Summer 2006

Religious Expression and Symbolism in the American Constitutional Tradition: Government Neutrality, But Not Indifference

Daniel O. Conkle
Indiana University Maurer School of Law, conkle@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, International Law Commons, and the Religion Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol13/iss2/4
Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference

DANIEL O. CONKLE*

Abstract

In this article, I describe and analyze three principles of First Amendment doctrine. First, the Establishment Clause generally forbids governmental expression that has the purpose or effect of promoting or endorsing religion. Second, and conversely, private religious expression is broadly defined and is strongly protected by the Free Speech Clause. Third, as an implicit exception to the first principle, the government itself is sometimes permitted to engage in expression that seemingly does promote and endorse religion, but only when the expression is noncoercive, nonsectarian, and embedded within (or at least in harmony with) longstanding historical tradition. Comparing these three principles to the demands of French laïcité, I conclude that the United States and France share fundamental common ground on the first principle, but that the second and third principles demonstrate that the American approach is in some respects more protective and tolerant of religious expression in the public domain. I suggest that these variations are not accidental, but rather are the product of historical, philosophical, and cultural differences.

Two recent controversies highlight the French commitment to laïcité, which demands a strict separation of church and state. First, France has strongly resisted the inclusion of religious language in the proposed European Constitu-

*Robert H. McKinney Professor of Law, Adjunct Professor of Religious Studies, and Nelson Poynter Scholar, Indiana University Bloomington. This article is a revised and updated version of a paper I presented on January 28, 2005, during a conference on “La Conception Américaine de la Laïcité” at the Université Paris II (Panthéon-Assas). My original paper was published in French as Daniel O. Conkle, Expression et symbolisme religieux dans la tradition constitutionnelle américaine: neutralité de l’État, mais pas indifférence, in LA CONCEPTION AMÉRICaine DE LA LAÏCITÉ 153 (Elisabeth Zoller ed., 2005). I wish to thank Professor Elisabeth Zoller for hosting a wonderful conference.

Portions of this article draw upon the author’s recent book, which offers a more complete account of American religious liberty. See DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES (2003).
tion. Second, it has banned students from wearing Islamic headscarves and other conspicuous religious apparel in public schools. These actions address the relationship between church and state in the context of expression and symbolism, that is, verbal or symbolic speech. Taken together, the actions suggest that the state should be secular in its expression and that religious expression should be confined to the private realm.

The French commitment to laïcité is matched by a similar commitment in the United States, but the American constitutional tradition in this context is nuanced and complex. Our understanding of separation, like that of France, goes well beyond the institutional separation of church and state. We are committed to the idea of secular as opposed to religious government, and our national Constitution is itself a secular document. At the same time, general references to God are commonplace in state constitutions and in other official pronouncements. It is an open question whether our tradition would sanction the contemporary adoption of religious constitutional language such as the religious language considered for the European Constitution. Depending on the wording, however, this type of religious language might be permissible in the United States. And there is little doubt about American constitutional principles in the context of student religious attire. A law like the one adopted in France would almost certainly be unconstitutional in the United States.

At first glance, the American approach to religious expression and symbolism might seem confused and inconsistent. Consider the following, additional examples. School-sponsored prayer is strictly banned from public schools, even during graduation ceremonies and at extracurricular events, and even when offered by students rather than teachers. But public schools are required to permit students and community groups to hold religious meetings after school on the same basis as nonreligious meetings. And even during the class day, public school teachers—at least for the time being—may lead students in reciting the Pledge of Allegiance to the American flag, complete with its reference to "one Nation under God." By contrast, efforts to promote the religious content of the Ten Commandments by posting them in public schools and in other public buildings have been declared unconstitutional. Likewise, governmental holiday

---

RELIGIOUS EXPRESSION AND SYMBOLISM

displays cannot endorse the religious aspect of Christmas. Yet no one doubts the constitutionality of our national motto, “In God We Trust,” which is prominently displayed on American coins and currency. And American presidents routinely declare days of prayer and offer religiously oriented Thanksgiving proclamations.

In this article, I will discuss the American approach to religious expression and symbolism, suggesting that the American approach is multifaceted but not incoherent. If the French conception of laïcité can be understood to require neutrality in the sense of governmental indifference to religion, the American approach calls for neutrality of a somewhat different character. The American conception of neutrality—sometimes called “benevolent neutrality”—generally demands that the government not favor religion over irreligion, but, as an apparent exception, it permits some governmental expression that seems to violate this principle. Perhaps more important, the American understanding of neutrality grants private religious expression strong protection under the First Amendment’s Free Speech Clause, including strong protection against discriminatory treatment, and this protection extends to expression in public schools and other public places. The United States and France thus share a similar commitment to the separation of church and state, but the American commitment is distinctive in significant ways.

In an attempt to explain the American approach, I will discuss three constitutional principles. First, the Establishment Clause of the First Amendment generally forbids governmental expression that has the purpose or effect of promoting or endorsing religion. Second, and conversely, private religious expression is broadly defined and is strongly protected by the Free Speech Clause. Third, as an implicit exception to the first principle, the government itself is sometimes permitted to engage in expression that seemingly does promote and endorse religion, but only when the governmental practice is noncoercive, nonsectarian, and highly traditional in a historical sense. In closing, I will suggest that the American departures from the French conception of laïcité should not be overstated, but neither should they be ignored. I will further suggest that the variations are not accidental, but rather are the product of historical, philosophical, and cultural differences.

1. The Establishment Clause Prohibition on Governmental Expression That Promotes or Endorses Religion

The Establishment Clause of the First Amendment, ratified in 1791, provides that "Congress shall make no law respecting an establishment of religion . . . ." The Establishment Clause was originally directed to the national government alone, but the United States Supreme Court has concluded that the Fourteenth Amendment, ratified in 1868, incorporated the Establishment Clause and thereby extended its prohibition to state governments as well (including their local subdivisions and public schools). Whether this conclusion is consistent with the original understanding of the First and Fourteenth Amendments is a matter of dispute, but for more than half a century the Supreme Court has declared that the Establishment Clause requires government at all levels to be neutral toward religion. As the Court wrote in its 1947 decision in Everson v. Board of Education, "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." Since Everson, Establishment Clause issues have arisen mainly in two areas: challenges to governmental funding programs that extend to private religious schools or organizations, and challenges to governmental expression or symbolic action, especially in public schools. Our focus here is on the second set of issues.

According to an oft-cited 1971 case, Lemon v. Kurtzman, Everson's requirement of neutrality demands that governmental action satisfy a three-part constitutional test: it must be supported by a secular purpose; it must not have the primary effect of advancing or inhibiting religion; and it cannot create an excessive governmental entanglement with religion. In the context of governmental expression, entanglement typically is not an issue, and the constitutional inquiry has focused largely on the purpose and effect of the government's action. Moreover, the Supreme Court has developed a supplemental constitutional test, the endorsement test, that refines the purpose and effect prongs of the original Lemon test. The endorsement test focuses specifically on the symbolic character of governmental action. This test was first proposed in 1984 by Justice O'Connor.

6. Id. at 612–13.
in her influential concurring opinion in Lynch v. Donnelly.⁷ According to the endorsement test, the government violates the Establishment Clause if it intends to communicate a message that endorses or disapproves religion or if its action has the effect of communicating such a message. More specifically, the second part of the endorsement test asks whether an "objective observer," properly informed of the relevant history and context, would find in the government's action a message of endorsement or disapproval. For obvious reasons, the endorsement test is well-suited for constitutional challenges involving expression and symbolism.

The Lemon test and the endorsement test are designed in part to protect the value of religious voluntarism, that is, the freedom of individuals to make religious choices for themselves. But governmental action can violate these tests even in the absence of coercion and therefore even when religious voluntarism is not seriously threatened. As a result, it is clear that these tests reflect additional constitutional values. One such value is religious equality—equality not only between and among religions, but also between religion and irreligion. Another is the value of respecting the religious or irreligious identity of individual citizens, a value that in turn promotes a religiously inclusive political community. The endorsement test, in particular, is designed to address these concerns. Governmental expression that endorses or disapproves religion may not impair religious voluntarism, but it is likely to affront and alienate citizens who are excluded from the government's symbolic favor. As Justice O'Connor wrote in her Lynch concurrence, "Endorsement 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. Disapproval sends the opposite message."⁸ As to the "outsiders," the government's action may constitute not only an insult, but also a psychological assault on the core of their self-identity. By denigrating the dissenters' religious or irreligious identity, moreover, the governmental action is likely to create resentment and religious divisiveness that could threaten the unity of the political community itself.⁹

Perhaps for these reasons, the Supreme Court has embraced the Lemon and endorsement tests in the context of governmental expression, and the Supreme Court and lower courts have used these tests to invalidate a variety of govern-

---

⁸ Id. at 688.
mental actions. The Supreme Court has called for special vigilance in the public school setting, where governmental expression raises distinctive concerns, including concerns about the subtle coercion of impressionable children. But its decisions stand for the broader proposition that the government—whether acting within or outside the public school setting—should not itself endorse or disapprove religion, regardless of whether the government's action is coercive.

In a long line of cases, the Supreme Court has invalidated school-sponsored prayer and religious instruction in public schools, even when student participation is designated as voluntary. Public schools are free, of course, to teach about religion in a neutral and objective manner, as part of a secular program of instruction. But the Supreme Court has outlawed teacher-led prayers and devotional exercises, whether composed by the government, drawn directly from the Bible, or even—in certain circumstances—when the exercise is a moment of silence. It has prohibited school-sponsored prayers at graduation ceremonies and extracurricular events, even when the prayers are nonsectarian and even when they are offered by invited clergy or by students selected by their peers. It has invalidated laws precluding the teaching of human evolution and promoting the teaching of divine creation. It has precluded public schools from posting the Ten Commandments in their classrooms. And it has ruled that public schools cannot schedule classroom religious instruction during the school day, even when the instructors are privately employed and when students participate only upon the request of their parents.

Some of these public school cases predated Lemon and the endorsement test, and the Supreme Court's reasoning sometimes included additional elements, including a concern about the subtle coercion of school children. But the decisions have rested largely on (what is now) the first part of the Lemon and endorsement tests. Whether by law or by practice, the government, through the public schools, was acting not with a secular purpose, but rather with the impermissible purpose of promoting and endorsing religion. The government therefore was
responsible for the religious expression that took place in these cases, making the expression its own—in substance if not in form. As a result, the government violated the Establishment Clause requirement of religious neutrality.

The constitutional prohibition on governmental expression that endorses or disapproves religion extends beyond the public school setting. In particular, the Supreme Court has ruled that the government cannot sponsor verbal or symbolic public displays, including holiday displays, that convey this type of impermissible message. As in the public school cases, the Court has invoked the Lemon and endorsement tests. The government can satisfy the first prong of this analysis if it has included a religious element in a public display not for the purpose of promoting or endorsing religion, but instead for a secular reason—for example, simply to acknowledge or recognize some relevant aspect of religion. For example, a city might include a Christian crèche in a Christmas display not to promote or endorse Christianity, but merely to acknowledge or recognize the religious origins of this public holiday. Just as public schools are free to teach about religion in a neutral way, other governmental units are free to address the topic of religion in an objective, nonpromotional manner. Needless to say, the sincerity of this sort of asserted secular purpose might be doubted, and, if the government's true purpose is found to be promotional, there is a violation of the first prong. Perhaps more important, even a genuinely secular purpose will not save a public display if it fails the second prong of the analysis. This second prong precludes the government, whatever its purpose, from sponsoring a public display that has the effect of promoting or endorsing religion.

Relying especially on the endorsement test and focusing mainly on its second prong, the Supreme Court has upheld some displays and rejected others. Under the second prong of the endorsement test, the analysis focuses not on the government's intention but on the symbolic effect of its action. More precisely, the question is whether a well-informed “objective observer” would conclude that a public display including a religious element in fact conveys a message of governmental endorsement. In resolving this question, the Court has relied on fine distinctions. For example, it has precluded a stand-alone crèche inside a county courthouse, complete with a banner declaring, “Gloria in Excelsis

---

16. See McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (relying on the first prong to find county courthouse displays of the Ten Commandments unconstitutional when the history of the displays revealed that the counties' predominant purpose was to promote religion).

17. Cf. id. at 2734 (finding the "objective observer" inquiry relevant even under the purpose prong of Lemon).
Deol," but it has upheld a broader, city-sponsored outdoor display that included not only a crèche, but also a Santa Claus house, reindeer, other secular symbols, and a banner reading "Seasons Greetings." Likewise, the Court has selectively permitted the government to display the Ten Commandments on nonschool public property, but only when the context suggested a predominantly secular message about the historical role of the Commandments and their relationship to moral ideals. Although the Court's particular decisions are finely drawn and fact-specific, the underlying constitutional principle is clear: the government cannot act, even unintentionally, as the sponsor of expression that promotes or endorses religion.

Especially in the public school setting, the Supreme Court has gone to great lengths to uncover and preclude the unconstitutional sponsorship of religious expression. Closely examining governmental policies and intentions, the Court has refused to tolerate attempts to circumvent its constitutional doctrine and has invalidated such attempts as "shams." Three cases are illustrative.

In Wallace v. Jaffree, the Court invalidated an Alabama statute authorizing public school teachers to lead their students in a daily period of classroom silence "for meditation or voluntary prayer." The Court did not preclude teacher-led moments of silence altogether, nor statutes authorizing this practice. Instead, it focused on the precise language and history of the Alabama statute that was under review. The Court suggested that it would uphold moment-of-silence statutes that do not mention prayer, and it implied that statutory references to prayer might sometimes be permissible. But the Court found that this particular Alabama statute was "entirely motivated by a purpose to advance religion" by "convey[ing] a message of state endorsement and promotion of prayer." The

20. Van Orden v. Perry, 125 S. Ct. 2854 (2005) (5-4 decision upholding a 40-year-old display of the Ten Commandments as one monument among many on the outdoor grounds of the Texas State Capitol); see id. at 2868–73 (Breyer, J., concurring in the judgment) (providing the decisive fifth vote to uphold the Ten Commandments monument and arguing that, in its particular historical context and physical setting, the monument conveyed a predominantly secular message); cf. McCreary County, 125 S. Ct. 2722 (invalidating recently erected courthouse displays of framed copies of the Ten Commandments, despite the presence of other documents as well, when the history of the displays revealed a predominantly religious purpose).
22. Id. at 56.
23. Id. at 59.
Court noted that preexisting Alabama law had already authorized a moment of classroom silence, without mentioning prayer, and that a key legislative sponsor of the challenged statute had conceded that his only purpose was to "return voluntary prayer" to the public schools. 24 The Supreme Court also cited the Alabama legislature's almost contemporaneous effort to directly challenge the Court's precedents by authorizing a prescribed spoken prayer for public school classrooms. In context, it seemed clear that Alabama's attempt to revise its moment-of-silence law had the same, constitutionally impermissible purpose: to promote and endorse prayer as a favored activity in Alabama's public schools. 25

The Supreme Court likewise found an impermissible legislative purpose in Edwards v. Aguillard. 26 In a previous decision, the Court had invalidated a law prohibiting public school teachers from teaching evolution as an explanation of human origins. 27 At issue in Edwards, by contrast, was a Louisiana "balanced treatment" statute. The Louisiana statute did not ban the teaching of evolution. Instead, it declared that any public school that elected to teach evolution was required to teach "creation science" as well. The state claimed that creation science reflected legitimate scientific opinion and that the statute permitted students to confront the competing evidence and decide for themselves. As in Wallace, however, the Court closely examined the statute and its legislative history. It concluded that the state's secular defense of the statute was a "sham" and that, in reality, the law was not designed to promote the teaching of diverse scientific theories. Rather, the legislature's "primary" and "preeminent" purpose was to advance and endorse a particular religious viewpoint, a religious understanding of creation that appeared to be drawn from a literal reading of Genesis. Accordingly, the statute promoted and endorsed religious expression in violation of the first prong of the Lemon and endorsement tests. 28

In Santa Fe Independent School District v. Doe, 29 the Supreme Court confronted an even more elaborate attempt to avoid the strictures of the Establishment Clause. In an earlier case, the Court had extended its prohibition on school-sponsored prayer beyond the classroom setting, ruling that public schools could not invite clergy to offer prayers during graduation ceremonies. 30 Evi-

24. Id. at 57.
25. See id. at 56–60.
dently concerned about the impact of this precedent on school-sponsored prayers at high school football games, a public school board in Texas adopted a policy that was designed to permit such prayers to continue, but without the school board’s formal sponsorship or imprimatur. The policy called for two votes by the high school student body. In the first vote, the students were to decide whether there would be a student-led “invocation and/or message” before each home football game, not only “to promote good sportsmanship and student safety,” but also “to solemnize the event.” If this first vote was positive, the second vote was to elect a particular student, from a list of volunteers, to offer the “invocation and/or message.” The school board claimed that its policy served secular purposes, promoting student free speech as well as sportsmanship. And it argued that any prayers that resulted from the policy would be private student expression not subject to the Establishment Clause.

As in *Wallace* and *Edwards*, however, the Supreme Court closely scrutinized the situation and found an Establishment Clause violation. Examining the text of the policy, the manner in which it would be implemented, and the school board’s previous practice of explicit sponsorship, the Court ruled that the school board’s secular justification for the policy was a “sham.” The Court concluded that the true purpose and the inevitable effect of the policy was to continue, promote, and endorse the longstanding practice of school-sanctioned prayer at the games. As a result, the policy violated both the purpose and the effect prongs of the *Lemon* and endorsement tests. Although the prayers would be uttered by students, they would not be purely private expression. Due to the school board’s promotion and endorsement, the prayers, in reality, would be undertaken on behalf of the school board itself. As a result, the policy was not protected by free speech principles, but instead was invalid under the Establishment Clause.

**II. Free Speech Protection for Private Religious Expression**

As just explained, a critical factor in *Santa Fe* was the Supreme Court’s conclusion that it would not treat the student-led prayers as private expression. This was critical because private religious expression is not subject to the Establishment Clause. Much to the contrary, it is strongly protected by the First Amend-

32. See id. at 308–09.
33. See id. at 301–10, 313–17. The Court also cited concerns about coercion. See id. at 310–13.
ment. Perhaps surprisingly, the main source of protection for private religious expression is not the Free Exercise Clause, which specifically addresses religion and which forbids the government from "prohibiting the free exercise thereof." Instead, the constitutional protection springs mainly from the First Amendment's Free Speech Clause, which prohibits the government from "abridging the freedom of speech." As construed by the Supreme Court, the Free Speech Clause extends not only to secular expression, but also to religious expression, including prayer and worship, religious speech and instruction, and nonverbal religious symbolism. The Free Speech Clause thereby protects not only the constitutional value of expressive liberty in general, but also the value of religious liberty in the realm of private expression.

As Santa Fe makes clear, religious expression will not be treated as private if the expression is sponsored by the government. In the absence of such sponsorship, however, religious expression will be treated as private expression protected by the First Amendment—even if the expression takes place on governmental property, including the premises of public schools. What the Establishment Clause forbids is not religious expression, but governmental sponsorship or promotion of religious expression. Unlike the government, students and other private actors generally are free to advance and endorse religion through their speech and symbolic actions. Indeed, under the Supreme Court's free speech doctrine, privately initiated religious expression is high-value speech entitled to the same free speech protection as core political speech.34

Free speech doctrine provides only limited protection against the content-neutral regulation of expression, including religious expression. Content-neutral regulation restricts expression for reasons unrelated to its content or message. For example, the government might impose size or location restrictions on billboards, regardless of content, in order to promote traffic safety or visual aesthetics. Or public schools might further their educational mission by disciplining students who disrupt their classes by talking. These sorts of generally enforced, content-neutral regulations probably would not violate the First Amendment even if, in particular cases, they were applied to billboards that contained religious messages or to students who prayed aloud while their teachers were lecturing.35

Conversely, free speech doctrine strongly disfavors content-based regulation, and especially viewpoint discrimination, due to the First Amendment's hostility to censorship and to governmental distortions of public discourse in the "marketplace of ideas." Content-based regulation targets speech or symbolic conduct because of its communicative nature; that is, the government finds the expression harmful or inappropriate precisely because of its subject matter or message. Viewpoint discrimination is a subtype of content-based regulation, a subtype that is especially offensive to free speech values. Viewpoint discrimination targets not merely a particular subject matter, but a particular viewpoint or perspective. Although one could argue otherwise, the Supreme Court generally has treated governmental action that discriminates against religious speech as not only content-based, but also viewpoint-based. According to the Supreme Court, discrimination against religious speech favors secular over religious perspectives, thereby distorting the search for truth that freedom of speech is supposed to facilitate. Viewpoint discrimination is presumptively unconstitutional. As a matter of free speech doctrine, viewpoint discrimination triggers strict judicial scrutiny of not only regulatory penalties, but also governmental attempts to selectively deny religious speakers access to public property. This reasoning applies to property such as public parks, which are recognized "public forums" for First Amendment expression. It also extends, more broadly, to other public property on which the government has permitted private expression to take place.

The Supreme Court has developed and applied this analysis in a series of "equal access" cases involving claims by religious speakers that they have been improperly denied access to public property. In these cases, the religious claimants have challenged governmental policies permitting the use of publicly owned land or the after-hours use of public buildings by secular groups or for secular purposes, but expressly precluding such use by religious groups or for religious purposes. The claimants rely on free speech, typically asserting viewpoint discrimination. The government denies it, but goes on to argue that even if there were a presumptive violation of free speech, the Establishment Clause would preclude the requested access to the public property. Honoring the Establishment Clause by excluding the religious speakers, the government contends, serves a compelling interest that satisfies free speech doctrine even if strict scrutiny is required. In each of the cases decided thus far, however, the Supreme

Court has accepted the challengers' free speech argument and rejected the government's Establishment Clause defense, essentially by finding that the government's fear of breaching the Establishment Clause is misplaced. According to the Court, equal access for privately initiated religious and secular speech would not violate the Establishment Clause because it would not constitute governmental sponsorship of the religious expression.37

In its recent decision in *Good News Club v. Milford Central School*,38 the Supreme Court extended this reasoning to after-school religious meetings at public schools, even for elementary students. A New York public school permitted private groups to use the school after hours for various purposes, including character and morals education for children. Citing this policy, an evangelical Christian organization sought permission to hold weekly after-school meetings for elementary school children (ages six to twelve), meetings at which the children would sing songs, hear Bible lessons, memorize scripture, and pray. But the school's after-hours policy expressly precluded meetings "for religious purposes," and the school denied permission. The Christian organization claimed a free speech violation, and the Supreme Court agreed, finding that the school had engaged in viewpoint discrimination by permitting after-hours meetings to teach the development of character and morals from a secular perspective, but not from a religious perspective.39 The school's Establishment Clause argument was unavailing, because the Court found that extending nondiscriminatory access to the Christian group would not be an Establishment Clause violation. The Court noted that student participation in the religious meetings required parental permission, mitigating potential concerns about coercion. In any event, the Court found that such concerns were constitutionally significant only when public schools themselves were sponsoring religious expression. Here, there would be no such sponsorship. Although the religious expression would occur on the school's premises, the school—by giving the expression equal, not preferential, treatment—would neither be promoting nor endorsing it.40


39. See id. at 107–12.

40. See id. at 112–19.
Good News Club was decided in 2001, only a year after Santa Fe. The contrasting results are striking. In Santa Fe, the Supreme Court precluded prayers before high school football games, even though the prayers would be nonsectarian, would be offered by high school students acting as volunteers, and would take place only a few times each year. In Good News Club, the Court permitted not only Christian prayers, but sustained evangelical instruction, offered by adult Christian leaders to young and impressionable elementary students every week at a public school, just after the close of the regular school day. At first glance, these results seem anomalous. Surely the religious expression that the Court permitted in Good News Club is more likely to promote religious beliefs and practices than the religious expression that the Court precluded in Santa Fe. But in the American constitutional understanding, that is not the issue. The critical question is whether the government is sponsoring or promoting the religious expression. If so, as in Santa Fe, the government is violating the Establishment Clause. If not, as in Good News Club, there is no Establishment Clause violation, and the Free Speech Clause will affirmatively protect the private religious expression—even on public property, and even on the premises of public schools.

The Free Speech Clause protects private religious expression on the premises of public schools not only after hours, but also during the school day. Religious expression by teachers or other school officials is likely to indicate school sponsorship, as opposed to private expression. For a teacher to lead her students in classroom prayer, for example, would clearly violate the Establishment Clause, even if the teacher acted on her own initiative. As Santa Fe makes clear, religious expression by student speakers also may be school-sponsored and therefore unconstitutional. School sponsorship might be present during the regular school day if students offer prayers or other religious expression as part of official school programs or in written publications that are sponsored and supervised by school officials. Purely private student speech, however, is protected by the Free Speech Clause, and this protection extends to privately initiated prayer and other religious expression. As the Court wrote in Santa Fe, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."42

More generally, the Supreme Court has ruled that the Free Speech Clause protects privately initiated student speech and symbolic expression in public

42. Id. at 313.
schools. The leading case is *Tinker v. Des Moines Independent Community School District*.\(^43\) In *Tinker*, the Court barred public school authorities from disciplining students for wearing black armbands to school as a symbolic protest against the war in Vietnam. In so ruling, the Court declared that First Amendment rights extend to the public school environment and that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^44\) Thus, students are free to express their personal views “in the cafeteria, or on the playing field, or on the campus during the authorized hours.”\(^45\) Student expression can be restricted, the Court explained, only if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”\(^46\) The armbands in *Tinker* did not meet this test, despite the controversy and distraction that they were likely to cause.

Under American free speech principles, the French ban on conspicuous religious attire in public schools would almost certainly be unconstitutional. Under *Tinker*, public schools can ban student expression that would be truly disruptive. This might include derogatory references to specific racial or religious groups. It might also include symbolic clothing that is extremely provocative or, perhaps, symbolic clothing that largely conceals a student from view. But *Tinker* would protect the wearing of conspicuous religious apparel that merely symbolizes a student’s religious identity and commitments. It would not be enough for the government to show that such symbolism might be controversial or distracting. As the Court held in *Tinker*, the First Amendment protects students who wish to engage in “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”\(^47\) Furthermore, the French ban applies only to “symbols or clothing by which students conspicuously manifest a religious appearance.”\(^48\) The law directly targets religious expression, as such, for distinctive regulation. Other symbolic apparel is not affected, no matter how controversial


\(^{44}\) *Id.* at 506.

\(^{45}\) *Id.* at 512–13.

\(^{46}\) *Id.* at 513. This standard applies to purely private student expression, that is, the expression of students acting on their own. School officials have more leeway to control student expression that occurs in school-sponsored programs or publications. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

\(^{47}\) *Tinker*, 393 U.S. at 508.

or disruptive it might be. This regulation would certainly be regarded as content-based, and, under the Supreme Court's equal-access precedents, it probably would be treated as a viewpoint-based exclusion of symbolic religious communications. These precedents also would reject any claim that church-state separation demands or supports this selective exclusion of private religious expression. The analysis of *Tinker*, coupled with the First Amendment's special aversion to regulations targeting private religious expression, would lead to almost certain invalidation.

More generally, as we have seen, the First Amendment has been interpreted to require a sharp distinction between private religious expression and religious expression that is sponsored by the government, including public schools. Private religious expression is protected by the Free Speech Clause, even when it takes place on the premises of public schools or on other governmental property. Governmentally sponsored religious expression, by contrast, is precluded by the Establishment Clause. This picture is not yet complete, however, because the Establishment Clause prohibition is subject to an implicit exception.

### III. An Implicit Exception to the Establishment Clause Prohibition on Governmental Expression that Promotes or Endorses Religion

As discussed in Part I of this essay, the Supreme Court has adopted two complementary tests under the Establishment Clause, the *Lemon* test and the endorsement test. In its formulation and application of these tests, the Court has demanded governmental neutrality not only between and among religions, but also between religion and irreligion. More specifically, the Court has concluded, time and again, that the Establishment Clause forbids the government from sponsoring verbal or symbolic expression that promotes or endorses religion, even if the governmental action is neither coercive nor sectarian. The Court has been especially vigilant in enforcing this prohibition in the public school setting, closely examining governmental claims of secular justification and sometimes dismissing those claims as "shams." But the prohibition extends to other settings as well, including governmental promotions of religion through the use of religious elements in verbal or symbolic public displays. This understanding of the Establishment Clause reflects the Supreme Court's general approach, and it plainly dominates the Court's decisionmaking.

At the same time, however, the Court has indicated that the Establishment Clause permits a narrow category of governmentally sponsored religious ex-
pression that would appear to violate these standards. In *Marsh v. Chambers*, 49 for example, the Court upheld the practice of governmentally sponsored legislative prayer, offered before legislative bodies by publicly paid chaplains. The Court made no pretense of applying its customary Establishment Clause doctrine. Instead, it emphasized that legislative prayer dates back to the First Congress of the United States and is such a longstanding historical tradition that it is "part of the fabric of our society." 50 In dicta in other cases, the Court likewise has approved other historical practices even though they appear to constitute governmental expression that promotes and endorses religion. For example, the Court has suggested that the following practices do not violate the Establishment Clause: presidential Thanksgiving proclamations that, since the time of George Washington, have included religious references and appeals; the Supreme Court's own opening cry, "God save the United States and this honorable Court," which dates back to the early nineteenth century; our national motto, "In God We Trust," which has appeared on selected American coins since the 1800s, which became our official motto in 1956, and which now appears on all our coins and currency; and the statutorily prescribed language, "one Nation under God," which has been part of the Pledge of Allegiance since 1954. 51

The Supreme Court has yet to offer a persuasive explanation for the constitutionality of these historical governmental practices. The Court sometimes has implied that these practices actually can satisfy the *Lemon* and endorsement tests because the governmental expression merely acknowledges religion without promoting or endorsing it. Some justices have gone further, contending that the expression has lost its religious meaning over time and now serves symbolic purposes that are secular in nature. 52 But these arguments are difficult and labored, if not contrived and disingenuous. By all indications, the governmental expression in question does promote and endorse religion, and it does so deliberately. As the Supreme Court tacitly recognized in *Marsh*, the expression therefore cannot be defended under the Court's conventional Establishment Clause tests. Instead, the Court appears to be recognizing an implicit exception to its conventional tests and to the general prohibition on governmental expression that promotes or endorses religion.

50. *Id.* at 792.
52. *E.g.*, *id.* at 716–17 (Brennan, J., dissenting).
The contours of this implicit exception are quite uncertain, in part because the Supreme Court has been reluctant to formally recognize its existence. Yet one can discern potential criteria by looking for common elements in the practice of legislative prayer, as described and approved in *Marsh*, and in the other practices the Court has approved in dicta. First and foremost, each of these various practices has a prominent and lengthy history in the United States, and, as a result, each has become an established feature of the American social fabric. In addition, each practice is primarily and essentially symbolic, not coercive. The government is promoting and endorsing religious expression; indeed, the government itself is speaking religiously. Yet the government is not coercing dissenting citizens to join or affirm the religious expression. At most, any such coercion is indirect and de minimis. Finally, the approved religious expression is nonsectarian in the following sense: it includes general invocations of God and religious faith, but it does not reflect (at least not in the Supreme Court’s estimation) a governmental preference for Christianity or any other specific religion.

Based upon this analysis, it appears that the exception is extremely narrow and that it requires that each of three conditions be satisfied: first, that the practice is a widely accepted and longstanding historical tradition; second, that it is primarily and essentially symbolic, not coercive; and third, that the government’s promotion and endorsement of religion is general and nonsectarian in nature.

So understood, this implicit exception appears to rest on a distinctive mix of constitutional values. In particular, the value of historical tradition or custom is added to the balance, and it acts as a partial counterweight to the Establishment Clause values that generally support a strong prohibition on governmentally sponsored religious expression. Those general Establishment Clause values are not abandoned altogether in this setting. For example, religious voluntarism remains important. Thus, no governmental practice can fit within the exception if it is coercive in any serious way. Religious equality remains important as well, but here it is enough that there be equality between and among religions. Sectarian preferences are forbidden, but more general governmental preferences for religion over irreligion are permissible in this context. As a result, the exception does not honor the value of religious equality in its fullest sense. The exception also tends to impair other constitutional values that the Supreme Court’s general doctrine would protect. In particular, the exception tolerates governmental practices that do not fully respect the identity of irreligious citizens and that therefore might undermine the religious inclusiveness of the political community. Yet the impairment of these customary Establishment Clause values is mitigated by the absence
of coercion. Moreover, the preservation of historical tradition properly informs the Establishment Clause. It is a constitutional value in its own right, a value that is entitled to substantial weight and serious consideration.

I believe that my analysis offers a persuasive account of this narrow corner of the Establishment Clause. Thus, I believe that there is an implicit exception to the Supreme Court's customary Establishment Clause doctrine; that it is limited to a select group of governmental practices that are historical, symbolic, and nonsectarian in nature; and that the exception is the product of a distinctive blend of constitutional values. It also is important to emphasize, however, that the Supreme Court has not adopted my account. Indeed, the Court has not formally recognized a doctrinal exception of any sort. The Court's lack of clarity has created considerable uncertainty and confusion—not only concerning the precise scope of any exception, but also concerning the prior question of whether a doctrinal exception indeed exists. To further examine these questions, let us consider two contemporary controversies. The first is an actual controversy in the United States. It concerns a highly publicized constitutional challenge to the Pledge of Allegiance. The second relates to French opposition to religious language in the proposed European Constitution. This controversy raises the hypothetical question of whether the contemporary enactment of similar language in the United States would violate the Establishment Clause.

In its 2004 decision in *Elk Grove Unified School District v. Newdow*, the Supreme Court confronted—but avoided—an Establishment Clause challenge to the "under God" language in the Pledge of Allegiance, which reads in full as follows: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." The decision under review was a two-to-one ruling by the Ninth Circuit Court of Appeals. Over the dissenter's protest, the Ninth Circuit sidestepped Supreme Court dicta approving the pledge and declined to recognize an implicit doctrinal exception along the lines I have suggested. Rather, the court applied the Supreme Court's conventional Establishment Clause doctrine and found a constitutional violation. In its initial opinion, the Ninth Circuit ruled that the congressionally adopted "under God" language violated the *Lemon* and endorsement tests. The court's decision triggered a public outcry, as well as petitions for rehearing en banc. With nine judges dissenting, the Ninth

---

54. See Newdow v. U.S. Congress, 292 F.3d 597, 602-12 (9th Cir. 2002).
Circuit denied rehearing en banc, but the original three-judge panel issued an amended opinion that narrowed the court's holding to the public school setting. In this second opinion, the court avoided a general ruling concerning the "under God" language. Instead, citing concerns about the coercion of impressionable children, the court ruled only that public schools could not sponsor recitations of the pledge that include this religious language.

Under the Supreme Court's conventional Establishment Clause doctrine, the Ninth Circuit's opinions were perfectly reasonable, including not only the court's second opinion, but also its first. For the government to declare and to encourage the idea that the United States is a nation "under God" is, by every indication, an action that promotes and endorses religion in violation of the Lemon and endorsement tests. If the Ninth Circuit was mistaken, it was not in its interpretation of the Supreme Court's conventional doctrine. Rather, it was in the court's decision to apply that doctrine, unmodified, in this particular context.

In the Supreme Court, only eight justices participated, Justice Scalia having recused himself. By a vote of five to three, the Court avoided the Establishment Clause issue by reversing the Ninth Circuit on procedural grounds. The majority opinion concluded that the Establishment Clause issue was not justiciable because the challenger (a parent with limited and disputed custodial rights) lacked "prudential standing" to bring the case in federal court. The majority's justiciability ruling was plausible but novel, leading the three justices who dissented on this point to suggest that the majority was improperly evading the Establishment Clause issue. Although each offered different reasoning, these three justices would have reversed the Ninth Circuit on the merits by declaring that the "under God" language does not violate the Establishment Clause, not even in the public school setting. Chief Justice Rehnquist's opinion was doctrinally ambiguous, but it implied that the Court's Establishment Clause doctrine permitted a history-based exception somewhat along the lines I have posited. Justice

59. See id. at 25-33 (Rehnquist, C.J., concurring in the judgment).
O'Connor sounded similar themes, but she also concluded, remarkably enough, that the "under God" language—understood as a historical and descriptive reference—does not endorse religion and therefore satisfies the endorsement test, eliminating the need for a doctrinal exception. Justice Thomas, by contrast, argued that the Court's conventional doctrine would clearly require invalidation, but he contended that this doctrine should be substantially modified, not only for historical practices but also more generally. In light of the Court's justiciability ruling and the divergent reasoning of the justices who would have reached the merits, the Establishment Clause question remains open.

The Court's apparent reluctance to decide this issue is not surprising, because even if I am right about an implicit doctrinal exception, the Pledge of Allegiance does not present an easy case. The "under God" language is nonsectarian, so it meets that condition. In addition, it dates back to 1954, giving it a substantial, fifty-year history. But other historical traditions, such as legislative prayer, are much older, and, indeed, the tradition of the pledge is not unambiguously religious. The pledge was first conceived in 1892, without the contested language, and its history as an entirely secular statement therefore is longer than its history with the "under God" addition of 1954. Moreover, one could argue that the pledge falls outside the exception because it is impermissibly coercive, at least when recited in public schools. The Supreme Court has squarely ruled that public schools cannot directly compel objecting students to recite the pledge, but that case predated the "under God" language and therefore did not present an Establishment Clause issue. In the Establishment Clause context, the Court has not approved school-sponsored prayer even when the prayer is formally voluntary. Instead, it has been concerned about the indirect and subtle coercion, including peer pressure, that can arise when teachers or other school officials ask children to participate in a group exercise. As Chief Justice Rehnquist and Justice O'Connor emphasized in Newdow, however, the

60. See id. at 33–45 (O'Connor, J., concurring in the judgment).
61. See id. at 45–54 (Thomas, J., concurring in the judgment).
63. See Newdow, 542 U.S. at 6–7.
Pledge of Allegiance is not a prayer or religious exercise. It is a patriotic exercise that includes a brief and general religious reference or declaration. Moreover, a student who objects only to the "under God" language is free to remain silent during that portion of the pledge. These factors mitigate the concern about coercion, because they reduce the threat to religious voluntarism. As a result, perhaps it is enough that students cannot be directly compelled to recite either the "under God" language or the pledge in general. Overall, the Establishment Clause issue is debatable, but the implicit exception might very well apply.

We can further explore the implicit doctrinal exception by considering a hypothetical question: Would the Establishment Clause permit (for example, in a state constitutional amendment) the contemporary enactment in the United States of religious language like the language that France opposed for the preamble to the proposed European Constitution? Along with other opponents, France acquiesced to a statement that the European Union "draw[s] inspiration from the cultural, religious and humanist inheritance of Europe," but it resisted any reference to God or Christianity, even in terms of historical influences. Is the French position consistent with the American understanding of church-state separation, as embodied in Establishment Clause doctrine, or is the French position more strongly separationist? Note that the question here is whether the Establishment Clause would forbid religious language such as the language that France opposed; quite clearly, nothing in the First Amendment would require the government to promote or enact this sort of religious language.

The precise content of the religious language would be critical to this inquiry. For present purposes, perhaps the most interesting proposal was for language that did not mention Christianity, thereby avoiding the issue of sectarian

---

65. See Newdow, 542 U.S. at 30–32 (Rehnquist, C.J., concurring in the judgment); id. at 38–43 (O'Connor, J., concurring in the judgment).
67. Although France played a leading role in crafting and promoting the proposed European Constitution, its citizens later rejected it in a referendum that had the effect of killing the constitution, at least for the time being. There is no indication that the issue of religion was a significant factor in the French vote. See Elaine Sciolino, French No Vote on Constitution Rattles Europe, N.Y. Times, May 31, 2005, at A1. Within days after the French referendum, the proposed constitution also was rejected in the Netherlands. See Richard Bernstein, 2 'No' Votes in Europe: The Anger Spreads, N.Y. Times, June 2, 2005, at A1. The United Kingdom then suspended its plans for a referendum, and European leaders put the ratification process on hold. See Alan Cowell, Britain Suspends Referendum on European Constitution, N.Y. Times, June 7, 2005, at A8; Elaine Sciolino, European Leaders Give Up on Ratifying Charter by 2006, N.Y. Times, June 17, 2005, at A3.
preference. Under this proposal, the preamble would have stated that the values of the European Union "include the values of those who believe in God as the source of truth, justice, good and beauty as well as of those who do not share such a belief but respect these universal values arising from other sources." Although one could argue otherwise, this language can be understood to endorse religion. Even so, the endorsement is general. The language invokes God, not Christianity or any other specific religion, and it therefore would qualify as non-sectarian. Moreover, the statement is entirely symbolic. The language would appear in a constitutional preamble, not a substantive constitutional provision. Furthermore, the last part of the statement suggests that irreligious citizens embrace different understandings of truth and are entirely free to do so. In any event, this language would not coerce anyone, directly or indirectly, to do or say anything inconsistent with his or her own religious or irreligious beliefs.

Although this language would qualify as nonsectarian and noncoercive, the contemporary enactment of comparable language in the United States would appear to fall outside the implicit exception because the language would represent newly adopted religious expression by the government, rather than religious expression embodied within a longstanding historical practice. The exception rests upon historical tradition or custom as a partial counterweight to other Establishment Clause values. Moreover, historically embedded governmental practices—part of the social fabric—might impair some of those customary values to only a modest degree. In particular, dissenters might be somewhat more willing to tolerate historical practices as imbedded features of the status quo, not contemporary statements of disrespect, and this in turn might reduce the risk of their alienation from the political community. But if no historical tradition is present, this argument is unavailable. More generally, the counterweight disappears. As a result, the customary Establishment Clause prohibition on governmentally sponsored religious expression would render the religious language unconstitutional.

Conversely, one could argue that my understanding of the implicit exception is too narrow. Perhaps the weight of historical tradition should be conceived more broadly, meaning, in the American setting, that specific historical practices, such as our national motto, "In God We Trust," are merely exemplary of a broader category of permissible governmental expression. In his separate opin-

68. Thomas Fuller, Europe Debates Whether to Admit God to Union, N.Y. Times, Feb. 5, 2003, at A3 (quoting language proposed by delegates from Poland, Italy, Germany, and Slovakia).
ion in Newdow, for example, Chief Justice Rehnquist cited a range of historical examples as support for the more general proposition that "our national culture allows public recognition of our Nation's religious history and character."^{69} Professor Michael J. Perry has urged a somewhat similar position, contending that the Establishment Clause prohibition on governmentally sponsored religious expression does not apply to certain generalized endorsements of religion, including statements suggesting that God exists and that human beings are the sacred product of God's creation.\textsuperscript{70} There may be differences between the Rehnquist and Perry approaches, but each would appear to permit the government to sponsor newly crafted religious expression as long as the expression is general and nonsectarian, as well as noncoercive. This type of standard seemingly would permit a contemporary governmental statement about God such as the statement proposed for the European Constitution.

IV. Concluding Observations

The Establishment Clause of the First Amendment generally forbids governmentally sponsored expression or symbolism that has the purpose or effect of promoting or endorsing religion. This principle is vigorously enforced, especially in the public school setting. To this extent, the American approach to religious expression mirrors French laïcité, and it is important to emphasize this fundamental point of agreement. In other respects, however, the American approach is distinctive. First, there is an implicit exception, albeit quite narrow, to the general prohibition on governmentally sponsored religious expression. This exception appears to permit the government to sponsor religious expression that

\textsuperscript{69} Newdow, 542 U.S. at 30 (Rehnquist, C.J., concurring in the judgment); see also Van Orden v. Perry, 125 S. Ct. 2854, 2861–64 (2005) (plurality opinion by Rehnquist, C.J.) (arguing that the Court should reject the Lemon test in the context of a passive monument inscribed with the Ten Commandments and that the government should be permitted to display such a monument as part of an unbroken history of official governmental acknowledgements of the role of religion in American life). Cf. McCreary County v. ACLU, 125 S. Ct. 2722, 2748–53 (2005) (Scalia, J., dissenting) (contending that the Establishment Clause should not be construed to forbid the government from favoring religion over irreligion and arguing, in the context of public acknowledgments of religion, that the government should be permitted to promote a monotheistic conception of God the Creator).

is noncoercive, nonsectarian, and embedded within (or at least in harmony with) longstanding historical practices. Second, the American constitutional tradition offers private religious expression strong protection under the First Amendment's Free Speech Clause, including protection against discriminatory treatment. This Free Speech Clause protection extends to private religious expression on public property and in public schools.

The American constitutional tradition rests upon constitutional values that emerged in the founding period, but these values and their implications have evolved over time. Thus, contemporary interpretations of the First Amendment inevitably reflect not only the values of the past, but also the societal circumstances and understandings of the present. I am not an expert on French laïcité, nor on French history or culture. Even so, I have little doubt that the French conception of laïcité—like the American constitutional tradition—is a product of history, of the philosophy and values that this history reflects, and of contemporary circumstances and understandings. What follows is a highly tentative appraisal and comparison of our two traditions as they relate to religious expression.71

In the American constitutional tradition, the general Establishment Clause prohibition on governmentally sponsored religious expression is supported by a number of constitutional values, including religious voluntarism, religious equality, respect for the religious or irreligious identity of individual citizens, and the promotion of a religiously inclusive political community. French laïcité in the context of religious expression may rest in part on similar values, but it may also reflect a deeper and more fundamental commitment to secularism in government and in the public sphere. The French experience is complex, but the path of French history, from the time of the Revolution, suggests a firm rejection of religious authority in the public domain, with the sovereignty of the secular state prevailing in its place. Furthermore, under the influence of Rousseau, French political and legal theory calls for the state not only to ensure social cohesion, but also to facilitate the exercise of "public freedoms" delimited by law.72

The American experience, by contrast, is influenced more by Locke than by


Rousseau. It is more liberal than republican. Unlike the French tradition of "public freedoms," the American tradition of constitutional rights rests upon a powerful, if not radical, commitment to the autonomy and sovereignty of the individual in the exercise of such rights. In the context of religion, moreover, the sovereignty of the state is likewise moderated by the historical and still prevalent belief that religious authority is a competing sovereign and that the state and religion govern different but overlapping spheres of human endeavor.

These differences in history and in prevailing political theory may help explain the differences between the American and French approaches to religious expression. The American constitutional tradition includes strong protection for private religious expression, as a matter of individual right, whereas French laïcité can be interpreted to permit, and perhaps require, the state to control religious expression in settings such as public schools. French political theory may call for such control if the religious expression is thought to impair social cohesion or if, as in the case of Islamic headscarves, the religious expression may be believed to reflect the coercion of religious communities or to threaten the public value of gender equality. Governmentally sponsored religious expression is a different matter, and here the United States and France are in broad and general agreement. Yet the American tradition permits a narrow but conceptually significant exception for certain nonsectarian religious expression, expression that permits the government to affirm the competing and overlapping sovereignty of religious authority. The French tradition, with its more categorical rejection of religious sovereignty in the public sphere, seems to require no such exception.

The French and American approaches to religious expression surely are affected as well by contemporary circumstances, including the religious composition of each society. France is a largely secularized society, with religion playing a relatively modest role in the lives of most citizens. At the same time, and conversely, there is a large Muslim minority that may be seen to threaten French culture. The United States, by contrast, has resisted secularization and remains a broadly religious society. More than 90 percent of the American people affirm a belief in God or a Supreme Being. And some 60 percent—about six times the percentage in France—claim that religion is very important to their lives.

73. In fact, the French response to the headscarf issue has evolved over time, and the proper interpretation of laïcité in this setting is controversial. See Bellier, supra note 48; Jacques Robert, Religious Liberty and French Secularism, 2003 BYU L. Rev. 637, 645–47; Gunn, supra note 71, at 452–79.

What the Supreme Court wrote of America in the 1950s is equally true today: "We are a religious people whose institutions presuppose a Supreme Being." This statement captures both the contemporary vitality of religion in the United States and its historical and continuing role in the American constitutional tradition. It helps explain why the American approach to religious expression reflects not indifference, but governmental neutrality, and, indeed, a qualified neutrality that may tilt slightly in religion’s favor.

76. Cf. id. at 314 (government need not "show a callous indifference to religious groups").