Can the Accommodationist Achieve Pluralism?

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In March of 2008, Seattle University School of Law hosted an engaging conference on Pluralism, Religion, and the Law. The theme of the conference—religion and pluralism—is not only unavoidable but is probably one of the most important issues of our times. This paper is based on my brief remarks on a panel dedicated to "reimagining the relationship between religion and law" and focuses on the U.S. Supreme Court's church and state jurisprudence. In particular, I ask whether an approach to the Establishment Clause known as accommodation is consonant with the larger concept of pluralism, particularly in the context of public religious symbols and displays, and offer some proposals and tentative conclusions. I propose two alternatives, signs and disclaimers, and tentatively conclude that the use of either might relieve the perceived tension between accommodation and pluralism.

I. WHY VIEW PLURALISM THROUGH AN ACCOMMODATIONIST LENS?

First, the easy question: What is meant by the term pluralism? It is a (relatively) easy question because most of us have a sense of what pluralism means. Webster's defines pluralism as, among other things, "a state of society in which members of diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization."[1] In fact, to recite this definition is to do no more than simply make an observation about society as we know it. But the common civilization identified in the last part of that definition seems to be at odds with the society described in the first part, particularly in the case of religion. At the point at which we begin to recognize a common *religious* character we are confronted by the danger that *e pluribus unum*

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1. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 955 (11th ed. 2005).

("out of many, one"), will become an oppressive state-sanctioned establishment of religion. Thus, the conventional wisdom has been that pluralism requires a strict separation of church and state, or perhaps neutrality between religion and nonreligion, and not a more flexible religious accommodation,[2] to survive and to thrive.[3]

It might seem strange, then, to think of pluralism in terms of whether an accommodationist approach to the Establishment Clause can achieve it. There are very practical reasons for looking at these two ideas together. The current composition of the U.S. Supreme Court suggests that the general trend for Establishment Clause cases is toward acknowledgment and accommodation of religion and away from strict separation.[4] Moreover, religious accommodationists prefer a public square with a rich religious vibrancy that reflects the religious pluralism of the populace, and they therefore likely would argue that there is no disharmony at all.[5] An obvious point of tension exists, however, between the group I have been describing in this paper, whom I will refer to as "religious accommodationist pluralists," and another group whom I will refer to as "religious multiculturalists." While both pluralists and multiculturalists appreciate the connection between religion and identity, multiculturalists would tend to view majority manifestations of religion with distrust, perhaps viewing them as symbols of dominance rather than as group expressions of identity. This particular strand of argument presses the question of whether accommodationism can indeed promote pluralism.

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2. "Accommodation" refers to an approach to the Religion Clauses that values individual religious practice, the autonomy of religious groups, and the presence of religion in public life. *See generally* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985). As discussed in this paper, accommodation in the Establishment Clause context refers to an approach that is less likely to find public manifestations of religion unconstitutional.

3. *See, e.g.*, Erwin Chemerinsky, *The Wren Cross Controversy: Religion and the Public University: Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2206 (2008).

4. The two most recent additions to the Court, Chief Justice Roberts and Justice Alito, seem poised to continue the accommodationist trend in the Court's doctrine. *See, e.g.*, Hein v. Freedom From Religion Fund., Inc., 127 S. Ct. 2553 (2007).

5. *Cf.* McConnell, *supra* note 2, at 14 ("An alternative view is that religion is a welcome element in the mix of beliefs and associations present in the community. Under this view, the emphasis is placed on freedom of choice and diversity among religious opinion. The nation is understood not as secular but as pluralistic. . . . The idea of accommodation of religion, which is foreign to interpretations of the Religion Clauses based on strict neutrality or separation, follows naturally from the pluralist understanding."). McConnell's article ultimately focuses on legislative accommodations; he acknowledges that reasonable minds may differ on whether permitting certain religious symbols such as the Nativity crèche in the public square "run[s] counter to the ideal of religious pluralism." *Id.* at 49–50; *see also* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687 (1992) (excluding from discussion religious display and symbols cases and referring to those cases as involving "collective expression of religious ideas").

II. ACCOMMODATION AND PLURALISM: SYMBOLS AND DISPLAYS

In the case of religious symbols and displays, the multiculturalist's concerns are reflected in the doctrinal skepticism about the compatibility of accommodation and pluralism. A prominent example is the line of U.S. Supreme Court cases involving holiday displays and featuring Justice O'Connor's endorsement test that focuses on whether a citizen is made to feel like an "outsider."[6] Justice Breyer's concerns about civil strife and divisiveness in the 2005 Ten Commandments case also seem to reflect such skepticism.[7]

To appreciate these concerns, one need only consider an example from the current overabundance of reality television. The Home and Garden Television Network features several shows in which homeowners attempt to market their homes for sale. Realtors and professional home "stagers" offer advice to anxious sellers on how to improve the chances of a speedy and profitable sale, and the standard advice with respect to family pictures is to remove them from the home. These home-selling experts reason that removing family pictures allows prospective purchasers to envision themselves in the house. By contrast, leaving family pictures on display reminds potential buyers that the home belongs to someone else and prevents them from making the kind of personal connection that could lead to a quick offer to buy. In the same way, the argument goes, a citizen who observes a religious symbol or display that does not represent either her beliefs or the sub-community to which she belongs is made to feel that she is not a full part of the larger community.[8] The historical response to this objection has been to include, where possible, more religious symbols, including symbols of minority faiths. This general approach has been met with approval by the U.S. Supreme Court.[9] While attempting to showcase religious diversity is one way to solve the problem, it is not always feasible in every public

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6. The endorsement test first appeared in Justice O'Connor's concurrence in *Lynch v. Donnelly*, and the test asks whether the government action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. 668, 688 (1984).

7. *See, e.g.* Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) ("[The Religion Clauses] seek to avoid the divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."). Justice Breyer cast the deciding vote in favor of the constitutionality of the Ten Commandments monument in *Van Orden* and against the constitutionality of the monument in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

8. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

9. *See* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (holding a crèche display in a county building unconstitutional, but finding constitutional a Christmas tree and menorah on the county courthouse steps).

setting to include many different religious symbols.[10] It also follows logically that even the most inclusive display would probably fail to be inclusive of every religion or creed represented in a given community.

III. DISCLAIMERS AND SIGNS

Increased effort at inclusive religious representation is one tool with which to promote pluralism, but in the cases in which such an effort is not possible or practical, the issue for the accommodationist pluralist remains whether it is possible to avoid the exclusionary message perceived by some when confronted with religious symbols. On this particular point Noah Feldman in his book, *Divided by God*, concludes that the answer is yes[11]: "Talk can always be reinterpreted, and more talk can always be added, so religious speech and symbols need not exclude."[12] Two forms of explanatory "talk" that I propose here are disclaimers and signs. A disclaimer might accompany a particular display or symbol to explain the social or historical significance of the symbol. A sign, on the other hand, could contain a general statement about the openness of the community concerning religion.

The Supreme Court has not squarely considered this first idea, that a disclaimer accompanying a religious display would remove or lessen any concerns about the Establishment Clause. In its first Ten Commandments case, the Court ruled that a legislative statement contained at the bottom of the display concerning the historical significance of the Ten Commandments could not override the religious purpose of posting them in a schoolhouse.[13] But in Justice Brennan's dissent in *Lynch v.*

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10. The facts of the Court's 2008-2009 Ten Commandments case, for example, illustrate a situation in which a minority religion's proposed symbol conflicts with the existing one, not simply because it represents an obscure faith, but because it proposes an alternative interpretation of the same religious narrative. *See* Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008); The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Nov. 10, 2008) (explaining that Moses first received the Aphorisms of Summum on tablets at Mount Sinai as a "higher law" prior to returning to Mount Sinai to obtain the tablets containing the Ten Commandments, or "lower law").

11. NOAH FELDMAN, DIVIDED BY GOD (2005). Feldman reaches a conclusion that I have reached previously, though in his case with far less handwringing. *See* Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1 (2004). *Compare, e.g., id.* at 39–40 (discussing the Jehovah's Witnesses' desire to be exempted from the pledge rather than to eliminate the practice altogether), *with* FELDMAN, *supra*, at 242 ("The Jehovah's Witnesses never claimed that their conscientious scruples required that the pledge and salute be abolished for everyone – they just wanted their children to be exempt.")

12. FELDMAN, *supra* note 11, at 238 (2005). Feldman proposes that the way to bridge the divide between "Legal Secularists" and "Values Evangelicals" is to flip the Supreme Court's Establishment Clause doctrine such that public religious symbols would not violate the Establishment Clause, but public funding for religious institutions would. *Id.* at 238–42.

13. Stone v. Graham, 449 U.S. 39 (1980).

Donnelly a few years earlier, he seemed to approve of a crèche on federal park land adjacent to the White House because that display contained "explanatory plaques" designed to disclaim government sponsorship and downplay religious differences.[14] The Court's doctrine makes clear that the erection of a display or symbol must not have a religious purpose, but beyond that, particularly in the case of long-standing historical symbols or displays, it is not clear what constitutional effect a disclaimer would have.[15]

As for signs with targeted messages intended to convey religious pluralism, there is even less guidance as to whether such a novel approach would pass constitutional muster. A 2006 National League of Cities initiative challenged American cities and towns to promote inclusiveness by posting signs in prominent places in their cities that read, "Welcome. We are Building an Inclusive Community."[16] One could imagine a city sign focused on religious pluralism that read, similarly, "Welcome. We are building an inclusive community of diverse religions, faiths, and creeds. There are no outsiders here."[17] As with the explicit disclaimer, no Supreme Court cases address the issue of whether a community may use signs to control the religious message it sends—or does not send. However, unlike the disclaimer, which in some cases might merely describe the historical significance of a symbol or display, the sign is an attempt by a community to define itself on religious terms. Even if the sign did not affect the interpretation of a particular religious symbol as exclusionary or welcoming, the sign itself would be subject to constitutional scrutiny. A court might consider a sign to have been animated either by a secular purpose, to promote pluralism and diversity, or by a religious one, to immunize a particular religious symbol from constitutional challenge. Practically, too, the strategy is one of high potential reward and correspondingly high risk. It is conceivable that some citizens would not tolerate explicit messages about religion and that others would resent such overt efforts at pluralism.

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14. 465 U.S. 668, 707 (1984) (Brennan, J., dissenting). In discussing the case involving federal park land, Brennan compared the display in *Lynch*, noting that the town of Pawtucket "made no effort whatever to provide a similar cautionary message." *Id.* (distinguishing *Allen v. Morton*, 495 F.2d 65, 67-68 (D.C. Cir. 1973) (*per curiam*)).

15. *Compare, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (religious purpose evident from evolution of displays containing Ten Commandments), *with* Van Orden v. Perry, 545 U.S. 677 (2005) (long-standing monument in Texas capitol merely an acknowledgment of religion that does not violate the Establishment Clause).

16. Several cities joined and have adopted the signs. Haya El Nasser, *Small Indiana Town Singing Tune of Racial, Ethnic Harmony*, USA TODAY, Aug. 4, 2006, at 3A; *see also* Lisa Shaw Roy, *Religion and Inclusion: The Impact of Signs*, NAT'L L. J., Mar. 26, 2007, at Col. 1.

17. Roy, *Religion and Inclusion*, *supra* note 16.

With all of this in mind, let us return to the example of the home sellers and the impact of their family pictures on potential buyers. This example helps us understand the perspective of the potential buyer, but it does not necessarily correspond to the reality of shared public space. A potential buyer expects to make the home her own; she will not have to share it with a larger community. Likewise, once he is in his new home, an owner likely feels no obligation to establish a sense of continuity with or historical connection to the home's previous occupants. Perhaps a better example might be one that comes from my own institution: our law school's main floor has a hallway featuring pictures of each graduating law school class, from the earliest up to the most recent. The pictures spread across one long corridor divided in the center by an entrance to the law library. On one end of the hall are class pictures that feature mostly white males, with few persons of color and few women. At the other end of the hall, the pictures become more diverse. How should a law school ensure that both sides of the hall make all students feel welcome? One possibility would be to remove the older class pictures and replace them with artwork, current pictures of students or faculty, or other historical information. But a better alternative would be to retain the older class pictures, and use additional images and/or text to convey that the law school embraces all students regardless of race or gender or other defining characteristics.

In fact, for either disclaimers or signs, the real test is whether such ideas would succeed in practice. Success would likely depend on such considerations as whether in a given community a relationship of trust and good faith already exists between religious communities and government, and between citizens of different faiths and of no faith.

IV. CONCLUSION

Accommodation and pluralism are not always thought to go hand in hand, but neither does this observation mean that the accommodationist seeking to promote pluralism is doomed to failure. In the case of public religious symbols and displays, the possibility of disclaimers and signs may potentially reconcile the interests of both accommodationists and pluralists. Though the constitutional status of such messages is unclear, as mentioned earlier, the Court's doctrine is likely to move in the direction of accommodation except in cases involving egregious Establishment Clause violations, so that uncertainties might be expected to be resolved in the accommodationist's favor. Whether disclaimers or signs succeed in practice is another matter, but the accommodationist would argue that either is worth a try.