note 26, at 305.

55. *See* Ferrari, *supra* note 9, at 751–53.

citizen and group must embrace”⁵⁶ It seeks to “include[] and reconcile[] the particular values of the religious, racial, ethnic, cultural, and political communities living in France.”⁵⁷ This differs from Gedicks and Hendrix’s approach in its public treatment of religion. Its goal is to “shield[] [citizens] from the competing values upheld by religions.”⁵⁸ It assumes that “not only the state and its institutions, but also society and politics, have to be independent from particular traditions and conceptions of life. . . . [As a result,] these traditions are to be pushed to the margins of public life.”⁵⁹ For example, French public schools are banned from teaching about any religion and students cannot “wear[] religious symbols that are too conspicuous in school.”⁶⁰

While each alternative has its own benefits, they each also face important difficulties. In the first alternative, having a state church forces other religions and beliefs to “accept [the state religion’s] dominant position as the civil religion of the country,” something that is becoming more difficult because of the growing plurality of religions in most countries.⁶¹ Despite the existence of many religions and beliefs in the country, the government requires all citizens to constantly conform their public behavior to only one religion’s values.⁶²

The second alternative (Mirsky’s approach) would entirely strip the religion out of civil religion. While it would still be a set of beliefs and traditions, it would be devoid of any religious meaning or symbols. This may seem an attractive option, but research suggests that religion produces social goods better than secular

56. *Id.* at 751.

57. *Id.*

58. *Id.* at 753.

59. *Id.* (citing Jean Bauberot, Roberto Blancarte & Micheline Milot, *Déclaration sur la laïcité* [Declaration of laïcité], in JEAN BAUBEROT, L’INTÉGRISME RÉPUBLICAIN CONTRE LA LAÏCITÉ [The Republican Fundamentalism Against Secularism] 247–65 (2006)).

60. *Id.* at 752 (citing Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 Framing, Pursuant to the Principle of Laïcité, the Wearing of Signs or Dress Denoting Religious Affiliation in Public schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Mar. 15, 2004, p. 5190).

61. *See id.* at 755–56 (detailing how “non-Christian” immigrants struggle to accept Catholicism’s established position as Italy’s civil religion).

62. *See id.*

reasoning.⁶³ Some research suggests that “religious beliefs . . . are more supportive of social justice and human rights than secular discourse. . . .”⁶⁴ Similarly, some scholars have found that “religious beliefs . . . command the assent of more citizens in this country than . . . secular ‘public reason.’”⁶⁵ This is because “the coldness and individualism of these procedural values make them unable to create the solidarity, commitment, and feeling of belonging required by a full citizenship.”⁶⁶ The states that have followed this are arguably “no longer nations in the sense that they have lost the ability to create the emotional commitment that once characterized the national state.”⁶⁷

Both Gedicks and Hendrix’s solution and the French’s *laïcité* confront the same issues as Mirsky’s. They also face additional problems. First, “secular discourse is [generally not] ‘neutral’ toward religion and inclusive of all citizens.”⁶⁸ If secular beliefs replace civil religion, then religions in general may find themselves being treated

63. See Smith, *supra* note 9, at 313; see also ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 123, 130 (2013) (arguing that religion should be promoted in America as a good because of the several benefits that religion produces).

64. Smith, *supra* note 9, at 313 n.16 (citing Michael J. Perry, *Comment on The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1067 (1985); see also JOHN COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 193–98 (1982) (footnotes omitted) (“[T]he strongest American voices for a compassionate just community always appealed in public to religious imagery and sentiments. The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command commitments of emotional depth, when compared to ‘secular’ language[,] Secular Enlightenment language remains exceedingly ‘thin’ as a symbol system.”). Smith also cites another Perry article that argues “that a religious rationale is necessary to justify human rights.” Smith, *supra* note 9, at 313 n.16 (citing MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 11–41 (1998)).

65. Smith, *supra* note 9, at 313. (citing BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY (2007)).

66. Ferrari, *supra* note 9, at 759. Ferrari similarly asserts “that, in the long run, a citizenship based only on the cold exchange of rights and obligations is not viable; something more, capable of warming the hearts of citizens, is required.” *Id.* at 750 (citing Tariq Modood, *Multiculturalism, Citizenship and National Identity*, in CITIZENSHIP BETWEEN PAST AND FUTURE 117 (Engin F. Isin, Peter Nyers & Bryan S. Turner eds., 2008)). He also agrees with a German lawyer’s belief that “constitutional texts cannot create values, thus it is unfair to expect that they can give citizens a feeling of belonging and solidarity.” *Id.* at 763 (citing Ernst Wolfgang Böckenförde, *Wahrheit und Freiheit: Zur Weltverantwortung der Kirche heute* [Truth and Freedom: To the World Responsibility of the Church Today], ZUR DEBATTE [THE DEBATE], July 2004, at 5–6.).

67. *Id.* at 760.

68. Smith, *supra* note 9, at 313 (citing Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992)).

as less valuable in the public than those ideologies and arguments devoid of religion.⁶⁹ This unfairly discriminates against religion. Additionally, these solutions do not answer an important question: Will arguments and potential societal goods be rejected because of their source (i.e. religion)? There is a growing rejection of all arguments made by religious people whether they are based on secular reasoning or not.⁷⁰ Removing religion entirely from governmental expression would only fuel this notion that religion cannot be used in the pursuit of societal or secular good.

Civil religion is based on the idea that even though we cannot agree on all things, we can still agree on certain core principles and those often involve some element of religion in one form or another.⁷¹ In fact, “no playing field is absolutely neutral and, for this reason, the best way to deal with this dilemma is to reduce the playing field’s rules to the minimum required for a fair game.”⁷² Thus, with no improved solution found outside of the current civil religion, this comment now look to the Roberts Court to see if its approach can resolve these problems, by first summarizing the relevant cases and then analyzing the Court’s pitfalls before offering a new solution.

II. ROBERTS COURT CASE ANALYSIS

A. Pleasant Grove City v. Summum

The Roberts Court first addressed public religion in *Pleasant Grove City v. Summum*.⁷³ In 2009, the Summum religion sued Pleasant Grove City for violating the Free Speech Clause by accepting a Ten Commandments Monument in its public park but not accepting its proposed religious monument.⁷⁴ The city argued that it “limit[ed] monuments in the Park to those that ‘either (1) directly relate to the history of [the city], or (2) were donated by

69. See Luke Goodrich, *Mexico’s Separation of Church and State*, WALL ST. J. (Mar. 1, 2010, 1:52 PM), <http://www.wsj.com/articles/SB10001424052748703740704575095704065365166>.

70. See Brett Scharffs, *Can Public Reason Accommodate Conscience?*, INT’L CTR. FOR L. & RELIGION STUD., <http://www.iclrs.org/index.php?pageId=1&linkId=205&contentId=2010&blurbId=17119> (last visited Apr. 6, 2015).

71. See Smith, *supra* note 9, at 312.

72. Ferrari, *supra* note 9, at 761.

73. 555 U.S. 460 (2009).

74. *Id.* at 464–66.

groups with longstanding ties to the [city's] community.”⁷⁵ The Summum monument qualified under neither.⁷⁶

The Supreme Court held that the city's rejection of one monument, while accepting others is “a form of government speech” which is “not subject to the Free Speech Clause.”⁷⁷ The Supreme Court distinguished between private and government speech, finding that the former requirement is bound by the Free Speech Clause, but the latter is not.⁷⁸ Under government speech, the government can “select the views that it wants to express” in a forum that it creates, since it cannot express every single viewpoint.⁷⁹ If the government creates a forum, it can then limit the types of groups or subjects discussed there and make restrictions “that are reasonable and viewpoint neutral.”⁸⁰

Additionally, the Court held that a city cannot violate the Establishment Clause when putting permanent monuments on its property.⁸¹ But a city creates its identity through these monuments. Thus it is allowed to use “factors [such] as esthetics, history, and local culture” in choosing which monuments it will accept.⁸² A city does not need to proclaim what message it intends to send by its monuments.⁸³ Nor is a monument limited in its interpretation by what the donors intended the message to be.⁸⁴

Despite this language, the Court does not fully explain how the Ten Commandments monument meets these criteria because these facts and arguments were not fully before it. The Court seems to

75. *Id.* at 465.

76. *See id.*

77. *Id.* at 481.

78. *Id.* at 467. For a further discussion on the uncertain line between the Free Speech and Establishment Clauses in this case see generally RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045 (2010).

79. *Summum*, 555 U.S. at 468; *see also id.* (quoting *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990)) (holding that government would likely not function “[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed”).

80. *Id.* at 470. For more on the Court's treatment of public forums see generally Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203 (2010).

81. *Summum*, 555 U.S. at 468.

82. *Id.* at 472.

83. *Id.* at 473.

84. *Id.* at 473–74.

suggest that the Ten Commandments monument helps create the city's identity. But the Court does not specify how the monument qualifies as esthetics, history, or local culture. The city did limit its monuments to those that "either (1) directly relate to the history of [the city], or (2) were donated by groups with longstanding ties to the [city's] community."⁸⁵ There is no explanation on how a Ten Commandments monument relates to Pleasant Grove's history. So it must be assumed that the monument was accepted because the Fraternal Order of Eagles had longstanding ties to the community⁸⁶ and that this is what the Court most likely qualified as local culture.

While allowing any religion or religiously related group to donate simply because they have been in the community for a long time could lead to promoting a particular religion, it will not so long as the monument's purpose is *not* to establish that particular religion but to celebrate its impact on the community. The resulting principle is that the city can use a religious expression in a public monument as long as it is celebrating the cultural impact of that religion or religiously oriented group on the community. However, the monument must not violate the Establishment Clause. So far as the Court knew, the monument was valid.

One question with this approach is whether the city would have allowed monuments from smaller religious groups that *did* have longstanding ties to the community or were important culturally. The Summum faith did not have any major ties to the community, but suppose there was a significant minority of the population that was Muslim, Buddhist, or Sikh, would their monuments be accepted? The Court does not address this issue because it was not before it. If the city did not accept a minority religion's monument, then the test would really be about whether the monument came from a large, "mainstream" religion (i.e. Christianity). But those were not the facts before the Court. However, the city would most likely have allowed a monument from Mormons because they are a majority faith in Utah and they have longstanding ties to the community, including settling most of the towns. A monument depicting Mormon pioneers could certainly pass this test despite its religious influence. If no minority religious monuments are allowed, then it would appear that part of the monument's purpose is to

85. *Id.* at 465.

86. *Id.*

promote a particular religion, Christianity, instead of just celebrating its cultural impact on the community. However, since the Court did not have a chance to address this issue, it is uncertain how the Court would have held. So, we turn to *Salazar* to see what guidance it provides on the role of religion in government activities.

B. *Salazar v. Buono*

A year later in *Salazar v. Buono*,⁸⁷ the Court addressed another religious monument in the public square. Buono had obtained an injunction forbidding the government “from permitting the display of [a] Latin cross” on public land.⁸⁸ Both lower courts found that the cross violated the Establishment Clause because it “conveyed an impression of governmental endorsement of religion.”⁸⁹ The government did not appeal this injunction to the Supreme Court, so the judgment became final.⁹⁰ Congress responded by passing a law requiring the land to be transferred to the private organization that first erected the cross in exchange for a portion of the organization’s land.⁹¹ That organization could keep the land so long as the property was maintained “as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.”⁹² Buono contended this was an attempt to avoid fulfilling the injunction he was granted and obtained another injunction preventing the land transfer.⁹³ In issuing this second injunction, the district court did not consider whether the government’s attempt to maintain the cross still violated the Establishment Clause, but it did consider the land-transfer act and found that it violated the purpose of the injunction.⁹⁴ When the case reached the Supreme Court, the government challenged Buono’s standing, but the Court found that

87. 559 U.S. 700 (2010). It should be noted that *Buono* is a plurality opinion with three justices agreeing on the language that follows in this section. *Id.* at 704. Justice Alito agreed with the entire opinion, except he disagreed with the plurality that it should be remanded, finding that the facts sufficiently supported a resolution of the case. *Id.* at 723 (Alito, J., concurring). Justices Scalia and Thomas believed that the court should not address the merits because the plaintiff had no standing. *Id.* at 729 (Scalia, J., concurring).

88. *Id.* at 708 (plurality opinion).

89. *Id.*

90. *Id.* at 709.

91. *Id.* at 709–10.

92. *Id.* at 710.

93. *Id.*

94. *Id.*

Buono had standing in this case because he obtained a “‘judicially cognizable’ interest in ensuring compliance with [the injunction].”⁹⁵

The Court then turned to the merits of the injunction holding that all courts must address any “significant changes in the law or circumstances underlying an injunction.”⁹⁶ Because the district court based its first injunction on perception but based its final injunction on “suspicion of an illicit governmental purpose” (i.e. establishing a religion), it failed to decide if “the original finding of wrongdoing continue[d] to justify the court’s intervention.”⁹⁷ The Court found that the injunction’s general purpose of “avoiding the perception of governmental endorsement” would not oppose the government’s decision to transfer the land to a private party.⁹⁸ Because of the “highly fact-specific” inquiry needed to evaluate Congress’s land-transfer act, the Court remanded the case to the district court.⁹⁹

The Court also found that the cross was originally erected to commemorate World War I veterans, not to endorse Christianity.¹⁰⁰ It also found that seventy years of existence had intertwined “the cross and the cause it commemorated . . . in the public consciousness.”¹⁰¹ Accordingly, Congress was recognizing its historical, not its religious meaning.¹⁰² When Congress had to decide how to comply with the injunction, it chose to accommodate a symbol that “has complex meaning beyond the expression of religious views.”¹⁰³ The Court found that “avoiding governmental endorsement does not require eradication of all religious symbols in the public realm,” and “[t]he Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”¹⁰⁴

The Court then questioned the validity of the district court’s reasonable person test, but assumed that even under that test, the cross would withstand a challenge.¹⁰⁵ The district court focused

95. *Id.* at 712.

96. *Id.* at 714.

97. *Id.* at 718–19.

98. *Id.* at 720.

99. *Id.* at 722.

100. *Id.* at 715.

101. *Id.* at 716.

102. *Id.*

103. *Id.* at 717.

104. *Id.* at 718–19.

105. *Id.* at 720–21.

solely on the cross's religious meaning, instead of "its background and context."¹⁰⁶ A Latin cross does more than represent Christianity, it is also "used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. . . . It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles"¹⁰⁷

The Court clearly followed the same test by finding that the purpose of the cross was not to promote Christianity, but to remember the fallen soldiers. It also reiterated one of the main reasons for allowing public religion, namely that religion has a major role in society and should not be completely ignored by the government in order to avoid an appearance of establishment.

It could be argued that the cross only reminds us of all the fallen *Christian* soldiers (who happen to be the vast majority during World War I) and thus is still promoting Christianity over other religions. But, while the cross does not represent the religious views of all the fallen soldiers, it does represent the graveside marker for an overwhelming majority of them. We are remembering these soldiers in their death and sacrifice for us, which is symbolized by the one indicator of where they lie, the cross. So while there may be other ways to memorialize fallen troops, the government does not need to reject a cross simply because it is also associated with a particular religion.

Additionally, the Stevens dissent points out that the Park Service did not allow a Buddhist to set up a smaller monument commemorating the death of Buddhist soldiers.¹⁰⁸ So, once again the test seems to apply only if the religion is a majority faith (i.e. Christianity). However, the rejection of the Buddhist monument was not the issue before the court and so they could not rule on it. The issue was whether transferring the land with the cross to a private entity still violated the injunction. The Court found that it did not and its dicta about the cross strongly suggests that the cross would be appropriate to retain as long as it continued to fulfill a secular purpose. But it was not until *Town of Greece v. Galloway* that the Court was directly confronted with the issue of public religion.

106. *Id.* at 721.

107. *Id.*

108. *Id.* at 745 (Stevens, J., dissenting).

C. *Town of Greece v. Galloway*

Five years after *Buono*, the Court considered the clearest case of involvement of religion in governmental action in *Town of Greece v. Galloway*.¹⁰⁹ The town of Greece, New York began their monthly board meetings with a prayer given by a local minister who was almost always Christian because “nearly all of the congregations in town were Christian.”¹¹⁰ After two citizens complained about the prayers being all Christian, the town made an extra effort to invite non-Christian religious leaders.¹¹¹ These two citizens then sued the town, alleging that this practice violated the Establishment Clause “by preferring Christians over other prayer givers and by sponsoring sectarian prayers.”¹¹² They sought an injunction limiting the prayers to “‘inclusive and ecumenical’ [ones] that referred only to a ‘generic God’ and would not associate the government with any one faith or belief.”¹¹³

Following precedent in *Marsh v. Chambers*,¹¹⁴ the Court found that legislative prayer does not violate the Establishment Clause.¹¹⁵ The analysis is not based on any other Establishment Clause test, but “by reference to historical practices and understandings.”¹¹⁶ So, it is not an exception to the Establishment Clause because legislative prayer was an accepted practice by the Founders at the time they adopted the First Amendment.¹¹⁷

The Court¹¹⁸ also held that the purpose of legislative prayer is to “lend[] gravity to public business, remind[] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[] a common aspiration to a just and peaceful society.”¹¹⁹ Lawmakers, not

109. 134 S. Ct. 1811 (2014).

110. *Id.* at 1816.

111. *Id.* at 1817 (explaining how the “town invited a Jewish layman and the chairman of the local Baha’i temple to deliver prayers” and accepted the request of a Wiccan priestess).

112. *Id.*

113. *Id.*

114. 463 U.S. 783 (1983).

115. *Town of Greece*, 134 S. Ct. at 1819.

116. *Id.* (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)).

117. *Id.* at 1818–19.

118. It should be noted that Justices Thomas and Scalia did not join this part of the opinion. *Id.* at 1835 (Thomas, J., concurring).

119. *Id.* at 1818 (plurality opinion).

the public, are the principal audience for these prayers.¹²⁰ A prayer for them may “set[] the mind to a higher purpose and thereby ease[] the task of governing . . . , reflect the values they hold as private citizens . . . , [and] show who and what they are without denying the right to dissent by those who disagree.”¹²¹ As *Marsh* explains, legislative prayer is a “symbolic expression [of] a ‘tolerable acknowledgement of beliefs widely held,’” and has “become part of the fabric of our society.”¹²² These prayers “acknowledg[e] the central place that religion, and religious institutions, hold in the lives of those present.”¹²³ They recognize that “many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define”¹²⁴ They also have a “ceremonial purpose.”¹²⁵ Legislative prayer is “part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of ‘God save the United States and this honorable Court’ at the opening of this Court’s sessions.”¹²⁶ Doing away with this traditional practice would “begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.”¹²⁷

The Court then found that precedent does not require “nonsectarian or ecumenical prayer[s].”¹²⁸ *Marsh* explicitly held that the “‘content of the prayer is not of concern to judges,’ provided ‘there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.’”¹²⁹ Nonsectarian prayers would require the government to

120. *Id.* at 1825.

121. *Id.* at 1825–26; *see also* Orrin G. Hatch, *Keynote Address*, 2015 BYU L. REV. 585, 591–92 (“The argument against basing laws on religious considerations rests on the view that religion is a purely private matter and, therefore, public debate and political decision-making may legitimately be based only on so-called public reason, which is defined as excluding religious values and expression. This view . . . insists that religion is limited to belief, not behavior; that religious exercise is individual, not collective; and, especially, that religion is something that should be conducted in private, not in public.”).

122. *Id.* at 1818–19 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

123. *Id.* at 1827.

124. *Id.*

125. *Id.* at 1828.

126. *Id.* at 1825.

127. *Id.* at 1819.

128. *Id.* at 1820.

129. *Id.* at 1821–22 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–795 (1983)).

unconstitutionally supervise and censor religious speech.¹³⁰ “Government may not mandate a civic religion that stifles any but the most generic reference to the sacred”¹³¹ Even if these prayers were required, it is likely impossible to determine what would “qualif[y] as generic or nonsectarian” and ministers should not be asked to “set aside their nuanced and deeply personal beliefs for vague and artificial ones.”¹³² Prayers may make “passing reference to religious doctrines,” because “[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”¹³³

Only “a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose,” will violate the Establishment Clause.¹³⁴ The legislature must follow a nondiscrimination policy, but it does not need to search “for non-Christian prayer givers in an effort to achieve religious balancing.”¹³⁵ This would require excessive “government entanglement with religion” by requiring “wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each.”¹³⁶ However, legislators cannot “direct[] the public to participate in the prayers, single[] out dissidents for opprobrium, or indicate[] that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”¹³⁷ Because none of these issues were occurring, the Court found that the prayers did not violate the Establishment Clause.¹³⁸

Thus, the Court’s approach in *Town of Greece* explicitly endorses religious expression during governmental activities. While the Court focused on secular purposes for legislative prayer, it also included in its purposes the religious expression of individuals.¹³⁹ It also explains these prayers in civil religion terms by pointing out the prayer’s

130. *Id.* at 1822.

131. *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.”)).

132. *Id.*

133. *Id.* at 1823.

134. *Id.* at 1824.

135. *Id.*

136. *Id.* (alteration in original) (quoting *Lee*, 505 U.S. at 617 (Souter, J., concurring)).

137. *Id.* at 1826.

138. *Id.* at 1828.

139. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826–27 (2014).

ceremonial purpose, similar to other traditions in our civil religion.¹⁴⁰ However, the Court also flatly rejected a nonsectarian approach, favoring one where any religion can participate and the government did not have to give preference to any particular sect.¹⁴¹

It could be argued that this case is just the third example of the Court allowing the government to use only Christian religious expressions, but this ignores the facts of the case. The town had almost no non-Christian congregations and never denied the prayer to a non-Christian religious leader. The Court would need to assume facts not in evidence to say that this situation was the government promoting Christianity. Instead, the government was allowing local religious individuals to express themselves in a government setting in a way that benefited the community's governmental activities. Forcing the town to obtain outside individuals changes the focus to the individual giving the prayer instead of the prayer's purpose. If the town had denied non-Christians the opportunity to pray or if the Christian ministers had attacked other non-Christian faiths in the prayer, then the town would be establishing Christianity. But these were not the facts of the case and so should not govern its final outcome.¹⁴²

In light of the outcomes of these cases, this Comment will now discuss how the reasoning of these cases (both in dicta and the holdings) shows the Robert Courts acceptance of public religion.

III. THE ROBERT'S COURT'S ACCEPTANCE OF PUBLIC RELIGION

A. The Court's Guiding Public Religion Principles

Throughout all three cases, the Roberts Court follows two consistent principles in its reasoning. First, the government can use religious elements for non-religious purposes. Second, the government cannot exclude non-majority religions that want to

140. *Id.* at 1825, 1828.

141. *Id.* at 1820–24.

142. *But see id.* at 1839 (Breyer, J., dissenting) (arguing that since the non-Christian prayers were only allowed after the initial complaints from citizens, the practice was promoting Christianity over other religions until they were threatened with a lawsuit). However, at no point was the town intentionally discriminating against non-Christians. To force them by threat of lawsuit to reach out to other religions makes the town intentionally discriminate in favor of particular religions. And while the town could have potentially done a better job at letting these other faiths know about this opportunity, *see id.* at 1839–40, it did not have to, *see id.* at 1824 (majority opinion).

participate, but it also does not need to make an extra effort to ensure that multiple religions are represented. This two-pronged approach will allow greater religious expression within the country's civil religion framework and thus offers a possible solution to the problems critics have pointed out about the current circumstances.

Under the Court's approach, religious expressions can be used as long as they promote a secular purpose.¹⁴³ This can include honoring fallen veterans¹⁴⁴ or helping legislators transcend their differences before they begin the process of lawmaking.¹⁴⁵ However, it can also include secular purposes as tied to religion. It allows individuals to express their religion publicly,¹⁴⁶ and it recognizes the importance of religion in American culture and history,¹⁴⁷ as well as in the individual lives of many Americans.¹⁴⁸

This approach will also lead to the cultivation of a new public religion to replace the current Judeo-Christian version. This public religion would allow all forms of religious belief to be expressed in the public square as long as they don't promote one religious sect over another but instead help establish an American community. This would be a civil religion that seeks to transcend the differences between religious sects, and even those who are non-religious, in order to focus on goals that all desire. It would fulfill Justice Kennedy's description of prayers at city council meetings in a way that the current Judeo-Christian version cannot.

As will be argued in the next section, the key is finding a common denominator that can unite Americans without diluting its influence on each individual. Judeo-Christianity cannot inspire or unite us as Americans as a civil religion is supposed to

143. A recent article criticizes this approach arguing that religious people seeking to keep public religious symbols by giving them secular meanings are leading their society to the very end that they hoped to avoid, further secularization. See Frederick Mark Gedicks & Pasquale Annichino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 101, 167–68 (forthcoming 2015).

144. See *Salazar v. Buono*, 559 U.S. 700, 709–10 (2010).

145. See *Town of Greece*, 134 S. Ct. at 1825.

146. See *id.* at 1826–27.

147. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009); see also Jean-Paul Willaime, *Towards a Recognition and Dialogue Secularism in Europe*, 2015 BYU L. REV. 779, 798–99 (“Merely considering the individual aspects of religious and philosophical attitudes fails to account for the cultural strata of societies, the fact that particular religious dimensions have played a more significant role in the history of the societies and in their configuration as state-national communities.”).

148. See *Town of Greece*, 134 S. Ct. at 1827.

do if it excludes a growing minority of American religious people¹⁴⁹ or references only the most abstract religious principles that do not motivate anyone.¹⁵⁰ With these thoughts in mind, this Comment now turns to see how the Court's approach holds up against the problems found with the current American civil religion and its alternatives.

B. A Solution to the Problems of the Current American Civil Religion

According to critics, the current American civil religion faces five problems.¹⁵¹ This section shows how the Court's approach addresses each of these problems.

The first problem with the old American civil religion is that there is no consistent approach to the government's allowance of religious symbols and expressions.¹⁵² The Court's approach solves this; the government can use and allow religious expressions and symbols in its activities as long as 1) its purpose is not to promote religion and 2) it does not preclude any religion from expressing itself when the government allows another to do so.¹⁵³ This rule can consistently and logically address each of the major public religion challenges facing the courts.

Under this approach, Pleasant Grove City could have a Ten Commandments monument as long as 1) its purpose is to build the city's identity through a tie to its history or culture,¹⁵⁴ and 2) other monuments that have a tie to religion are also allowed if they meet the same criteria.¹⁵⁵ Similarly, the government could allow a Latin cross on public lands as long as 1) its purpose is to depict fallen soldiers, not promote Christianity¹⁵⁶ and 2) other religious symbols

149. See Gedicks & Hendrix, *supra* note 26, at 285.

150. See *Town of Greece*, 134 S. Ct. at 1822.

151. See *supra* Section I.B.

152. See Mirsky, *supra* note 14.

153. See *Town of Greece*, 134 S. Ct. 1811; *Salazar v. Buono*, 559 U.S. 700 (2010); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

154. See *Summum*, 555 U.S. at 472.

155. See *id.* at 465 (mentioning the city's requirements for accepting a monument and, thus implying based on the facts, that the Ten Commandments met them because the donors had long standing ties to the city while the Summum monument did not because it was an out-of-town religion). But, as mentioned before, other minority faiths must be allowed to donate if they do meet this same criteria.

156. *Buono*, 559 U.S. at 715–17, 721–22.

are allowed for the same purpose.¹⁵⁷ Also, legislators could allow any minister to begin the meeting with a prayer or other opener as long as 1) the purpose of the prayer focuses on helping the legislators understand the gravity of their task and rise above their differences, not to promote or denigrate a religious belief or unbelief¹⁵⁸ and 2) any religious leader can offer the ceremonial opening.¹⁵⁹

Additionally, this approach would extend to other areas where government and religion mix. The phrase “under God” in the Pledge of Allegiance could be found permissible since 1) its purpose is to remind citizens that their rights come not from the government, but from a source outside of it¹⁶⁰ and 2) an individual can replace that phrase with an alternative that fulfills this same purpose.¹⁶¹ Federal officials can be sworn in using a Bible and the phrase “so help me God” as long as 1) its purpose is to help the officials fully commit and devote their service to their country and not their own personal interests and 2) other religious books and phrases (or other deeply meaningful documents such as the U.S. Constitution for non-believers) can be used instead.¹⁶² This idea still conforms with the notion that “the state may not . . . declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth.”¹⁶³

The second problem for critics lies in the belief that the American civil religion favors Judeo-Christian beliefs over others,¹⁶⁴

157. See, e.g., *id.* at 745 (Stevens, J., dissenting) (alteration in original) (quoting *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) (explaining, disapprovingly, that the Park Service denied “an adherent of the . . . Buddhist faith” from putting up a similar religious memorial to fallen WWII soldiers).

158. *Town of Greece*, 134 S. Ct. at 1818–19, 1826–27.

159. See, e.g., *id.* at 1824 (holding that the town must have “a policy of nondiscrimination”).

160. See *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1037 (9th Cir. 2010) (“The phrase ‘under God’ is a recognition of our Founder’s political philosophy that a power greater than the government gives the people their inalienable rights. Thus, the Pledge is an endorsement of our form of government, not of religion or any particular sect.”).

161. For example, those of the Jewish faith can use “under Yahweh,” Muslims “under Allah,” and even non-believers could use “under natural rights” or a similar idea.

162. See Frederic J. Frommer, *Congressman to Be Sworn in Using Quran*, ASSOCIATED PRESS (Jan. 3, 2007, 4:07 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/03/AR2007010301179.html> (detailing how a Muslim congressman used a Quran to be sworn into the U.S. Congress).

163. KOPPELMAN, *supra* note 63, at 3.

164. See Mirsky, *supra* note 14, at 1240, 1246. Some argue that it really favors conservative Christians over all others. See Gedicks & Hendrix, *supra* note 26, at 278, 296–97, 300–01.

especially by ignoring and alienating non-monotheists.¹⁶⁵ The second part of the Court's approach clearly does not allow this. When religious individuals or groups are participating in a public event, they must be allowed to use their own religious terminology and symbols. Thus even a Wiccan priestess must be allowed to give the opening legislative prayer.¹⁶⁶ Similarly, any religion may seek a holiday display as long as other religions are also allowed to do so.

As to the first part of the Court's approach, many symbols and expressions in our civil religion do seem to favor Christianity, monotheism, or religion generally.¹⁶⁷ However, it is impossible to find a unanimous expression of belief in any sphere. For example, some Americans still disagree with the idea that all men were created equal.¹⁶⁸ Yet this does not mean that the government should remain silent on important issues.¹⁶⁹ As the Court held in *Sumnum*, government could not exist "if every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed."¹⁷⁰ In order to perpetuate the political myth of the American nation, the government needs to use a civil religion.¹⁷¹ While there may be many Americans who do not believe in the terms or symbols used by the civil religion,¹⁷² the government can and must use the most common and historical beliefs available to perpetuate its community. This approach fulfills this need.

Third, critics argue that through civil religion the government is placing religion at the head of public discussions.¹⁷³ However, government does a similar thing with race every time that it celebrates black history month.¹⁷⁴ This commemoration exists even

165. See Gedicks & Hendrix, *supra* note 26, at 276, 301–02, 305; see also Ferrari *supra* note 9, at 757.

166. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014).

167. See Gedicks & Hendrix, *supra* note 26, at 278, 296–97, 300–01.

168. See Smith, *supra* note 9, at 312.

169. *Id.*

170. *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009) (quoting *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990)).

171. See *supra* Part I.A.

172. Compare *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (noting that 97% of Americans are monotheists), with Gedicks & Hendrix, *supra* note 26, at 288 (estimating that only 66–75% of Americans are monotheists).

173. See *supra* note 38 and accompanying text.

174. See Kevin J. Seamus Hasson, *A Modest St. Paddy's Day Proposal*, WALL ST. J. (Mar. 16, 2009, 11:00 PM), <http://www.wsj.com/articles/SB123725627239551027>. The same could also be said of ethnicity with every St. Patrick's Day parade. See *id.*

though a Constitutional Amendment prohibits this racial differentiation.¹⁷⁵ Yet, this does not mean that the government cannot publicly acknowledge the different aspects of our culture, whether race or religion.¹⁷⁶ This is seen in *Town of Greece*, where the Court held that legislative prayers “acknowledg[e] the central place that religion, and religious institutions, hold in the lives of those present.”¹⁷⁷ They recognize that “many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define.”¹⁷⁸ Additionally, a prayer can “show who and what [the legislators] are without denying the right to dissent by those who disagree.”¹⁷⁹ Thus the purpose of this civil religion is not to promote religion, but to acknowledge its role in society as a builder and unifier.¹⁸⁰

This might be labeled as sanctioned pluralism. Not only do many Americans deeply care about their beliefs, but they also have a wide variety of beliefs. The courts must strive to create a system that allows each of those beliefs to coexist with one another. Religious scholars have argued that establishing a system that allows this coexistence of many beliefs is essential to social stability.¹⁸¹ The courts must sanction the right of every belief system to express itself publicly in order to show other belief systems that all are welcome

175. See U.S. CONST. amend. XIV, § 1; see also Hasson, *supra* note 174.

176. See Hasson, *supra* note 174; see also Vanja-Ivan Savič, *Still Fighting God in the Public Arena: Does Europe Pursue the Separation of Religion and State Too Devoutly or Is It Saying It Does Without Really Meaning It?*, 2015 BYU L.REV. 679, 681 (“[W]hen playing solely by secularism’s rules, the state ignores that religious guidelines are more than just a part of history and tradition; they are actual living pieces of culture and, therefore, part of the state’s public and legal existence.”) (citations omitted); Willaime, *supra* note 147, at 798–99 (“[P]ublic authorities [have recognized] the historical and cultural importance that one or several specific religious traditions have had in a given country. . . . [In] trying to promote a sense of equality by putting all religions on the same level . . . seems like an attempt to apply an abstract scheme that denies history and reality. Merely considering the individual aspects of religious and philosophical attitudes fails to account for the cultural strata of societies, the fact that particular religious dimensions have played a more significant role in the history of the societies and in their configuration as state-national communities.”) (citations omitted).

177. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014); see also *Salazar v. Buono*, 559 U.S. 700, 718–19 (2010) (“The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”).

178. *Town of Greece*, 134 S. Ct. at 1827.

179. *Id.* at 1826.

180. See *Buono*, 559 U.S. at 718–19.

181. W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 13–14 (2010) (citing John Locke, *A Letter Concerning Toleration* (William Popple trans., Huddersfield 1796)).

and free to express themselves. The plaintiffs in these cases seem to focus on one of two unfortunate alternatives. They either argue that the government is asserting Christianity as the main, approved religion in the United States by sanctioning only its symbols using secular terms,¹⁸² or they argue for the prohibition of any government use of religion since it establishes that religion.¹⁸³ Both alternatives tell every belief system (religious or not) that they are not welcome in the public square unless you are either Christian or non-religious. But that is not what made the American experience so unique.¹⁸⁴ Since the early colonial days, there were many different religions and over time each colony (and eventually state) had to allow other religions to be included.¹⁸⁵ With this Court's approach to civil religion, they will officially sanction pluralism.

Fourth, civil religion contaminates sectarian religion and puts pressure on the government to interpret religious symbols as lacking in religious significance.¹⁸⁶ While there is still a common belief expressed through aspects of the civil religion, the Court's approach would make clear that any religion can express itself through governmental activities. Now, any person with any belief can perform the ceremonial opening of a town board meeting.¹⁸⁷ It might be argued as well that now any religion can seek a government holiday display as long as it fulfills the secular purpose for having the displays. Additionally, the Court has directly rejected the idea of a watered down, generic civil religion.¹⁸⁸ As it affirmed, religious leaders should not be asked to "set aside their nuanced and deeply personal beliefs for vague and artificial ones."¹⁸⁹ There is no establishment problem as long as any religious or non-religious belief can be freely and sincerely expressed. And while *Summum* and *Buono* focus solely on the secular purpose of the religious symbols,¹⁹⁰ *Town*

182. Brett Scharffs, *Creation and Preservation in the Constitution of Civil Religion*, 41 GEO. WASH. INT'L L. REV. 985, 999 (2010).

183. *Id.*

184. See DURHAM & SCHARFFS, *supra* note 181 at 18.

185. *Id.*

186. See *supra* note 39 and accompanying text.

187. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014).

188. See *id.* at 1820–24.

189. See *supra* text accompanying note 132.

190. *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009); *Salazar v. Buono*, 559 U.S. 700, 721 (2010).

of Greece allows prayers to be done for a secular purpose but without removing the religious significance of the prayer.¹⁹¹

Thus this slightly departs from Andrew Koppelman's approach which requires "that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute."¹⁹² Koppelman's approach allows abstract religion, but does not allow the government to include any religious symbols or expressions that further its secular purpose.¹⁹³ This approach will continue this dilution of religion that many Americans and *Town of Greece*¹⁹⁴ directly reject.

Fifth and finally, the critics argue that American civil religion is being narrowed by conservative Christians to only represent their specific values and beliefs.¹⁹⁵ It is true that all of the cases focused on here had a tie to Christianity,¹⁹⁶ but the second part of the Court's approach ensures that non-Christians are not excluded from these opportunities. In the first two cases, it was not the Christian message of the monuments that was allowed by the courts, but their historical meaning.¹⁹⁷ Simply because Christianity is closely tied into important historical events does not mean that those events should be banned from government recognition.¹⁹⁸ However, the government must also allow other religious symbols that fulfill that same purpose, an issue that was not before the courts in any of these cases.¹⁹⁹ In *Town of Greece*, the Court stated that prayer as a ceremonial part of

191. *Town of Greece*, 134 S. Ct. at 1826–27.

192. KOPPELMAN, *supra* note 63, at 2.

193. *See id.*

194. *Town of Greece*, 134 S. Ct. 1822.

195. *See supra* note 40.

196. *Summum* dealt with the Ten Commandments monument which could be seen as Judeo-Christian, but is definitely Christian. *See* 555 U.S. 460, 464–465 (2009). Buono faced the issue of using a Latin cross, a symbol that often represents Christianity. *See* 559 U.S. 700, 715, 721 (2010). *Town of Greece* nearly always had Christian ministers give the ceremonial prayer because the town was predominantly of that faith. *See* 134 S. Ct. at 1816.

197. *See Summum*, 555 U.S. at 472; *Buono*, 559 U.S. at 716.

198. *See Buono*, 559 U.S. at 718–19.

199. In *Summum*, the Court rejected the minority's attempt to be included not because it was a non-Christian faith, but because inclusion of its monument would destroy the secular purpose of the city to celebrate organizations that had an important impact on the community. *See Summum*, 555 U.S. at 472. In *Buono*, the Court was not determining if the cross violated the Establishment Clause, so it did not need to look at the fact that a Buddhist monument was not allowed at the site. *Compare Buono*, 559 U.S. at 706 *with id.* at 745 (Stevens, J., dissenting). Finally in *Town of Greece*, no religious leader was ever denied the opportunity to pray even if they were not intentionally recruited. *See Town of Greece*, 134 S. Ct. at 1824.

government is open to any religion and does not need to be exclusively the job of a paid Christian minister as was traditionally done.²⁰⁰ As previously mentioned, any and all beliefs can express themselves in the legislative opening ceremony, which is certainly not an endorsement of Christianity.

While not perfect at addressing these concerns, the Court's approach in these three cases arguably responds to each criticism and does so in a way that can be agreeable to most. And as the Court said in *Town of Greece*, "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."²⁰¹ Additionally, this approach also potentially solves the problems caused by the aforementioned alternatives.²⁰²

C. A Solution to the Problems Caused by Proposed Alternatives

Through these three cases, the Roberts Court implicitly rejects the alternative versions of the civil religion in favor of principles that could lead to a new version of civil religion.

First, while the Roberts Court's approach seems similar to aspects of Italy's version,²⁰³ it has one key difference that solves a major problem found in the latter's approach: the separation of church and state.²⁰⁴ This separation allows all religions the chance to participate in the public square and is key to the Court's approach. All religions can perform the ceremonial opening of a legislative session, use their revered book or document to be sworn into office, and place their holiday displays on government property. People of any belief can express themselves as they choose in the public square.

It also overcomes issues with Mirsky's method.²⁰⁵ His solution of a civil religion devoid of any actual religious elements might lead to less support for "social justice and human rights," hold less sway over the nation's citizens, and publicly treat religion's role historically and culturally as second class to other ideologies and beliefs.²⁰⁶ The Court's approach avoids all three of these

200. See *Town of Greece*, 134 S. Ct. at 1824.

201. See *id.* at 1823.

202. See *supra* Part I.B.

203. See *supra* text accompanying notes 43–46.

204. See Ferrari *supra* note 9, at 756.

205. See *supra* text accompanying notes 47–51.

206. See *supra* Part I.B.

consequences. It allows a civil religion that retains the religious elements that can better support social justice and human rights.²⁰⁷ It will also better unite Americans.²⁰⁸ For example, a federal official is sworn into office using a Bible and the phrase “so help me God.” While the Constitution and “so help me America” could be used instead, for many religious people these alternatives would not express as deep of a commitment to faithfully serve their country as their own religious book and higher power. The key lies not in barring religion from the public square but in allowing any religion or non-religion to use whatever best leads to this deep commitment.²⁰⁹ Similarly, the phrase “under God” in the Pledge of Allegiance is meant to convey that rights and liberties come from a source outside of the government and thus cannot be taken away by the state.²¹⁰ Using a phrase such as “under natural rights” cannot stir the soul of most Americans and thus would fail to effectively remind them of where their rights come from. Additionally, the Court’s approach will continue to respect religion’s role in history and culture without promoting it over other ideologies or beliefs that have also played important roles in these spheres. This allows religions to publicly celebrate holidays just as other groups are allowed to do even though the government is banned from discriminating among them (e.g. races with Black History month and ethnicities with St. Patrick’s Day).²¹¹

Finally, this approach overcomes the problems caused by both Gedicks and Hendrix’s approach²¹² and the French’s *laïcité*,²¹³ including avoiding a secular basis that is actually not neutral toward religion and has no way of producing common values without looking to religion. While the Court’s approach is not perfectly neutral toward specific religions, it still allows a wide range of religious practices to be involved in its governmental activities and seeks to include as many religions as possible in its necessary

207. *See supra* note 63.

208. *See supra* note 64; *see also* Bellah, *supra* note 18, at 9–11 (describing the use of civil religion during the Civil War to unify the nation).

209. *See supra* note 163 (detailing how a Muslim congressman used a Quran to be sworn into the U.S. Congress).

210. *See* *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1037 (2010).

211. *See* Hasson, *supra* note 174.

212. *See supra* text accompanying notes 52–55.

213. *See supra* text accompanying notes 56–61.

declaration of a common American belief. It also allows the government to look to religious values to determine its own, even if it cannot base its decision on a religious argument. Thus, even though it is still imperfect in its approach, the Roberts Court's approach best balances the need for a common belief to unify the nation with the policy of nondiscrimination among religions.

IV. CONCLUSION

In summary, every government needs some type of belief system to help create a community or nation amongst its citizens. While there are several systems to fill this need, a public religion best balances the need for a deep tie to the community with the ability of citizens to still identify with the nation despite differences in religious belief. Neither a state church nor thin procedural values can achieve this balance. However, there have been serious and legitimate concerns raised about public religion, especially as seen in the United States.

The Roberts Court has addressed these concerns in three of its cases. First, the Court allowed government use of religious expressions as long as they had a secular purpose. Second, it did not deny any religion or belief system the opportunity to participate or be used in these public expressions as long as they fulfill the same secular purpose. This two-pronged approach will help develop a new American public religion that fosters greater inclusion of all beliefs while still maintaining an overall American identity based on a commitment to understanding and transcendence of differences. This approach will also overcome many of the criticisms laid against the current public religion by creating a consistent approach, treating all religions equally in public expression, allowing all religions to be an important part of public discussions, retaining the relevance and purity of each religion, and broadening instead of narrowing the scope of inclusion. Finally, it ensures that the government continues to officially sanction pluralism and public religious expressions.

The Roberts Court will most likely continue to face more cases involving the government's public use of religion. The Court must continue to realize the importance of promoting religious diversity through its public religion by following the principles laid out in these three cases and by developing a more defined test. Otherwise it will continually be striving to find new ways to justify the

inclusion of religious symbols and expressions under secular terms while not allowing other religious symbols and expressions to be used as well or it will decide to exclude religion entirely from governmental expression. This continued schizophrenic approach will only lead to more confusion. This will be especially important for lower courts, which may understandably misinterpret the Supreme Court's precedent and fall into the traps of complete exclusion of all religions from public use or exclusion of all religions except Judeo-Christianity.

Instead, religion in general should continue to be treated equally with other non-religious philosophies and ideologies. The government should only allow it to be used when it furthers a purpose that is non-religious, such as uniting Americans as a political community. Meanwhile, the debate will continue among scholars as to whether this approach really succeeds or if it can be replaced by something better suited to Americans' needs.

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