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RELIGION LAW

Secularism and the First Amendment's Establishment Clause

BY BARRY BLACK

The First Amendment to the U.S. Constitution begins, "Congress shall make no law respecting an establishment of religion… ." Over the many years in which the Establishment Clause has been at the heart of disputes reaching the U.S. Supreme Court, the court has struggled to pronounce a consistent standard to determine whether the federal government (or now, through the Fourteenth Amendment, a state), has violated the Establishment Clause.

Everyone acknowledges that, for example, Congress may not establish a national religion, as England did with the Anglican Church. Beyond that, though, the justices typically have failed (and continue to fail) to reach unanimity. See, e.g., *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

One problem resulting from the Supreme Court's confused rulings is that public officials, religious institutions and their members, and the public at large do not have adequate guidance as to what is permitted or prohibited by the Establishment Clause.

Perhaps more important, however, is that in many instances the decisions that have come down have had the effect of marginalizing the religious community and hampering their members' right to freely exercise their own religion (which is separately protected by the First Amendment's Free Exercise Clause). That is so because the court's Establishment Clause decisions have tended to prioritize the secular over the spiritual, the temporal over the ecclesiastical, and the atheists and the agnostics over the believers. See, e.g., *Shurtleff v. City of Boston*, 142 S.Ct. 158 (2022) (Gorsuch, J., concurring in the judgment).

One problem resulting from the Supreme Court's confused rulings is that public officials, religious institutions and their members, and the public at large do not have adequate guidance as to what is permitted or prohibited by the Establishment Clause.

In a sense, secularism has become the de facto established religion in this country. It is time for the Supreme Court to correct its interpretation of the Establishment Clause, as Justice Clarence Thomas and the late Justice Antonin Scalia, among others, have long advocated.

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The 'Espinoza' Case

Consider the majority opinion by Chief Justice John Roberts and the concurring opinion by Justice Thomas in *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

The case involved a challenge to a program established by the Montana legislature that provided tuition assistance to parents who sent their children to private schools. The program granted a tax credit

to anyone who donated to certain organizations that in turn awarded scholarships to selected students attending those schools.

The Supreme Court of Montana struck down the program after parents sought to use the scholarships at a religious school. The Montana court relied on the "no-aid" provision of Montana's constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination."

The court, in an opinion by Justice Roberts, reversed. It found that the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the schools, which violated the Free Exercise Clause.

Interestingly, Roberts pointed out near the beginning of his opinion the interconnectivity between the First Amendment's Free Exercise and Establishment Clauses, noting a "play in the joints" between what the Establishment Clause "permits" and what the Free Exercise Clause "compels."

He then proceeded to discuss the Establishment Clause, observing that the parties did not dispute that the scholarship program was permissible under the Establishment Clause and that, in any event, they could not dispute that because the court had "repeatedly held" that the Establishment Clause was "not offended when religious observers and organizations benefit from neutral government programs." The citations that followed included *Locke v. Davey*, 540 U.S. 712 (2004), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), as well as *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. ___ (2017), which recognized the parties' agreement that the Establishment Clause was not violated by including churches in a playground resurfacing program.

The Thomas Concurrence

Justice Thomas joined in the opinion by Roberts (as did Justices Samuel Alito, Neil Gorsuch and Brett Kavanaugh). Notably, Thomas also wrote a concurring opinion (in which Gorsuch joined) that focused more specifically on the court's Establishment Clause jurisprudence. In particular, the opinion argued that the court's interpretation of the Establishment Clause "continues to hamper free exercise rights" and that, until the court corrects that interpretation, "individuals will continue to face needless obstacles in their attempts to vindicate their religious freedom."

> The court's Establishment Clause decisions have tended to prioritize the secular over the spiritual, the temporal over the ecclesiastical, and the atheists and the agnostics over the believers.

Justice Thomas observed that, under the court's "modern, but erroneous," view of the Establishment Clause, government must treat all religions equally and must treat religion equally to nonreligion. Government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another," Thomas continued, quoting from the first case applying the Establishment Clause to the states, *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947).

He noted that the theory of this "equality principle" prohibited government from "expressing any preference for religion—or even permitting any signs of religion in the governmental realm." Thus, he added, when a plaintiff brings a free exercise claim, the government may defend its law (as Montana did in *Espinoza*) on the ground that the law's restrictions were required to prevent it from "establishing" religion.

In Thomas' view, this understanding of the Establishment Clause was "unmoored from the original meaning of the First Amendment." At the founding, he wrote, the Establishment Clause served only to protect states, and by extension their citizens, "from the imposition of an established religion"—akin to the Church of England—by the federal government. According to Justice Thomas, that application of the Establishment Clause would protect against the "coercion of religious orthodoxy and of financial support by *force of law and threat of penalty*" that Justice Scalia referenced in his dissent in *Lee v. Weisman*, 505 U.S. 577 (1992).

Thomas then declared that the "modern view" of the Establishment Clause, which presumed that states must remain "both completely sep-

arate from and virtually silent on matters of religion" to comply with the Establishment Clause, was "fundamentally incorrect."

Thomas said that, under this modern view (and in this regard it is important to keep in mind the interconnectivity of the Establishment and Free Exercise Clauses as noted above), state and local governments could rely on the Establishment Clause to justify policies that others wished to challenge as violations of the Free Exercise Clause. Once a government demonstrated that its policy was required for compliance with the Constitution, any claim that the policy infringed on free exercise could not survive.

Thomas reasoned that the concern with avoiding governmental endorsement of religion has been used to "prohibit voluntary practices that potentially implicate free exercise rights," with courts and governments going so far as to suggest "that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith," *Kennedy v. Bremerton School District*, 586 U.S. ___ (2019) (Alito, J., statement respecting denial of certiorari).

Further to this point, Justice Thomas also cited to *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (voluntary decision to begin football games with a prayer violated the Establishment Clause); *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017) (M. Smith, J., concurring) (coach's decision to lead voluntary prayer after football games); and *Walz v. Egg Harbor Township Board of Education*, 342 F. 3d 271 (3d Cir. 2003) (student's decision to distribute small gifts with religious messages to classmates).

Thomas concluded that the court's "distorted view" of the Establishment Clause "removed the entire subject of religion from the realm of permissible governmental activity, instead mandating strict separation." This communicated a message that "religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion." Thomas once again quoted Justice Scalia, this time from *Locke*, stating that manifestations of this "trendy disdain for deep religious conviction" assuredly lived on and were evident in the fact that, unlike other constitutional rights, as Justice Gorsuch set forth in his concurring opinion in *American Legion*, the mere exposure to religion can render an "offended observer" sufficiently injured to bring suit against the government even if the individual had not been coerced in any way to participate in a religious practice.

Conclusion

The Establishment Clause should not mean that government cannot do anything for religion, that for government to remain "neutral" with respect to religion, religion must be excluded from society's public sphere. Indeed, as Kelsey Curtis wrote in "The Partiality of Neutrality," 41:3 Harvard J. L. & Pub. Pol'y 935 (2018), the court's rulings have not been neutral towards religion but, instead, have "embrace[d] the secular." Daniel O. Conkle had a similar thought, in "The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future," 75 Ind. L. J. 1 (2000), writing that "the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect … may be to … secularize religion."

The Establishment Clause, however, must not be interpreted to require religion to hide or to divest society of religion. Just as the Establishment Clause prohibits the establishment of a particular church or religion by the government, so it must prohibit government from harming or, worse, destroying, religious institutions or their symbols. Cf. Patrick M. Garry, "When Anti-Establishment Becomes Exclusion: The Supreme Court's Opinion in *American Legion v. American Humanist Association* and the Flip Side of the Endorsement Test," 98 Neb. L. Rev. 643 (2019).

The bottom line: The corrosive effect of secularism on religion today must not be permitted to continue. It remains up to the Supreme Court to set the law on a proper course.

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