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The Templeton Debates: God and Government

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GOD AND GOVERNMENT

ERWIN CHEMERINSKY VS. GREGORY WALLACE*

PROFESSOR CHEMERINSKY: The Religion Clause of the First Amendment offers a simple but wise teaching: private religion is a good thing and it should be protected, but government-sponsored religion is a bad thing. Thomas Jefferson was exactly right when he said that there should be a wall that separates church and state. I've always understood that to mean that the place for religion is in the private realm—in people's homes, churches, synagogues, mosques, hearts, and minds—but that our government should be secular.

Why should our government be completely secular? There are several reasons. One is that we want to make sure that every citizen feels equally that it is his or her own government. Justice O'Connor captured this well in her opinion in *Wallace v. Jaffre*, when she said that the central teaching of the Establishment Clause is that none of us should be made to feel outsiders under our own government, nor should others be made to feel that they're insiders relative to the government. Imagine that you, as a non-Christian lawyer, walked into a courtroom with a large Latin cross behind the judge's bench. Would you feel that this was your courtroom or your government? The answer is clearly no. If City Hall had a large cross on top, those who aren't Christian would clearly feel like outsiders. One reason why we want to make sure that our government is secular is so that each of us, from every faith or no faith, can equally believe that it is our government.

Another reason why we want the government to be strictly secular is it is wrong to spend a person's money to support a religion that he or she doesn't believe in. Over 200 years ago, James Madison said it's immoral to spend one person's money to support the religion of another. By making sure that our government is secular, we ensure that our dollars aren't advancing a faith that we don't believe in or even find repugnant.

Another reason why we want our government to be strictly secular is because religion is divisive. If the history of the world teaches anything about religion, it's how intense people's religious feelings are, how much society can be divided over religion. If the government becomes aligned with religion, there's going to be a fight about which religion. Even if the Christian majority decides it's going to be a Christian religion, then you have the question of what denomination of Christianity is going to be in control. By saying our government is secular, we avoid that.

Finally, we keep our government secular to protect religion itself. Robert Williams, who was one of the founders of the Constitution, expressed this long ago when he said that the reason we want a separation of church and state is to protect the church, because once the government starts giving money to religion, the government can regulate what

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religion does. We protect the free exercise of religion by ensuring that our government is secular.

Now, that was abstract. Here are a few concrete examples of what secular government means. First, government-sponsored religious activity in public schools is unconstitutional. The Supreme Court has been exactly right on this for over forty years. It has said that prayer, even voluntary prayer, is unconstitutional because it is government-sponsored religious activity. The Supreme Court has said that clergy-delivered prayers at public school graduations are unconstitutional because students feel pressure to be at their graduation and prayer should not be part of that if they don't believe in it. Five years ago the Supreme Court said that student-delivered prayers at high school football games are unconstitutional. The Court explained that students often have to be at football games, as part of the band, for getting credit, for being cheerleaders, and the like, and to have a prayer, even a student prayer, violates this principle. The Supreme Court has even said that a moment of prayer is unconstitutional. In reality students have been saying silent prayers as long as teachers have been giving tests. The government doesn't need to institutionalize silent prayer; if it does, it is a government-sponsored religious activity.

Perhaps even more controversial, I think the words "under God" in the Pledge of Allegiance in public schools are unconstitutional. The words "under God" are inherently religious; they cannot be secular. Yet those who believe in no religion or a non-theistic God will feel enormous pressure to participate in pledging allegiance to a god. When my youngest grandchild, now seven, was in kindergarten in the public school in Los Angeles, she came home at the beginning of the second week of school and showed mom and me how to do the Pledge of Allegiance. She put her hand on her heart and recited it. My wife said, "I thought you won a Ninth Circuit decision that the words 'under God' in the Pledge of Allegiance were unconstitutional." I said, "Well, the Ninth Circuit stayed that order." My granddaughter said, "No, you have to say that or you get sent to the principal's office." That's not what the teacher said, but what she internalized in the five days of school is, you do what the teacher says or you go to the principal's office as punishment. That's what children all over the country feel today, because of the words "under God" in the Pledge of Allegiance in the public schools.

The second example is that religious symbols should not be on government property, if they symbolically endorse religion. This has been a principle that the Supreme Court has followed for almost two decades. Thus, the Supreme Court has said that there can be a nativity scene on government property if it's surrounded by symbols of other religions and secular symbols. A nativity scene all by itself is impermissible, however. Last June, the Supreme Court said that a Ten Commandments display at a Kentucky county courthouse was unconstitutional because the government

acted with the purpose of advancing religion. The Court was wrong in another Ten Commandments case decided the same day, and I confess to self-interest that I argued that case in the Supreme Court and lost five-to-four. It was about the six-foot-high, three-foot-wide Ten Commandments monument on the Texas state capitol grounds, at the Texas Supreme Court. It sat all by itself at that corner and had in huge letters, “I am the Lord thy God.” Given its placement and context, it is clearly government’s symbolic endorsement of religion. What about somebody who doesn’t believe in religion or is atheistic? Would they still feel that it’s their government as they walk into the state capitol? Won’t they inevitably feel like outsiders? Aren’t their tax dollars every year paying to take care of that monument?

One final example: the government should not give assistance that can be used for religious instruction in parochial schools. Until very recently, the Supreme Court was exactly right in this area. The government should be able to give aid to parochial schools if it’s the same that it’s giving the public schools and if it can’t be used in religious instruction. The Supreme Court has modified this recently to say that the government can’t give aid to parochial schools that goes into religious indoctrination, because my tax dollars and your tax dollars shouldn’t be supporting religions that we don’t believe.

This isn’t about hostility to religion. I believe in a robust Free Exercise Clause, but religion should be in the private realm and not in the government’s realm. Sandra Day O’Connor wrote in a decision about the Ten Commandments on June 27th, “By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or the bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would re-negotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”

Professor Wallace.

PROFESSOR WALLACE: Thank you, Professor Chemerinsky. I agree with much of what you said. The reasons that you gave for government being strictly secular are also, in many respects, good reasons for government avoiding an establishment of religion, which is what, in fact, the Religion Clause prohibits. There is nothing in the text of the Religion Clause that says government must be “strictly secular.” I hope that Professor Chemerinsky might further define for us what he means by “strictly secular” when he responds in a moment.

There’s nothing in the Religion Clause that says government cannot make any references to God or government cannot act as if God exists. In fact, in formulating the Religion Clause, broader language actually was proposed and rejected by Congress. Samuel Livermore proposed that the Religion Clause read, “Congress shall make no law

touching religion.” That broad interpretation of how government should relate to religion was rejected by Congress.

The Religion Clause does prohibit an “establishment of religion.” Now, that is a term that we are not terribly familiar with, since we haven’t seen religious establishments in their formal sense in this country for more than a hundred years. Because of that, we need to consult history and tradition to help us understand what the Religion Clause means. The hallmark of religious establishments was state-enforced religious uniformity. The government would use its coercive power to pressure people to conform to the religion of the majority. Now, we don’t want government pressuring people to hold certain religious beliefs or to perform certain religious acts. We might describe this as a no-imposition principle. We don’t want government interfering with or directing people’s individual religious choices.

The question that we’re concerned with today is, Can government speak about God in a way that doesn’t pressure people to change their religious beliefs or actions? I think it can. The position that Professor Chemerinsky has taken is that of strict neutrality. I’m curious as to how far, exactly, that goes. Does it require complete government agnosticism toward religion? If it does, I think there are some problems with that position.

First, official agnosticism is inconsistent with the history and tradition of our country. There are references to God in the Declaration of Independence and other public documents. We have a long history reaching back to the founding period of governmental religious proclamations. There is a reference to God in our national motto. We can see that on the money that we carry around. We see references to God in the Pledge of Allegiance, on public buildings, on monuments, in speeches of our leaders. For example, there are fourteen references to God in the 699 words of Abraham Lincoln’s Second Inaugural Address, which is inscribed on the walls of the Lincoln Memorial. Court sessions are opened with an acknowledgment of God: “God save the United States and this honorable Court.” To take the position that the Religion Clause requires government agnosticism conflicts with our long history and tradition.

A second problem with requiring government agnosticism is this: If government cannot show cognizance of God, then it cannot recognize limits on its own power. This is one of the central ideas of the Declaration of Independence: People have certain inalienable rights endowed by their Creator, and when government acts in conflict with those rights, when government acts in a way that violates those rights and oppresses people, people have the right to overthrow the government. By recognizing God, government can assert the limits of its own power and prerogative, and it can affirm a transcendent source of human rights and dignity. Thomas Jefferson worried about how the liberties of our nation would be secure if removed from what he called their only firm basis: a conviction in the minds of people that these liberties are a gift of God.

Finally, the predominant justifications for our constitutional commitment to religious freedom presuppose

God's existence. The whole idea of religious freedom is based on taking seriously the central claim of religion, namely, that God exists. Religious freedom makes sense only if God's being makes sense: God makes claims on humans; those claims are prior to and superior to the claims of the state; the individual's response to God's claims, if it is to be authentic, must not be coerced; the state, therefore, must not attempt to define or direct the relationship between God and individual. On the other hand, if God doesn't exist, then religion is nothing more than silly superstition — on the same level as fortune-telling or believing in ghosts — and it makes no sense to constitutionalize its protection. Look at Jefferson's bill for establishing religious freedom, which was introduced in the state of Virginia. The entire preamble amounts to a religious argument for religious freedom. Requiring government agnosticism would eliminate the very justifications for Jefferson's bill. It would be ironic to interpret our constitutional protection for religious freedom to require government agnosticism about God's existence. The Religion Clause would be in conflict with itself.

I think a better approach is not strict secularism but what I call a no-imposition principle. First, government should not favor any one particular religion over the other. This, of course, would forbid the display of a cross behind the judge or in a state house. Second, government should not engage in a religious imperative. By this I mean that government should not tell people what to believe and practice in matters of religion. This is the hallmark of an establishment of religion, and it's what the Religion Clause prohibits. Government must not speak in a way that is likely to pressure people to make religious choices or to engage in religious acts. For government to interject itself into individual decision-making in religious matters is to violate religious conscience.

There are times when government can speak religiously and not interfere with individual religious decisions. I agree with Professor Chemerinsky that the school prayer cases were decided correctly because, in that context, pressure was brought to bear on children to engage in a religious activity — prayer — in violation of their religious conscience. Simply exposing persons to religious messages, such as by referring to God in the Declaration of Independence or national motto or by hanging a religious painting in a government-sponsored museum, without more, does not seem to me to be the kind of infringement on religious conscience that the Framers contemplated.

In a pluralistic society where the government is a significant participant in the formation of public culture, the best understanding of what the Religion Clause forbids and permits is one that allows government speech to reflect the mixture of religious and nonreligious perspectives in the private sector. In that way, government influence on religious choices is minimized because the public would be presented with the same variety of perspectives if government were absent from public cultural sphere.

Professor Chemerinsky.

PROFESSOR CHEMERINSKY: If all you're saying is, It's okay to have "In God We Trust" on money or "God save

this honorable Court" at the beginning of the Supreme Court sessions, I don't think we disagree, although I could argue that is pretty trivial. If what you're saying is that the government can express a profoundly religious message, that the government can indoctrinate people by communicating religious views in government speech, then we disagree.

I began by saying we need to have our government be secular, and I gave several reasons for that: to ensure we're all treated as equal citizens and equally in the government, it's wrong to give some of our money to support the religion of others, it's inherently divisive if the government becomes aligned with religion, and it threatens religion itself. I assume we agree on that.

Professor Wallace says several things. First, the Religion Clause prohibits the establishment of religion. Not quite right. The First Amendment prohibits the government from any law "respecting the establishment of religion." That's broader than just prohibiting the establishment of religion, but what does that mean?

Second, he talks about there being references to God throughout American history. That depends on context. I'd rather our money didn't say "In God We Trust," because I think government shouldn't be expressing religious messages. If it bothers you that your money says that, I'm glad to take the problem off your hand. I don't think it's a very big deal, however. Likewise, I'd rather they didn't say before Court sessions, "God save this honorable Court", but I don't see it as a very big deal. If you change that a little bit — and I apologize if you view it as blasphemy — "In the name of Jesus Christ, God save this honorable Court", I would be deeply offended because it's invoking a particular religion. Is there a difference for an atheist between saying "one nation under Jesus Christ" and "one nation under God"? Both are equally objectionable. The Pledge of Allegiance is different than "In God We Trust" on coins or "God save this honorable Court" because in order to spend money in the store, you don't have to say "In God We Trust"; in order to argue at the Supreme Court, you don't have to say, "God save this honorable Court". Children feel pressure every day to say "one nation under God," and that's objectionable.

The next point you make is that to have limits on government power, we need to recognize the existence of religion. I vehemently disagree. Our limits on governmental power come initially from the Constitution, which formed the United States government, and secondly from theories of government like social contract theory and natural law (or, for you, religion). I don't accept that the only theory that provides limits on government is a religious theory. There are countless jurisprudential theories and philosophical theories that can also limit government power.

Finally, he said that religious freedom makes sense only if we acknowledge the existence of God. Again, I strongly disagree. All we need to protect religious freedom is to recognize that there are many people in this country who believe in religion. Even those who don't believe in religion can recognize that for those who do, it's very important, and the Constitution says we'll protect free

exercise of religion. We'll protect free exercise for those who do and for those who don't believe in religion. We don't need to believe in God in order to believe that the free exercise of religion is important.

It's easier to identify disagreements if we talk about specifics. First of all, Professor Wallace says he believes in a no-imposition principle. I also think that the government shouldn't impose religion. What does that mean and is it sufficient, or is it just part of what the Religious Clause meant? I have three specific examples. First, there shouldn't be government-sponsored religious activity in public school classrooms. No prayers, no voluntary prayer, no silent prayer, and not even "under God" in the Pledge of Allegiance because students feel pressure to say it. That's clearly consistent with the no-imposition rule. Second, there shouldn't be religious symbols on government property in a manner that appears to endorse religion. When you said there shouldn't be a large Latin cross behind the judge's bench or on top of the seal, I think you agree with that. I see no difference between the large Ten Commandments monument and a large cross.

The Ten Commandments monument on the Texas state capitol grounds, in the Texas Supreme Court, displays the Protestant version of the Ten Commandments. The Jewish version of the Ten Commandments is different; it has different language in a number of places. The First Commandment, in the Jewish version, says "I am the Lord thy God who took you out of Egypt, out of bondage." That's not the version at the Texas state capitol. The Catholic version of the Ten Commandments is also traditionally different. It does not prohibit images of God because of the importance of saints and statues within the Catholic faith. That's not the Texas version. If you accept no-imposition, the Supreme Court was wrong. Putting the Protestant version of the Ten Commandments at the Texas state capitol is the imposition of a religion.

Finally, with regard to aid to parochial schools, I said the government should not provide any assistance to parochial schools that will be used for religious indoctrination or religious education, because that would be the government supporting imposition of faith. If we agree on those three specifics, then we really agree on the principle. Maybe there's some abstract agreement, but my guess is that there is a fundamental disagreement between us. Our government should be, to the greatest extent possible, a secular government. The place for religion should be a robust free exercise clause. As Justice O'Connor said, this is the system that has served us well for 200 years. Why replace it with a system that has served others throughout the world, throughout history, so poorly?

PROFESSOR WALLACE: I am pleased to see Professor Chemerinsky concede that there is some place for government to acknowledge God in its speech, but he says, Not in the occasional setting, not in government symbols, and not in government funding. I'm not sure exactly what sphere of government activity that leaves. The strictly secular approach urged by Professor Chemerinsky might make more sense if two things were true: first, that we had a minimalist

government; and second, that we had no long history of religious speech by government.

Let me address the first. Given our modern regulatory state with its ever-growing influence over personal behavior, over education, over public culture, strictly secular government speech would not be neutral toward religion. Secular speech, because it encompasses only that which is this-worldly, can convey the idea that all knowledge and value is confined to the secular or temporal world and that this reality is the only reality that really counts. As one writer has said, it's a fallacy to suppose that by omitting a subject, you teach nothing about it; on the contrary, you teach that it is to be omitted, and that it therefore is a matter of secondary importance. For the state to convey only secular or non-religious viewpoints would make those viewpoints and ideals familiar, easily understood, acceptable. On the other hand, total silence about God would marginalize or trivialize religious views by making them seem irrelevant or outdated or even strange.

So, for the state to confine itself to non-religious speech in all the ways that it affects public culture would not in any sense be "neutral." And as I suggested earlier, when government is a significant participant in the formation of public culture, the best understanding of neutrality is one that allows government speech to reflect the same mixture of religious and nonreligious perspectives in the private sector. In this way, government is not able to leverage its power on individual religious choice. People would be exposed to the same diverse voices as if government were not in the public sector at all.

The second problem for Professor Chemerinsky is our long history of government religious speech. Given that long history, the elimination of all religious language and symbols from the government sphere, as Professor Chemerinsky proposes, would send a forceful message of hostility toward religion. If you're going to take his position seriously, it would mean removing the inscriptions containing religious language from the walls of the Lincoln and Jefferson memorials, changing names of streets, cities, mountain ranges, expunging from public school textbooks the religious affirmations in the Declaration of Independence and other public documents, etc.

Professor Chemerinsky would allow for some government religious speech for government that doesn't endorse religion. I don't find the endorsement test particularly helpful here because any time government speaks or acts as if God exists, even in the statement "In God We Trust," it is a religious affirmation. That affirmation is an endorsement of a claim that is central to religion: God exists. I don't see how a consistent application of the endorsement test would not lead to the kind of completely secular sphere that Professor Chemerinsky advocates.

Thank you.