

## ESSAYS

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### COMMUNITARIAN THEORY

#### **Toleration: The Lost Virtue**

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##### **From Liberty to Community**

In the 1950s, this most indifferent Sunday School student in New York heard his full ration of pleas for toleration. The crux of the argument was that Christians of all denominations who did not believe and share in our Jewish beliefs should nonetheless allow us to conduct our lives as we deemed appropriate, with the full range of practices, beliefs, rituals, and symbols. Toleration was thought of as a nonutopian virtue requiring self-discipline from the dominant group whose toleration we sought. The key subtext of our claim was, and is, that toleration isn't required for those practices of which you approve and respect. Rather, you have to find the inner strength to tolerate only those practices that you reject or find offensive. At root, toleration is a principle of live-and-let-live. The offset is that this demand for toleration requires at most indifference. There is of course no need to welcome tolerated individuals into your heart or your home; it is possible to speak out against tolerated practices, and to urge others to abandon them. Nor is it necessary to tolerate those practices that constitute a direct threat to your ability to conduct your own lives as you see fit: human sacrifice, physical attacks, and verbal abuse are not

proper objects of toleration. What is required is that the dominant group does not place any special burden, tax, or disability that impedes one's ability to engage in the tolerated practice. Even in this modest form, the toleration motif offered a minimalist defense against religious persecution. As Jews, we were, of course, required to "tolerate" the dominant Christian faith, but that ersatz toleration did not count because, as a minority group, we did not have the political clout to impose our will on them. In that setting, toleration was a one-way virtue. It is only when two groups have roughly equal political power that mutual toleration becomes a social necessity.

The traditional Jewish concern with toleration was closely tied to the then-recent past history of virulent anti-Semitism in the United States, not to mention the atrocities of the Holocaust. But the theme sounded dated to my young ears in the relatively good times of the 1950s. It is hard to demand toleration when you think that you enjoy widespread social acceptance. Today we are in the midst of a wide set of culture wars, precipitated, only in part, by recent Supreme Court decisions that touch on issues of marriage and morals, and that have helped fuel the firestorm over same-sex marriages. In dealing with such issues, once tired pleas for toleration become more urgent if our national political community is to hold together. In addressing this issue, it is commonly urged that large political and social communities can only stay together if their members share a set of common values on the good life that allows them to cooperate on matters of public importance. The point is correct insofar as it reminds us that our ability to reach consensus on social issues depends heavily on the existence of a shared set of values and norms from which further deliberation can proceed. People who share common values do not have to argue about ultimate goals to make any concrete decision: indeed they don't even have to have very good reasons to believe what they believe. They will usually find it sufficient to resolve instrumental differences on the best means to a common goal, or factual questions surrounding any particular problem. These technical and empirical questions do not open up new areas for moral dispute.

But the existence of an elusive set of common values is not a necessary given from which all subsequent collective deliberation proceeds. Quite the contrary, the set of common values is more likely

to shrink as the size of a political community expands and as the number of groups defined by race, creed, religion, or values increases. Personal and ethnic identities are thick; they are not exhaustively described by name, rank, and serial number. These communities are distinctive precisely because they do not accept the same sources as moral authority and because each carries forward a distinctive culture whose values may not be widely shared by other groups within the polity. To demand a strong and comprehensive set of common values counts as an open invitation to factional struggles because the choice of one rich set of values necessarily entails the rejection of many others. The wiser communitarian looks for more modest efforts in which there is some agreement about the rules of the game even if there is no strong agreement on matters of political choice and personal conduct. There is some good sense in the Rawlsian notion of an "overlapping consensus," so long as we do not push a good idea too far, by insisting that people share certain common views about, say, relations between the races and sexes in order to be eligible to participate in public debate. In the search for some large social consensus, it is critical to remember that moral arguments sufficient to guide one's own conduct are not necessarily sufficient to coerce similar conduct in others. If there is one value that stands out, it is the need to respect the *right* of other individuals to make choices in their own lives even if we do not respect, or even if we condemn, the choices that they make.

The better approach therefore is to turn again to thoughts of toleration in the effort to develop a society in which live-and-let-live gains an ever higher priority. The skepticism about common political values has in large measure accounted for the success of our own political institutions. I think that the success of our constitutional scheme for the protection of freedom of speech and religion rests on a deep suspicion that any one code of personal conduct is so superior to all its rivals that it is entitled to state preference or public allegiance. The nub of the argument is that the only way to advance community is to resort to the small-state limited government view that has been associated with various strands of libertarian thought. It is somewhat mythical to think that huge numbers of diverse individuals can aspire to more than some form of live-and-let-live with people who are total strangers to their own lives, and from whom they are separated by

deep philosophical differences that could easily become more pronounced with intense discussion and debate. Yet it is not necessary to have some overarching sense of community for people to lead rich and textured lives. All individuals are far more likely to achieve some abiding sense of community through an array of voluntary arrangements in which affiliations are matters of choice and not necessity. Stated otherwise, the road to community lies through liberty, and the political precondition for liberty is, ultimately, toleration.

## Two Generations of Flag Salute Cases

One object lesson for this view is the flag-salute cases that confronted the Supreme Court during World War II. Dispute then swirled over whether members of the Jehovah's Witnesses could be required to salute the flag in public schools, when that practice was in violation of their own religious prohibition against the worship of graven images. That public act of fealty was required under a statute whose preamble stated that "conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs"; and further that "national unity is the basis of national security; [and] that the flag of our Nation is the symbol of our national unity transcending all internal differences, however large within the framework of the Constitution." The emphasis here was exclusively on the neutral form and secular motivation for the law, not its differential impact on the dissenters. In *Minersville School District v. Gobitis* (1940), Justice Frankfurter upheld the statute, writing:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. We live by symbols. The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.

Yet this homily to national identity proved, even in its own time, to be subversive of its stated ends. The specter of forcing children to engage in actions contrary to their religious beliefs in public settings

conveys just the wrong image for a nation soon to be at war with totalitarian enemies. The law took out our collective insecurity on defenseless people who just wanted to be left alone. If the law had asked whether the Jehovah's Witnesses had to pay taxes to support the war effort, then they should be, and are, bound like everyone else by the collective decision to fight a foreign war. If the case had asked whether they had to do military service, which cuts closer to the bone, then a program for conscientious objectors might have offered a way to respect religious beliefs without allowing an easy out from the obligations of citizenship. But in the flag-salute case, the only state interest was symbolic. Precisely because those symbols are so freighted with social meanings, the collective "we" in a free society should not force them down the throats of dissenters.

Thankfully, three years later, *West Virginia State Board of Education v. Barnette* (1943) overruled *Gobitis*. Justice Jackson penned one of the Court's more memorable lines: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Justice Frankfurter in dissent protested that courts should override democratic deliberation. In a telling remark, he attacked *Barnette's* majority for hewing to "libertarian" views in striking down general laws with secular purposes. But his argument gets it exactly backwards: when the only interest behind a law is symbolic, then every effort should be made to insulate individuals from actions that are inconsistent with their deepest beliefs. In the long run, the only form of allegiance that matters is that which is voluntary in origin, and those who are convinced that the Jehovah's Witnesses are profoundly misguided need only strengthen their own resolve. They do not have to browbeat others. The conclusion: only liberty and the minimalist view of state power works in the interest of community and security.

The decision in *Barnette* rested in large measure on the free exercise of religion. Its purpose was to allow dissenters to stand aside from collective rituals that violated their beliefs. The issue of the pledge of allegiance came before the Supreme Court in *Newdow v. Elk Grove Unified School District*. The substantive issue in that case was whether the words "under God" in the Pledge of Allegiance consti-

tuted an establishment of religion, at least within the context of public schools. If the case had followed the lead of *Barnette*, then the only substantive question would have been whether young Newdow should be allowed to refuse to say the pledge. But aggressively, Newdow claimed a violation of the establishment clause on the ground that the words “under God” breached the wall of separation between church and state in this context. The basic argument was that impressionable school children are subject to the state endorsement of religious ideals that could easily be read as a form of subtle coercion that could exert disproportionate impact on students. In light of *Barnette*, these school children should be allowed to stand aside from the pledge whether their objections stem from religious or secular motives. In so doing, they communicate a clear message that they (and possibly their parents) disagree with the import of the collective measure.

What made *Newdow* so difficult on the merits is that the remedy sought was to ban the pledge in school for *all* students so that even those who think that it embodies this nation’s highest ideals cannot say it. *Newdow* thus presented the mirror image of *Barnette*: can the protest of a single outlier dictate the way in which our collective institutions conduct their operations? Under the current law, the establishment clause argument has real power. For its part, the Supreme Court held as early as 1962 in *Engel v. Vitale* that explicit religious prayers in school count as an establishment even if other students have been able to stand to one side. Later in *Lee v. Weisman* (1992), it held that religious leaders, even on a rotating basis, cannot participate in high school graduation services on the grounds that this injects religion into public life. If the wall of separation is absolute, then this smaller but more frequent encroachment of religion into public schools must be resisted. So within the public school context, at least, the words could be forcibly removed from the Pledge 50 years after their insertion, which is what the Ninth Circuit held in a lengthy decision that led to widespread political consternation.

Now my first instinct on this matter, recently vindicated, was to wish that this case would go away so that a long-standing practice does not become the focal point of an acrimonious political dispute between religious and secular groups who already regard each other with deep suspicion. Even if the words to be removed from the

Pledge, at least within the schoolhouse, were just adopted today, on this heavily symbolic issue, it is probably best to think of their use as validated through long use—an argument that could never be invoked, for example, to justify the continuation of segregation in the 1950s, with its odious concrete effects. Indeed, technical doctrine of “standing” (which Neal Katyal and I urged successfully in an amicus curiae brief) lead a majority of the Court to the conclusion that Michael Newdow does not have standing to challenge the Pledge when his daughter’s mother, whom he had never married, had legal custody over their daughter and thus was the sole person who represents her interests.

My objections to Newdow’s lawsuit, however, go deeper and should lead ultimately to its dismissal if its ultimate reason is decided on its merits. In running the schools, the state is not acting in its role of enforcer of the civil peace, but as the operator of a complex social institution that has positive obligations toward the education of all children. In principle, one strong reason *not* to have public schools is that it puts the state in the position of making collective decisions on issues in which different groups hold different views. The question of whether evolution or religious theories of creationism should be taught in public schools is but one evidence of the gulf in question. A decentralized set of private institutions allows for people to sort themselves in accordance with their own views so as to diffuse the public tensions on these divisive issues.

Unfortunately, that alternative is not practical in this case, requiring some collective decision. We need therefore some guide that indicates the relative positions of the majority and the minority. The best frame of reference is the full range of private educational institutions that constantly have to face the question of how much religious activity has to be injected into the overall educational setting. There have been pitched battles about the extent to which religious matters should be introduced into private education: does the lobby holiday sing-a-long include Christmas Carols, Chanukah candles, Kwanzaa, and, more recently, Islamic materials. Who is to say? But amidst all this confusion, I doubt very much that any more than a tiny minority of private schools would refuse to say the Pledge of Allegiance because it contains the words “under God,” especially on the ground that it is coercive to school children who in many instances are wilful

and indifferent, rather than compliant. The honest revelation of sentiments is about as much as we can hope for on this controversy. Here in the long run, with regard to the Pledge, greater social peace will come if the majority has its way so long as the dissenter can stand aside. The alternative is that the majority cannot engage in the practices that it wants, a far greater sacrifice. It is only when the state moves toward systematically injecting religion into the educational experience that the balance changes and the establishment clause claims become more credible, which is why *Engel* is a far closer case. Yet at that point in the political process, Newdow no longer stands alone, for the overall political sentiment shifts as well, so that some limits remain on state religious activity even if one person no longer dictates the common agenda. But for Newdow to strike out the words “under God” on the Establishment Clause claim risks turning the Constitution into a weapon of intolerance: that dislikes of a tiny minority trump the will of a strong majority.

### **Affirmative Action and Same-Sex Marriages**

This approach does not only apply to religious challenges but it also carries over to other social issues. For better or for worse, there is a strong social consensus in favor of affirmative action programs in higher education. The absolutist reading of the equal protection clause insists that all public institutions must be run on a color-blind basis. That principle is imperative when the question is how the state uses its coercive powers in administering its criminal and civil law. It is not acceptable to have affirmative action for minority burglars, nor to insist that members of disadvantaged groups can drive faster on public highways than other people. But in running public universities, the state does not act as a legal enforcer or the operator of a network facility that is open to all on a nondiscriminating basis. Instead it has undertaken the role of *manager* of a complex business, which has to make choices and trade-offs like those found in other businesses. It is evident that most private universities are committed in varying degrees to affirmative action programs, which in my view is their choice because of the preeminence of freedom of association in organizing social life. The root difficulty here is that public institutions are crosses between ordinary businesses and state institutions, so that the principle of freedom of association has to be reconciled

with the need for state impartiality. On this matter, I think that the former is the more important consideration, so that it becomes inappropriate to apply the unyielding standard of strict scrutiny appropriate to traditional government functions. Rather, it should be sufficient to make sure that public institutions are in rough conformity without private benchmarks. As there is, thankfully, no strong private pressure for old-line race segregation, that option for public institutions can be ruled therefore out of bounds on constitutional grounds. (The same argument does not apply in reverse when segregation was the norm because the entire system was maintained by an unholy mix of public and private forces that made it impossible to use private behavior as a baseline for public choices. ) Accordingly, it does make a difference that huge sectors of public life champion the use of affirmative action programs of the sort that the University of Michigan adopts. But the same limit set out above applies. Any private institution that wants to follow a set of color-blind rules, or indeed grant explicit preferences on grounds of race, creed, religion, or national origin, should be free to do what it pleases. The rest of us should remember the importance of toleration, and withhold the enforcement of state norms against any private group that wants to buck the trend. Stated more bluntly, the antidiscrimination rules as applied to private institutions are often justified on the grounds that these are necessary to rid American life of bias and prejudice against various individuals. But the public enforcement of one view on right and wrong violates the minimum condition of toleration and rightly breeds strong resentment in those who want to order their own lives. It is, of course, no accident that it is often religious institutions that bear the brunt of the collective power of the state. How easy it is to forget the sense of toleration that made *Barnette* such an important landmark in the law.

We face this same issue today in connection with the contentious issue of gay marriage, which has been forced on the public at large by the recent Supreme Court decision in *Lawrence v. Texas* (2003), which struck down the state antisodomy law as a general infringement of liberty in terms so broad that it is hard to see how, its pious disclaimers notwithstanding, it could let stand the current definitional limitation on marriage as a union between one man and one woman. But the higher level of judicial scrutiny is warranted because the state

wishes to limit the freedom of association between two people. In this context, the confrontation between tradition and liberty is at its highest, and whether the matter is resolved by political or constitutional devices, the latter should prevail. The claims of tradition are never as strong as those on behalf of an industry custom. The latter are never binding, and those parties who wish to adopt other terms in their own agreement are free to do so. In contrast, traditions are said to bind individuals who disagree with their content.

The point is especially clear here because the state claims for itself the sole power to issue marriage licenses. In an age of consensus, the restriction of one man and one woman would not grate because few people would have the desire to deviate from it. The change in social mores has completely undone that consensus, and thus calls this use of monopoly power into question. Here the license should be withheld only if the conduct it seeks to prevent is wrongful to some third party. Yet in this instance, no such individualized harm is at issue. Rather, those who want to make sure that state monopoly power serves their own end thus invoke arguments that should prove as unavailing as the arguments made by the state in *Gobitis* and *Barnette*. Those with genuine religious fervor argue that they need "protection" from "anarchy." But the issuance of marriage licenses to others will not force them to participate in gay marriages, nor alter the religious content of their own marriages. The opponents of gay marriage also claim that the structure of society depends on the strength of the family, which in large measure it does. But no one here requires them to alter anything that they do with their own lives. And it is hard to see why efforts to imitate traditional family structure should be regarded as a repudiation of it. There is scarcely anything more destructive to communal harmony than the proposed amendment to the United States Constitution that would ban gay marriages, for it would convert a document whose great achievement lies in its commitment to ordered liberty into a document that bespeaks intolerance. The operative principle should remain that two individuals can form whatever associations they choose unless one can show harm (beyond offense) to third parties, and this cannot be done in this case.

Unfortunately, the tragedy deepens because the virtue of toleration in these authoritarian times is too often rejected by the propo-

nents of gay marriage. They are so confident in their own moral judgments that they often violate the second principle of liberty, namely, that individuals should not be forced into any associations with individuals with whom they have fundamental disagreements. This position manifestly requires the rejection of any comprehensive antidiscrimination law based on sexual orientation or anything else for ordinary social relations. Only through voluntary unions is it possible to form relations of trust that will be able to withstand the pounding of ordinary events. The operative principle should remain live-and-let-live, and both sides should pull back on their demands for the correct behavior of the other.

### **Light at the End of the Tunnel?**

Admittedly, this overall story is not a pretty picture of social organization, because it contemplates two separate groups that warily circle each other, without a hint of cooperation. But this portrait overstates the grimness of the situation. The key here is that ordinary individuals enter into multiple overlapping forms of association on everything from dance to soccer that do not necessarily require them to thrash out their strong differences on gay rights or affirmative action. So long as those associations are voluntary, then we can count on the most sensible individuals on both sides to reach out to the other in the effort to find some limited areas of compromise and cooperation. If that critical element of trust can be established on some limited grounds, then the seeds are planted for its expansion over time into other areas. But this program will only work through voluntary interaction that takes place with the prospect of mutual advantage, and it cannot work when moral overconfidence breeds social intolerance. Forced associations will only compound the presently high level of distrust and make matters worse. But if cooler heads are allowed to prevail, then our nation should be able to weather this storm as it has so many others, and put together the levels of goodwill that are truly necessary to hold a nation together in the face of external peril or natural disaster. There is no way to force-feed a viable social community. It has to be the outgrowth of voluntary interactions by free and responsible men and women.