Written by **Joe Wolverton, II, J.D.** on November 14, 2015

# Judicial Attacks on Christianity Violate Letter and Spirit of Establishment Clause

On November 12, a federal judge ruled that a Nativity scene erected on the lawn of an Arkansas county courthouse (shown) violates the First Amendment's prohibition on the establishment of religion by the government.

According to a *Wall Street Journal* report on the case, "The Baxter County Courthouse in northern Arkansas has displayed a nativity scene on the corner of its lawn at Christmas season going back at least 40 years, court papers say. The crèche itself is owned by a local attorney not party to the case."

The complaint was filed by the American Humanist Association (on behalf of Baxter County resident Dessa Blackthorn) alleging that by setting up the Christmas scene (which in addition to the Nativity includes a Santa and reindeer display), Baxter County "violated the Establishment Clause of the First Amendment by erecting a religious display."

Additionally, the American Humanist Association claimed that Blackthorn was compelled to file the lawsuit because she experienced "direct and unwelcome personal contact" with the alleged establishment of religion.

In his ruling against Baxter County, District Court Judge Timothy L. Brooks writes that in her deposition, Ms. Blackthorn explained that "what she finds unwelcome is not Christianity itself, but rather her perception that her government has established Christianity as its preferred religion by displaying the nativity scene without also displaying holiday celebrations that are predominantly secular or representative of other faiths."

Then, after ruling on the various procedural challenges to the suit made by Baxter County, Judge Brooks holds that "there simply is no reasonable inference to be drawn from them other than that in 2014, if not earlier, the County's purpose in erecting the creche was a predominantly religious one." Thus, he declares, Ms. Blackthorn and the American Humanist Association "have shown a violation of the Establishment Clause."

Such judicial attacks on religious faith — particularly the religious faith of Christians — is nothing new. For years, judges have given wide berth to the practices and rites of various religions, while regularly finding constitutional infringements in the actions of state and local governments that promote Christian values and holidays.

It was about 50 years ago that the Supreme Court began applying the 14th Amendment to states in a way that "incorporated" the Bill of Rights to the states, having the effect of applying the Bill of Rights' restrictions on the federal government to state and local governments, as well.

Apart from its overt aim to marginalize the Christian religion and evict it from the public square, the

incorporation doctrine pursued by the Supreme Court has eroded state sovereignty and severely weakened constitutional federalism.

Some judges have pointed to the Constitution's "silence" on public virtue and the explicit prohibition on the establishment of religion as evidence that the Founding Fathers wanted to keep religion out of government. They insist that the "wall of separation" between faith and government must be maintained.

There is, however, another way of analyzing this issue that sets such statements on their ear.

First, we all must understand that in no way did the Constitution eliminate or delegitimize the traditional religious jurisdictions of the states.

American intellectuals, academics, and the judges that seek to appease them seem to have what one historian calls "theological amnesia." They fail — for one reason or another — to appreciate the "demonstrable salience of religious ideas in 18th Century America."

The effect of this ailment on the role of faith and virtue in the United States has been devastating. The practices and habits once fostered by state and local institutions have been abolished, abandoned, and in some cases, criminalized.

As he did in so many other cases, Alexis de Tocqueville watched this happen in his native France and warned Americans what could happen should they follow this same irreligious road:

> The old localized authorities disappear without either revival or replacement, and everywhere the central government succeeds them in the direction of affairs…. Everywhere men are leaving behind the liberty of the Middle Ages, not to enter into a modern brand of liberty, but to return to the ancient despotism; for centralization is nothing else than an up-to-date version of the administration seen in the Roman Empire.

We are witnesses to the forceful surrender of state sovereignty by all three branches of the central government. The role of fostering virtue and Christian devotion once fostered by the state and local authorities is declared unconstitutional and the moral decline of our country accelerates.

Finally, a closer reading of the Establishment Clause and a more dedicated study of the legislative history of the First Amendment reveals not only that our Founders did not intend for the prohibitions contained in that part of the Bill of Rights to apply to the states, but, on the contrary, they intended those limitations to preserve those very same prerogatives for the states and cities!

As historian Akhil Reed Amar noted in 1996, "The original establishment clause, on a close reading, is not anti-establishment, but pro-states' rights; it is agnostic on the substantive issue of establishment versus non-establishment, and simply calls for the issue to be decided locally."

Amar goes on to explain that by presuming to rule on the constitutionality of state and local acts that promote religion, the judges themselves are violating not only the letter, but the spirit, of the First Amendment.

Often the enemies of the public display of religious faith (again, typically only if that faith is Christianity) will cite Thomas Jefferson as a proponent of their particular interpretation of the proper rule of courts in protecting the public square from any participation by people of faith or the emblems of their faith. Once again, these people demonstrate a woeful understanding of history.

Again, Amar delivers a devastating blow to the anti-Establishment advocates. Regarding Jefferson's

understanding of the purpose of the Establishment Clause, Amar writes:

> Thus, while President Jefferson in 1802 refused to proclaim a day of religious Thanksgiving, he had done just that as Governor Jefferson some 20 years before. In defending his practice to Reverend Samuel Miller in 1808, Jefferson quoted both the First and Tenth Amendments, and explained:
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> > I am aware that the practice of my [presidential] predecessors may be quoted. But I have ever believed that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that what might be a right in a state government, was a violation of that right when assumed by another.

Amar continues his historical refutation of the claim that the Founders brooked no official accommodation of religion:

> Interestingly, a virtually identical view was voiced in the First Congress on September 25, 1789 — the very day the Bill of Rights cleared both houses. When New Jersey Representative Elias Boudinot introduced a bill recommending "a day of public thanksgiving and prayer," South Carolina's Thomas Tucker rose up in opposition: "[I]t is a religious matter, and as such, is pro- scribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States."

As this brief rehearsal of constitutional law and our Founders' conception of it reveals, far from being a bar on a state or county's erection of a Nativity scene, the First Amendment was specifically worded — "Congress shall make no law" — so as to prevent the federal government from infringing legislatively in any manner whatsoever on the authority of states and localities to promote and protect the religious faith of its people.

In other words, the Establishment Clause that was intended by our founders to protect state efforts to promote virtue and religious faith from federal intrusion, is now being used by that same federal government not only to intrude on that authority, but to abolish it all together!

In blatant disregard of these facts, however, federal judges such as Timonty L. Brooks continue to misunderstand, misinterpret, and misapply the Constitution's Establishment Clause and continue using rulings to run religion out of town.

Baxter County's attorneys have not commented on their next move.

*Photo of nativity scene: U.S. District Court*