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FIRST AMENDMENT CASES IN THE OCTOBER 2004 TERM

*Joel M. Gora**

There were seven First Amendment cases in front of the Supreme Court this past Term. Four involved speech and association rights¹ and three involved religion issues.² In these seven cases, the First Amendment claim prevailed only twice.³ First, I will discuss the First Amendment speech cases and then I will finish up with the three religion cases.

I. FREEDOM OF SPEECH AND ASSOCIATION

A. *Tory v. Cochran*

The first speech case I will discuss is *Tory v. Cochran*.⁴

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¹ See *Tory v. Cochran*, 125 S. Ct. 2108, 2110 (2005); *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004); *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2058 (2005); *Clingman v. Beaver*, 125 S. Ct. 2029, 2034-35 (2005).

² See *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2728 (2005); *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005).

³ See *Tory*, 125 S. Ct. at 2111 (holding that the injunction is an overly broad prior restraint upon speech because of the trial court's stated reason for granting the injunction could no longer be met); *McCreary County*, 125 S. Ct. at 2741 (upholding a preliminary injunction issued against government display of the Ten Commandments among historically significant government documents because the government failed to persuade the Court that the display had a legitimate secular purpose).

⁴ 125 S. Ct. 2108 (2005).

Professor Chemerinsky argued this classic prior restraint⁵ case.⁶ The Cochran of *Tory v. Cochran* was the famous, and late, lawyer Johnnie Cochran. The clients that Professor Chemerinsky represented were individuals who had grievances with Mr. Cochran and expressed their grievances by demonstrating and picketing outside of his office.⁷ As a result of these protests, Mr. Cochran sued the protestors for defamation.⁸ The California court granted a permanent injunction against any protesting or picketing of a similar nature targeting Mr. Cochran.⁹

The Supreme Court granted certiorari to decide the issue of whether the injunction against engaging in defamatory speech constituted a prior restraint of speech.¹⁰ During the pendency of the argument, Mr. Cochran passed away and his wife was substituted as a party.¹¹ There was an issue of whether the death of Mr. Cochran mooted the case. The Court, in a short opinion by Justice Stephen

⁵ *Id.*; see *Alexander v. United States*, 509 U.S. 544, 554 n.2 (1993), which noted that the doctrine of prior restraint has roots in the 16th and 17th-century English system of censorship. American jurisprudence recognizes prior restraints as governmental censorship of content before publication and particularly in the form of the government licenses for printing presses and judicial injunctions against future speech. *Id.* See also Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1136 (2001) (“The most common case in which the ban on prior restraint protects ‘unprotected’ speech is the prohibition on enjoining defamatory statements. Despite the arguments of those who assert the equitable limitation on injunctive relief is outdated, the constitutional prohibition has prevented injunctive relief from being awarded to successful defamation plaintiffs.”).

⁶ Duke Law School – Erwin Chemerinsky biography, <http://www.law.duke.edu/fac/chemerinsky> (last visited Jan. 19, 2005).

⁷ *Tory*, 125 S. Ct. at 2110.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (“Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.”).

¹¹ *Id.*

Breyer, held that the case was not moot because the injunction was still operative on the speakers, and thus the Court could read the merits of the case.¹² However, with the death of Mr. Cochran, the underlying concern that there would be an effort to coerce Mr. Cochran, was no longer present.¹³ Therefore, it was argued that on its face the sweeping nature of the injunction was overbroad in relation to Mr. Cochran's arguable interest.¹⁴ Overbroad injunctions against speech are one of the few things that you can guarantee will violate the First Amendment,¹⁵ and as expected, the Court held that the injunction was overbroad and a violation of the First Amendment.¹⁶ Specifically, the Court found that the sweeping nature of the injunction was sufficient to render it facially unconstitutional, which invoked some great prior restraint language from cases where the Court struck down injunctions against speech.¹⁷ The Supreme Court remanded the case to the California courts for further proceeding.¹⁸ This case was an important reminder that since the early days of the First Amendment, one of its main theoretical

¹² *Tory*, 125 S. Ct. at 2110-11.

¹³ *Id.* at 2111.

¹⁴ *Id.*

¹⁵ See *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (stating that in examining injunctions that restrict speech, the Court follows those principles that assure an injunction is "no broader than necessary to achieve its desired goals"); *M.I.C., Ltd. v. Bedford Twp.*, 463 U.S. 1341, 1343 (1983) (staying the trial court's "broad proscription" that bars showing films before a final judgment has been rendered on whether the films indeed qualify as obscene); *CBS, Inc. v. Young*, 522 F.2d 234, 236, 242 (6th Cir. 1975) (ordering the trial judge to vacate an order that prohibited parties, counsel, close friends and associates from discussing with the media the litigation "in any manner whatsoever" as overly broad).

¹⁶ *Tory*, 125 S. Ct. at 2111.

¹⁷ *Id.*

¹⁸ *Id.*

missions was to prevent the government from prohibiting speech before it occurred through the issuance of injunctive orders.¹⁹

B. *San Diego v. Roe*

The next First Amendment case before the Supreme Court last Term was *San Diego v. Roe*.²⁰ Here, a police officer in the San Diego Police Department made some videos where he was taped stripping out of a police uniform and engaging in a unilateral sexual activity.²¹ He sold the videos on eBay along with some police memorabilia, none of which were actually issued by the department.²² One of his superiors found out about these items and initiated a proceeding to dismiss the officer from the department.²³ The officer was dismissed for conduct unbecoming an officer, and I guess also for being out of uniform.²⁴

When the *Roe* case went up to the Ninth Circuit, the court ruled in favor of the former police officer.²⁵ A free speech decision by the Ninth Circuit is almost always a prima facie case for Supreme Court review.²⁶ The Supreme Court reversed the Ninth Circuit and

¹⁹ *Alexander*, 509 U.S. at 553-54 n.2 (noting that injunctions against future speech are disfavored).

²⁰ 543 U.S. 77 (2004).

²¹ *Id.* at 78.

²² *Id.* (noting that plaintiff also sold underwear and a video of him engaging in a unilateral sexual act); *Roe v. City of San Diego*, 356 F.3d 1108, 1110-11 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004).

²³ *Roe*, 543 U.S. at 78-79.

²⁴ *Id.* at 79.

²⁵ *Id.* at 78.

²⁶ *See Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 37 (1999) (reversing a Ninth Circuit decision to enjoin the enforcement of a California statute that restricted the dissemination of arrestee's address because the statute violated the First Amendment).

ruled in favor of the police department on two grounds.²⁷ First, in past decisions, the Court reasoned that public workers are still citizens and can pursue speech efforts off duty as long as they do not impact their work.²⁸ However, in *Roe* the officer's activity was not constitutionally protected. The Court reasoned that because the videos involved police insignia and police identity, the officer's activities were not off duty because they were not unrelated to his work.²⁹ Therefore, the Court held that the officer could not take advantage of the line of cases which have held that off duty activities are constitutionally protected.³⁰

Next, *Roe*'s other argument relied on *Pickering v. Board of Education*,³¹ an important case decided in the late 1960s.³² *Pickering* held that a government employee has a right to comment about things related to the employee's area of expertise, such as writing a letter to the newspaper about department policies. Similarly, *Roe* argued that he was speaking out on issues related to his employment and was therefore entitled to take advantage of the *Pickering* decision.³³ The Court said that before it engages in a balancing of the officer's rights against the department's concerns, the predicate for the *Pickering* rule is that the employee was off duty, on his or her own time, and was commenting on a matter of public concern.³⁴ Only after this is

²⁷ *Roe*, 543 U.S. at 80.

²⁸ *Id.*

²⁹ *Id.* at 81.

³⁰ *Id.* at 80-82.

³¹ *Id.* at 81-82. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

³² *Pickering*, 391 U.S. at 565-69.

³³ *Roe*, 543 U.S. at 79.

³⁴ *Id.* at 82-83 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

established, could the Court decide whether the commentary hinders the working relationship.³⁵ The Court held that in this case, there was no commentary on a matter of public concern.³⁶ This was just a sexual presentation, and so the officer in *Roe* could not rely on the Court's precedent that public employees have the right to comment on matters of public concern.³⁷

The *Roe* decision was a strong per curiam decision on the question of employee rights, which reaffirmed the principles, set forth in *Pickering*. However, when the Court applied those principles, it resulted in sustaining the dismissal of an employee.³⁸ Perhaps, not surprisingly, *Roe* was the first case where the First Amendment claimant did not prevail.

C. **Johanns v. Livestock Marketing Association**

The next speech case is *Johanns v. Livestock Marketing Association*.³⁹ This case involved the Beef Promotion Research Act, which announced a federal policy of promoting the marketing and consumption of beef and beef products.⁴⁰ The Act imposed an assessment or "checkoff," on all sales and importation of cattle.⁴¹ A committee, set up by the government to promote the sale of beef, spent the assessment imposed by the Act on promotional

³⁵ *Id.*

³⁶ *Id.* at 84.

³⁷ *Id.* at 84-85.

³⁸ *Roe*, 543 U.S. at 79, 85.

³⁹ 125 S. Ct. 2055 (2005).

⁴⁰ *Id.* at 2058. The statute also establishes a "Cattlemen's Beef Promotion and Research Board." *Id.*

⁴¹ *Id.* A one-dollar per-head assessment was imposed. *Id.*

advertisements.⁴² The problem was that the government required the promotional subsidy to be supported by members of the industry supposedly being benefited by the advertisements.⁴³ The dissenting members of the industry did not think they were being benefited and therefore did not want to support the ads.⁴⁴ Thus, they filed suit, invoking what was at this point the well-settled First Amendment doctrines that in certain circumstances, the government cannot compel speech nor can the government compel one to subsidize speech of others with whom one might disagree.⁴⁵

The first case that held compelled speech to be unconstitutional was *West Virginia State Board of Education v. Barnette*, which came out of the World War II context of refusing to salute the flag in school.⁴⁶ The Court in *Barnette* reasoned that an individual is protected in refusing to honor the flag if saluting the flag was against the individual's religious or other beliefs.⁴⁷ The Supreme Court held that an individual had a constitutional right not to be compelled to speak when such speech was against that person's belief.⁴⁸ Some thirty years later, the Court applied this principle in

⁴² *Id.* at 2059. In addition to the promotions, the assessments were used to fund food research and provide informational campaigns for the benefit of both consumers and producers. *Id.*

⁴³ *Id.* The advertisements included, "Beef. It's What's for Dinner." *Id.*

⁴⁴ *Johanns*, 125 S. Ct. at 2064.

⁴⁵ *Id.* at 2059 (referring to the Court's holding in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)).

⁴⁶ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-30 (1943). The children who refused to salute the flag were expelled from school and their parents were prosecuted for causing "delinquency." *Id.* at 630.

⁴⁷ *Id.* at 634-35. The appellees in this case were Jehovah's Witnesses who teach, "that the obligation imposed by law of God is superior to that of laws enacted by temporal government." *Id.* at 629.

⁴⁸ *Id.* at 642.

Wooley v. Maynard, and held that the State of New Hampshire could not enforce criminal sanctions against a couple who refused to display the state motto, "Live Free or Die" on their license plate.⁴⁹ The Supreme Court explained that an individual has a right not to be compelled by the state to have a message displayed on their car when that message is offensive to that particular person.⁵⁰

The other issue addressed in *Johanns* was whether subsidized government speech was contrary to the First Amendment. There have been cases where public employees were required to contribute to the bargaining agent for, among other things, supporting or opposing an array of state legislation.⁵¹ The Supreme Court held that you have a right not to be taxed for that speech through another organization with which you do not agree.⁵²

The cattlemen in *Johanns* attempted to invoke these principles but were unsuccessful.⁵³ I think the reason is twofold. First, there was some indication in the *Johanns* opinion that the Court is hospitable to government efforts to support these types of promotional efforts by the government, which seeks to promote sales

⁴⁹ *Wooley v. Maynard*, 430 U.S. 705 (1977). Jehovah's Witnesses, George and Maxine Maynard, asserted that the New Hampshire State motto was "repugnant to their moral, religious, and political beliefs," and therefore refused to display it on their automobiles. *Id.* at 707.

⁵⁰ *Id.* at 715. The court examined two points which included the Maynard's First Amendment protections and the State's countervailing interest in compelling the Maynard's to display "Live Free or Die" on their license plates. *Id.* at 715-16.

⁵¹ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 6-14 (1990) (holding that compulsory dues violated the First Amendment right when such dues were not necessarily used to improve the legal profession); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (holding that the Constitution did not require that political and ideological causes be financed through such assessments).

⁵² *Keller*, 496 U.S. 15-17; *Abood*, 431 U.S. at 235-36.

⁵³ *Johanns*, 125 S. Ct. at 2065 ("Since neither the Beef Act nor the Beef Order requires attribution, neither can be the cause of any possible First Amendment harm.").

for the agricultural industry. The Court had a couple of previous cases involving agricultural and food product industry advertising mandated by the federal government.⁵⁴ The Court upheld one program involving fruits and vegetables,⁵⁵ while striking down another program involving a different kind of agricultural product.⁵⁶

Second, Justice Scalia, writing for the majority in *Johanns*, said that this was not a compelled speech case because the dissenting members of the association were not personally being compelled to utter the words.⁵⁷ The speech being subsidized was government speech, not the speech of the association.⁵⁸ The purpose of the advertisements was to further a government policy to promote this kind of food product, and therefore the association's argument was really that they had the right not to subsidize government speech.⁵⁹ The problem with this argument was that if you have a right not to subsidize government speech, you have a right not to pay your taxes and to say to the federal government I'm not paying for it because I don't like it. The Court rejected this argument and stated that First Amendment rights yield to the government's right to tax people and institutions and use the tax proceeds to support the government's activities, including the speech that the government utters or requires

⁵⁴ See *United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1997).

⁵⁵ *Glickman*, 521 U.S. at 469-74 (holding that required assessments for product advertising did not violate the First Amendment rights of the tree fruit producers).

⁵⁶ *United Foods, Inc.*, 533 U.S. 405, 415-16 (2001) (holding that mandatory contributions for generic mushroom advertising were not part of a "broader regulatory scheme" and therefore violated the First Amendment).

⁵⁷ *Johanns*, 125 S. Ct. at 2063.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2062.

its agents to utter as part of the government's activities.⁶⁰ The Court, in rejecting the compelled speech argument, focused on the fact that this was government speech that was being subsidized, not private speech.⁶¹

There were two concurring opinions. Justices Breyer and Ginsburg both focused on the fact that this was merely economic regulation, and as economic regulation it does not invoke the kind of heightened scrutiny and sensitivity, which is the hallmark of First Amendment analysis.⁶² Justices Souter, Stevens, and Kennedy dissented.⁶³ They took the stronger First Amendment position that these were private individuals who were being forced to subsidize speech that would benefit other private individuals and therefore this could not be easily dispatched as a government speech case.⁶⁴

D. **Clingman v. Beaver**

So far, we have discussed three First Amendment cases before the Court last Term, of which there was one win⁶⁵ and two losses⁶⁶ for the First Amendment. But the final loss in the free speech and

⁶⁰ *Id.* at 2063 (“Citizens may challenge compelled support of *private* speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.”).

⁶¹ *Id.* at 2062-63.

⁶² *Johanns*, 125 S. Ct. at 2067 (Breyer, J., concurring); *Id.* at 2067-68 (Ginsburg, J., concurring).

⁶³ *Id.* at 2068 (Kennedy, Souter, JJ., dissenting).

⁶⁴ *Id.* at 2069-75 (including Thomas Jefferson’s quote: “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical”).

⁶⁵ *See Tory*, 125 S. Ct. 2108.

⁶⁶ *See Roe*, 543 U.S. at 77; *Johanns*, 125 S. Ct. at 2055.

association area was in *Clingman v. Beaver*,⁶⁷ a case involving the government regulation of political parties, and particularly the ability of political parties to open their primary elections to non-members of that party.⁶⁸

About twenty years ago in a case called *Tashjian v. Connecticut*, the Supreme Court seemed to hold that Connecticut could not prevent Republicans, who wanted to expand their base, from inviting Independents to vote and participate in the Republican primary.⁶⁹ The Court held that a law that mandated a closed primary, meaning closed to anybody but Republicans, violated the Republicans' rights of speech and association because it denied Republicans the right to associate with Independents through their primary.⁷⁰

However, in *California Democratic Party v. Jones*,⁷¹ decided in 2000, the Court held the opposite. California mandated that anybody, Independents included, could vote in any primary.⁷² The Republicans and Democrats objected, stating that they wanted to have their own members and define their own identity. They were afraid that if they were required to include members of other parties in their primary election, they might have a watered down identity.⁷³ The Supreme Court agreed, concluding that the parties had the right

⁶⁷ 125 S. Ct. 2029 (2005).

⁶⁸ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

⁶⁹ *Id.* at 210-11.

⁷⁰ *Id.* at 215, 225.

⁷¹ *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁷² *Id.* at 570.

⁷³ *Id.* at 571.

to not only include whomever they wanted but also to exclude whomever they wanted, even if this includes those who are not members of the party.⁷⁴

Along came *Clingman v. Beaver*.⁷⁵ *Clingman* came out of Oklahoma. Oklahoma had a semi-closed primary system, which only permitted members of that party and Independents to participate.⁷⁶ The Libertarian party in Oklahoma decided that they would welcome anybody to vote in its primary election, regardless of party affiliation.⁷⁷ The case went up to the Supreme Court, where the Libertarians argued the Oklahoma semi-closed primary system violated their First Amendment rights to association.⁷⁸ The Supreme Court, in a six-to-three decision rejected that claim.⁷⁹

Justice Thomas wrote the *Clingman* opinion and said that while the Court has given strong protection to political parties, as embodying freedom of association, and has given protection against laws that regulate the parties' internal processes, or the ability of the party to communicate these views to the public, this is not such a case.⁸⁰ The Court concluded that since this restriction in *Clingman* did not involve the core concerns that motivated the Court to give strong protection to the rights of political parties, the scrutiny to

⁷⁴ *Id.* at 586.

⁷⁵ 125 S. Ct. at 2029.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 2038 ("According to respondents, the burden imposed by Oklahoma's semi-closed primary system is no less severe than the burden at issue in *Tashjian*, and hence we must apply strict scrutiny as we did in *Tashjian*.").

⁷⁹ *Id.* at 2029 (Stevens, Ginsberg & Souter, JJ., dissenting).

⁸⁰ *Clingman*, 125 S. Ct. at 2036. See *Tashjian*, 479 U.S. 208; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

which the measure was subject was less than strict scrutiny.⁸¹

In *Clingman*, the Court evaluated whether there were important interests that were furthered by the semi-closed primary system. The Court found that there were three regulatory interests that were “enough to justify reasonable, nondiscriminatory restrictions.”⁸² First, the system helped to preserve the identity of parties, which would ensure that the election would reflect the voting of the party’s own members.⁸³ Second, the system would retain “the importance of party affiliation,” and would aid in party electioneering and party-building efforts.⁸⁴ Finally, the system helped parties operate better and ensured confidence that their own membership would be choosing the parties’ nominees and would protect parties against being raided by calculating members of other parties.⁸⁵ The Court concluded that because the semi-closed primary system furthered the state’s interests, and since strict scrutiny was not being called for, the law would be sustained.⁸⁶

The dissenters said this really is about political protectionism and protecting parties against good, healthy competition.⁸⁷ If the Libertarians wanted competition, the First Amendment should let them have it, rather than let the state decide who can associate with the Libertarian party during an election.⁸⁸

⁸¹ *Clingman*, 125 S. Ct at 2038.

⁸² *Id.* at 2039.

⁸³ *Id.*

⁸⁴ *Id.* at 2040.

⁸⁵ *Id.* at 2039-41.

⁸⁶ *Clingman*, 125 S. Ct. at 2041-42.

⁸⁷ *Id.* at 2054 (Stevens, J., dissenting).

⁸⁸ *Id.* at 2054-55.

II. RELIGION AND ESTABLISHMENT

The final cases that I want to discuss are the Court's religion cases. The two most prominent ones are the ones involving the Ten Commandments. First is the Texas case, *Van Orden v. Perry*, which Professor Chemerinsky argued.⁸⁹ In that case, the Court sustained the display of the Ten Commandments.⁹⁰ The second case before the Court last Term was the Kentucky case, *McCreary County, Kentucky v. ACLU*.⁹¹ Here, the Court struck down the display of the Ten Commandments.⁹²

Generally, the issue before the Court in these Ten Commandments cases was under what circumstances and in what settings can a government display content, such as the Ten Commandments, and not run afoul of the Establishment Clause. As we all know the First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.⁹³ Accordingly, there are two sides of the coin: the government can't support religion and the government can't penalize religion.⁹⁴ If the government seems to be supporting, subsidizing, encouraging, or endorsing religion or religious content, then that would be a problem under the Establishment Clause.⁹⁵ On the other hand, where government is simply acknowledging the presence of religion in our lives, then

⁸⁹ *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

⁹⁰ *Id.*

⁹¹ *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

⁹² *Id.*

⁹³ U.S. CONST. amend. I, which states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

⁹⁴ *Van Orden*, 125 S. Ct. at 2859.

⁹⁵ *Id.*

perhaps that is not prohibited by the Establishment Clause.⁹⁶ Government is supposed to be neutral when it comes to religion. This issue is the subject of an ongoing debate among the Supreme Court Justices.⁹⁷ I think the modern view is that the government must be neutral. But there is another point of view that says the government can favor certain religious points of view, as long as it does not pick and choose among them or coerce belief by those who dissent. These different interpretations of the Establishment Clause made it difficult to foresee how the Supreme Court was going to come out on these Ten Commandments cases.

A. **McCreary County, Kentucky v. ACLU**

McCreary County was a five-to-four decision, which struck down the presentation of the Ten Commandments.⁹⁸ I think the reason the display in *McCreary County* was struck down has to do with the long history of attempts by the legislature to have the display pass muster under the First Amendment. When the display was originally posted in the courthouses, there was a religious suggestion made in the initiating resolutions of the county.⁹⁹ After suit was filed, the display took a separate form.¹⁰⁰ Other documents were added, but the religious portions of the other documents were

⁹⁶ *Id.* at 2861-62.

⁹⁷ *Id.* at 2860-61.

⁹⁸ *McCreary*, 125 S. Ct. at 2729, 2732.

⁹⁹ *Id.* at 2728-29.

¹⁰⁰ *Id.* at 2727 (“After suits were filed . . . the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky’s ‘precedent legal code.’”) (citation omitted).

highlighted.¹⁰¹ At that point, the county changed counsel and the display evolved into a third incarnation called “Foundations of American Law and Government Display,” which now included both the Magna Carta and the Ten Commandments.¹⁰² What was the purpose of this display?¹⁰³ Was it for the secular purpose of addressing the role of religion in the relationship between people and government, or was the purpose religious whereby the government supported the Ten Commandments as an official government document?¹⁰⁴

The Court held in a five-to-four decision that the purpose of the display was religious.¹⁰⁵ Looking at the origins of the placement of the Ten Commandments and then at the history of the display in the county, the Court held that the original purpose of the presentation of the Ten Commandments was religious.¹⁰⁶ That purpose had not dissipated during the course of the litigation, even up to the point of where the display was renamed “The Foundations of American Law and Government.”¹⁰⁷ It was not clear whether the display started out with other documents including the Ten Commandments, it would have been acceptable and viewed as not having a sectarian or religious purpose. However, the Court could not ignore the history of this particular presentation or divorce the

¹⁰¹ *Id.* at 2729.

¹⁰² *Id.* at 2730-31, 2739-40.

¹⁰³ *McCreary*, 125 S. Ct. at 2731.

¹⁰⁴ *Id.* at 2731-32.

¹⁰⁵ *Id.* at 2722 (Scalia, Rehnquist, Thomas & Kennedy, JJ., dissenting).

¹⁰⁶ *Id.* at 2731.

¹⁰⁷ *Id.* at 2731-32.

past from the present.¹⁰⁸ And in light of the display's history, the determination was that the purpose was religious.¹⁰⁹

In reaching the conclusion that the posting of the Ten Commandments violated the First Amendment, the Court was guided by its decision in *Stone v. Graham*, a case decided twenty-five years earlier.¹¹⁰ In *Stone v. Graham*, the Court struck down the mandatory placement of the Ten Commandments in all schools in the state of Kentucky.¹¹¹ The Court held that in light of the special concern of not wanting to indoctrinate young people together with the religious nature of the Ten Commandments, the mandatory display of the Ten Commandments in all schools in the state would indicate "official support of the State" for a particular religion, which violated the Establishment Clause.¹¹² While a school environment is a different context from a courthouse, the *McCreary County* Court nonetheless was guided by the *Stone* decision, finding that the religious purpose of the display, similar to the display in *Stone*, was sufficient to strike it down.¹¹³

There were four conservative dissenters in *McCreary County*.¹¹⁴ The dissenters believed that the nature of the display did

¹⁰⁸ *McCreary*, 125 S. Ct. at 2731.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2732, 2737.

¹¹¹ *Stone v. Graham*, 449 U.S. 39 (1981).

¹¹² *Id.* at 41-42 (holding that the display failed the first part of the Lemon test, which required that there be a secular legislative purpose supporting the display and in light of the school's failure to integrate the Ten Commandments into the school's curriculum, and the "plainly religious" nature of the Ten Commandments, the display violated the first part of the Lemon Test and the Establishment Clause of the Constitution).

¹¹³ *McCreary*, 125 S. Ct. at 2737, 2745.

¹¹⁴ *Id.* at 2748 (Scalia, Rehnquist, Thomas & Kennedy, JJ., dissenting).

not cross what they thought was the proper line between permitted neutrality and the excessive government support of religion.¹¹⁵

B. Van Orden v. Perry

The other Ten Commandments case before the Supreme Court last Term was *Van Orden v. Perry*.¹¹⁶ In this case, the Supreme Court upheld the placement of a Ten Commandments display.¹¹⁷ This case involved the placement of the Ten Commandments on a monument in front of the Texas State Capitol, which contained seventeen other monuments and twenty-one historical markers.¹¹⁸ What was different about this case was Justice Breyer. He became the Justice O'Connor, namely the swing vote, because he had gone along with striking down the Ten Commandments as presented in the Kentucky courthouse case, but upheld the presentation of the Ten Commandments as it appeared in the Texas Capitol.¹¹⁹

Justice Breyer and the conservative Justices felt that displaying the Ten Commandments in this fashion was a permissible government acknowledgment of religion.¹²⁰ They felt that the

¹¹⁵ *Id.* at 2750. Justice Scalia wrote for the dissent and argued that the First Amendment does not mandate absolute neutrality between government and religion. *Id.* at 2750 (“[H]ow can the Court possibly assert that the First Amendment mandates government neutrality between religion and nonreligion and that manifesting a purpose to favor adherence to religion generally, is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words. Surely not even the current sense of our society”) (citations omitted).

¹¹⁶ 125 S. Ct. 2854 (2005).

¹¹⁷ *Id.* at 2854, 2859 (2005).

¹¹⁸ *Id.* at 2858.

¹¹⁹ *Id.* at 2868 (Breyer, J., concurring).

¹²⁰ *Id.* at 2864 (plurality opinion).

government does not have to be strictly neutral where religion was concerned.¹²¹ The liberal Justices, namely Justices Stevens, Souter and Ginsburg along with Justice O'Connor, dissented on the grounds that this was too much government support of religion and that the text in this display was too sectarian.¹²² According to the dissenters, the result of allowing religious displays with the public support would not advance religion, but would cause divisiveness among religions and between believers and nonbelievers.¹²³

With these powerful doctrinal and human forces on either side, why did Justice Breyer think that this display was permissible whereas the Kentucky display was not? I think the answer, as I said before, could be context. According to Justice Breyer, the context in *Van Orden* was different because the display appeared in an open park setting, rather than an enclosed building.¹²⁴ Second, the display in *Van Orden* contained a wide variety of other forms of expression, documents, and monuments that dissipated the religious nature of the Ten Commandments.¹²⁵ Furthermore, Justice Breyer made an analogy to adverse possession and pointed out that the display had been on the Texas State Capitol grounds for forty years and nobody complained until now.¹²⁶ This was convincing evidence that the display did not prove to be divisive and was not an obvious

¹²¹ *Van Orden*, 125 S. Ct. at 2863 (“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”).

¹²² *Id.* at 2873 (Stevens, Ginsburg, JJ., dissenting); *id.* at 2891 (O’Connor, J., dissenting); *id.* at 2892 (Souter, Stevens, Ginsburg, JJ., dissenting).

¹²³ *Id.* at 2881-82 (Stevens, J., dissenting).

¹²⁴ *Id.* at 2870 (Breyer, J., concurring).

¹²⁵ *Id.*

¹²⁶ *Van Orden*, 125 S. Ct. at 2870-71.

compromise of the government's required neutrality.¹²⁷

Finally, Justice Breyer cautioned that if the Court reached a contrary conclusion in *Van Orden* based upon the mere religious nature of a display, countless displays would be struck down. This, Justice Breyer feared, would lead to an implied hostility towards religion.¹²⁸ In turn, this would bring about religious strife and warfare — an outcome, which the establishment and free exercise clauses sought to prevent.¹²⁹

C. *Cutter v. Wilkinson*

The last religion case I will discuss is *Cutter v. Wilkinson*.¹³⁰ This case invoked the argument that giving statutory protection to the religious needs of prisoners violated the Establishment Clause.¹³¹ Prison officials argued that Congress violated the Establishment Clause when they gave some protection to the religious concerns of prisoners.¹³² The ACLU was on the other side of the Establishment Clause argument, claiming that Congress, in fact, had not violated the Establishment Clause.¹³³

The history of *Cutter* goes back to 1990 with the Supreme Court decision, *Employment Division v. Smith*.¹³⁴ The Court in *Smith*

¹²⁷ *Id.*

¹²⁸ *Id.* at 2873 (“[T]o reach a contrary conclusion here, based primarily upon on [sic] the religious nature of the tablets’ text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”).

¹²⁹ *Id.* at 2871.

¹³⁰ 125 S. Ct. 2113 (2005).

¹³¹ *Id.* at 2116-17 (2005).

¹³² *Id.* at 2117.

¹³³ *Id.* at 2116.

¹³⁴ 494 U.S. 872 (1990).

dealt with a claim that the First Amendment protected the religious use of peyote by a municipal worker in Oregon.¹³⁵ The Supreme Court held that the Free Exercise Clause does not immunize individuals from generally applicable criminal laws and that regardless of the Oregon law's unintended effect of inhibiting Smith's exercise of his religion, the law was not a violation of the First Amendment.¹³⁶

Congress, unhappy with the outcome in *Smith*, passed controversial legislation, the Religious Freedom Restoration Act of 1993 (RFRA), stating that whenever any government, federal, state, or local official interferes with the exercise of religion, the government must satisfy a compelling interest standard justifying such interference.¹³⁷

The Supreme Court in *City of Boerne v. Flores* said that Congress did not have the constitutional authority to pass the RFRA.¹³⁸ The Court reminded Congress of the well-settled precedent of *Marbury v. Madison*, which stated that it is the duty of the *judicial* branch to interpret the Constitution and to decide what level of scrutiny is required when evaluating legislative action.¹³⁹ Not to be outdone, Congress took its turn again and passed the Religious Land Use and Institutionalized Person's Act,¹⁴⁰ which

¹³⁵ *Id.* at 872, 874.

¹³⁶ *Id.* at 878-79.

¹³⁷ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

¹³⁸ *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (holding that the legislature's powers are defined and limited based on the constitution).

¹³⁹ *Id.* at 535-36. "Our national experience teaches that the Constitution is best preserved when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *Id.* at 536.

¹⁴⁰ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.S. § 2000cc et

basically says the same thing as the RFRA, but limited the legislation to two categories of cases: zoning cases involving churches, and religious practice cases involving prisoners.¹⁴¹

In *Cutter v. Wilkinson*, Ohio resisted claims of certain inmates who were subscribers to “off-brand religions,” and when asked to justify the restrictions of the prisoner’s religious claims by reference to a compelling state interest, refused, arguing that Congress could not protect religion this way because it violated the Establishment Clause.¹⁴² The Supreme Court rejected the state’s argument and held that there was no violation of the Establishment Clause and that unlike the RFRA, this was tailored legislation as it only dealt with two specific areas.¹⁴³ Furthermore, the Court stated that prisoners were already disadvantaged where their religious practices were concerned, and therefore this statute does not bestow an advantage on a particular group, but rather brought the prisoners up to par with other un-disadvantaged groups.¹⁴⁴

Specifically, the statute stated that if a prisoner had a religious requirement or need and requested that of a prison official, the prison official must have a good reason for denying the prisoner’s request.¹⁴⁵ The rationale behind the legislation was that because these people are in prison, it is hard for them to practice their

seq. (2000).

¹⁴¹ 42 U.S.C.S. § 2000cc; *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005) (noting Greek church challenged denial of zoning application by city council); *Cutter*, 125 S. Ct. at 2118.

¹⁴² *Cutter*, 125 S. Ct. at 2117, 2120.

¹⁴³ *Id.* at 2117, 2121.

¹⁴⁴ *Id.* at 2122.

¹⁴⁵ *Id.* at 2122-23.

religion; therefore, there should be some flexibility in seeking accommodations.¹⁴⁶

Justice Ginsburg wrote the opinion for the Court and pointed out that the statute also takes into account the prison needs of order and discipline.¹⁴⁷ On balance, the Court concluded unanimously that even though this is a statute that gives additional protection to religious claimants in a state and local government setting, it is protection that is reasonable.¹⁴⁸ In other words, the statute did not provide extra protection to the prisoners; it only returned the prisoners to a level playing field when it came to practicing their religion.¹⁴⁹

¹⁴⁶ *Id.* at 2122.

¹⁴⁷ *Cutter*, 125 S. Ct. at 2123 (noting that lawmakers were aware of the importance of safety and security in penal institutions).

¹⁴⁸ *Id.* at 2121 (adding that the provision is both permissible and compatible with the Constitution).

¹⁴⁹ *Id.* at 2122 (concluding that institutionalized persons rely upon the government for the freedom to exercise religion).

