Constitutional Corner – Yes, Tear Down This Wall!

"[The wall of separation] metaphor is based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[1] So said Chief Justice of the Supreme Court William Rehnquist essentially concurring with Associate Justice Byron Stewart, who in a preceding opinion, wrote: *"[Resolving complex constitutional controversies] "is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation," a phrases nowhere to be found in the Constitution.*[2]

But Rehnquist's and Stewart's companions on the bench had no problem with the metaphor: it suited their purposes – it was ambiguous enough to mean whatever they wanted it to mean, and imposing enough to quash ill-informed dissent.

Besides, given Jefferson's "well-known" hostility to organized religion, this must be what he meant, an impregnable wall, right? Well, except for the fact that Jefferson attended organized religious services his whole life, including attending, the day after penning his letter to the Danbury Baptists, church services in the U.S. Capitol building, of all places; and considering that he contributed financially his whole life to multiple churches and their ministers, I guess you could say that he was "hostile" to organized religion, in a blatantly supporting sort of way.

Read the concerns of the Baptists and Jefferson's reply, in context, and you easily see that Jefferson wished to assure the Baptists that the federal government (the only one for which he spoke) had no intention of interfering in their beliefs, even if (or especially if) they differed from the official state church of Connecticut: the Congregational Church.

But in 1947, Democrat Klansman Hugo Black, the most senior justice on the Court, appointed by FDR, desperately needed a metaphor. So he purloined a hundred forty-six year old phrase from a private Jefferson letter (confident, it would seem, that Jefferson would not object) to prove that the Constitution, a document that Jefferson had no part in since he was serving in France during its drafting, required this absolute separation -- except when it didn't.

You see, even though the Court erected this "impregnable" wall in *Everson v. Board of Education*, Black ruled that the Catholic parents who sought reimbursement for the cost of public buses that took their kids to Catholic schools (parochial schools as we used to call them back in the day) should get it. So Black becomes the hero to Catholic parents for sustaining the New Jersey law at question, he becomes the hero of all American Atheists for creating a weapon that could be used to keep those "Christian fanatics" at bay.

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[1] Chief Justice William Rehnquist, *Wallace v. Jaffree* (1985) dissenting

[2] Associate Justice Byron Stewart*, Engel v. Vitale* (1962) dissenting

Mind you this decision was delivered in 1947, after more than a hundred years of American courts saying almost exactly the opposite thing.

In 1799, the Supreme Court of Maryland saw no conflict with the First Amendment in a naturalization oath which included a declaration of belief in the Christian religion.[3] Indeed, the Maryland state Constitution began with the words: "We the people of the state of Maryland, grateful to Almighty God for our civil and religious liberty…" That year the same court stated that: "By our form of government, the Christian religion is the established religion, and all sects and denominations of Christianity are placed upon the same equal footing and are equally entitled to protection in their religious liberty."[4]

In 1811, a Mr. Ruggles was found guilty of public blasphemy. The New York Supreme Court sustained the conviction: "[T]o revile the religion professed by almost the whole community is an abuse of that right (of religious opinion). We are a Christian people and the morality of the country is deeply engrafted upon Christianity and not upon the doctrines or worship of those other imposters."[5]

In 1844, the U.S. Supreme Court took a stand. A Mr. Girard stipulated in his will that his remaining estate be used to establish a public school, but one from which ministers or any religious instruction would be excluded. Justice Joseph Story wrote the majority opinion which forcefully stated that "Christianity is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers of the injury of the public."[6]

In case after case the courts affirmed a close relationship between the Christian church and the law. Did any of this establish some denomination as the official religion of the United States? No. these and other cases only affirmed the existing reality: we considered ourselves a Christian nation. Our laws and mores were rooted in the Bible; not the Koran, the saying of Buddha, Pantheism or any other belief system.

But by 1947, things had changed in this country; secular humanism now formed the core of the public school curriculum. Although Bible reading and morning prayer was still allowed in those schools, that was about to change as well, along with released time for religious instruction. All these accommodations of Christianity would soon be discarded. Why not? There was a "Wall" to enforce.

Atheists were flexing their muscles and had the perfect tool. But there was a problem: Christianity was too well connected with our public infrastructure for a complete and utter separation. The connection would have to be chipped away, one small issue at a time. How could you ignore our national motto (In God we Trust) and its appearance on all our money? Outlaw Chaplains in the military and Congress? Don't even think of it. Amend the Constitution to no longer give the President Sunday off when considering whether to sign a bill? To hard.

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[3] *John M'Creery's Lessee v. Allender* (1799)
[4] *Runkel v. Winemuller* (1799)
[5] *The People v. Ruggles* (1811)
[6] *Vidal v. Girard's Executors* (1844)

All these “entanglements” would be allowed. Of the others, some would take considerable time and effort. Prohibit all display of the Ten Commandments, the basis for our laws, from schools and courtrooms? Though it took scores of years, even that would ultimately prevail.

Christians remained embarrassingly silent while public expressions of their faith continued to be chipped away by the Courts; aided and abetting by obliging Presidents (particularly our last). An “open-door” policy was extended to groups like “Freedom from Religion Foundation” and “American United for Separation of Church and State,” They were able to identify even the most minor of “affronts.”

On the other side, groups like Alliance Defending Freedom, American Center for Law and Justice, Family Research Council and many others rose up to meet the atheists and agnostics in court. Thanks to a few victories, the “Wall” is showing signs of age and its original shaky foundation.

A significant chunk of the wall may soon to be dismantled as the Court rules on *Trinity Lutheran v. Comer*. The case was heard on Wednesday, April 19th and both audio and written transcripts of the session can be downloaded here.[7]

Questions from both liberal and conservative justices hinted that the court is ready to declare these so-called “Blaine Amendments” unconstitutional as in conflict with the 14th Amendment’s Equal Protection provision.

Both sides choose to frame the argument in First Amendment terms, either the Establishment Cause or Free Exercise Clause or, at times, both. It was not until 38 minutes into the discussion (page 39 of the transcript) that Justice Elena Kagan, finally framed the argument as what she called “a constitutional principle as strong as any…that there is.” She continued: “[W]hen we have a program of funding – and here we’re funding playground surfaces – that everybody is entitled to that funding,…whether or not they exercise a constitutional right (religion); in other words,…whether or not they are a religious institution doing religious things. As long as you’re using the money for playground services, you’re not disentitled from that program because you’re a religious institution doing religious things.” Yes, equal protection of the laws, that’s it. There is no entanglement with religion, there is no establishment of religion, but the church is definitely penalized for being a church.

(If you’ve never listened to or read Supreme Court oral arguments, I encourage you to do so. At times you will scratch your head and wonder what is the Justice asking? The poor litigant advocates!)

Blaine Amendments should never have been placed in 39 state Constitutions; they grew out of religious bigotry – anti-Catholic bigotry to be precise, and America’s Protestants should be embarrassed by them. We should want to see them stricken as much as we struck, eventually, the last vestiges of slavery.

But what else can be done to chip away at the “Wall?” Join us on “We the People – the Constitution Matters on Friday, 28 April, 7-8am EDT (www.1180wfyl.com) as we finish up this discussion.

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[7] https://www.supremecourt.gov/oral_arguments/audio/2016/15-577

Suggested reading List:

"Original Intent," 2000, by David Barton.

"Bring Down That Wall," 2014, by Nicholas F. Papanicolaou.

"Backfired, A nation founded on religious tolerance no longer tolerates its founders religion," 2012, by William J. Federer.

"The Separation of Church and State, Has America lost its moral compass?" 2001, by Stephen Strehle.

"The Assault on Religion," 1986, Russel Kirk.

"The Separation Illusion, A Lawyer Examines the First Amendment," 1977, by John Whitehead.

"Separation of Church and State, 2002, by Philip Hamburger.

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