

The Breakfast Club

Constitutional Minute for 22 June 2024

The Ten Commandments, Yet Again

Many of us will remember the saga of Judge Roy Moore, Chief Justice of the Alabama Supreme Court, He was removed from the bench in 2003 over his repeated refusal to obey a federal court order and remove a Ten Commandments monument from the rotunda of Alabama's judicial building.¹ Moore was re-elected as Chief Justice in 2013 and resigned four years later rather than be removed again, this time for refusing to enforce the Supreme Court's decision in *Obergefell v Hodges* which legalized homosexual marriage.

As most of us also know, the Ten Commandments are now back in the news, this time in the nearby state of Louisiana. The Louisiana Legislature passed and the Governor signed [House Bill 71](#) which required the posting of the Ten Commandments in Louisiana public school classrooms and allowed for the posting of other historical documents such as "The Mayflower Compact and The Northwest Ordinance of 1787 "to educate and inform the public as to the history and background of American and Louisiana law."

Patrons of the bill in the Legislature were well aware of the mixed messages the Supreme Court has created on this issue: in the 2005 case of [Van Orden v. Perry](#) the Court, in a 5-4 decision, found **constitutional** a display of a Ten Commandments monument that had been donated by the Fraternal Order of Eagles and which had sat outside the Texas state capitol, unprotested, for 40 years. In the majority decision, Justice Breyer observed: "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."

The same year, [McCreary County v. ACLU](#) was argued before the court. There the court reached a different result: that posting the Commandments inside a Kentucky courthouse was **unconstitutional**. How could opposite conclusions be reached over essentially the same set of words, one posted on a monument and the other on a wall? In his dissent in *McCreary*, Justice Anton Scalia pointed to the irony of the different results. He argued the court should follow its own precedent and historical traditions and charged that the result in *McCreary* was "inconsistent with the intentions of the America Constitution." Scalia's dissent is worth the read. I think (and pray) that the present court's thinking will be more in line with Scalia's.

The obvious difference between both of these cases and what will eventually be the Louisiana case when it reaches the high court—and it will, the plaintiffs will be prepared to "go all the way"— is the venue, i.e. public school classrooms. The court has always treated classrooms differently than other public spaces, and even though HB71 includes no requirement to incorporate the Ten Commandment displays into the curriculum or require students to even read the new posters on their walls, impressionable school kids are a different audience than found outside the Texas capitol building or inside a Kentucky courthouse.

Let's be clear on the reasoning behind the First Amendment's Religion Clause. On the floor of Congress Madison was asked to explain what he was hoping to achieve with that amendment and the Congressional Record records: "Mr. Madison said, he apprehended the meanings of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." Does posting a copy on public school classroom walls do either?

The breathless press has of course warned of impending doom: "*Louisiana's mandatory Ten Commandments law invites the Supreme Court to impose more theocracy*"ⁱⁱ Calling the newly passed legislation [a clearly unconstitutional law](#), an MSN "journalist" accuses the lawmakers of "thumbing their nose at the men they love to call the Founding Fathers. The founders were quite clear in their intentions for a secular state..." Oh really?

Benjamin Franklin was certainly not an orthodox Christian, but he was not reticent in noting a necessary connection between the government and organized religion:

"That wise Men have in all Ages thought Government necessary for the Good of Mankind; and, that wise Governments have always thought Religion necessary for the well ordering and well-being of Society, and accordingly have been ever careful to encourage and protect the Ministers of it, paying them the highest publick Honours, **that their Doctrines might thereby meet with the greater Respect among the common People.**"ⁱⁱⁱ (Emphasis added)

In a 1799 Election Sermon, Rev. Jedidiah Morse was even more adamant: "To the kindly influence of Christianity we owe that degree of civil freedom, and political and social happiness which mankind now enjoys. In proportion as the genuine effects of Christianity are diminished in any nation...in the same proportion will the people of that nation recede from the blessings of genuine freedom... All efforts to destroy the foundations of our holy religion, ultimately tend to the subversion also of our political freedom and happiness. **Whenever the pillars of Christianity shall be overthrown, our present republican forms of government, and all the blessings which flow from them, must fall with them.**" (Emphasis added)

"[F]or avoiding the extremes of despotism or anarchy . . . the only ground of hope must be on the morals of the people. I believe that religion is the only solid base of morals and that morals are the only possible support of free governments. [T]herefore **education should teach the precepts of religion and the duties of man towards God.**" (Emphasis added)

President of Princeton Reverent John Witherspoon saw no "wall of separation" between religion and the state: "Those who are vested with civil authority **ought...to promote religion** and good morals among all under their government."^{iv} (Emphasis added)

The distinguished Supreme Court jurist Joseph Story in his 1833 Commentaries on the Constitution, wrote: "Probably at the time of the adoption of the Constitution, and of the First Amendment to it, the general, if not universal sentiment in America was that **Christianity ought to receive encouragement from the state**...Any attempt to level all religions and to make it a matter of policy to hold all in utter indifference would have created universal disapprobation, if not universal indignation." (Emphasis added)

In 1852, a House Committee was formed to compose a response to a petition to Congress to separate Christian principles from government. The Committee issued a report that contained this observation:

"Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle. At the time of the adoption of the Constitution and the amendments, **the universal sentiment was that Christianity should be encouraged**, not any one sect [denomination]. Any attempt to level and discard all religion would have been viewed with universal indignation. The object was not to substitute Judaism or Mohammedanism, or infidelity, but to prevent rivalry among sects to the exclusion of others. It must be considered as the foundation on which the whole structure rests. Laws will not have permanence or power without the sanction of religious sentiment, - without a firm belief that there is a Power above us that will reward our virtues and punish our vices. In this age there can be no substitute for Christianity: that, in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions. That was the religion of the founders of the republic, and they expected it to remain the religion of their descendants." (Emphasis added)

Yes, Thomas Jefferson thought there should be a "wall of separation" between church and state. Yes, James Madison thought that "religion flourishes in greater purity, without than with the aid of government."^v When compared with the bulk of America's Founders, these two gentlemen were outliers.

I will give "America's Schoolmaster," Noah Webster, the final word. He wrote in an 1829 letter to James Madison: "[T]he christian religion, in its purity, is the basis or rather the source of all genuine freedom in government. . . . I am persuaded that no civil government of a republican form can exist & be durable, in which the principles of that religion *have not a controlling influence*." (Emphasis added)

Bring on the Ten Commandments!

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ⁱ <https://www.cnn.com/2003/LAW/11/13/moore.tencommandments/>.

ⁱⁱ <https://www.msn.com/en-us/news/opinion/louisianas-mandatory-ten-commandments-law-invites-the-supreme-court-to-impose-more-theocracy/ar-BB1oDpyR>.

ⁱⁱⁱ On that Odd Letter of the Drum, 1730.

^{iv} In a "Sermon Delivered at Public Thanksgiving After Peace," December 11, 1783.

^v In a letter to Edward Livingston, 1822.