Florida Journal of International Law

Volume 18 | Issue 2 Article 2

August 2006

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# GOD AND CAESAR IN THE TWENTY-FIRST CENTURY: WHAT RECENT CASES SAY ABOUT CHURCH-STATE RELATIONS IN ENGLAND AND THE UNITED STATES

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## I. INTRODUCTION

Controversies about the relationship between church and state are at least as old as the Bible. In a familiar story, the Pharisees and Herodians tried to trap Jesus by asking him whether it was lawful to pay taxes to the secular government. Jesus replied, "Render to Caesar the things that are Caesar's, and to God the things that are God's."[1]

That canny response did not finally resolve church-state debates. Centuries later, when the American colonies were settled, the controversies were especially vehement. England had an established church,[2] and many colonists emigrated from England seeking liberty to practice religion freely.[3] When the colonists adopted their Constitution, they insisted on an amendment to prevent the national government from establishing a religion.[4] Today, the Church of England remains established, but the degree of its connection to the state has diminished. Meanwhile, a "culture war"[5] in the United States generates heated discussion about the appropriate degree of separation between church and state, with some preferring a wall between the two and others arguing that the United States should permit more governmental religious expression.

This Article will analyze the two nations' current approaches to church and state through recent cases on the subject. Part II analyzes recent cases in each country, and Part III draws comparisons and contrasts between the countries' contemporary approaches to church-state issues. It concludes that the two countries, once so far apart, are moving closer to each other on the issue of establishment.

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1. *Mark* 12:17 (King James). The same story appears in Matthew 22:21 and Luke 20:25.

2. *See* Sarah M. Montgomery, Note, *Drawing the Line: the Civil Courts' Resolution of Church Property Disputes, the Established Church and All Saints' Episcopal Church, Waccamaw*, 54 S.C. L. REV. 203, 207 (2002).

3. DANIEL L. DREISBACH, RELIGION & POLITICS IN THE EARLY REPUBLIC 151 (Daniel L. Dreisbach ed., 1996); *see also* Everson v. Board of Ed. of Ewing Township, 330 U.S. 1, 7-8 (1947) (stating, "A large portion of the settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend favored churches.").

4. U.S. CONST. amend. I; *see* JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 606-07 (Little Brown & Co. 1873) (explaining that religious freedom was important to the Founders because of their previous experience of bigotry and intolerance).

5. *See* JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42 (1991) (defining the cultural conflict as "political and social hostility rooted in different systems of moral understanding.").

## II. CHURCH AND STATE IN ENGLAND AND THE UNITED STATES AS SEEN THROUGH RECENT CASES

### A. *England*

#### 1. Background

Unlike the situation in the United States, where the concept of establishment has been the subject of a significant body of jurisprudence and academic interpretation, in the United Kingdom (and more generally within Europe), "establishment" is not a legal term of art but a general description of a state of affairs. As such, it does not have the status of a legal principle to be enforced by the courts.[6] Further, insofar as it is a general description, it is so vague as to be unhelpful in providing clarity as to the nature of Church/State relationships in a particular case. Within the United Kingdom, there are two established churches (the Church of England and the Church of Scotland) and two churches, each of which has been formally disestablished but retains the characteristics of a "national church" (the Church of Ireland and the Church in Wales).[7] The legal nature of the Church of England is very different from that of the Church of Scotland, as are the implications of establishment. Very generally, however, establishment has been defined as a situation where one church has official recognition or approval above other religions[8] and a different status in the Constitution. Given the differences within the United Kingdom in the way in which establishment is expressed, this Article will focus on the law of England only.

The historical core of English establishment is the fact that the Head of State (the reigning monarch) is also the head of the established Church. The significance of this has diminished as the role of the monarch within the British constitution[9] has diminished. In the seventeenth century, establishment meant that the nation and the Church of England were

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6. *See* Colin Munro, *Does Scotland have an Established Church?*, 4 ECC. L.J. 639-45 (1997).

7. *Id.* (pointing out that there is some dispute in Scotland as to the establishment or otherwise of the Church of Scotland, thus demonstrating the vagueness of the concept in constitutional terms. He argues that as, unlike Wales and Ireland, Scotland has never formally disestablished the Church, it must still be considered established.).

8. It should be noted that this does not necessarily imply disapproval of other religions.

9. Unlike the U.S. Constitution, Britain's constitution is unwritten, consisting of assemblage of laws, institutions and customs that govern the country. *See* Michael Burgess, *Constitutional Change in the United Kingdom: New Model or Mere Respray?*, 40 S. TEX. L. REV. 715, 717 (1999).

unified.[10] Consequently, dissent was punished as disloyal and seditious. While Protestant dissent came to be tolerated,[11] Roman Catholic dissent was much more severely treated precisely because it involved not only a lack of loyalty towards the English nation but potentially sympathy and unity with other, Roman Catholic nations.[12]

However, this understanding has developed considerably. Theologically and ecclesiologically, the contemporary Church of England is not understood as constituting or united to the nation, but as a Church of baptized Christians with a particular duty of service to the nation.[13] Within England (and indeed within the rest of the United Kingdom) the relationship between the established church and the legal system is best summed up by the following words of Munby J in *Suleiman v. Juffali*:

> Although historically this country is part of the Christian west, and although it has an established church which is Christian, I sit as a secular judge serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice "to all manner of people." Religion—whatever the particular believer's faith—is no doubt something to be encouraged but it is not the business of government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity. A secular judge must be wary of straying across the well-recognised

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10. Referred to by Avis as the Erastian Paradigm, Erastianism is a ecclesiological model which acknowledges that the State has a role in spiritual as well as temporal governance. PAUL AVIS, ANGLICANISM AND THE CHRISTIAN CHURCH: THEOLOGICAL RESOURCES IN HISTORICAL PERSPECTIVE (1989).

11. The Toleration Act of 1688 permitted nonconformist Protestant religious groups to meet for worship, with the proviso (still in force) that worship must not take place behind locked doors.

12. *See* 1 KENNETH HYLSON-SMITH, THE CHURCHES IN ENGLAND FROM ELIZABETH I TO ELIZABETH II (1996), ch. 4. Of course, as this account makes clear, the involvement of Roman Catholics in plots to overthrow the reigning monarchs throughout the sixteenth and seventeenth centuries (most notably the so-called Babbington plot to bring Mary Queen of Scots to the throne in 1586 and the Gunpowder plot, led by Guy Fawkes, to blow up the Houses of Parliament in 1605) as well as the active complicity and encouragement which they received from the Vatican and from France in particular did much to encourage this perception.

13. *See* PAUL AVIS, CHRISTIANS IN COMMUNION (1990). See also Bishop Michael Nazir-Ali's observation that "the Church of England, in particular, welcomes its special place in society, but it must see that place as a place for service and not for rule. It must see its role in establishment, for example, as the desire of the state and the people in this country to hear the voice of the church in national affairs." *A Spiritual and Moral Framework for Society, in* CHURCH, STATE AND RELIGIOUS MINORITIES 31-35 (Tariq Modood ed., 1997).

> divide between church and state. It is not for a judge to weigh one religion against another. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms.[14]

There are two significant things about this statement worth noting at this stage. Firstly, it reflects the conviction that establishment does not involve giving a preferential position to Christians and to members of the Church of England. Active religious discrimination, of the type that was in place in the seventeenth century, was slowly abolished over the nineteenth century.[15] The only vestige which remains is that the Monarch must be a member of the established churches and may not be married to a Roman Catholic.[16]

Secondly, however, Munby J points to one of the key features of establishment, which is that religion is actively considered to be a positive thing which should be supported by the State. This contrasts with the position of neutrality taken in other European countries such as France, where religion (or other philosophical positions such as atheism) is to be considered neither positive nor negative.[17] One clear example of this attitude within the British legal system is the law of charities, where a trust set up for religious purposes is automatically considered to be of public value and, therefore, entitled to charitable status.[18]

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14. 1 FLR 479, 490 (2002). The case considered whether a Muslim *talaq* divorce could be recognized in UK family law.

15. Following the Toleration Act 1688, the most significant developments were the 1828 repeal of both the 1661 Corporation Act (requiring all those holding civic office to be communicants of the Church of England) and the 1673 Test Act (which required all those holding civic or military office to be communicants of the Church of England and to denounce the doctrine of transubstantiation); the 1829 Catholic Emancipation Act (which allowed Roman Catholics to enter Parliament) and the 1871 abolition of religious tests for entrance to the universities of Oxford and Cambridge.

16. This provision was first enshrined in English law by the Act of Settlement 1700, intended to clarify the succession following the departure of the recently converted Roman Catholic King James II and the arrival of his Protestant heirs William and Mary. It states that every person who "should be reconciled to or shall hold communion with the see or church of Rome or should professe the popish religion or marry a papist" should be excluded from the line of succession to the Crown.

17. *See, e.g.*, CE 17/6/1988 Union des athées req. no 63912 AJDA 1988 612, 582 (denying the French Union of Atheists, which denied them the status of an association in the public interest).

18. See Lord Macnaghten's classification of charitable purposes in *Commissioners of Special Income Tax v Pemsel* [1891] A.C. 531. Religious purposes include not only the work of the major Christian denominations, but also smaller fringe groups. Thornton v Howe, 21 Beav. 41 (1862) (concerning a trust for the publication of the works of Joanna Southcott, who believed that she would give birth to a new Messiah and non-Christian religions (e.g., Neville Estates, Ltd. v. Madden [1962] ch. 832)). In *Neville Estates*, Judge Cross observed that "[a]s between different

More generally, however, a central feature of establishment in England is that the Church of England is given by the state the symbolic function of making religion present within public life. This is partly visible in the context of civic religion: significant events in the life of the nation are often marked by church services organized by the Church of England, in the Anglican mold, but with the participation of other denominations and faiths.[19] Thus, a further principle of establishment can be understood as an acknowledgement of the public role of religion and a resistance to it being seen as a part of the private life only of an individual.

More concretely, there are a number of constitutional implications. As mentioned above, the monarch must be a member of the Church of England (and of the Church of Scotland) and cannot be married to a Roman Catholic. There are seats within the House of Lords[20] for a number of bishops of Church of England.[21] In some areas, acts of the Church of England Synod must be approved by Parliament, although this tends to be a formality.[22] Finally, and in some ways most significantly, bishops and archbishop of the Church of England are chosen by the Queen on the

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religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none" and non-theistic philosophical positions do not get the same treatment. *Neville* [1962] ch. 832.

19. *See* David McClean, *The Changing Legal Framework of Establishment*, 7 ECC. L.J. 292 (2004) (suggesting that the Church of England's responsibility to the nation is expressed in part through these expressions of civic religion). Parekh has suggested that the existence of an established church in England is a way of giving religion a public presence but making it subject to public responsibility. Bhikhu Parekh, *Religion and Public Life*, *in* CHURCH, STATE AND RELIGIOUS MINORITIES, *supra* note 13, at 16-22.

20. The House of Lords is the nonelected Second Chamber of Parliament, currently comprising a mixture of hereditary and nominated members. Reforms have been proposed to abolish the membership of hereditary peers, but these have hit political difficulties. The Judicial Committee of the House of Lords, comprised only of experienced nominated judges, acts as the highest court in the UK legal system.

21. The current count is twenty-six, out of one hundred and fourteen Church of England bishops in total. The membership of the House of Lords is not capped, and currently stands at seven hundred and twenty-three members.

22. The most infamous example of Parliamentary interference was the rejection of the 1928 revision of the Book of Common Prayer. *See* J.R.H. MOORMAN, A HISTORY OF THE CHURCH IN ENGLAND 427 (3d ed. 1972). *See also* MONICA FURLONG, C OF E: THE STATE IT'S IN 235 (2000) (debating on the ordination of women, with the "laughable spectacle of, on the one hand, the Revd Ian Paisley (a noted Ulster Presbyterian politician) explaining why the Church of England should not ordain women, and, on the other, the almost equally absurd phenomenon of a clutch of willing women Labour MPs, with only the dimmest understanding of how the church worked, explaining why they should.").

advice of the Prime Minister.[23] The primary implication of establishment in England is, therefore, not one of influence of the Church in affairs of state. The Bishops do have influence in parliamentary debates and often participate in a wide range of debates, as part of their role to maintain the visibility of the spiritual and ethical dimension.[24] Cranmer has observed that the influence of the Church is not in terms of what it says but what it does.[25] There is little or no attempt by the Church to require, as a corollary of establishment, compliance with Christian doctrine or a moral code throughout society; while part of the visibility of the Church involves making public pronouncements on such issues, that is in the interest of making a voice heard, rather than enforcing compliance. In fact, one of the benefits of establishment has in some quarters been perceived as the maintenance of the Church of England as a moderate, nondogmatic and pragmatic Church.[26] There is generally speaking little or no controversy or debate about this form of public religious expression.

While English establishment appears to require the state publicly to acknowledge the existence and value of religion, it does not require the state to impose religious belief, or any particular religious belief, on its citizens. Notably, the existence of civic events of a religious, even Christian, nature should not be interpreted as an attempt to force people into a particular religious belief. There is something of a tradition within the Church of England of distinguishing acts and beliefs, and of leaving the matter of the conscience up to the individual. Historically, much of the spirit of the contemporary Church of England and contemporary establishment can be traced back to the time of Queen Elizabeth I, who had lived through the heresy hunts of her sister (Mary I) and brother (Edward VI). This did not mean that she was in favor of toleration of nonconformism or of the Roman Catholic Church in England. She was a subscriber to the view of the unity of Church and Monarch and thus saw

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23. *See* Frank Cranmer, *Church State Relations in the United Kingdom: A Westminister View*, 6 ECC. L.J. 111 (2001) (suggesting that the Prime Minister rejected the original nominations put forward for the bishopric of Liverpool.).

24. See, for example, the response of the Archbishops' Council of the Church of England to the proposals for House of Lords reform, which observes that the role of the bishops in the House is to act "as independent and authoritative voices able to draw together and articulate a range of concerns and interests that may run the risk of being overlooked otherwise." Interestingly, the Council actively supports representation of other faiths and denominations. For details of the reform process and copies of all the consultation responses, see http://www.dca.gov.uk/constitution/holref/holrefindex.htm.

25. Cranmer, *supra* note 23, at 112.

26. Sir John Laws, *A Judicial Perspective on the Sacred in Society*, 7 ECC. L.J. 317-27 (2004).

nonconformity as sedition. However, what she was interested in was a unity of practice and allegiance, rather than a unity of theology or personal belief.[27] Religious conformity, in Elizabethan times, was a way of maintaining national cohesion around the twin pillars of the Monarch and the Church.

This unity of practice, following the arrival of toleration and the increasing multi-faith nature of British society, is no longer required to demonstrate social cohesion.[28] Establishment in the twenty-first century does not tolerate discrimination against members of other religions or denominations.

The United Kingdom is bound in international law by the European Convention on Human Rights, Article 9 of which protects freedom of thought, conscience and religion and Article 14 of which prohibits discrimination on Convention grounds (including, therefore, on grounds of religion). The Convention is enforceable in British courts following the Human Rights Act of 1998 and Article 9 has been considered, but only rarely have UK authorities been found to be in violation of the provision.

## 2. Recent Cases

### a. Denbigh High School

A notable exception has been the recent case of *R (on the application of SB) v. Denbigh High School*,[29] concerning a schoolgirl who was effectively excluded from school because of her choice to wear severe Muslim dress. However, unlike comparable and well-reported cases in other European countries, the basis of the exclusion was not a rule prohibiting Muslim dress in school in order to maintain a secular or Christian ethos. The school, like most British schools, imposed a uniform requirement on pupils and, given the large Muslim population in the area, the school uniform had been designed in consultation with a local mosque to ensure that variants were available which suited Islamic dress code, thus

27. *See* HYLSON-SMITH, *supra* note 12, at 32 (arguing that "she [Elizabeth] did not want to make windows into men's souls, but she did want to ensure as far as possible that whatever men believed they should obey her government." Hylson-Smith also quotes her chief ministers, Sir William Cecil, stating that "the state could never be in safety, where there was toleration of two religions. For there is no enmity so great as that of religion, and they that differ in the service of God, can never agree in the service of their country.").

28. It is perhaps arguable, however, that inter-faith activity is crucial to the maintenance of social cohesion, as the centrality of religious leaders and inter-faith commemorations in the aftermath of the July 2005 bombings in London have demonstrated.

29. 2 All ER 396 (2005).

encouraging a multicultural ethos within the school. The problem was that the form of Islamic dress which the pupil wished to wear was more severe than the one considered normative by the local Muslim leaders and thus did not conform to the uniform.[30] The question before the court was therefore not whether or not Islamic dress could be visible within the school, but rather whether the individual convictions of the individual should be allowed to prevail over a solution which had been reached collectively.[31] The judgment of the Court of Appeal was that it should, and that religious freedom is a matter of individual conscience rather than membership of a particular community involving compliance with its norms. This represents perhaps the first acknowledgment by the English Courts that religious freedom involves the individual conscience, rather than participation in a particular collectivity. However, the co-existence of this principle with an established church is beyond doubt.

On one level, therefore, establishment in England is about the Church of England taking on a role in making visible and public the religious and spiritual life of the nation, without imposing specifically Anglican, or even Christian, beliefs or practices. Legally, however, there are more significant links between the Church and State within the legal system. Part of English establishment is that the Canon law of the Church of England is the law of the land and can be enforced as such.[32] This, in some contexts, gives the civil courts jurisdiction in church matters.[33] In practice, the judiciary tends to be reticent in exercising their jurisdiction, but there are times when it becomes inevitable. Two recent cases illustrate the impact of this jurisdiction and the impact of establishment on the reasoning of the courts. The central theme of both cases is the extent to which the Church can be understood as a public institution.

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30. *Id.* ¶¶ 31-47 (analyzing the two opposing theological positions on Islamic dress for women which were found to be in conflict).

31. *Id.* ¶ 49 (stating that the appellant's freedom of religion had been violated, as she was prohibited by the school from acting on her belief as to the proper dress code which she should follow).

32. This state of affairs, arguably, is the last vestige of the Erastian paradigm, whereby the State has a role in enforcing church order and where the law of the land was seen as having a spiritual basis. According to the Elizabethan Richard Hooker: "the laws made by the monarch with the consent of Parliament were in effect the laws of God for the people of England." FURLONG, *supra* note 22, at 55-56.

33. *See* McClean, *supra* note 19 (arguing that the advantage of this arrangement is in practical terms to act almost as a threat to parties before the ecclesiastical courts and thus to give those courts their coercive jurisdiction. It is therefore not often necessary for the civil courts actually to act.).

### b. *Aston Cantlow*

*Aston Cantlow* and *Wilmcote with Billesley Parochial Church Council v. Wallbank and Another*[34] was brought by owners of a farm against the Parochial Church Council of their local Church of England parish church. The farm carried with it an ancient property encumbrance, enshrined in legislation by the Chancel Repairs Act of 1932 but described in the judgment of the House of Lords as "arcane and unsatisfactory"[35] which rendered them liable to pay for certain repairs within the parish church.[36] The Parochial Church Council attempted to enforce this liability by requiring payment for repairs worth nearly £100,000 and this was challenged by the landowners.

The existence and application of the encumbrance was uncertain.[37] However, the applicant argued, among other things, that the obligation was, in essence, a discriminatory tax and was thus contrary to the European Convention on Human Rights, rendered enforceable in the United Kingdom by the Human Rights Act 1998. The Human Rights Act applies only to public bodies, and therefore, prior to any decisions as to whether or not there was a violation, it needed to be established whether or not the Parochial Church Council is a public body bound by the provisions of the Human Rights Act.

The Court of Appeal held in its judgment that the P.C.C. is a public body, bound by human rights legislation.[38] It drew on the historical relationship between Church and State and the intertwining of canon law and common law to argue that the PCC of a Church of England church, unlike the governing authorities of other denominations or faiths, has powers available to it which are not available to private individuals. Notably, the notice for repair which the council had issued to the applicant had statutory force.[39] As the judgment put it:

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34. 1 AC 546 (2004).

35. *See* Opinion of Lord Nicholl, ¶ 2 (using the expressions "anachronistic" and "capricious").

36. It was argued in the case that the historical basis for this right was that the property owner, known as the lay rector, was entitled to receive tithes from the church.

37. The judgment of the Court of Appeal leant towards the view that the common law was relatively clear, but that the application of the Human Rights Act confused matters. *See* [2002] ch. 51 ¶ 24. The House of Lords did not make any assertions about the state of the law on chancel repair.

38. *Id.* ¶ 35.

39. *Id.*

> [The PCC] is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church.[40]

On that basis, extra power must give rise to the extra accountability which the Human Rights Act provides.[41]

While the principle of this seems reasonable, the implications were considerable and the PCC appealed to the House of Lords as final court of appeal.[42] The House of Lords adopted a narrower interpretation of the definition of a public authority, as a body linked to governmental activities.[43] This definition, it was argued, is limited to the applicability of the Human Rights Act, rather than to the broader field of judicial review.[44] The PCC cannot be characterized as a body of a governmental nature, but is primarily a religious organization and thus is *de facto* acting in a private manner.[45] The historical intertwining of canon and common law does not change this. This argument explicitly discounted any particular impact of the fact of establishment, and gave Church of England churches the same status as any other church.[46] A significant reason for this was that, if a PCC is a public authority it cannot, prima facie, claim the benefit of the Human Rights Act in cases, for example of discrimination on grounds of religion.[47]

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40. *Id.*

41. It should be noted in particular that the Court of Appeal explicitly relied on the standard case-law on the question of public authorities in judicial review. *See* R v. Panel on Take-Overs and Mergers, Ex p Datafin plc [1987] QB 815 ¶ 34 (defining public authority broadly, in order to ensure maximum accountability for decision-making with a public impact). Under the *Datafin* principle, a body is a public authority when its activities have a public element to them and where its jurisdiction is not limited to people who have entered into a contractual or consensual relationship with it.

42. *See* Editorial Comments, 7 ECC. L.J. 246 (2002) (criticizing the Court of Appeal's judgment); I. Dawson & A. Dunn, *Seeking the Principle: Chancels, Choices and Human Rights*, 22 L. STUD. 238-258. Criticisms focused on the use of the Datafin case law to define a public authority.

43. *See* Opinion of Lord Nicholl, ¶ 7; Opinion of Lord Hope, ¶ 47.

44. *See* Opinion of Lord Nicholl, ¶¶ 6 & 7 (linking his definition with state liability under the European Convention on Human Rights). *Id.* ¶ 52 (criticizing the Court of Appeal for having ignored the case law of the European Court of Human Rights on the subject and having focused solely on the domestic definition of public authority in the context of judicial review).

45. *See id.* ¶ 13.

46. *See* Opinion of Lord Hobhouse, ¶ 86.

47. *See* Opinion of Lord Nicholl, ¶¶ 8 & 15.

In a state where there is a clear separation between Church and State, the question of whether or not a church council is public or private is difficult to contest. In England, the debate arises because of the special status given to the Church of England. However, as the disagreements between the Court of Appeal and the House of Lords make clear, the controversy lies in whether or not that special status is sufficient to place State-like obligations on the Church. In the event, the final judgment made is that the Church of England in this matter is no different from any other religious organization, and that the appropriate solution would be for the Chancel Repairs Act to be repealed by Parliament. However, in order to find in this way, the House of Lords is obliged to discount the relationship between canon law and common law which lies at the heart of establishment.[48] In so doing, they also emphasize that, while the Church of England is by law established, it is not part of the governmental or public authorities of the State, and its activities are to be understood as religious matters rather than State matters.[49]

### c. Bishop of Stafford

In some ways the water here is a little muddied through the existence of a further judgment, which was not cited in *Aston Cantlow* but which raises some of the same issues: *R v. Bishop of Stafford ex parte Owen*.[50] This judgment concerned the status, not of a Church Council, but of the decision-making power of a bishop. The Reverend Ray Owen sought judicial review of the decision of his bishop not to extend his licence to minister as Rector of a Team Ministry once he had reached the age of sixty. The Court of Appeal relied on long-standing precedent that judicial review is available in such circumstances, citing a number of apparently unreported nineteenth century cases. However, it was argued for the Bishop that judicial review was not available, relying on *R v. Chief Rabbi*

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48. This is implicit in the rejection of the Court of Appeal's argument that a PCC may be a public authority because its decisions can have statutory force.

49. *See* Opinion of Lord Hope, ¶ 61 (discussing establishment):

> The state has not surrendered or delegated any of its functions or powers to the Church. None of the functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility... The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.

50. AC 14 (2001). This judgment is not reported in any official reports, and is only available in full via the Westlaw database. Pinpoint references are thus not available.

*of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann.*[51] This argument is consequently based on an assumption that a bishop of the Church of England has the same status as a leader of any religious community. Schieman observed, in justifying his position that judicial review was available, that the argument in favor of it is made much stronger by the fact that the Church of England is an established church.

However, a reason behind this apparent lack of criticism of the historical status quo can be found in the reference later in the judgment to the fact that Church of England clergy have few employment rights and that consequently the decision of the Bishop was one which would deprive the Reverend Owen of his livelihood and against which there is no other recourse.[52] There is, therefore, a certain pragmatism in *Ex parte Owen.* However, there is equally an explicit recognition that the history of establishment means that the courts are given the power to control the affairs of the Church of England at times, and will exercise that power when it appears necessary, in the interests of justice to do so.

### 3. The Current State of English Establishment

Recent cases show that, while the Church of England has been established for over four centuries, the essence and characteristics of that establishment have changed considerably. Establishment does not imply anything other than the full acceptance of religious diversity, and indeed the United Kingdom is one of the most religiously diverse countries in Europe. Further, while establishment involves a link between Church and State, it no longer implies that Church and State are unified, or, generally speaking, that the Church can be understood as a public body. Religious and spiritual matters are part of public life, but it is the Church, and not the government, which has the responsibility for ensuring that this happens.

## B. *The United States*

### 1. Background

In adopting the Constitution, the founders of the United States insisted on adding provisions to safeguard certain individual rights even when they

51. 1 WLR 1036 (1992).

52. *See* Diocese of Southwark v. Coker, ICR 140 (1998) (holding that parish clergy are not employees and thus have no employment rights and cannot challenge an unfair dismissal in the employment courts).

were unpopular with the majority.[53] The First Amendment safeguards religious freedom through two companion clauses. The Establishment Clause provides that "Congress shall pass no law respecting the establishment of religion,"[54] while the Free Exercise Clause balances this by adding, "nor prohibiting the free exercise thereof."[55] As with most of the provisions of the Bill of Rights, these protections were later held to apply to the individual states and their political subdivisions by virtue of the Fourteenth Amendment.[56]

In a 1971 Establishment Clause case, the Court developed what has become known as the *Lemon* test.[57] *Lemon* involved two state statutes, one providing salary supplements for teachers in nonpublic schools and one authorizing reimbursement of teachers' salaries, textbooks, and instructions materials.[58] In evaluating the statutes' constitutionality, the Court melded criteria from earlier cases into the following test: to be Constitutional under the Establishment Clause, a government action must: 1) have a secular purpose, 2) have a primary effect that "neither advances nor inhibits religion," and 3) avoid "'excessive government entanglement with religion.'"[59] The Court acknowledged that "some involvement and entanglement [between church and state] are inevitable," but stated that "lines must be drawn." It held both statutes unconstitutional because they promoted excessive entanglement.[60]

Since then, members of the Court have periodically criticized the *Lemon* test as having been inconsistently applied and leading to fractured opinions.[61] At one point, Justice O'Connor proposed a modification of the test in *Lynch v. Donnelly*.[62] That case involved a Christmas nativity scene erected by the city of Pawtucket, Rhode Island as part of a winter display in a private park.[63] Applying the *Lemon* test, the Court held that the scene was constitutional because its purpose was primarily secular and the scene

53. STORY, *supra* note 4, at 601 (stating that the founders saw a bill of rights as "an important protection against the unjust and oppressive conduct on the part of the people themselves").

54. U.S. CONST. amend. I.

55. *Id.*

56. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

57. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 615 (1971).

58. *Id.*

59. *Id.*

60. *Id.* at 624-25.

61. *See* McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2751 (2005) (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (citing cases for the proposition that a majority of the current justices have separately "repudiated the brain-spun '*Lemon* test.'").

62. 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring).

63. *Id.* at 671 (majority opinion).

did not impermissibly advance religion or create an excessive church-state entanglement.[64] In her concurrence, Justice O'Connor proposed that the appropriate inquiry in Establishment Clause analysis is whether government *endorses* religion.[65]

The Court later applied the endorsement test in *County of Allegheny v. ACLU*,[66] a case involving a nativity scene as well as a menorah and a Christmas tree.[67] The nativity scene was situated on a courthouse grand stairway and included the Biblical legend "Gloria in Excelsis Deo."[68] The other symbols were located outside another government building one block away.[69] The Court applied the endorsement test, explaining that under it, the government cannot "appear to take a position on questions of religious belief . . . ."[70] The nativity scene was held unconstitutional because of its "patently Christian message."[71] However, the menorah and Christmas tree, with their accompanying "Salute to Liberty" sign, were Constitutional because they merely recognized different religious traditions without endorsing them.[72]

Currently, the exact parameters of Establishment Clause protections are a frequent subject of debate in the United States.[73] Some commentators have viewed the endorsement test as modifying the effects prong of the *Lemon* test,[74] while others have seen it as a separate alternative to the *Lemon* test.[75] In deciding Establishment Clause cases, the Court sometimes applies the *Lemon* test and sometimes ignores it completely.[76]

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64. *Id.* at 685.

65. *Id.* at 688 (O'Connor, J., concurring).

66. 492 U.S. 573 (1989).

67. *Id.* at 579-82.

68. *Id.* at 580.

69. *Id.* at 581.

70. *Id. See generally* Paul L. Hicks, Comment, *The Wall Crumbles: A Look at the Establishment Clause*: Rosenberger v. Vector & Visitors of the University of Virginia, 98 W. VA. L. REV. 363, 372-57 (1995) (discussing the Court's use of the endorsement test in *Allegheny* and the continuing viability of the *Lemon* test.)

71. *Allegheny*, 492 U.S. at 601.

72. *Id.* at 621.

73. *See* DREISBACH, *supra* note 3, at 159 (stating that questions about the constitutionality of governmental religious expression continue and "are issues that . . . will always be with us always.").

74. *See, e.g.*, James M. Lewis & Michael L. Vild, *A Controversial Twist Of Lemon: The Endorsement Test as the Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 697 (1990).

75. *See, e.g.*, Ashley Bell, Comment, *"God Save This Honorable Court" How Current Establishment Clause Jurisprudence Can Be Reconciled With The Secularization Of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1290 (2001).

76. Van Orden v. Perry, 125 S. Ct. 2854, 2860-61 (2005) (plurality opinion) (citing cases).

The latest salvos in the debate are two recent Supreme Court cases, *McCreary County, Kentucky, v. ACLU of Kentucky*[77] and *Van Orden v. Perry*.[78] Both involved displays of the Ten Commandments on public property. By the time the *McCreary County* and *Van Orden* cases reached the Supreme Court, various constituencies eagerly watched them to see whether the *Lemon* test would be kept intact, refined, or eliminated.

Perhaps no constituency was completely satisfied. The justices were closely divided, lining up on the same sides in each case, with the exception of Justice Breyer, who made up the fifth vote to hold two displays unconstitutional in *McCreary County*[79] and another display constitutional in *Van Orden*.[80] In their main opinions and multiple concurrences and dissents,[81] the justices advocated approaches to the church-state relationship that range from a degree of separation under which even the Texas monument would be unconstitutional[82] to allowing public religious expression that favors the monotheistic religions of Christianity, Judaism, and Islam.[83]

### 2. Recent Cases

#### a. *McCreary County*

The *McCreary County* case involved postings of the Ten Commandments in modest frames along with other documents in the courthouses of two Kentucky counties, McCreary and Pulaski, pursuant to county resolutions.[84] In each courthouse, the first display consisted only of a frame containing the Ten Commandments. When the American Civil Liberties Union (ACLU) challenged those postings under the Establishment Clause, each county added additional documents that

77. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722 (2005).

78. *Van Orden*, 125 S. Ct. at 2854 (plurality opinion).

79. *McCreary County*, 125 S. Ct. at 2727.

80. *Van Orden*, 125 S. Ct. at 2857.

81. Chief Justice Rehnquist, on announcing the multiple concurrences and dissents, quipped, "I didn't know we had that many people on our court." *Verbatim*, TIME, July 11, 2005, at 13.

82. *Van Orden*, 125 S. Ct. at 2890 (Stevens & Ginsburg, JJ., dissenting).

83. *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (arguing that the Founders intended to protect the three monotheistic religions). By contrast, the *McCreary County* majority stated that the Founders intended to protect only Christians, not members of all three monotheistic religions. But the majority also believed that applying religious tolerance only to Christians is not appropriate in contemporary times. *Id.* at 2744-45.

84. *Id.* at 2728 (majority opinion).

contained references to God, including a passage from the Declaration of Independence and the national motto, "In God We Trust."[85] The Federal District Court, applying the *Lemon* test, entered a preliminary injunction on the ground that the displays lacked a secular purpose as evidenced by the choice of documents mentioning God.[86] The counties then undertook a third try, surrounding the King James version of the Ten Commandments with other documents, including the Magna Carta and a picture of Lady Justice.[87] An explanatory document declared, among other things, that the Ten Commandments were "the moral background of the Declaration of Independence."[88]

In the continuing lawsuit, each county stated that its purpose in erecting the third display was educational: the counties wanted to "demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and to educate the citizens about documents important in that founding.[89] The district court again found that the counties' purpose was religious and issued a supplemental injunction against the displays.[90] The Court of Appeals for the Sixth Circuit affirmed the decision.[91] The counties then petitioned to the U.S. Supreme Court, which granted certiorari.[92]

The U.S. Supreme Court's majority opinion, written by Justice Souter, was based on the displays' lack of the secular purpose required by the *Lemon* test.[93] The Court found the history of the displays particularly revealing. Religious purposes surfaced throughout, although some were later modified. For example, by the time the counties submitted their briefs to the Supreme Court, the prior assertion that the Commandments were *the* moral background for the Declaration of Independence was softened to a declaration that "many of the Commandments . . . are compatible with the rights to life, liberty, and happiness."[94] Stressing that "purpose needs to be

85. *Id.* at 2729.
86. *Id.* at 2730.
87. *Id.* at 2731. A citation to the King James Bible was later removed. *Id.* at 2731 n.6.
88. *McCreary County*, 125 S. Ct. at 2731.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 310.
93. *McCreary County*, 125 S. Ct. at 2733, 2745.
94. *Id.* at 2741 n.21 (citing Brief for Petitioners 10 n.7). At oral argument, Justice Scalia said the notion that the Ten Commandments are *the* basis of the Declaration of Independence is "idiotic." Van Orden v. Perry, 125 S. Ct. 2854, 2877 n.9 (2005) (Stevens & Ginsburg, JJ., dissenting). Justice Scalia added, "What the Commandments stand for is the direction of human affairs by God. That's what it stands for." Transcript of Oral Argument, Mar. 2, 2005, at 30-31.

taken seriously under the Establishment Clause and needs to be understood in light of context," the Court stated that an "implausible" claim of a changed purpose should not prevail in court or among persons with commonsense.[95] Justice Souter, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer, held that the Kentucky displays were unconstitutional. The remaining justices dissented.[96]

The Court stressed that references to sacred texts on public property will not always be unconstitutional. For example, in the Court's own courtroom frieze, the figure of Moses holding tablets with a portion of Hebrew text, along with other lawgivers, would pass constitutional muster because it is unlikely to be perceived by an observer as "violating neutrality in religion."[97]

### b. *Van Orden*

The history of the *Van Orden* display differed markedly from that of the Kentucky displays. At the Texas Capitol, the Ten Commandments appeared on a six-foot high granite monument that had been on the grounds for more than forty years by the time Van Orden brought suit.[98] It had been paid for not by the state but by the Fraternal Order of the Eagles, a civic organization,[99] as part of an effort to combat juvenile delinquency by promoting "civic morality."[100] The Capitol grounds also contain seventeen other monuments and twenty-one historical markers, all memorializing secular persons or events. The stated purpose of the monuments is to commemorate "the people, ideals, and events that compose Texan identity."[101] Both the District Court and the Fifth Circuit held that the Ten Commandments monument was constitutional under the Establishment Clause.[102]

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95. *McCreary County*, 125 S. Ct. at 2741.

96. *Id.* at 2727.

97. *Id.* at 2741. The frieze is on the courtroom wall high above the normal line of sight. It shows Moses standing with other lawgivers holding a tablet, on which portions of Commandments six through ten, written in Hebrew, are visible. *See* http://www.supremecourtus.gov/about/north&southwalls.pdf.

98. *Van Orden*, 125 S. Ct. at 2858 (plurality opinion).

99. *Id.* at 2870. However, to be eligible for membership in the Eagles, a candidate must believe in a "Supreme Being." *Id.* at 2878 (Stevens & Ginsburg, JJ., dissenting).

100. *Id.* at 2870 (Breyer, J., concurring in the judgment). However, the state had selected the site, and two state legislators were present at the dedication. *Id.* at 2858.

101. *Id.* at 2858 (plurality opinion) (citing Tex. H. Con. Res. 38, 77th Leg. (2001).

102. *Id.* at 2859.

Chief Justice Rehnquist wrote the Supreme Court's plurality opinion, which was joined by Justices Scalia, Kennedy, and Thomas.[103] The Chief Justice characterized Establishment Clause jurisprudence as having two faces, "Janus-like": one looks at "the strong role played by religion" in U.S. history and requires that the state not exhibit hostility toward religion, while the other "looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom . . . demanding a separation between church and state."[104] Mentioning the *Lemon* test, but stating that its factors "serve as 'no more than helpful signposts,'" the plurality found the test inapplicable to the "passive" Texas monument.[105] Instead, the plurality considered the "nature of the monument and our Nation's history."[106]

The plurality recognized that the Ten Commandments are religious, but cited the historical acknowledgment of religion in the United States, mentioning President George Washington's proclamation of a day of thanksgiving for "the many and signal favors of Almighty God."[107] The plurality also cited contemporary governmental acknowledgments of religion, including the frieze appearing in the Supreme Court's courtroom.[108] These accepted acknowledgments of religion show that "[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause," wrote the Chief Justice.[109] But the plurality also recognized that "there are, of course, limits to the display of religious messages or symbols," citing a prior Kentucky case, *Stone v. Graham*.[110] *Stone* concerned a state statute requiring that the Ten Commandments be posted in every public classroom.[111] The statute had an "improper and plainly religious purpose," Rehnquist wrote, stating that *Stone* exemplified the Court's particular vigilance "'in monitoring compliance with the Establishment Clause in elementary and secondary schools.'"[112] The plurality found the Texas

103. *Van Orden*, 125 S. Ct. at 2858.

104. *Id.* at 2859.

105. *Id.* at 2861 (citation omitted); *but see id.* at 2896 (Souter, Stevens & Ginsburg, JJ., dissenting) (asserting that the Texas monument is not passive).

106. *Id.*

107. *Id.* at 2861.

108. *Van Orden*, 125 S. Ct. at 2862; *see supra* note 97 and accompanying text.

109. *Van Orden*, 125 S. Ct. at 2863.

110. *Id.* at 2863 (citing Stone v Graham, 449 U.S. 39 (1980) (*per curiam*)).

111. *Id.*

112. *Id.* at 2863-64 (citation omitted). *But see id.* at 2896 (Souter, Stevens, & Ginsburg, JJ., dissenting) (stating "our numerous prior discussions of *Stone* have never treated its holding as restricted to the classroom").

monument to be a "far more passive" use of the Commandments, one that had a "dual" significance, both religious and nonreligious.[113] Therefore, it did not violate the Establishment Clause.

Justice Breyer concurred in the judgment, but called *Van Orden* a "borderline case."[114] Stating that there is "no single mechanical formula" that would resolve every Establishment Clause case, Breyer wrote that the Texas monument has both a religious and a secular message.[115] But the circumstances of its placement at the Capitol and the surrounding secular monuments suggest, Breyer said, that the secular aspects of the monument predominate.[116] Moreover, the passage of forty years without a challenge indicated that observers had not thought the monument showed any significant governmental favoritism of religion.[117] Indeed, Breyer said, requiring removal of the monument would constitute "hostility toward religion that has no place in our Establishment Clause traditions," thereby causing "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[118] Emphasizing his disagreement with the plurality's analysis, Justice Breyer concurred in the judgment.[119] The remaining justices dissented.[120]

Significantly, two dissenting justices pointed out that by choosing the King James version of the Ten Commandments and numbering them as most Protestant denominations do, the governments in *McCreary County* and *Van Orden* implicitly took a side in religious debates.[121] The numbering of the Commandments is important because they are not numbered in the Bible,[122] and religious groups have numbered them

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113. *Id.* at 2864. *But cf. id.* at 2896 (Souter, Stevens, & Ginsburg, JJ., dissenting) (stating that "placing a monument on the ground is not more 'passive' than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it.").

114. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment).

115. *Id.* at 2868.

116. *Id.* at 2870.

117. *Id.*

118. *Id.* at 2871. *See* Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 477 (1998) (explaining that the Framers were "deeply concerned about the perils of religious conflict," and opposed establishment not out of hostility to religion, but "to free it from the temptations of secular power.").

119. *Van Orden*, 125 S. Ct. at 2872.

120. *Id.*

121. *Id.* at 2873-74, 2879-80 (Stevens & Ginsburg, JJ., dissenting).

122. Lubet, *supra* note 118, at 474-75. *See also* Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1487-90 (2005) (explaining that Catholic, Lutheran, and Jewish numbering of the Commandments differs from that of most Protestants in a theologically significant way).

differently to emphasize points of theological significance.[123] Translations of the Commandments also differ meaningfully. Justices Stevens and Ginsburg pointed out that, for example, the Jewish version of the Commandments states "You shall not murder," while the King James version says, "Thou shalt not kill." Far from being trivial, this difference reflects "a deep theological dispute."[124] Thus the monument projects "an inherently sectarian message."[125]

### 3. Effect of *McCreary County* and *Van Orden* on Establishment Clause Jurisprudence

#### a. No Major Change in the Analytic Framework

The *Van Orden* decision is the first case in which the Supreme Court has approved the posting of the Ten Commandments on public property. In its result, then, *Van Orden* has expanded allowable religious expression. But in terms of the analytic framework, the *McCreary County* and *Van Orden* cases have not changed Establishment Clause jurisprudence significantly, if at all. The two cases are consistent on certain key points. Both named government neutrality as a guideline of Establishment Clause jurisprudence. The *McCreary County* decision referred to "the importance of neutrality as an interpretive guide,"[126] and the *Van Orden* plurality cited with approval "'the very neutrality that the Establishment Clause requires.'"[127] A majority of the justices explained that neutrality means government cannot favor religion over nonreligion or one religion over another.[128] Notably, though, the *Van Orden* plurality may have rejected

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123. *See* Finkelman, *supra* note 122, at 1488-89 (stating that "there is no such thing as a neutral or nonsectarian translation" of the Ten Commandments). *Id.* at 1484.

124. *Van Orden*, 125 S. Ct. at 2880 n.16 (Stevens & Ginsburg, JJ., dissenting). However, Justice Scalia wrote, "I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not)." McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2762 n.12 (2005) (Scalia, J., Rehnquist, C.J., Kennedy, J., & Thomas, J., dissenting).

125. *Van Orden*, 125 S. Ct. at 2879-80.

126. *Id.* at 2742.

127. *Id.* at 2860 (citation omitted). *But see McCreary County*, 125 S. Ct. at 2750 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (stating, "How can the Court *possibly* assert that the First Amendment mandates governmental neutrality between religion and nonreligion . . . ?").

128. *McCreary County*, 125 S. Ct. at 2742 (stating that the government may not favor one religion over another, or religion over irreligion); *id.* at 2746 (O'Connor, J., concurring) (stating that the government "may not prefer one religion over another or promote religion over nonbelief"); *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (stating, "The Court has made clear . . . that government must . . . 'effect no favoritism among sects or between religion and

this definition, although the language it rejected was broader, encompassing "*any and all* government preference for religion."[129]

The *Lemon* test also remains viable, at least to some extent. The *McCreary County* majority relied on its purpose prong.[130] The *Van Orden* plurality chose not to rely on the *Lemon* test and expressed some tentativeness about it, suggesting that its fate is uncertain, but it did not discard it.[131] Nor did the fifth member of the *Van Orden* majority, Justice Breyer. He based his conclusion that the Texas monument was constitutional on the ground that its purpose, a factor that derives from *Lemon*, was "mixed but primarily nonreligious."[132]

Thus little if anything about the analytic framework has changed. Indeed, the *McCreary County* majority emphasized that, in the current climate of religious divisiveness, "This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief . . ."[133] And Justice O'Connor stated in her concurrence, "[W]e have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate" that church and state are separate in the United States.[134] In fact, she noted, separation has encouraged private religious expression to thrive, more so than in other developed nations.[135] She concluded, "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[136]

However, four justices who dissented to the *McCreary County* decision stated that the case does modify precedent in two ways that "ratchet up the

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nonreligion'") (citations omitted).

129. *Van Orden*, 125 S. Ct. at 2860 n.3 (stating, "we have not, and do not, adhere to the principle that the Establishment Clause bars *any and all* government preference for religion over irreligion.") (emphasis added).

130. *McCreary County*, 125 S. Ct. at 2732 (citing *Lemon*, 430 U.S. at 612).

131. *Van Orden*, 125 S. Ct. at 2861 (suggesting tentativeness through the phrase "whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence . . . .").

132. *Id.* at 2871 (Breyer, J., concurring in the judgment).

133. *McCreary County*, 125 S. Ct. at 2745.

134. *Id.* at 2746 (O'Connor, J., concurring).

135. *Id.* (citing ROBERT FOWLER ET AL., RELIGION AND POLITICS IN AMERICA 28-29 (2d ed. 1999)).

136. *Id.*

Court's hostility to religion."[137] First, the dissenters said the majority effected a change by examining legislative purpose not on its own but only as seen through the eyes of the "reasonable observer."[138] However, this is not a new approach to the role of legislative purpose. It was previously adopted by the Court in *County of Allegheny v. ACLU*.[139] In applying the endorsement test there, the Court evaluated purpose by considering "what *viewers* may fairly understand to be the purpose of the display."[140]

Second, the dissenting justices in *McCreary County* said the majority added a new requirement that a secular purpose must "'predominate' over any purpose to advance religion."[141] This is less a new requirement than an inference from established law. As the *McCreary County* majority stated, the requirement of a secular purpose for government action would "have no real bite" if, where a religious purpose predominates, an action could be saved by an accompanying secular purpose, "no matter how trivial."[142] Indeed, when the Court has been faced with both religious and secular purposes, it has at times found Establishment Clause violations. For example, in *Santa Fe*, which concerned prayer at school football games, the Court considered proffered secular purposes—the promotion of good sportsmanship and an "appropriate environment for competition"—but held that the practice nevertheless violated the Establishment Clause because the proffered secular purposes were shams.[143] The dissenting justices in *McCreary County* saw no analytic connection between the sham-purpose cases and the *McCreary County* holding that a secular purpose must predominate,[144] but the two concepts are not so distinct. In *Santa Fe*, for example, there was probably some basis for the proffered secular purposes, but the religious purpose predominated, making the practice unconstitutional.[145]

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137. *Id.* at 2757 (Scalia, J., Rehnquist, C.J., Kennedy, J., & Thomas, J.,dissenting).

138. *McCreary County*, 125 S. Ct. at 2757.

139. County of Allegheny v. ACLU, 492 U.S. 573, 620 (1989) (emphasis added).

140. *Id.* at 596. *See also* Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308-08 (2000) (explaining that it is relevant whether the objective observer would perceive an endorsement and holding that the observer would find one in *Santa Fe* based on an understanding that the school district's purpose was to encourage prayer.).

141. *McCreary County*, 125 S. Ct. at 2757 (Scalia, J., Rehnquist, C.J., Thomas, J., & Kennedy, J., dissenting).

142. *Id.* at 2736 n.13 (majority opinion).

143. *Santa Fe*, 530 U.S. at 309.

144. *McCreary County*, 125 S. Ct. at 2757 (Scalia, J., Rehnquist, C.J., Thomas, J., & Kennedy, J., dissenting).

145. *See Santa Fe*, 530 U.S. at 309.

Thus Establishment Clause jurisprudence was not significantly changed under the *McCreary County* and *Van Orden* decisions. It is the cases' concurrences and dissents that proposed more dramatic changes.

### b. Proposals for Change in Concurrences and Dissents

*Calls for a different test.* Some justices have concluded that current precedent provides no principled basis for deciding cases consistently,[146] thus creating the appearance that cases are decided according to justices' personal preferences.[147] Justice Scalia proposes a more permissive standard that, he contends, would be capable of consistent application and comport with "our nation's past and present practices."[148] He would abandon the neutrality principle, allowing a state to "favor [ ] religion generally, honor [ ] God through public prayer and acknowledgments, or, in a nonproselytzing manner, venerat[e] the Ten Commandments."[149] He believes that such public religious expression could appropriately favor the three monotheistic religions.[150] He also maintains that the majority of the American people want the government to be able to engage in some religious expression.[151]

Justice Thomas would also adopt a different standard. He views current precedent as too restrictive, permitting "even the slightest public recognition of religion to constitute an establishment of religion."[152] He would therefore abandon *Lemon* in favor of the coercion test,[153] which he contends would implement the original meaning of the Establishment Clause.[154] Under that test, the Establishment Clause would be violated only when the government requires a citizen to do something religious "'*by force of law and threat of penalty*.'"[155] This standard would broaden the scope of acceptable governmental religious expression.[156] Under it,

146. *McCreary County*, 125 S. Ct. at 2751 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting); Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring).

147. *McCreary County*, 125 S. Ct. at 2751 (Scalia, J., Rehnquist., C.J., & Thomas, J., dissenting).

148. *Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring).

149. *Id.*

150. *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

151. *Id.* at 2756.

152. *Van Orden*, 125 S. Ct. at 2866 (Thomas, J., concurring).

153. *Id.* at 2867 (Thomas, J., concurring).

154. *Id.*

155. *Id.* at 2865.

156. *See id.* at 2890 n.35 (Stevens & Ginsburg, JJ., dissenting) (pointing out that the coercion test would allow "explicit state endorsement of religion.").

Thomas would find the Texas monument constitutional because passersby are not forced to stop or even look at it: "[I]n no sense does Texas compel petitioner Van Orden to do anything."[157] The Kentucky displays would no doubt also pass this test. Thomas contends that it would provide a more consistent guide than current precedent for distinguishing among Establishment Clause challenges.[158]

It is worth noting that the Court has previously applied a coercion test, but only as a threshold inquiry. In *Lee v. Weisman*,[159] which involved a nonsectarian prayer by clergy at a public school graduation ceremony, the Court found the practice so coercive that it was unnecessary to consider the entire *Lemon* framework in finding it unconstitutional.[160] And in *Santa Fe*, which involved prayer at public high school football games, the court followed *Lee* in finding the prayer impermissibly coercive, explaining that it was not necessary to inquire beyond coercion to resolve the case.[161] In both of these cases, then, the Court saw coercion as sufficient, but not necessary, for finding an Establishment Clause violation.[162] Adopting coercion as the sole test would considerably broaden the range of allowable governmental religious expression.

*Call to discard incorporation under the Fourteenth Amendment.* Justice Thomas would also overturn sixty years of Establishment Clause jurisprudence to hold that the clause is not incorporated into the Fourteenth Amendment and, therefore, does not apply to the states.[163] If this view were to prevail, the *McCreary County* and *Van Orden* cases could not have been brought. There would be no basis under the Federal Constitution to challenge any state involvement with religion.

*Arguments against more government involvement with religion.* Other justices oppose an expansion of allowable government religious expression. The *McCreary County* majority frankly agreed that "an elegant interpretive rule to draw the line in all the multifarious situations is not to be had," but said the principle of neutrality provides a good guideline.[164]

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157. *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring).

158. *Id.*

159. Lee v. Weisman, 505 U.S. 577 (1992).

160. *Id.* at 586-87.

161. Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 317 (2000).

162. *See Lee*, 505 U.S. at 619 (Souter, Stevens, & O'Connor, JJ., concurring) (stating that the Court's precedents "simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim.").

163. *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring).

164. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2742 (2005) (majority decision). *See also Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (stating

And Justice Breyer suggested that an elastic standard can promote better results than a bright-line rule, especially in a complex area like Establishment Clause jurisprudence.[165] Moreover, two justices stated, "To reason from the broad principles contained in the Constitution does not, as Justice Scalia suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference."[166] Indeed, U.S. jurisprudence relies on long-established elastic standards in other areas of the law, such as the reasonable person standard in tort law.[167]

Justices Stevens and Ginsburg pointed out that the coercion test would allow government endorsements of religion such as a government advertisement touting "Catholicism as the only pure religion."[168] They also found it "dubious" that the coercion test would result in a more consistent jurisprudence, explaining that "coercion may be obvious to some, while appearing nonexistent to others."[169] Along with Justice Souter, and contrary to Justice Thomas's conclusion, they suggested that the *Van Orden* display *is* coercive: it makes its religious nature clear by putting the word "LORD" in capital letters, stating rules about the Sabbath and not worshipping other gods, and adding religious symbols.[170] The three concluded, "It would therefore be difficult to miss the point that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it," and that God is the God of Christians and Jews.[171] Justice Scalia also noted that justices have disagreed about what constitutes government coercion under the Establishment Clause.[172] Thus the coercion test is unlikely either to draw

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that there is "no single mechanical formula that can accurately draw the constitutional line in every case.").

165. *McCreary County*, 125 S. Ct. at 2743 (quoting founder James Madison's statement that "it may not be easy, in every possible case, to trace the lines of separation between the rights of religion and civil authority with such distinctness as to avoid collisions & doubts on nonessential points," and citing *Letter from J. Madison to R. Adams* (1832), *in* 5 THE FOUNDERS' CONSTITUTION 107 (P. Kurland & R. Lerner eds., 1987)).

166. *Van Orden*, 125 S. Ct. at 2888 (Stevens & Ginsburg, JJ., dissenting).

167. *See* DAN B. DOBBS, THE LAW OF TORTS 277 (2000).

168. *Van Orden*, 125 S. Ct. at 2890 n.35 (Stevens & Ginsburg, JJ., dissenting).

169. *Id.*

170. *Id.* at 2893 (Souter, Stevens, & Ginsburg, JJ., dissenting).

171. *Id.*

172. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2761-62 (2005) (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (stating, "The Court has in the past prohibited government actions that . . . apply some level of coercion (though I and others have disagreed about the form that coercion must take). . . .").

a bright line in this complex area of the law[173] or to eliminate accusations that judges decide cases according to their personal preferences.[174] In fact, as Justices Stevens and Ginsburg pointed out, even the underlying choice between the sides of the historical debate about the Establishment Clause may be seen to involve personal preferences.[175]

In response to the argument that the American people want to see the government allowed more religious expression,[176] Justice O'Connor replied that a key purpose of the Bill of Rights was to protect the rights of the minority.[177] She wrote,

> [W]e do not count heads before enforcing the First Amendment . . . . The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[178]

Significantly, Justices Stevens and Ginsburg pointed out that the Ten Commandments can be freely posted by owners of nongovernmental property, including churches, civic organizations, and private citizens.[179] In light of this option, the justices who favor more governmental religion expression provided little explanation of why it is so important to allow it. Justice Scalia came the closest to addressing this latent question when he cited "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people* with respect to our national endeavors."[180] But allowing the government to facilitate religious practice in that manner would significantly expand what is currently permissible under the Establishment Clause.

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173. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 416-17 (2002) (urging caution in arguing for a coercion test because even at the time of the founding there was no agreement about what constituted coercion).

174. *Van Orden*, 125 S. Ct. at 2888-89 (Stevens & Ginsburg, JJ., dissenting).

175. *Id.*

176. *McCreary County*, 125 S. Ct. at 2756 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

177. *Id.* at 2747 (O'Connor, J., concurring).

178. *Id.* (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

179. *Van Orden*, 125 S. Ct. at 2890 (Stevens & Ginsburg, JJ., dissenting).

180. *McCreary County*, 125 S. Ct. at 2756 (Scalia, J., dissenting). *See also* Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 676-77 (stating that Justice Scalia apparently believes "public worship not only is an aspect of the individual's practice of religion, but may be necessary for the country's welfare as well.").

### c. The Place of Founding History in the Debate

Both scholars and Supreme Court justices have cited history from the founding period in an effort to plumb the meaning of the Establishment Clause. Credible scholars have cited founding history to argue that the government should be allowed either more or less religious expression.[181] Among the justices, each side of the debate has accused the other of misapprehending the founding history.[182] In light of these differing viewpoints, the *McCreary County* majority concluded that "a record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle."[183] Similarly, in their *Van Orden* dissent, Justices Stevens and Ginsburg argued that, because the early historical record is "too indeterminate to serve as an interpretive North Star," the inquiry should go beyond the founding history: "We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye towards our nation's history and the other fixed on its democratic aspirations."[184]

## III. COMPARISONS AND CONTRASTS

Establishment is a contextually defined word that has different connotations in England than in the United States. The two countries share common historical, legal, and religious roots. Yet they took radically different paths at the time of the founding of the United States, when England retained establishment while the fledgling country repudiated it. Over time, the connection between Church and State in England has diminished;[185] what remains is relatively unproblematic precisely because it has existed for such a long time and thus goes unnoticed. Meanwhile, debates in the United States concern whether there should be more

181. Feldman, *supra* note 173, at 353 (citing scholars who cited history to argue each position).

182. For example, Justices Scalia, Rehnquist, and Thomas contended that Justice Stevens and Ginsburg relied on the wrong historical sources in support of their view. *McCreary County*, 125 S. Ct. at 2754 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting). Similarly, Justices Stevens and Ginsburg found one of Justice Scalia's conclusions "unmoored from the Constitution's history," *Van Orden*, 125 S. Ct. at 2886 (Stevens & Ginsburg, JJ., dissenting).

183. *McCreary County*, 125 S. Ct. at 2744 n.25.

184. *Van Orden*, 125 S. Ct. at 2888-89 (Stevens & Ginsburg, JJ., dissenting).

185. *See* James W. Torke, *The* English *Religious Establishment*, 12 J.L. & RELIGION 399, 411 (1995-96) (citation omitted) (reporting the diminishing connection between church and state in England).

governmental religious expression. Thus the two countries' establishment debates today revolve around different issues.

There are some similarities between the two countries' approaches to church-state issues. Both allow some governmental religious expression that has become part of the cultural fabric. In England, the long history of establishment and of a close relationship between the Church of England and the British State means that some of the most noticeable religious expressions are not generally perceived as implying a particular state stance towards religion or any coercion. In the United States, some government acknowledgments of religion are constitutionally acceptable; the *Van Orden* monument is a prominent example of this.

Both countries allow churches a great deal of autonomy from state interference. In England, state authorities retain some jurisdiction over the established Church, but it is rarely exercised. Still, that jurisdiction has symbolic value because it clarifies that English establishment is not the same as clerical rule or the imposition of particular beliefs or behaviors. Establishment is seen as placing an obligation on the Church of England to operate in a way that reflects multi-faith nature of British society. Thus, one could say that England has an established church but not an established religion. Meanwhile, in the United States, the reluctance of the courts to interfere with church matters is based on the Free Exercise Clause,[186] which also forbids the imposition of particular beliefs. A case like *Denbigh High School* would thus be analyzed under the Free Exercise Clause, not the Establishment Clause.[187] Although England has no written counterpart to the Free Exercise Clause, the Court of Appeal in *Denbigh High School* articulated a principle similar to free exercise protection when it based its decision on the importance of the individual conscience as part of religious freedom.[188]

But there are also some key differences in the two countries' current approaches to church-state issues. None of the three English cases concerns a positive step by government to engage in a religious practice. It is unlikely that a government body would attempt to introduce a new religious practice in the current climate that so emphasizes diversity. The idea, for example, of prayers before a school sports event would be as

186. U.S. CONST. amend. I. *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. REV. 1633, 1633 (explaining that "[g]overnment action designed to thwart religious exercise is, of course, unconstitutional.").

187. *See* Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298, 306 (Or. 1986) (applying the Free Exercise Clause to a public school teacher's challenge to a statute restricting her ability to wear religious dress in school).

188. *See supra* notes 29-31 and accompanying text.

inconceivable as the Ten Commandments in front of a courtroom. To be sure, some state religious expression is part of the English cultural fabric. For example, a law provides that state-supported nondenominational schools must provide a daily "'act of collective worship,'" which is to be "of a broadly Christian character."[189] However, as few as 25% of schools actually comply with this requirement, and its enforcement is not a priority, largely because a significant number of the authorities charged with its enforcement do not agree with it.[190] And parents have the right to opt their children out of such acts of worship. Thus, the cultural relevance of this legislation is minimal.[191] Most English people probably do not even know that the law exists, which explains the lack of move to repeal it. Meanwhile, the *McCreary County* and *Van Orden* cases did involve affirmative steps by the government to engage in more religious expression.

Thus, if there is a continuum between establishment and disestablishment, the two countries are moving along it in different directions. The three English cases, taken together, inch away from the establishment side. While the *R v. Bishop of Stafford* holding was based partly on establishment, the other two cases moved away from establishment. The holding that Muslim dress is acceptable in a government-funded school reinforces not establishment but the diversity that has become the hallmark of modern England. The holding that the Parochial Church Council is not a governmental body but a private one illustrates a degree of separation between church and state. English establishment implies public visibility of religion, but, crucially, gives the role of achieving that to the national Church rather than to the government. This gives the church greater autonomy than it formerly had[192] while freeing up government not to have to engage in the promotion of religion—and government promotion of religion may well appear more coercive than Church promotion of religion. This is perhaps one of the important conceptual implications of *Aston Cantlow*—that a Church Council is not a governmental authority, despite its legal powers.

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189. Torke, *supra* note 185, at 426.

190. *See* Office for Standards in Education, An Evaluation of the Work of Standing Advisory Councils for Religious Education, *at* http://www.ofsted.gov.uk/publications/index.cfm?fuseaction=pubs.summary&id=3756.

191. *But see* Ann Blair, *Negotiating Conflicting Values: The Role of Law in Educating For Values in England and Wales*, 14 EDUC. & L. 39-56 (2002) (arguing that the privileged position of Christianity in schools undermines their neutrality.).

192. Torke, *supra* note 185, at 410.

Low church attendance in England[193] means that there is a genuine diversity with no particular majority among active believers and no push for the government to become more actively involved in religious expression. Indeed, candidates for office would find little political advantage in promoting further government entanglement with religion. People expect the government to remain aloof and the Church to remain sensitive to diversity and noncoercive in its approach.[194]

At the same time, a movement for more governmental religious expression in the United States has been embraced by some of the Supreme Court justices. In holding for the first time that the Ten Commandments may be posted on government property, five justices have moved away from the disestablishment end of the continuum. Language in the *Van Orden* plurality opinion signals a desire by some justices to allow more even governmental religious expression, as do the *McCreary County* dissents.[195] Further forays in that direction would create an ironic result, with the newer country moving closer to establishment just as the older one moves away from it.

## IV. CONCLUSION

England's established religion was one of the reasons many colonists left England to settle in the United States. Since that time, England has relaxed the reins of establishment, as illustrated in two of three recent cases. At the same time, cultural forces in the United States urge more government involvement with religion. The recent *Van Orden* decision allowing posting of the Ten Commandments on government property illustrates this, as do several justices' concurrences and dissents in the two recent Ten Commandments cases. These developments are somewhat ironic in light of the differences between the two countries when the United States was founded.

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193. Figures on active religious participation in the United Kingdom would suggest that, if the UK approach to establishment is intended to be coercive, it fails rather spectacularly. *See Comparison of Church Attendance Trends in the UK and Australia*, *at* http://www.cra.org.au/pages/00000063.cgi (last visited Aug. 30, 2005) (reporting that Sunday church attendance in the United Kingdom had declined to 7.4% of the population by 1998).

194. See, for example, the notorious occasion where Prime Minister Tony Blair was interrupted by his public relations-aware communications advisor, Alistair Campbell at a press conference, on being asked by an American journalist about his faith, with the words "We don't do God." Roger Childs, *Blending Politics and Religion*, BBC NEWS, *at* http://news.bbc.co.uk/1/hi/world/3301925.stm (last visited Aug. 31, 2006).

195. *See supra* notes 147-58 & 163 and accompanying text.