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A Growing Cloud of Confusion –The Supreme Court on Religion

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Friday, October 28, 2005

Over the past half century, the U. S. Supreme Court has accomplished a feat America's founders would surely have found to be inconceivable–they have created a perverse cloud of confusion over the question of religious liberty and the place of religious language and symbols in the public square.

Indeed, the confusion is now so pervasive that a consistent understanding of the Court's directives is practically impossible. In just a few short decades, the Court has decided that organized prayer must be removed from the public school classrooms, that religious symbolism must be removed from official seals and emblems, and that all references to a deity must be reduced to a merely ceremonial meaning if they are to be allowed. On the other hand, the federal courts have allowed for the military to pay chaplains, for the words "under God" to remain in the Pledge of Allegiance (at least so far), and for both houses of Congress to employ chaplains and to begin each session with prayer.

The Court's decisions amount to a form of judicial sophistry. Take, for example, the question of nativity displays on public land. The Court allows that such displays *may* be allowable, but only if the Christmas scene is surrounded by the commercial paraphernalia of the season. In other words, the Christ child is allowed only insofar as Rudolph the Red-Nosed Reindeer, Santa Claus, and Frosty the Snowman are also present. But in its last session, the nation's High Court pushed its jurisprudence on these questions into even greater depths of confusion. This time, the issue was the public posting of the Ten Commandments.

Dealing with two separate cases, one from Kentucky and one from Texas, the Supreme Court came to two different conclusions. In two 5-4 decisions, with Justice Stephen Breyer casting the decisive fifth vote in both cases, the Court decided that a Kentucky display of the Ten Commandments was unconstitutional, even as it allowed a display of the same text on the grounds of the Texas Capitol. In other words, a majority of one vote found that the display of the Ten Commandments in McCreary County, Kentucky violated the Constitution, while the display of the Decalogue in Texas was permissible. Confused?

Professor Stephen B. Presser of Northwestern University's School of Law argues that "for sheer incoherence nothing beats the Court's 'establishment clause' jurisprudence." The First Amendment famously includes two different clauses concerning religion. The positive clause assures that citizens are guaranteed the free exercise of religion. The second, known most commonly as the "establishment clause," reads: "Congress shall make no law respecting an establishment of religion . . . ." That's all.

How did the Court transform itself into the source of such confusion? Presser, who holds the Raoul Berger Chair in Legal History at Northwestern, explains that the federal courts should have avoided this confusion by avoiding the cases altogether. "One might have thought, indeed, that because the establishment clause *only prohibits acts of Congress*, and not of the state or local authorities, the Supreme Court has no business telling state and local governments what to do with matters of religion. And, if one thought that, one would be correct, since the First Amendment was passed, in 1791, to

prevent the federal government from interfering with the three state-established churches (in Massachusetts, Connecticut, and Virginia) and with the many states which then imposed some kind of religious test for service in their legislatures or for exercise of the franchise."

So why did the Court enter this dangerous and apparently unconstitutional terrain? The simple answer is: "Because they wanted to." The justices who pioneered the role of the Supreme Court in adjudicating such cases found their opening in a controversial application of the Fourteenth Amendment. That amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As Professor Presser explains, the Court simply declared that the Fourteenth Amendment "somehow changed the meaning of the First Amendment so that *'Congress'* ought to be interpreted as meaning '*Any state or local governmental official*.'"

At this point we come face to face with the infamous "incorporation" doctrine that has become the avenue for a vast expansion of federal power and influence. Writing in the October 2005 issue of *The American Spectator*, Professor Presser explains that this doctrine was an act of "judicial legerdemain," through which the Court simply dictated "that certain fundamental prohibitions against the federal government in the first ten Amendments to the Constitution should also be extended to prohibit acts of state and local government." This, he declares, "is one of the great constitutional usurpations of the modern era, but [it] now goes virtually unchallenged."

The Fourteenth Amendment was intended to provide no such opening for a vast expansion of federal power. Instead, it was, as Presser explains, "originally designed to ensure that the contract and property rights of the newly freed slaves were not abridged." So good, so far. Nevertheless, "the Supreme Court no longer feels itself bound by that history, and for many years the Fourteenth Amendment has been used by the Court as a tool to dictate what the states can and cannot do in matters of education, religion, abortion, gender, and a whole host of other areas completely unrelated to the original purposes of that provision."

This crucial chapter in American constitutional history is of tremendous importance. Most Americans remain blissfully unaware of the process whereby the federal government, through its judicial branch, now claims the right and power to determine issues that were never understood by the founders to be within its purview.

The incorporation doctrine has not gone without criticism. As Presser indicates, Attorney General Edwin Meese did publicly attack the doctrine, only to experience a vitriolic assault. When it comes to the Court's decisions on matters of religion, this leaves the field wide open to those who would argue for the most thoroughly secular shape for America's public life.

In its last term, the Supreme Court "had an opportunity to resolve the status of the Decalogue in American public life," Presser explains, "but, alas, only sowed further confusion."

Presser provides a brilliant and concise summary of the two decisions: "When the smoke cleared on the two Ten Commandments cases, the Court had held that the Commandments had to be removed from Kentucky courtrooms, but it was perfectly permissible for them to exist on a monolith outside the Texas legislature. There are nine members of the Supreme Court, and both of these cases were decided by five to four majorities. In each case, Justices Stevens, Souter, O'Connor, and Ginsburg wanted the Ten Commandments banned, and Justices Rehnquist, Scalia, Kennedy, and Thomas wanted them to stay. Justice Breyer believed the Texas display was fine, but the Kentucky ones were not, and, casting the deciding vote in both cases, his views prevailed. A review of the two cases illuminates the sad state of establishment clause jurisprudence in particular, and the general arbitrariness of a majority of the justices."

In his dissent to the Kentucky ruling, Justice Antonin Scalia cited an earlier decision in writing, "We are a religious people whose institutions presuppose a Supreme Being." In his concurring opinion in the Texas case, Justice Clarence Thomas directly condemned the incorporation doctrine. Presser refers to Thomas's objection as "an acknowledgement as rare among Justices as it is indisputable as a matter of history."

To his credit, Professor Presser does not oversimplify the complexities in these cases. Instead, he simply asserts that the Court has unnecessarily compromised its own authority in delivering to the nation "this jurisprudential mish-mosh." Much of the confusion would be avoided if the justices interpreted the Constitution in terms of its original understanding.

"Original understanding can't clear up everything in constitutional law," Presser admits, "but if the court were more committed to interpreting the Constitution rather than social planning for the Republic, it might well diminish the number of 5-4 decisions rendered on important public issues. Splits of this kind among the Court are not unusual in cases involving race, abortion, gender, or religion, and underscore the arbitrary nature of what the Court has done in all of those areas."

Professor Presser's review of the Ten Commandments cases helps to clear the air, even as his historical analysis points to the intractable nature of the Court's misadventures.

Now, when any case involving references to deity in the public square comes before the Court, the ground is clear for proponents of the most radical secularism to have their day. The only mitigating factor in these cases is the personal restraint exercised by at least some of the justices. Some argue that the only reason the Court has not adopted an even more pervasively secularist approach is fear of public outrage.

Intelligent Christians should look to these developments with concern and with determination to contend for religious liberty. A fundamental and dangerous lie stands at the very center of the secularist argument. If there is no power higher than the state, then the state automatically becomes the highest power on earth. This is a most dangerous assumption, and it opens the door to fascism and unchecked assertions of state power.

From the very founding of this Republic, presidents, justices, legislators, and citizens have insisted that the nation is accountable to a higher power and a higher law. Of course, many of the Founders were believing Christians. Those who were not were generally deists of one variety or another, united in their denial of raw state power and united in denying the ultimacy of the State. The secularist argument is shipwrecked on the actual wording of the Constitution and the unquestionable beliefs and practices of the Founders.

Yet, there is a danger on the other side as well. Christians must contend for religious liberty and for the right of citizens to express their deepest convictions and beliefs in the public square. Furthermore we should insist that the state is not ultimate and that the state's actions and laws are accountable to God.

Nevertheless, we must be honest in acknowledging that public and ceremonial references to deity are not tantamount to statements of belief in the Triune God–Father, Son, and Holy Spirit. The Church bears responsibility to preach and teach the Gospel and to bear witness, without compromise or governmental restraints, to the one true and living God.

Likewise, the Church should ask for no assistance from the state, but should preach the Gospel on the basis of its own identity, mission, and divine assignment. In other words, even as the United States Supreme Court produces a jurisprudence of confusion, the Church is called to be a voice of clarity and truth.

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Accessed on 2010-10-05