The Establishment of Religion

by David Honig
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The Supreme Court of the United States is on the cusp of significant possible change as Justices retire. Two Justices are over 70, Justice O'Connor and Justice Ginsburg. Two are 80 or older, Justice Stevens and Chief Justice Rehnquist.

One decision any new Court will need to consider in the next few years is the proper application of the Establishment Clause of the Constitution of the United States. Presently, the Court has applied that Clause to the States. However, a new Court might decide otherwise, leading to significant changes in the lives of members of any minority religion. Such a statement is not mere hyperbole, but is based upon dissenting opinions by two of the Court's youngest, and some would argue most conservative, Justices, Justice Thomas and Justice Scalia. Justice Scalia has been mentioned by many as a likely replacement in the Chief Justice position should Chief Justice Rehnquist retire. It is also reasonable to anticipate that such decisions will be before the Court in the near future, as the Court recently agreed to hear Ten Commandments cases out of Kentucky and Texas, something they previously avoided.

The First Amendment, in relevant part, states, "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof…."

The Fourteenth Amendment, in relevant part, states, "…No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; …."

The issue is the meaning of the First Amendment, and its application to the States through the Fourteenth Amendment. To date, the Court has applied the Establishment Clause through the Fourteenth Amendment, prohibiting the establishment of state religions, particularly in cases related to school prayer, graduation day prayers, and the Pledge of Allegiance. Justice Thomas and Justice Scalia, in different opinions, have suggested a conclusion that would permit individual States to establish public religions, and to delegate some state authority to churches.

Lee v. Weisman

In a dissenting opinion in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), Justice Scalia castigated the majority of the Court for deciding its opinion in a graduation ceremony prayer case on the psychology of coercion rather than on history. The majority decision found that a graduation prayer was coercive, as students attending graduation were required to stand and either join the prayer or remain silent. The Court considered psychological evidence that this created a coercive atmosphere violative of the Establishment Clause. Justice Scalia ridiculed the Court's decision, stating "[a]s its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion…." He went on to state "interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of 'research in psychology' that

have no particular bearing upon the precise issue here … cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing."

Having first ridiculed the majority's decision, Justice Scalia turned next to the Establishment Clause. "The Establishment Clause," he wrote, "was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference)." The import of the last statement might well be hidden by its location in a parenthetical statement, but it can not be underestimated, for it is the heart of Justice Scalia's opinion. His final position is that States are free to establish official religions. Further, he would only limit such establishment to prohibit 'actual coercion,' "acts backed by threat of penalty" by the State government. In other words, short of statutory punishment, such as imprisonment or fine, a State could establish an official religion, and delegate to it official state functions.

Justice Scalia went on, rejecting even Jesus' admonition against public prayer,[1] arguing on behalf of public and institutional prayer. He wrote "[c]hurch and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged, entirely in secret, like pornography, in the privacy of one's own room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals…." While, on its face, this argument has validity, combined with the establishment of an official State religion it legitimizes public devotion, not at individual churches or synagogues, but at public institutions and events.

Elk Grove

Justice Thomas built on Justice Scalia's *Lee* dissenting opinion in his own dissent in *Elk Grove Unified School District v. Newdow*, No. 02-1624. Argued March 24, 2004--Decided June 14, 2004, the recent Pledge of Allegiance "Under God" case. He introduced his opinion stating "I would take this opportunity to begin the process of rethinking the Establishment Clause." He wrote that he accepted the Free Exercise Clause as applied against the States through the Fourteenth Amendment, but "the Establishment Clause is another matter," and "it makes little sense to incorporate the Establishment Clause." Justice Thomas opined that the Establishment Clause protects only the States, and not individual rights. "[T]he Establishment Clause," he wrote, "is best understood as a federalism provision--it protects state establishments from federal interference but does not protect any individual rights."

Justice Thomas went on to discuss exactly what he meant by "state establishments," describing official endorsement of a particular religion throughout State governmental authority. He began where Justice Scalia left off, discussing legal coercion, and finding (inconsistently with his thesis, that the Establishment Clause simply does not apply to States) that coercion through force of law and threat of penalty remained prohibited. However, he went on to state, there were other ways for a State to establish a religion without coercion. He wrote "[i]t is also conceivable that a

[1] **Matthew 6:5-6:** "And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men....when thou prayest, enter into thy closet and when thou has shut thy door, pray to thy Father which is in secret...."

government could 'establish' a religion by imbuing it with governmental authority, … or by delegating its civic authority to a group chosen according to a religious criterion." He did not state what authority could be imbued, or what civic authority could be delegated. However, it is reasonable to anticipate that, at a minimum, such an official establishment could prohibit public employment or contracting by members of other religions. Other state prerogatives, including marriage, divorce, and even civil courts (many of the American colonies had ecclesiastical courts), could be included.

This opinion is disturbing for two reasons. First, it encourages official public endorsement of, and delegation of authority to, an individual religion. Second, and even more pernicious, the internal illogic hints that Justice Thomas' limitation against coercion is a temporary public sop, promising religion without Inquisition. However, if his opinion is accepted at face value, the Establishment Clause simply does not apply to states, and therefore contains no limitations. Individuals might remain protected by the Free Exercise Clause, indeed that might have been Justice Thomas' point, but his opinion as written does not state that.

Conclusion

Religious liberty will be part of the Supreme Court's docket in the near future. With the imminent retirement of several Justices, it is difficult to predict how cases will be decided. However, it is not difficult to anticipate that any new Court will affect the freedoms of all Americans, and particularly Americans in religious minorities, for at least a generation.

David Honig is an attorney in Indianapolis, Indiana. He is also the artist behind Hypnocrites (http://hypnocrites.blogspot.com). This article was published in the Miami Herald in 2004.