University of Richmond Law Review

Volume 26 | Issue 3 Article 9

1992

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CONSERVATIVE SUPREME COURT: ITS IMPACT ON TRADITIONAL VALUES

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Most court watchers agree that the changing composition of the Supreme Court will ineluctably favor the interests of traditional values organizations like the American Family Association. The next decade will surely see the Court return to a more balanced approach in line with the preservation of family values. Certainly some will characterize the new Court as more conservative. To the extent that it will emphasize core principles in the Constitution as the bedrock from which it must proceed, it will be conservative. Yet this is simply a return of the Court to its intended function: interpretation and application of law textually found in the Constitution or duly enacted legislation. No doubt the Court will be more reluctant to manufacture new "rights" not specifically found in these core sources. It will look to the Congress and the state legislatures to enact new rights as the social and political needs of the people evolve. And in applying the Constitution it will no doubt rely on the Framers' original intent.

There are certain areas where this renewed deference to legislative prerogatives and constitutional intent will be manifested. Surely on issues relating to pornography, abortion, and religious activities in public schools, the Court will move away from unnecessary and creative renderings of constitutional magnitude. As discussed below the net practical effect will be an increased ability of state and federal legislative bodies to limit pornography and abortion, combined with greater tolerance of religious activities in public schools.

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Pornography

The Supreme Court has historically accepted the truism that pornography is harmful to society.[1] Attempting to address the growing societal problems of illegal pornography, in *Miller v. California*[2] the Court enunciated a three-part definition for unprotected obscene pornography in 1973. Since that time it is apparent that the *Miller* test has become more problem than solution. It has invited endless litigation over the meaning of its often criticized concepts.[3] As a result, many prosecutors, while recognizing the harms of pornography, have simply given up prosecuting obscenity cases.[4]

The essence of the problem with the *Miller* test is that it does not spring from the Constitution itself. Rather it is an invention of the Court.[5] Justice Scalia has in fact specifically called for a "reexamination of *Miller*."[6] He will certainly be one of the Court's leaders into the next century. But rather than doing away with pornography restrictions, Justice Scalia and the other conservative justices will likely facilitate state efforts to adopt stronger methods for dealing with the pornography problem.

Certainly it is not unthinkable for the Court to abandon the *Miller* test altogether and allow the various states and Congress to define regulated pornography. It was not until *Roth v. United*

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1. For instance, in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973), the Court observed that:

> The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation. . . . "[I]t has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' "
>
> [W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself.

Id. at 57 (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).

2. Miller v. California, 413 U.S. 15, 24 (1973). Under *Miller*, obscene pornography appeals to a prurient interest, depicts or describes sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value. *Id.*

3. Pope v. Illinois, 481 U.S. 497 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

4. UNITED STATES DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 53 (1986).

5. *Miller*, 413 U.S. at 24.

6. *Pope*, 481 U.S. at 505 (Scalia, J., concurring).

States[7] in 1957 that the Court seriously undertook to enunciate a singular definition of obscenity. Historically, the states themselves have been left to address the pornography problem. And there is "no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex . . . in any way limited or affected expression of serious literary, artistic, political, or scientific ideas."[8] Rather, the period following Thomas Jefferson up to Theodore Roosevelt was an "extraordinarily vigorous period" in literature.[9]

One approach that has been prominently suggested is the so-called "per se rule." Under this approach a law would prohibit all "hard core pornography," defined by its depiction of specific sex acts. Such a statute would state:

> No person with knowledge of the character of the material shall knowingly distribute or exhibit, to the public or for commercial purposes, any hard-core pornography.
>
> Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, anilingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible.[10]

As used by the Supreme Court and today's law enforcement authorities, the words "hard-core pornography" have become synonymous with obscenity.[11] It cannot be doubted that this type of regulation would bring badly needed clarity into pornography enforcement and remove, to a large extent, the troubling element of vagueness. And this would certainly be in line with the Court's mandate that government "be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[12]

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7. 354 U.S. 476 (1957).

8. *Miller*, 413 U.S. at 35.

9. *Id.*

10. Bruce A. Taylor, *Hard Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 272 (1988); *see also* BRUCE A. TAYLOR, PORNOGRAPHY AND THE FIRST AMENDMENT IN CRIMINAL JUSTICE REFORM 156-57 (1983); William W. Milligan, *Obscenity: Malum In Se or Only in Context? The Supreme Court's Long Ordeal*, 7 CAP. U.L. REV. 631, 643-45 (1978).

11. *Id.*; *see also Miller*, 413 U.S. at 27.

12. Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

In the future the Court will doubtlessly continue to broaden the ability of government to restrict the harmful pornography industry. In the last few years we have seen the Court uphold laws which prohibit nude dancing,[13] ban mere possession and viewing of child pornography,[14] permit the use of RICO statutes which employ obscenity violations as predicate offenses,[15] permit the enforced closure of adult bookstores found to be used for prostitution and lewdness,[16] and the regulation of adult businesses under restrictive zoning ordinances.[17] In the next decade the Court will continue to expand the states' ability to use innovative means in addressing the recognized pornography problem.

Student Religious Activities in the Public Schools

In the future we can expect the Supreme Court to take a more accommodating stance with respect to religion in the schools. The Court will return to an interpretation of the First Amendment's Establishment Clause[18] consistent with that of the Founding Fathers. The Framers never intended a complete "wall of separation" between church and state.[19] Indeed, the liberal Justice William O. Douglas even recognized that the First Amendment "does not say that in every and all respects there shall be a separation of Church and State."[20]

In 1971 the Supreme Court attempted to enunciate a three-part test for the application of the Establishment Clause in *Lemon v. Kurtzman*.[21] Like the *Miller* test,[22] the *Lemon* test is not found in the Constitution but is one of Supreme Court invention. Over time

13. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

14. Osborne v. Ohio, 495 U.S. 103 (1990).

15. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).

16. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

17. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

18. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

19. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1870-79 (5th ed. 1891).

20. Zorach v. Clauson, 343 U.S. 306, 312 (1952) (Douglas, J.).

21. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). To pass muster a government action must have a secular purpose, secular effect, and avoid excessive government entanglement with religion. *Id.*

22. 413 U.S. at 24.

it has lost favor with much of the Court. Today it may be that only two justices are still committed to the original *Lemon* test.[23]

Four Justices, lead by Justice Kennedy, have proposed a "coercion" test:[24] the "government may not coerce anyone to support or participate in any religion or its exercise" and it may not "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religous faith, or tends to do so.' "[25] This approach would recognize and accommodate the "central role religion plays in our society."[26] It would certainly permit many student religious activities forbidden under the bankrupt *Lemon* test. For instance, "moment of silence" statutes allowing time for silent religious meditation during the school day, would certainly pass muster under the "coercion test."[27]

The recent trend away from strict separation of religion and state was also illustrated in *Board of Education of Westside Community Schools v. Mergens*.[28] There, for the first time, the Court upheld the right of a student religious group to meet on school premises. The trend towards greater toleration and accommodation of religious student activities will doubtlessly continue with the addition of Justice Thomas to the Court.

Abortion

In 1973 the Supreme Court in *Roe v. Wade*[29] created a constitutional "right to abortion." This is not a right found in the text of the Constitution nor is it implied in any constitutional provision. Rather, the right to abortion was purportedly contained within a "right to privacy."[30] Yet no "right to privacy," as such, is found in

23. Justices Blackmun and Stevens remain committed to the *Lemon* test. Justice O'Connor would like to reformulate the *Lemon* test as the "endorsement test." Justices Kennedy, White, Scalia, and Chief Justice Rehnquist prefer the new "coercion" test. The positions of Justices Souter and Thomas are not known at present. *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

24. *Id.* at 659-62.

25. *Id.* at 659 (quoting Lynch v. Donnell, 465 U.S. 668, 678 (1984)).

26. *Id.* at 657.

27. *Compare* Alleghany County v. Greater Pittsburg ACLU, 492 U.S. 573, 659-62 (1989) *with* Wallace v. Jaffree, 472 U.S. 38 (1985) (reviewing an Alabama statute authorizing one minute of silence in public schools for meditation or voluntary prayer and holding the statute was unconstitutional under the *Lemon* test).

28. 110 S. Ct. 2356 (1990).

29. 410 U.S. 113 (1973).

30. *Id.* at 152-53.

the Constitution. So, like the *Miller* test and the *Lemon* test, the "right to abortion" is an invention of the Court itself. And because its underpinnings are not firmly grounded in the text of the Constitution, the "right to abortion" has gradually been eroded since 1973.

The so-called "right to abortion" has never received widespread support for several obvious reasons. First, the *Roe* decision utterly failed to take into account the interests of the unborn child.[31] The Court considered only the interests of pregnant women who chose to terminate their unborn children.[32] The interests of the human life destroyed were neither considered nor discussed. Today, we know that children are often conceived in laboratory test tubes and are viable as human life from the moment of conception. Second, the interests of the unborn child's father were completely ignored in *Roe*. Finally, Bible-believing Christians have rejected *Roe* because it promoted a practice — abortion — which violates scriptural teachings.[33] It is doubtful the original Founding Fathers, who were themselves Christians,[34] would have ever considered the inclusion of feticide in the Constitution. Today's evangelical Christians find such a notion equally abhorrent.

In the future we can look forward to the inevitable overturning of *Roe* and its "right to abortion" on demand.[35] Certainly we have seen the gradual chipping away of *Roe*.[36] Ultimately the "right to abortion" will be defined and delimited by the legislative process of Congress and the state legislatures.

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31. *See Roe*, 411 U.S. at 164-65.

32. *Id.*

33. *See Genesis* 1:27 ("And God created man in his own image"); *Exodus* 20:13 ("You shall not murder"); *Psalms* 139:16 ("Thine eyes have seen my unformed substance"); *Isaiah* 44:24 ("the Lord . . . who formed you from the womb"); *Jeremiah* 1:56 ("Before I formed you in the womb I knew you, and before you were born I consecrated you").

34. TIM F. LAHAYE, FAITH OF OUR FOUNDING FATHERS (1989).

35. *See* Ohio v. Akron Center for Reprod. Health, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion.").

36. *See* Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Ohio v. Akron Center for Reprod. Health, 110 S. Ct. 2972 (1990); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476 (1982); H.L. v. Matheson, 450 U.S. 398 (1981).

Conclusion

The inevitable effect of a more conservative Supreme Court will be the advancement of traditional values. On three key issues — pornography, religious activities in the public schools, and abortion — the Court will move toward such values. In doing so, the Court will come into line with the traditional role.