The Breakfast Club

Constitutional Minute for 22 November 2022

The “Wall of Separation” After Kennedy v. Bremerton School District

A few months ago (**06-28-22: Removing Another Brick from the Wall of Separation**) I focused my Constitutional Minute on the Supreme Court’s decision in ***Carson v. Makin*, **in which the Court announced that to not include parents in a tuition reimbursement program when those parents wished to send their children to a Christian school -- in an area of Maine where no public schools were provided -- amounted to anti-Christian discrimination, which would not be tolerated. I noted that this decision appeared to have the effect of removing a metaphorical “brick” from the metaphorical “wall of separation between church and state” the Court had erected in 1947 (***Everson v Board of Education***.) In my verbal remarks in the two Breakfast Club meeting at which I summarized the essay that week I also mentioned that the recently decided case of *Kennedy v Bremerton School District* appeared to have the same potential. The *Kennedy* case involved a high school football coach who was fired after continuing to pray in the middle of the field after football games after he had been expressly ordered by the School Board to cease such activity. I hoped at the time we would see more cases like these two and that these would eventually lead to complete abandonment of the ”wall of separation” metaphor by the Supreme Court. At the time, I had only read summaries of the *Kennedy* case, not the actual opinion itself.

This last Monday I attended the third lecture in the Lessons in Liberty series, dealing with the “Wall of Separation” issue, given by Bob Wallace, a friend of the Foundation for American Christian Education from the local area. Mr. Wallace pointed out something I would have learned had I read the Kennedy opinion: for all intents and purposes, *the “Wall of Separation” metaphor has largely been abandoned*!

To be clear, the Court has not thrown out the Religious Exercise and Establishment Clauses of the First Amendment; those must still be observed, but they will be viewed in a new way. To fully explain this, we must backtrack a bit.

To repeat, the “Wall” went up in 1947 in *Everson*. In 1971, in *Lemon v Kurtzman*, the Court designed a test that would help it tell when there had been a violation of the Establishment Clause. That test became known as the “Lemon Test.” In *Lemon v Kurtzman*, the Court found that two states had violated the first Amendment’s Establishment Clause by making state financial aid available to “church-related educational institutions.” This created an impermissible “entanglement” between church and state.

To determine, going forward, whether a particular program or policy created an unacceptable entanglement between church and state, the Court would weigh three factors:

1. The Court would look at the character and purpose of the institution that benefited,
2. the nature of the aid the state was providing,
3. and the resulting relationship between the government and the religious institution.

If the program failed any single part of the test, it would render the program an unconstitutional violation of the establishment clause. Over the next twenty years, the effect of

the “Lemon Test” was to further widen and strengthen the “Wall of Separation” effect. But overtime the Court found the Lemon Test was not as easy to apply as they had first envisioned: each case brought new peculiarities that made the test not quite “fit.”

In finally got to the point where Justice Antonin Scalia could take no more:

> *“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman conspicuously avoided using the supposed test but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.”*[i] *(*Who says Supreme Court Justices have no sense of humor?)

Back to the *Kennedy* case. Associate Justice Neil Gorsuch, writing for the 6-3 majority, surprised most everyone (OK, maybe only me) by pointing out that: *“this Court long ago abandoned Lemon and its endorsement test offshoot…In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “‘reference to historical practices and understandings.’” Town of Greece, 572 U. S., at 576; see also American Legion, 588 U. S., at ___ (plurality opinion) (slip op., at 25). “‘[T]he* ***line’”*** *that courts and governments“ must draw between the permissible and the impermissible” has to “‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’”* (Notice: we have a “line” not a “wall” separating church and state)

I almost fell out of my chair when I read that. What? is the Court telling us they are ready to look at the history of the country at the time the First Amendment was ratified to determine what is acceptable and what not in terms of church-state interactions? I’ll bet “Living Constitution” aficionados were greatly disturbed to read the *Kennedy* opinion.

Need I remind you that in 1791 when the First Amendment was ratified, 6 states had state-supported Christian denominations? There was no “wall of separation” anywhere to be seen, and neither religion clause of the First Amendment had been “incorporated” into the 14th Amendment’s Due Process Clause. OK, maybe the Court isn’t ready to discard the Incorporation Doctrine just yet; but that might come out of this Court as well. I know some current justices take issue with it, at least as originally formulated.

In 2017, I applauded the addition of Neil Gorsuch to the Supreme Court. I thought his first majority opinion in *Bostock v. Clayton County* was terrible, but this time, Gorsuch came through! Will the Court continue to dismantle the “Wall,” or will they simply pretend it doesn’t exist? Time will tell.

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p.s. Don't forget to sign up for the Virginia Constitution seminar on 10 December in Newport News. I'm going to limit the class to 20 people and I have half that already.

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[i] Justice Antonin Scalia in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398–99 (1993)