

IS THE WALL OF SEPARATION TUMBLING DOWN?

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ABSTRACT

This past summer, the United States Supreme Court ruled on two cases involving the establishment clause of the first amendment to the Constitution. In both cases, the court was ruling on the legality of a public display of the Ten Commandments. In one case, the Supreme Court ruled that the display was unconstitutional and in the other, the Court ruled that the display was constitutional. This article examines the origins of the establishment clause and the interpretive value of these two decisions as well as a look toward the future.

INTRODUCTION

On New Years Day, 1802, a throng of Baptists arrived at the White House to present a gift of gigantic proportions to President Jefferson. The Baptists were from Massachusetts where they suffered legal discrimination because the state sponsored religion, Congregationalist, found there particular brand of Protestantism to be heresy.

In celebration of Jefferson's election the Baptist preacher, John Leland, had brought his congregation together for a day of cheese making. They constructed a piece of cheese that was seventeen inches high, four feet in diameter, thirteen feet in circumference and weighed 1,235 pounds. Not an unremarkable feat for the early eighteenth century, but perhaps more remarkable was that they were able to transport this cheese all the way to Washington D.C. Every town they passed through brought out a throng of the curious who were treated to an evangelical sermon by John Leland, not only of his particular brand of Christianity; but on the ideal of religious liberty.

We tend to think that many Europeans immigrated to the new world for religious liberty. They didn't, they came here to establish their own form of church controlled civil government. It wasn't until Roger Williams fled to what was to become Rhode Island, after Puritan Massachusetts banned him from their colony for heresy, that religious freedom was established in the colonies.

Religious liberty was far from a universally held ideal when Jefferson defeated his friend John Adams for the presidency. The election had been bitter and hard fought and religion and religious liberty had played no small part in the campaign. While the Baptists celebrated, Congregationalists in

Massachusetts were burying their Bibles out of fear the Jefferson would have them confiscated. So strong was the hatred of Jefferson among established religious groups that the Philadelphia Public Library refused to house any of his writings, including the Declaration of Independence, until 1830 (Cousins, 1958.)

While Jefferson had written The Statute of Virginia for Religious Freedom and selected it as one of three accomplishments for which he chose to be remembered on his tomb stone, his letter to the Danberry Baptist Convention in Congregationalist Connecticut has come to define religious liberty. On the same day that he received the famous block of cheese he wrote to the Baptists in Connecticut the following:

“Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.”

This “wall of separation” has come to be the defining principle of the language in the First Amendment which guarantees us freedom of and freedom from state-promoted religion. The first time the Supreme Court was met with a constitutional case on religion they based their decision on Jefferson's letter. “Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the

scope and effect of the amendment thus secured.” *Reynolds v United States*, 98 U.S. 145, 164 (1879). By the time we reached the twentieth century the Supreme Court of the United States had etched Jefferson’s language in stone. In a case that was going to be quoted in every religious case since the Court stated: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.” *Everson v Board of Education*, 330 U.S. 1, 17 (1947)

Modern jurisprudence on the wall of separation issue has not varied from the ideal of Jefferson. In a famous and brilliant opinion Chief Justice Burger synthesized all of the proceeding establishment clause cases into a tripartite test. “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [Board of Education v. Allen](#), 392 U.S. 236, 243 (1968); finally, the statute must not foster “an excessive government entanglement with religion.” *Lemon v Kurtzman*, 403 U.S. 602, 612 (1971). Using this test to insure governmental neutrality in religious affairs the Court, over the years, acted to uphold the non-taxation of church property while at the same time requiring that public schools allow Christian club and Bible study to take place after school hours just as it would any other club. The courts have stuck to this neutrality because “Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.” *Lemon* at 625.

With this large amount of precedent, historical tradition, and ideals of liberty, the Supreme Court of the United States was faced with two similar Establishment Clause cases in 2005. Both cases were handed down on the same date, both involved public displays of the Ten Commandments, but they reached differing results. One case arose out of Texas and the other came from Kentucky. The Court upheld the display in Texas and ordered the display removed in Kentucky. Both decisions were an accurate reflection of our constitutional traditions.

Van Orden v Perry

In *Van Orden v Perry*, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2006) a divided Court upheld the placement of a monument containing the Ten Commandments on the grounds surrounding the

Texas Capital. The monument in question is surrounded by 17 other monuments and 21 historical markers. The monument had been given to the state by the Fraternal Order of Eagles over forty years ago. The Court determined that the context of the monument, surrounded by markers of Texas history, reflected American history and tradition as opposed to establishing or preferring one religion over another.

“In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.” *Van Orden* at 20

The problem in this case is not the result, but rather how the Court reached the result. The typical appellate decision has three types of opinions. The majority opinion typically becomes the law of the land as all judges who join it agree with both the result and the legal reasoning. In a concurring opinion those judges joining the concurrence agree with the result reached by the majority, but they do not agree on the legal standard that the majority applied. The dissenters disagree with both the result and the legal reasoning expressed by the majority. The problem in *Van Orden* is that we do not truly have a majority opinion. We have a plurality opinion. Four members of the Court, Rehnquist, Scalia, Thomas, and Kennedy joined the opinion of Chief Justice Rehnquist. Four members, O’Conner, Stevens, Souter, and Ginsburg dissented. Since we ended up with a tie, Justice Breyer wrote a concurring opinion thus declaring the Monument’s placement to be Constitutional. The problem is that this case left us with no guide for future lower court determinations of establishment issues. In fact the plurality opinion rejected most of our establishment clause jurisprudence.

McCreary County v ACLU

The Kentucky case, *McCreary County v ACLU*, 125 S. Ct. 2722; 162 L. Ed. 2d 729 (2005),

the posting of the Ten Commandments was not as neutral. The two Kentucky counties involved both placed large placards of the Ten Commandments on their Court House walls. When the ACLU objected both counties added other historical documents that contained references to Christianity and placed these much smaller exhibits around the Ten Commandments. Once again the ACLU objected and received a Preliminary Objection ordering the removal of the Ten Commandments. Both counties responded by replacing the original smaller exhibits with ones the same size as the Ten Commandments and placing a title above the exhibits which called them "The Foundations of American Law and Government Display". It states that the Ten Commandments are from the King James Version and explains in detail how the Ten Commandments have influenced the development of western law.

In this case we did have a typical opinion and a firm statement of the law. The majority opinion was joined by five justices, Souter, Stevens, O'Connor, Ginsberg, and Breyer in finding the display to be an establishment of religion by using the test of *Lemon v Kurtzman*. This seemed to be an obvious result reached with well established precedent. The majority agreed that the Kentucky displays had a religious purpose and therefore violated the *Lemon* test. It is rather hard to argue that the creation of a display was not done with a religious purpose. The Kentucky County government required to be displayed so that it would be "... visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." *McCreary* at 2728. The Ten Commandments were displayed in an official ceremony presented by the County Executive and the minister of his church in what was obviously a religious ceremony. Clearly the display did not have a secular purpose and therefore it violated the *Lemon* test, all prior establishment clause decisions, and the obvious intent of the framers.

The dissent in this case, like the plurality in *Van Orden*, did not argue a different interpretation of the historical jurisprudence of the establishment clause. Rather, they argued that all of our previous interpretations of the establishment clause be rejected and a new standard established. Justice Scalia, writing for himself and Justices Thomas, Justice Kennedy, and Chief Justice Rehnquist completely rejected the idea of a "wall of separation between church and state" "[H]ow can the Court possibly assert that 'the First Amendment mandates

governmental neutrality between . . . religion and non-religion,' *ante*, at 11, and that 'manifesting a purpose to favor . . . adherence to [*80] religion generally,' *ante*, at 12, is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words." *McCreary County v ACLU*, 125 S. Ct. 2722,2750 (2005) Justice Scalia dissenting.

Justice Scalia interprets the words from the First Amendment to the Constitution "Congress shall make no law...respecting an establishment of Religion..." as allowing government to "...favor religious practice." *McCreary County* at 2748 Justice Scalia dissenting. His arguments in support of this proposition are primarily examples of Presidents and other governmental officials invoking the name of God in public gatherings. While not specifically referenced, the Preamble to the Constitution acknowledges an historic belief in a Supreme being. Consequently, the dissenters drew the conclusion that the more recent decisions constraining governmental acquiesce to religious practices were a rejection of 200 years of practice and legal decisions. "Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century." *McCreary County* at 2748 Justice Scalia dissenting.

This strong statement from these four justices in repudiation of the "wall of separation" is very telling, in both its interpretation of history, and in its understanding of previous of the law. These judges are of course ignoring the Courts first pronouncement on the establishment clause which occurred in the nineteenth century, (see *Reynolds* above) let alone the words of Jefferson and Madison who fathered the First Amendment. The plurality in *Van Orden* didn't advocate the abandonment of establishment clause jurisprudence as strongly as Scalia did in his dissent in *McCreary*. Chief Justice Rehnquist based his decision on the points that the display in Texas was passive and that it was recognizing our legal and religious heritage. Because this language was not strong enough Justices Scalia and Thomas found it necessary to write separate concurring opinions.

Justice Scalia's short concurrence echoes his dissent in *McCreary County*. "I would prefer to reach the same result by adopting an Establishment

Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied -- the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments." *Van Orden* at 26,27 If the rejection of the wall of separation were not novel enough, Justice Thomas suggested an even more sweeping concurrence arguing that the First Amendment is not even applicable to the actions of state government.

"This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resist incorporation" against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue." *Van Orden* at 27,28. His point of view would indeed make Constitutional interpretation "easy."

This ease would not be without significant consequence. This strict interpretation would limit the extension of the United States Constitution to restrain the exuberance of state and local governments in a quest to establish a religion. This result would leave people to search out communities where they might find like-minded people in order to experience an illusion of freedom of religion.

CONCLUSION

Obviously the recent decisions reflect the deep divisions within the court. There is also little doubt that all of the justices would agree that the federal government should not establish a state religion although Justice Thomas would allow the state government to do so. It is clear that government should exercise great care to avoid actions that could reasonably be interpreted as persuading the populace to follow a particular religion. As Justice O'Connor stated in *McCreary County*: "Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or 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." *McCreary County* at 68.

What remains an area of significant division of the court is the issue of freedom *from* all public displays of religion or simply freedom from government promotion of religious belief. Strict application of freedom *from* religion would support the removal of "In God We Trust" from our money, eliminate "One nation, under God" from the Pledge of Allegiance, and, by parody of reason, in its most extreme application, remove "endowed by their Creator" from the Pre-amble to the Constitution.

What is needed from the court is more clarity as to the broadness of application of the establishment clause. Neither of these two decisions have added significant clarity to the issue. From a distant perspective, both cases involved a publicly sponsored display of religious heritage. In *McCreary County v ACLU* there was an evident intent by the local government to use the display to promote the religious beliefs of its leaders. In *Van Orden v Perry*, in an almost evenly divided court, the display was allowed to remain as a historical reminder of one element of the state's religious heritage, but failing to adequately address the extent that any display with religious connotations might be construed as publicly promoting a particular religious persuasion.

Since these two decisions we have lost two Supreme Court Justices. The Chief Justice has been replaced and Justice O'Connor soon will be. We are therefore confronted with the question of what will happen to our two hundred year old wall between the two religion clauses. Chief Justice Rehnquist would have more strictly applied the establishment clause limiting the wall between church and state, and Justice O'Connor would have allowed more broad interpretation and application of the principle. Therefore we are left with Justices Scalia and Thomas who believe the establishment clause is limited the promotion of a religious perspective and still allows religious expression in a "non-proselytizing manner, Justice Kennedy generally agrees with them, and Justices Stevens, Ginsberg, and Souter who believe that the wall of Thomas Jefferson extends to any visible sign religious expression. Justice Breyer seems to be somewhere in the middle.

We are now dependent upon the judicial selections of President Bush and the advise and consent of the United States Senate. The new Chief Justice, John Roberts, was never faced with an establishment clause case in his very short career as a

federal judge. The only indication we have of Chief Justice Roberts position on this matter is an amicus brief he helped write in *Lee v Weisman* 505 U.S. 577; 112 S. Ct. 2649; 120 L. Ed. 2d 467 (1992). His name is on the brief; however, he was an employee of the White House and worked directly for Kenneth Starr. There really is no way to know if Rogers was acting as the good employee or was also writing concerning his own legal views. If they were his views, then it is obvious that he will be inclined to vote to limit the “wall of separation” under the same legal theory as was espoused by his other former employer, Chief Justice Rehnquist. See 1990 US Briefs 1014.

Regardless of the future composition of the court, Justice O’Conner is absolutely right that our historic establishment clause jurisprudence has served us very well.

“We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.” *McCreary County* at 66.

“Those [Scalia, Kennedy, and Thomas] who would renegotiate 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?” *McCreary County* at 66. O’Conner concurring.

The only statement of the law we have from these two cases is *McCreary County* as it was the only decision of the two which had a majority opinion and therefore made law. The question for the future is whether or not the new make up of the Court will change our First Amendment jurisprudence and how much that change will affect governmental support of religious practice.

REFERENCES

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