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AN AMERICAN THEOCRACY?

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The first amendment of the Constitution opens with “Congress shall make no law respecting an establishment of religion . . . .” This provision is unique among the first amendment guarantees in that its purpose and definition can be ascertained only by examining history. The free exercise of religion, and freedom of speech, press, and assembly clauses, on the other hand, explicitly mention the values they are designed to protect.

Although it is generally agreed upon that the establishment clause has a unique dependence on history, there is significant disagreement among commentators and jurists as to the historical data to be used as evidence for defining it. The separationists, led by Justice Brennan, believe that history is relevant to establishment clause exegesis because the clause is based on a straightforward historical observation: when government officially recognizes and promotes religion, persecution and civil war have inevitably followed. Separationists apply lessons from history; intuitive, common sense arguments; and the legislative history of the first amendment in their attempt to protect the values underlying the establishment clause. They argue that the clause strips Congress of jurisdiction to legislate in matters pertaining to religion.

The nonpreferentialists, led by Chief Justice Rehnquist, believe that history defines the establishment clause in the sense that jurists, bound by jurisprudence of original intent, must look at the legislative history of the establishment clause to determine how the framers define “establishment of religion.” Once the definition is determined, courts of review simply apply the definition to the legislation at issue. Rehnquist and his bedfellows contend that, according to the framers, an establishment of religion occurs only when a government officially recognizes one church or denomination to the exclusion of all

others. Thus, they argue, government can actively promote religion as long as no single church or denomination is designated as the official state religion. Chief Justice Rehnquist articulated the nonpreferential thesis in his sole dissent in Wallace v. Jaffree.¹ In County of Allegheny v. American Civil Liberties Union,² Justice Kennedy, also in dissent, proposed a similar, though perhaps more restricted, nonpreferential view in which three other members of the Court joined, including the Chief Justice. Thus, it appears a growing faction of the Court believes that state and federal government can intentionally promote religion.³

Before analyzing the merits of either interpretation, it is noteworthy to mention that the establishment clause is the only uniquely American contribution to the republican form of government. The significance of this fact is highlighted by observing present wars and atrocities that are committed for religious purposes in countries without some effective restraint on government interference with religion. Indeed, it is well known that many Americans possess United States citizenship because their ancestors came to this country fleeing from violent religious persecution. And to this day, immigrants come to America in search of religious liberty.

THE ISSUE

At the core of the current debate over the proper application of the establishment clause is the concept of intentional government promotion of religion. Does it inevitably lead to religious persecution and strife? Or is it harmless as long as one particular sect is not designated as the official church?

JAMES MADISON

In view of the consensus that history defines the establishment clause, it should come as no surprise that the clause’s chief architect, James Madison, was a diligent student of historical political systems, including church-state entanglements. His friend Thomas Jefferson, then living in Paris, made sure

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³. With the July 20, 1990 resignation of Justice Brennan, this faction could very well become a majority.
that Madison, at this time living at Montpelier, received enough books to embark on a detailed study of ancient and contemporary confederacies. The lessons of history—"that last best oracle of wisdom"—formed a consistent theme for his writings, including his contributions to The Federalist Papers and his Remonstrance and Memorial for Religious Freedom.

Through his historical studies, he likely became familiar with Queen Mary, or "Bloody Mary," under whose reign the "fires of Smithfield" were never extinguished during a four year period of executing religious dissenters. Or perhaps he encountered Pope Innocent III, originator of a continent-wide Holy Inquisition that "left a trail of mangled bodies, shattered minds, and smoking flesh." In addition, the Crusades of the Christians; the attempted extermination of the Waldenses of Alpine Italy; the slaughter of the Huguenots in France; the Thirty Years War between Protestants and Catholics; the suffering of English Quakers at the hands of the established church in England; and generally, the conception and use of the cruelest forms of torture for use in defending the official faith provide a graphic illustration of the type of world the colonists were anxious to flee.

Although it is not known whether Madison ever read it, the validity of Blaise Pascal's statement is unquestioned against this historical backdrop: "Men never do evil so completely and cheerfully as when they do it from religious conviction." 

Actually, Madison did not even have to look beyond the recent history of the colonies to examine problematic church-state entanglements. The Salem witch hunts, the heresy trial of Anne Hutchinson, and the arrest of President George Washington in Connecticut for Sabbath desecration illustrated the church-state problems which existed in New England.

Throughout the colonies, Jews, Catholics, Free Thinkers, and Quakers were denied the equal protection of the law and suffered various forms of persecution.

Madison's own home state of Virginia was not without

problems either. The Virginia Sunday Law of 1610 provided a death penalty for those who dishonored the Sabbath on three occasions. In 1774, Madison communicated his disdain with the situation in Virginia in a letter to his friend William Bradford:

That diabolical Hell conceived principle of persecution rages among some and to their eternal infamy the Clergy can furnish their quota of Imps for such business. This vexes the most of any thing whatever. There are at this time in the adjacent county 5 or 6 well meaning in close Goal [jail] for publishing their religious sentiments. 8

Furthermore, his famous Remonstrance, mentioned above, was written to convince the people of Virginia to oppose a bill which provided for the support of Christian clergy in Virginia on a nonpreferential basis.

Regardless of the precise Colonial or European historical incidents Madison studied or experienced, his observations as to the cause of church-state problems and his proposals for curing them are clear. Government power to legislate in religious matters opened the gates for persecution and religious wars. 9 Even if jurisdiction was procured for the purpose of promoting religion; abuses followed because along with a power to promote, came a power to judge the validity of opinions. 10 This general power to “intermeddle with Religion” was the reason “[t]orrents of blood” were spilled in the old world. 11

Clearly, Madison did not espouse the view that the official elevation of one sect over all others was the only type of system in which persecution could occur. In his Remonstrance, he stated: “Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular Sect of Christians, in exclusion of all other Sects?” 12 According to Madison, the only cure was to remove religion from “the Cognizance of the Civil Government.” 13

10. Id. at paragraph 5.
11. Id. at paragraph 11.
12. Id. at paragraph 3.
13. See id. at paragraph 8.
Burger's Lemon Test

Almost two hundred years after Madison made his unparalleled contribution to religious and intellectual freedom, Chief Justice Warren Burger set forth an analysis based directly on Madison's observations. Burger constructed a three prong test, generally referred to as the Lemon test, that consists of tests applied individually in previous Supreme Court establishment clause cases. A statute analyzed against this test cannot have promotion of religion or irreligion as its primary purpose or effect. The underlying basis for the statute must be secular and rational. In addition, the statute cannot foster a situation in which the church and state are entangled with each other to the extent that one could have a coercive or oppressive impact on the other. This requirement strips the government of jurisdiction to judge the nature of a church's activities against its own views of orthodoxy or definition of religion. It also prevents the historically violent results of political division along religious lines.

Nonpreferentialism

Notwithstanding the direct relationship between Burger's Lemon test and Madison's unquestioned conclusions regarding church-state entanglements, nonpreferentialists claim the Lemon test has no basis in history. Briefly, these critics point to a statement, made by Madison during the composition of the establishment clause, indicating that the establishment clause prevents establishment of a "national religion." From this statement, nonpreferentialists claim that Madison merely intended to prohibit the government from favoring one powerful denomination to the exclusion of others.

This argument is fatally flawed. First, the Constitution was drafted as a document which specifically lists the jurisdiction of the federal government. The right to pass religious laws was not listed among the enumerated powers. Indeed, Madison stated in 1788: "There is not a shadow of a right in the general government to intermeddle in religion." Since no right to promote religion, nonpreferentially or otherwise, existed in

the federal government, nonpreferentialists can only point to the establishment clause as the source of governmental power to promote religion. However, the establishment clause, which stated "Congress shall make no law . . .,," was framed to restrict government power. Thus, as Professor Levy points out, nonpreferentialists assert the absurd proposition that the establishment clause added to the powers of Congress.\textsuperscript{17}

The notion that government should take on the task of promoting religion is sterile for other reasons as well. Nonpreferentialists contend that only statements made by "the Framers" in the congressional debates are relevant in defining the establishment clause. Such a proposition, however, prevents jurists from examining the actual historical events which provided impetus for a religious liberty guarantee in the first place. There is literally nothing in the record of the debates that indicates a consensus concerning the proper relationship between the church and the state. Even the term "establishment of religion" is inherently ambiguous because colonial America was familiar with laws which favored only one sect \textit{and} laws which could favor several sects simultaneously.\textsuperscript{18} Thus, nonpreferentialists consider a vague and obviously incomplete legislative committee report to be more relevant than over fifteen centuries of religious conflict and terrorism.\textsuperscript{19} The sheer illogic of their argument seems to indicate that nonpreferentialists, in pursuit of their narrow agenda, are attempting to sweep that turbulent history under the rug. And understandably so, since that history flies in the face of their thesis for at least two reasons:

1. A government which can aid religion on a nondiscriminatory basis has jurisdiction to decide which entities are valid religions according to the majority's definition.

2. Denominations that become dependant upon government support are placed in a position of vulnerability to governmental coercion.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} Id. at 175.
\item \textsuperscript{18} Id. at 174-94.
\item \textsuperscript{19} For example, there is no record of what was discussed in the Senate regarding the establishment clause.
\item \textsuperscript{20} For example, Jerry Falwell's Liberty University testified in a Lynchburg, Va., circuit court that it would express its evangelical Christian philosophy in a more subdued manner in order to protect government bonds issued on behalf of the school. \textit{Liberty University Bond Issue Will Be Appealed Says AU, 43 CHURCH AND STATE 111 (1990).}
\end{itemize}
According to Madison, jurisdiction to determine the validity of religious truth and to coerce religious groups are the very type of governmental powers that facilitate persecution and oppression. Because these evils are not cured by a nonpreferential approach, sectarian strife and coercion could flourish in a government with jurisdiction to promote religion. Indeed, Madison, regarding the bill that would provide government funds on a nonpreferential basis to “Teachers of the Christian Religion,” stated in his Remonstrance:

It degrades from the equal rank of Citizens all those whose opinions in religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. 21

Supreme Court Justices should be encouraged to examine all of the writings of the colonial intellectual leaders in order to adequately protect the values embodied in the establishment clause. The fact that a founding father was or was not a member of the First Continental Congress when he made a statement or published a paper on church-state relations is irrelevant. 22

Finally, the congressional debates reveal that the Framers of the establishment clause had several opportunities to adopt the nonpreferential view, yet they declined.

Wording which prohibited the establishment of “one religious sect or society in preference to others” was rejected, as was a proposal which stated “Congress shall make no law establishing any particular denomination of religion in preference to another . . . .” Why didn’t the Chief Justice mention these proposals in his Wallace dissent? 23

The arguments of Professor Levy, the legislative history of the establishment clause, and most importantly, the lessons of history taught by James Madison go directly against the notion that Congress can promote religion. Thus, as a matter of con-


22. Rehnquist argues that Madison’s views expressed in his Remonstrance and Jefferson’s oft-quoted statement of congressional intent are not relevant to establishment clause interpretation because Madison’s paper was not written for the congressional debates and Jefferson was in France during the debates. See Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

23. See Hegstad, Views of the Wall, 81 LIBERTY 1, 13 (1986).
stitutional law and a matter of church-state history, the non-preferential approach should be abandoned.

THE SECULAR STATE

The enactment of the establishment clause two hundred years ago by the first Continental Congress reflected a growing consensus among the people of the young nation that laws should be enacted, as Jefferson said, with "a single eye to reason." 24 Reasons for favoring a secular state varied with the individual. Some, like Madison, did so from a sense of religious conviction and scholarly study. Others favored at least a religiously tolerant if not a totally secular state in order to attract immigrants to their area to enhance commerce. George Washington and his ilk favored religious liberty for practical reasons such as diplomacy and harmonious relations between the states.

Whatever the reasons, the results of the experiment have been sparkling. Politicians have been encouraged to face issues head on with rational solutions, rather than retreating into "pious pronouncements and national messianism." 25 In addition, religious practice, thought, and debate have flourished in this country with a noteworthy lack of sectarian violence.

THE TWENTY-FIRST CENTURY

The fact that church-state disputes in this country are limited to courtroom disputes such as government financed nativity scenes and the purchase of nonreligious textbooks for private school children is itself evidence that the establishment clause has succeeded in exterminating the flames of religious strife. Issues such as abortion rights, equal access, and government funds for religious day care centers present current jurists and legislators with an opportunity to set the tone for church-state relations in the twenty-first century. Thus, the question is raised: Will Americans maintain their unique secular state birthright? Or will a quasi-theocracy be instituted in which the government, rather than institutions of private choice, is given the duty of promoting religious dogma?

Jefferson's statement regarding the Virginia legislature applies with equal force to the First Continental Congress that enacted the establishment clause two hundred years ago:

In fact it is comfortable to see the standard of reason at length erected, after so many ages during which the human mind has been held in vassalage by kings, priests and nobles: and it is honorable for us to have produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his own opinions.26

Hopefully, the same will be said of the lawmakers of our generation.
