

University of Missouri School of Law Scholarship Repository

Faculty Publications

1990

First Freedom: Religion and the Bill of Rights

Carl H. Esbeck

University of Missouri School of Law, esbeckc@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

 Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Carl H. Esbeck, *First Freedom: Religion and the Bill of Rights*, 8 *J. L. & Religion* 651 (1990)

This Book Review is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS. Edited by James E. Wood, Jr. Waco, TX: J.M. Dawson Institute of Church-State Studies, 1990. Pp. ix, 181. \$19.95. ISBN: 0-929182-13-8. Paper \$8.95. ISBN: 0-929182-14-6.

This volume is a collection of seven papers delivered at a symposium assembled in April 1989 upon the occasion, almost two hundred years hence, of the passage of the Bill of Rights by the First Congress. The unifying theme is stated to be the historical context of both Religion Clauses in the First Amendment, but the authors are driven primarily by Establishment Clause concerns. The thrust of the essays deal harshly with the originalism advanced during the years of the Reagan Administration, and nonpreferentialism comes in for particular criticism, both pejoratively characterized as that "growing clamor" (viii).

The authors generally sympathize with the standing order since *Everson v Board of Education*,¹ albeit the more scholarly among them have the decency to be embarrassed by Justice Black's law-office history in that case. Despite the obligatory statement by the convening editor that the essays "provoked lively discussions," (vii) the gathering overall must have been a congenial affair. Nonetheless, there is more disagreement than apparent on first reading, thus the book wants for a concluding chapter marshalling the points of contention. It is as if each paper is published in isolation of the others. Since the essays manage not to join on the issues, it would be easy to miss the points of contention that remain among these authors who, while separationists, are various hues of that genre. It would seem that there are three areas of inquiry that divide them.

First, was religious liberty primarily the achievement of dissenting Christian sects (Baptists, Quakers and Anabaptists) motivated by their belief that true religion was individualistic and voluntaristic, and by their concern that the church, the very bride of Christ, remain pure and uncorrupted by complicity with government? Or was liberty the practical consequence of a religiously diverse and unchurched America, where the absence of any one religion able to dominate inevitably drove each sect to grudgingly accede to no-establishment as the best way to protect its own turf? Or was religious liberty won by prominent republicans like Madison and Jefferson, principally influenced by the rationalism of the Enlightenment with its vivid memory

1. 330 US 1 (1947).

of European sectarian wars? One's choice among these options makes religious liberty principally an article of faith, an article of political expedience, or an article of peace.

Second, in addressing the intent of the founders concerning the Religion Clauses, should one be examining the work of the First Congress from June 8th to September 24th of 1789 as recorded in *The Annals of Congress*? Or, is the question of original intent to be governed by the evolution of religious liberty in the newly formed states beginning in 1776 as they threw off their colonial charters and drafted new constitutions — an evolution that occurred rapidly and dramatically in Virginia from 1783 to 1786, but ever so slowly in Puritan New England with Massachusetts not disestablishing until 1833? The Supreme Court has given this choice a most peculiar spin. The federal law of no-establishment was of little interest, of course, until the *Everson* decision brought the full force of the Establishment Clause to bear on state and local governments through the Fourteenth Amendment. In so doing, however, the Court read into the Establishment Clause, not a federal rule of decision as inferred from the legislative debates in the First Congress, but broad principles of religious liberty as they evolved in the laws of the several states from 1776 to the 1830s.

Third, while the authors join in the belief that correct Establishment Clause doctrine is not nonpreferentialist, just what is meant by the phrase “respecting an establishment of religion”? Is no-establishment achieved when there is mere absence of government-induced coercion of religiously based conscience, i.e., official tolerance of dissent? Or is no-establishment achieved only after there is entire separation of church and state as to financial support? Or is it also a bar to the endorsement of religion? Or also a bar to religion having a role in shaping government policy?

In the Introduction, James E. Wood, Jr., Professor of Church-State Studies at Baylor University, focuses principally on the Constitutional Convention of 1787 which gave scarce consideration to the matter of religious liberty, indeed a plenary treatment of enumerated rights was briefly considered and rejected. Instead, the drafters relied on the delegation of limited powers to the proposed central government, finding no need to deny powers not expressly granted. Concerning the means whereby religious liberty was ultimately achieved, a “primary reason” (10), says Wood, was religious diversity and that a vast majority of Americans were members of no church. Each sect, argues Wood, wanting to protect its own interests from government

intrusion, was forced to accept a notion of religious freedom for others that they wanted for themselves. No mention is made of the debates in the First Congress over the text of the First Amendment. Rather, like the Court in *Everson*, Wood relies on a selective recitation of evolving concepts of religious liberty in the original states (7-10).

David Little, Professor of Religious Studies at the University of Virginia at Charlottesville, argues that a prime mover in the achievement of religious liberty was religion itself, or, more precisely, "the radical Reformed tradition" (38) (elsewhere termed "left-wing Puritans"). In so doing, Little seeks to rehabilitate the role played in that accomplishment by the seventeenth-century preacher, essayist, and founder of Rhode Island, Roger Williams. Little ties the ideas of Williams to John Locke's letters on toleration and the sanctity of conscience, and from Locke to James Madison and Thomas Jefferson. It is unclear why such a heavy investment is made in drawing this connection spanning one and a half centuries, when eighteenth-century religionists, such as Isaac Backus, are prominent at the first moment of nationhood. What is important, however, is that unlike others who place pragmatic considerations foremost, Little directly links the achievement of church-state separation to the Christian gospel understood in the free church tradition. In opposition to Father John Courtney Murray and historian Quentin Skinner, Little reads the Establishment Clause to indeed reflect principles of Protestant faith (17-18, 20, 37-39).

Edwin S. Gaustad, Professor of History at the University of California at Riverside, addresses the perceived deficiencies in the original Constitution that caused anxieties over religion, especially during the ratification period. His efforts arrive at three conclusions (56), offered as part of the milieu from which the First Amendment was soon to be hammered out in the First Congress. First, that in 1787 freedom for religious dissenters from direct government coercion was no longer an issue. Second, official affirmations of religion in foundational documents, either unabashedly Christian or ceremonial deism, were controversial. The Constitution is noticeably silent on this score, unlike the state constitutions adopted during the period. This issue, while still not laid to rest even a century later, was resolved in favor of continued silence. Gaustad attributes this settlement to a blend of the desire to avoid sectarian divisiveness that might get in the way of forming the union, and, in a few circles, anti-clericalism (43). Third, while direct federal financial aid to religion was defeated (over dis-

sent), even of a nonpreferential sort, government affirmations favoring the Christian faith, of the nonsectarian sort, were considered and (over dissent) deemed necessary for moral training and good government.

Henry J. Abraham, Professor of Government and Foreign Affairs at the University of Virginia at Charlottesville, revisits the site of an old battle-of-historians: Did the Thirty-ninth Congress intend the Fourteenth Amendment to incorporate the Bill of Rights thus making its provisions binding on the states? Abraham does not resist the rubble. Rather, referencing the important scholarship for and against Justice Black's novation, Abraham erects an 'at-a-boy memorial honoring the Supreme Court's case-by-case process know as selective incorporation. However, this process has long since run its course, the last incorporation case being handed down in 1969. And so far as current cases before the Court, the wisdom of the application of the Religion Clauses to the states is a dead issue in any circle that matters.² So it is not apparent how this paper furthers our understanding of the First Amendment. An opportunity is missed when Abraham fails to examine the textual use of the very peculiar word choice of "respecting," in "no law respecting an establishment of religion."

In particular, it would have been highly pertinent to have examined incorporation in light of the view of Mark DeWolf Howe (and others) that the Establishment Clause is not a "liberty" within the meaning of the due process clause properly incorporated as a fundamental right, but a federalism provision meant to bar Congress from disturbing the church establishments of 1787 and other common religious preferences in the states.³ Abraham's overall celebration of selective incorporation impliedly rejects Malbin and Howe, but the essay wants for an explanation from either text or history.

Douglas Laycock, Professor of Law at the University of Texas at Austin, most helpfully distinguishes between two arguments over original intent: What did the framers intend? (an argument about history); and, What is the proper role of the framer's intent in adjudication? (an argument over the Court's theory of constitutional interpretation). As to the former question, Laycock claims that little can be gleaned from the debates in the First Congress, falling back, as he does, on the social, intellectual and political history of the founding

2. See *Jaffree v Bd of School Comm'rs of Mobile County*, 554 F Supp 1104, 1128 (SD Ala 1983), rev'd sub nom *Wallace v Jaffree*, 472 US 38, 48-56 (1985).

3. Mark Howe, *The Garden and the Wilderness: Religion and Government in Constitutional History* (Chicago, 1965).

generation (90). However, he later uses the series of drafts of the First Amendment ultimately rejected (i.e., proposed text as distinct from debate) to repudiate nonpreferentialism (98-103). Concerning the latter question, Laycock usefully spars with Steven D. Smith's recent article.⁴ Their disagreement, says Laycock, is not over history, but over the proper theory of judicial review concerning the text of the Establishment Clause (104). Smith reads the text to allow nonfinancial support of religion because the founders frequently engaged in such endorsements without apparent concern that they might be violating the First Amendment. Laycock reads into the Establishment Clause broader principles drawn from actual controversies in which the founders were engaged, principles that prohibit such official expressions of Christian piety. The one-year hiatus between the conference and the publishing of the papers permits Laycock to tack on a codicil to his essay, otherwise given over to no-establishment, to remonstrate against the Supreme Court's downgrading of the Free Exercise clause in *Employment Division v Smith*.⁵

John F. Wilson, Professor of Religion at Princeton University, laments the confusion of jurists and historians of law, on the one hand, with the discipline of the "critical historian" (119). The latter's task, in which category Wilson places himself, is to construe the evidence in the broadest possible framework, as distinct from the "terminus inquiry" of using the evidence to give meaning to a brief text in a document of juridical import. Wilson justifies this "elaborate argument" (130), not because he has grown weary of abuses of history and the "mythic or veiled form jurists and historians of law pursue" (129). Indeed, Wilson refrains from arguing that this "jurisprudential reasoning should change" (130), or that the Supreme Court has gotten matters either right or wrong. But as a critical historian, he refuses to slide over extrapolations such as the excessive reliance on the Virginia experience as exemplary of "the correct framework in which the text of the First Amendment should be situated" (126). And Wilson implies that scholars such as Howe were closer to the critical historians' "broadest possible framework" in stating that originally the Establishment Clause embodied "principles of federalism" (128) and an anxiousness to "preserve the authority of the states over religion" (129).

Leo Pfeffer, Adjunct Professor of Political Science at Long Island

4. Stephen D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Doctrine*, 67 Texas L Rev 955 (1989).

5. 110 S Ct 1595 (1990).

University, and a well-known advocate in church-state matters, begins his essay by careening through history violating the scholastic principles painstakingly laid down by Wilson and Laycock. Pfeffer picks and chooses events that help his cause and ignores evidence to the contrary (133-136, 161). He then takes up the theme that the Free Exercise and Establishment Clause are "two ways of saying the same thing" (133), and thus are never to be read in tension or opposition to one another. However, Pfeffer strains to find scholar or jurist who seriously disagrees with the unity theses. Indeed, he reviews case after case where the Court has refused to place the clauses in contradiction. Rather, the real debate is over the proper organizing principle underlying the two clauses. It does not advance the argument to say that the unifying principle is "religious liberty," for that phrase is defined in myriad of ways by the many protagonists. Here, as elsewhere, Pfeffer's perspective on no-establishment is governed by his near-religious devotion to strict separationism (161).

As is often true of separationists' publications, the volume's energies are directed entirely towards preventing government aid to religious enterprises. Neglected is the manner in which the First Amendment protects religious organizations from government intrusion into their ministries, or how the Amendment guarantees to religionists equal rights of speech and political activism aimed at influencing government policy. The authors' vigorous repudiation of nonpreferentialism is a timely contribution to the literature. Unfortunately, in my opinion, the Supreme Court may be on the verge of construing the Establishment Clause as embracing nonpreferentialism, for the Chief Justice and Justices White, Scalia and Kennedy have all recently written or joined opinions to that effect. If that should come to pass, the Court would have the dubious distinction of jettisoning strict separationism backed by the one-sided history in *Everson* and replacing it with nonpreferentialism backed by the one-sided history of the political right.

Carl H. Esbeck
Professor of Law
University of Missouri
Columbia, Missouri 65211