Week Eight Handout

"God & Caesar – The Ancient Modern Clash"

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God and Caesar in America:

Major Court Decisions on God and Caesar Issues

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How has the understanding of God and Caesar conflicts changed as a result of Constitutional Amendments and new Supreme Court decisions?
What is the current landscape of religious freedom and non-establishment as defined by the courts?

Case Studies

- A student censors the "under God" section of the pledge by saying "beep" during it. As the teacher what do you do?
- As a principal do you provide a stipend for the advisor of an afterschool Bible study club? All other club advisors are paid.
- Would you approve of a school voucher program that parents could apply to fund a Muslim school that teaches the supremacy of Shar'iah Law?

Constitutional Interpretation

- The Originalist Position
  - A Portion of the Constitution can only mean what it was understood as meaning for the original authors
  - Ignores the problems of new circumstances, unclear, contested, or compromised intent.
  - May require judges to be "time travelling mind readers."
- The Living Constitution Position
  - The Constitution and constitutional interpretation evolves to keep up with changing societal norms.
  - To what extent can/should unelected judges change the meaning of the document?
  - Is there a point where reinterpretation becomes rewriting?
- Constitutional Changes
  - Constitutional Amendments
  - More fully applying original principles
  - Reflecting changing societal expectations/norms
    - Cruel and unusual punishment
    - *Brown v. Board of Education*
    - *Loving v. Virginia*
  - Reflecting the will of voters as expressed through elections

Constitutional Revolution of 1937

1st Amendment Core Principles

- Liberty of conscience
- Free exercise of religion
- Religious pluralism
- Religious equality
- Separation of church and state
- Disestablishment of religion

1868 - Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

Ratified in 1868 The Fourteenth Amendment began the process of expanding the scope of the Bill of Rights so that its limitations would be binding upon the states as well as the federal government.

1871 – *Watson v. Jones* – The Supreme Court refused to intervene in an internal church dispute claiming that courts have no jurisdiction over internal matters of faith and practice.

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[i]

1879 *Reynolds v. United States* -- In a question related to polygamy in Utah the court ruled that the claim of a religious duty, ie to practice polygamy within the religion of Mormonism, did not permit the individual to violate a Congressional statute against polygamy. The First Amendment protected religious belief but not all behaviors which stemmed from that belief.

"Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit

every citizen to become a law unto himself. Government could exist only in name under such circumstances."

1925 – *Gitlow v. New York* – In this free speech case in which the Supreme Court began to selectively incorporate rights from the Bill of Rights into the Fourteenth Amendment and declare that they were binding on the states. While the case only spoke of the freedom of speech and the press from the First Amendment it was later expanded to include religion.
"For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

1940 – *Cantwell v. Connecticut* – Continued the incorporation process begun by *Gitlow* and declared that the Fourteenth Amendment required states to abide by the Free Exercise clause of the First Amendment.
"The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

1947 *Everson v. Board of Education* – While allowing public schools to spend money transporting students to parochial schools this decision helped to clarify the court's interpretation of the Establishment clause and incorporated it into the 14th amendment.
"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"
1953 – *Poulos v. New Hampshire* – This decision allowed municipal regulation of religious expression in parks or streets just so long as it was applied uniformly and did not allow local officials discretion on which permits to accept or reject thus clarifying *Cantwell*.
1962 – *Engel v. Vitale* – The decision declared mandatory prayer in school unconstitutional because it violated both the First and the Fourteenth Amendments.

"The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer

the American people can say - that the people's religious must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity. . . . It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

The central holding of *Engel v. Vitale* was expanded in a string of later cases which helped to clarify the boundaries between church and state in public education.

1963 – *Abington Township School District v. Schempp* – Banned publicly sponsored devotional Bible reading in the public schools. At the same time it specifically sanctioned the reading of the Bible for its literary or historical merits. At the center piece of the decision was the firm assertion that the state must maintain its neutrality in all issues related to religion.

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

1968 – *Epperson v. Arkansas* – Struck down an Arkansas state law which banned educators in state supported schools or universities "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory.

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."

1971 -- *Lemon v. Kurtzman* – Struck down Rhode Island and Pennsylvania laws that allowed the state government to partially reimburse parochial schools for the cost of teachers salaries, text books, and other instructional materials. It created the three pronged lemon test for determining whether specific laws violated the constitution.

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'"

1987 – *Edwards v. Aguillard* – The decision declared a Louisiana law mandating equal time for creation science in biology classrooms to be unconstitutional finding it an illegal establishment of religion.

"*The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.* "
1990 – *Board of Education of the Westside Community Schools v. Mergens* – Ruled that student run religious clubs could make use of school property during non-school hours. It also declared the 1984 Equal Access Act (which had guaranteed religious groups access to school facilities) to be constitutional. Since the decision was based on the interpretation of a statute and not the First Amendment it did not change the courts reading of the establishment clause.

1990 – *Employment Division v. Smith* – The court refused to give an exemption from state laws against smoking peyote as part of a Native American religious ritual when an employee was fired for the action and then denied unemployment compensation. Justice Scalia moved the court from a strict scrutiny standard toward considering whether the law was a "valid and neutral law of general applicability." Oregon law was subsequently changed to allow this sacramental use of peyote.

1992 -- *Lee v. Weisman* – Struck down clergy led prayers at student graduations and created the coercion test to measure whether or not a school's engagement in religion violates the First Amendment.
"As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in Engel v. Vitale (1962), and School Dist. of Abington, supra, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."

2002 - *Zelman v. Simmons-Harris* upheld a statute that provided state vouchers to be used by parents to fund education at the private school of their choice, including private religious schools.

2004 – *Elk Grove United School District v. Newdow* – This case challenged the constitutionality of the "under God" line in the Pledge of Allegiance. While the court refused to rule on the merits of the case, in a dissent Sandra Day O'Connor posited a ceremonial deism test that might point a way out of the controversy.

Proposed test for the pledge:

history and ubiquity
absence of worship or prayer
absence of reference to particular religion
minimal religious content.

2011 - *Snyder v. Phelps* upheld the rights of Westboro Baptist Church to protest at funerals of soldiers and other places (including in front of Grace Chapel.) The decision was based on freedom of speech not the free exercise of religion.

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[i] All excerpts from Supreme Court decisions were accessed at http://www.findlaw.com/casecode/supreme.html.