Abbreviated Version
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Religion in Public Space

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The secularist criticism of the French decision to order the French flag to be flown at half mast in honour of Pope John Paul II highlights the importance of the two cases currently before the Supreme Court --- Van Orden v. Perry from Texas relating to the public display of Ten Commandments on public land and McCreary County v. ACLU of Kentucky concerning the display of these Commandments in county courthouses.

The war in the United States is being fought between secularists who insist that the displays, which are on public lands or spaces rather than in private places, violate the First Amendment whose Establishment Clause says that "Congress shall make no law respecting an establishment of religion", interpreting the Clause as implying a strict separation of church and state, and the religionists who retort that this strict interpretation is not appropriate.

Sneaking in Theocracy

While the secularists have massive jurisprudential tradition on their side, there is concern that the Court will now find against them. That would however be a mistake for a very different reason which has resonance for the European debate as well. Allowing religious displays on public lands can be argued to be truly offensive to the original conception that the United States should not be a theocracy as many of the Islamic states are today. Why?

For, such public displays will likely occur only when sanctioned by legislatures or executives, whether federal, state or local. But these are then essentially political decisions. If so, with 82% of the population self-identifying itself as Christian, these

displays can be confidently expected to be overwhelmingly those belonging to the Christian tradition, extended perhaps to constitute the Judeo-Christian tradition: as in fact the Ten Commandments displays are. This public affirmation of the predominant religion of the country is then tantamount to a virtual affirmation of theocracy in the public space. While, in theory, such displays can belong to any religion, in practice they do not and for the most part will not. The equality among the nation's religions which might be asserted by arguing that no particular religion is being directly favored is then only apparent, what lawyers call facial, whereas the true effect is certainly discriminatory in favor of the predominant Christian religion of the country.

If the United States were wholly Christian, as it was at the founding of the nation and the writing of the Constitution(except for the native Americans who were neither Christians nor at Philadelphia) , this would be an empty objection. But it is no longer so. Today, the largest religions (as distinct from cults) in the United States include Jewish, Muslim, Hindu, Buddhist, Sikh and Zoroastrian faiths. The United States today is a multi-religious society: the Founding fathers would have welcomed it and seen the wisdom of separating the church from the state with added enthusiasm.

The Equal Protection Clause

In fact, in place of theocracy which would be sanctioned if the Court were to find in favor of public displays under a relaxed view of the Establishment Clause, the Court needs also to use the 14th Amendment on the Equal Protection Clause to require that no displays of only the predominant religion be permitted. The Court should require that, if Christian displays are permitted, then they must be matched by simultaneous displays by all leading religions of the country and possibly also by a tablet for the humanist doctrine

of the non-believers. One can be sure that the sectarian twice-born religious activists on the issue of public displays would back off if they realized that the issue was not theocracy but a respect for all religions, a sine qua non in today's world. And just as well.

Two Views of Religious Freedom

For, the question of public displays raises deeper philosophical questions about the important question of what we mean by religious freedom, a cornerstone of our fundamental political beliefs. The conventional American view of religious freedom considers it to be what I might call, borrowing philosophical terminology in the debates on liberty, negative religious freedom: that we permit the free exercise of religion. But, we also need to consider what should be called positive religious freedom: that no religion be favored in public space, effectively dominating and marginalizing other religions.

While theocracies typically elevate the dominant religion to a status that compromises positive religious freedom, there is no excuse for self-described non-theocratic societies like the United States to do so. And yet, because of historical reasons dating back to virtually mono-religious composition of the voting population, this is what hits the eye. Even in the quasi-public space, such as university convocations, one typically sees Christian ministers delivering benedictions, with an occasional rabbi thrown in: where are the Hindu and Buddhist priests and invocations? President Bush now makes an occasional nod to Islam: but that is a transparently political response to the need to demonstrate that we are not anti-Muslim as Islamic fundamentalists scream otherwise in the turbulent Middle East.

The US Supreme Court has a unique opportunity in the two cases before it to finally shift us towards a firm embrace of positive religious freedom, grounding it in the Equal Protection Clause of the 14th Amendment. Since many of the Justices now draw on foreign jurisprudence for ideas, and have cited the Indian Supreme Court, a pioneering Court on public interest litigation, on affirmative action, perhaps it may be relevant to note that its rulings under the Indian Constitution's (as it happens, also) Article 14 on equal protection can also be drawn upon.

But perhaps the best example that the US Court can learn from is the practice of Mahatma Gandhi, one of the greatest figures of the last century, in this regard. He began his public meetings, given his own and the nation's religiosity, with prayers drawing on the sacred texts of India's principal religions, among them the Bhagawad Gita, the Koran, the Old and the New Testament, and the Granth Sahib of the Sikhs. He is known to have borrowed civil disobedience from Thoreau. It is time for Thoreau's country now to borrow from him.