

The Benefits of the Establishment Clause

Douglas Laycock

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373 (1992)
Available at: <https://via.library.depaul.edu/law-review/vol42/iss1/29>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

THE BENEFITS OF THE ESTABLISHMENT CLAUSE

*Douglas Laycock**

I must begin by briefly discussing both the Free Exercise Clause and the Establishment Clause and the relationship between them. In my view, they are both clauses to protect religious liberty. Together, they protect both believers and nonbelievers. Indeed, each clause considered separately protects both believers and nonbelievers, or each would if it were properly interpreted. The shortest summary I can offer is that the clauses together are designed to minimize government influence on religious belief and practice. By minimizing government influence, they maximize religious liberty. Much more than with respect to any of our other liberties, the religion clauses are designed to make religious practice and nonpractice, belief and nonbelief, wholly matters of private choice insulated from government influence or control.

Much of the contribution of the Establishment Clause is that religious belief and practice are insulated even from government persuasion. There is no other area of our life where we say that government cannot even try to persuade you. On political issues, persuasion is a large part of what government does. Government leads; government tries to mold opinion. But with respect to religious opinion, we believe that molding opinion is precisely what government should not do.

In too many discussions of the religion clauses, including at least occasionally at this conference, you get a sense that each religion clause is one side's club to beat the other side with. Among some aggressively proselytizing religious groups you occasionally hear the Free Exercise Clause explained as their means of maximizing their religious influence, and the Establishment Clause as an unfortunate inconvenience. On the other side, and far more often in academic life, you hear the Establishment Clause referred to as the clause by

* Alice McKean Young Regents Chair and Associate Dean for Research, The University of Texas School of Law. This paper is based on oral remarks delivered at a conference sponsored by the Center for Church/State Studies, DePaul University College of Law, held on December 6 and 7, 1991.

which we keep these troublesome religious folks under control and out of the public sphere. Each of these views is nonsense. These two clauses, which are found in the same sentence, are not in opposition to one another. At the big picture level, they are not even in tension with one another, although I concede that in applying the clauses in close cases, the hard cases, there is sometimes tension.

It is important to remember that the votes for disestablishment came from evangelicals.¹ The votes came from Baptists, Presbyterians, Methodists, and Quakers. I do not mean to underestimate the contribution of James Madison, but he alone did not have the votes. The necessary political pressure, the demand for disestablishment, the threat not to ratify the Constitution unless something were done about religious liberty, came from the evangelical dissenting churches.

I am sure about where the votes came from. I am less sure about my next point, but I think it is more probable than not: but for the evangelicals, Madison would not have had the motivation to pursue religious liberty. He was influenced by the specter and the occasional reality of persecution of Baptist preachers in Virginia. Without that experience, I am not at all sure there would be the *Memorial and Remonstrance*² or any of the rest that we credit to Madison. In fact, Madison was nearly defeated for election to the First Congress, partly because of an anti-Federalist gerrymander, but also because he was dragging his feet on a federal bill of rights, and religious dissenters in his district were demanding an explicit guarantee of religious liberty.³

Under the religion clauses, as I understand them and as the Supreme Court has understood them, all religions are protected. But that commitment itself entails one choice about types of religion. There is one type of religion that cannot be fully protected. That is the religion of those people who believe that their religious exercise requires use of the instruments of government, either to directly im-

1. See, e.g., THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 134-37, 141, 143-46, 148-51, 156-57, 163-77, 179-83, 185-89, 195, 198-99, 216-17 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436-43 (1990).

2. Madison's *Memorial and Remonstrance Against Religious Assessments* was circulated in 1785 in response to the general assessment bill then pending in the Virginia legislature. The bill and *Memorial and Remonstrance* are reprinted as an appendix to *Everson v. Board of Education*, 330 U.S. 1, 63-74 (1947).

3. ROBERT A. RUTLAND, *JAMES MADISON: THE FOUNDING FATHER* 44-49 (1987); CURRY, *supra* note 1, at 198-99.

pose their belief on others or to use government in their own worship services. This choice among types of religion is also a choice among types of liberty. I believe that it is not simply a raw choice. It is a principled choice, based on the view that the best you can do to maximize religious liberty for all citizens is to prevent anyone from using the government for religious purposes.

What then is the role of the Establishment Clause as one of this pair of clauses to protect religious liberty? One way to view this question is in practical lawyer terms. What does the Establishment Clause add to the Free Exercise Clause? What abuses are forbidden by the Establishment Clause that would not be forbidden if the Free Exercise Clause stood alone?

Susan Gilles⁴ and Richard Kay⁵ have outlined what an established church can look like in a tolerant society under the most favorable conditions for liberty. One can decide for oneself whether the results are satisfactory. I tend to approach the question from the opposite perspective. Constitutional rights do not exist to protect us against the times when things are going well. Rather, we have constitutional rights to ameliorate the times when things are going very badly. Constitutional rights are aimed at abuses. The question then becomes: What abuses are forbidden by the Establishment Clause that are not forbidden by the Free Exercise Clause?

It is certainly true that constitutional clauses and judicial review are very thin reeds to rely on. When a society is bent on abuse or persecution, there is a great danger that judges will go along. A sufficiently determined political majority can appoint judges who promise not to enforce much of the Bill of Rights. Our mechanisms for preserving minority rights and majority rule are ingenious but fragile.

The claim that constitutional clauses do some good is not a claim that judges are inherently better than legislators at protecting liberty. Sometimes they are better; sometimes they are worse. Usually they are about the same. The claim that the Constitution does some good is simply the claim that two chances are better than one. Unlike legislators, judges have to at least go through the motions of listening to every complaint that is presented to them and of giving

4. Susan M. Gilles, "Worldly Corruptions" and "Ecclesiastical Depredations": How Bad Is An Established Church?, 42 DEPAUL L. REV. 349 (1992).

5. Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361 (1992).

principled reasons for each decision. They have some incentives to do so, incentives in judicial tradition and in insulation from political pressure. Some of the time, judicial review will do some good. Judges did nothing for the Mormons,⁶ but they may have saved the Jehovah's Witnesses⁷ and the Amish.⁸ If judges save one religious minority a century, I consider that ample justification for judicial review in religious liberty cases.

I come at last to the question of what abuses might be forbidden by the Establishment Clause that may not be forbidden by the Free Exercise Clause. The first, and most obvious, is taxation to support religion as religion. In Virginia by 1776, there were still some licensing provisions, and Baptist ministers were occasionally hassled, but Virginians were very close to general free exercise.⁹ The dissenting churches were already allowed to function. It would have been very easy to enact a Free Exercise Clause with no Establishment Clause.

In fact, that is what they did. The Virginia Free Exercise Clause was enacted in 1776, and disestablishment came some time later.¹⁰ The general assessment proposal that Madison resisted would have continued free exercise for all but required each citizen to pay taxes to support the religion of his choice.¹¹ The historian Thomas Curry thinks that many at the time believed that taxation to support the church violated free exercise.¹² He may be right, although there is no support in the case law for that claim today.¹³ Certainly it is easier to explain to a judge why taxation to support the church vio-

6. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

7. The Jehovah's Witness cases are collected in Douglas Laycock, *A Survey of Religious Liberty in the United States*, 42 OHIO ST. L. REV. 409, 419-20 (1986).

8. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

9. THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787*, at 36 (1977).

10. CURRY, *supra* note 1, at 135-36.

11. *Id.* at 136.

12. *Id.* at 147, 217.

13. See *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (rejecting a free exercise challenge to tax support for religious schools, on the ground that paying taxes to support another religion did not violate any practice or exercise of plaintiff's religion); cf. *United States v. Lee*, 455 U.S. 252 (1982) (rejecting a free exercise challenge to the use of tax money to support the Social Security system, which *did* violate the Amish plaintiff's religious tenets against participation in public insurance programs, on the ground that the government's interest in collecting taxes was compelling); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) (holding that the Establishment Clause is an exception to the general rule of no standing for taxpayers to challenge government expenditures, and that this clause operates as a specific constitutional limitation upon Congressional taxing and spending powers; there is no similar holding under the Free Exercise Clause).

lates the Establishment Clause than to explain why it would violate the Free Exercise Clause.

Taxation to support education and social services delivered by churches may or may not be distinguishable from taxation to support religion as religion.¹⁴ If church-sponsored education and social services are distinguishable from the church itself, then tax-support violates neither religion clause. If the church-sponsored education and social services are indistinguishable from the church itself, then the tax support violates the Establishment Clause. A free exercise claim is much harder to make. The analysis of whether the Establishment Clause adds anything to the Free Exercise Clause with respect to education and social services is analogous to the analysis of which clause forbids taxation to support religion as religion.

A second abuse forbidden by the Establishment Clause is coerced worship. Just as the general assessment proposal would have required everybody to pay a tax to some church, it is easy to imagine a law that required everybody to attend some church. Such a law might let the individual choose the church, but would require attendance somewhere. In fact, that is a rule at military academies today. Coerced worship is one way to understand school prayer; all the students are required to participate in this little worship service. I am assuming that in our pluralistic society, such a requirement would at least have some elements of nonpreferentialism. But one can even imagine a rule that says every church can continue to function, and you can go to your own church, as long as you also show up at the established or preferred church once a week.

A requirement that everyone worship would violate the Free Exercise Clause, if properly interpreted. Just as the Speech Clause protects one's right not to speak, the Free Exercise Clause protects one's right not to worship. I am not at all convinced, however, that the current Supreme Court would have agreed with this, even before *Employment Division v. Smith*.¹⁵ The Court says there is no free exercise claim unless a person is required to violate a specific and obligatory tenet of her religious belief.¹⁶

14. For an analysis of this possible distinction, see Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989 (1991).

15. *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that there is no constitutional right to exemption from facially neutral and generally applicable laws that prohibit religious practices).

16. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391-92 (1990). See also Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 23-28 (analyzing

Consider what the Court's rule implies for coerced worship. Suppose I say: "I am a traditional Roman Catholic and I have a specific tenet against worshiping with anyone else. And I still believe that, even though the rest of the Catholic Church has become considerably more liberal as to this tenet." If I sincerely believe this, then I may have a free exercise claim of coerced worship at another faith's service. But suppose I say: "I am just a nonbeliever. I do not care about any of this stuff." Or suppose I say: "I am a post-Vatican II Catholic. I have no objection in principle to worshiping with other faiths. But except on special occasions, I do not get much out of it. I am certainly not going to give up Mass, and it is a burden to also attend someone else's worship service every week."

In either of the latter scenarios, the current judicial response is likely to be: "You have no specific religious tenet that says you cannot show up and worship in someone else's church once a week as the law requires. You have no free exercise claim. The burden of attending two worship services every week is irrelevant, or in any event is much less onerous than the burden of closing a store two days a week as in *Braunfeld v. Brown*."¹⁷ This may be the wrong interpretation of the Free Exercise Clause but, again, as with taxation, protection against coerced worship is more easily explained in terms of the Establishment Clause.

Neither coerced worship, nor coerced tax support for religion as religion, seems very likely in the current political environment. A third and more real concern, as raised here by Daniel Conkle, is noncoercive religious observances by government.¹⁸ What about government-sponsored worship that no one has to attend but anyone may attend? What about government crosses, crèches, menorahs, Christmas pageants and the like? This is where much of the real issue exists today. If the Establishment Clause were cut back to only a rule against coercive impositions of religion by government, and if coercion were interpreted to mean only physical force or formal sanctions,¹⁹ then there would be much less political controversy.

this part of the *Swaggart* opinion).

17. 366 U.S. 599 (1961) (holding that a Sunday closing law did not violate the free exercise rights of an Orthodox Jewish merchant where religion required him to close on Saturday and law required him to close on Sunday).

18. Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 346 (1992).

19. *Compare* Lee v. Weisman, 112 S. Ct. 2649, 2658-60 (1992) (recognizing coercive pressure to participate in prayer at graduation ceremony), *with id.* at 2683 (Scalia, J., dissenting) (recognizing coercion only if imposed "by force of law and threat of penalty"). For an analysis of why

So, what are the benefits of a rule against all government-sponsored religious observances? What are the reasons for a rule that government cannot even persuade about religion, cannot engage in religious observances, and cannot display religious symbols, even if it's not coercing anybody?

I will begin my response by saying that if I had to give up one of the rights in the First Amendment, this is the one I would give up. A rule against government persuasion or influence is less critical than a rule against government coercion. In terms of history, in terms of comparative law, and in terms of what the rest of the world does, the Establishment Clause is an extraordinary protection. We would probably still be a free society without it. But I at least would mourn the loss. Repeal of our protection against religious persuasion by government would be a serious loss for reasons that have already been mentioned by other speakers at this conference. I review those reasons briefly.

First is the harm it would bring to religious minorities, whose faith will not be the one that the government observes and whose symbols will not be displayed. These minorities include nonbelievers — atheists, agnostics, and the wholly indifferent — but also believers in the extraordinary array of minority faiths in this country. Justice O'Connor described this harm in principle, although she can never recognize it when she sees it.²⁰ Government observance of the majority religion does indeed tell religious minorities that they are outsiders and not fully accepted members of the community:

Those who think government ought to be able to engage in religious rituals and display religious symbols might ask: "What is the problem? We see ideas that offend us all the time. Political dissenters who are seriously alienated from the policies of the Bush Administration are told that they are second class citizens in the same sense as offended religious minorities. If no one thinks it unconstitutional that the government lets political dissenters know it does not care about their views, what is so different about religion?" What is different is that on matters of governmental policy, somebody has to rule. This polity has decided that it should be the majority, but it

the majority has the more realistic understanding of coercion, see Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U.L. REV. 37, 67-68 (1991).

20. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (concluding that a government endorsement of one religion sends a message of exclusion to others, but that a government display of a crèche does not endorse Christianity).

must inevitably be someone. The government *must* make decisions about political matters.

In the case of religion, no one has to rule. There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are. By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.

It is also relevant here that people suffer more when you take away something they have come to think of as their own than if you never give it to them in the first place. After forty years of telling religious minorities in this country that it is part of their rights that the government will not engage in school prayer and in public religious observance, the harm of overruling all those cases at this point would be more severe than if the issue had been decided the other way from the beginning.

The other set of harms from noncoercive establishments is to the religious majority. It is not good for religion to have government engaged in religious rituals. Government by its sheer size and prominence will have a disproportionate influence on the kinds of rituals that are exercised and on public perception of what are appropriate rituals. The result will not be pretty. Government-sponsored religion is theologically and liturgically thin. It is politically compliant. It is supportive of incumbent administrations. In intolerant communities, it inevitably tends to impose the majority's forms, rituals, and terminology on everybody. In tolerant communities, efforts to be all-inclusive inevitably lead to desecralization, to the least common denominator, to a secular incarnation with plastic reindeer, to Christmas and Chanukah mushed together as the Winter Holidays.²¹ By stripping all the specific elements of different faiths and denominations and attempting to keep only the common elements that all faiths share, tolerant governments produce a mishmash that no faith can accept or believe in. It has always been a great puzzle to me why certain elements of the religious community invest so much effort in demanding that government model bad religion in this way. There

21. See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 616 (1990) ("[B]oth Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."). For further analysis of the harm to religion, see Laycock, *supra* note 19, at 61-65.

are serious costs to these government religious observances.

Finally, it is occasionally suggested that the Establishment Clause helps keep religion out of politics. Simply put, that is nonsense. As history clearly demonstrates, religion is always a part of politics. I think Daniel Conkle offered more or less the right distinction.²² What the Establishment Clause separates from government is theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both. In a democratic society, the state will ultimately decide these questions at least to the extent of deciding what conduct will be subject to legal sanctions. But these are also questions on which churches are absolutely entitled to speak.

For better or worse, churches have always spoken on these issues. Those who think that religion and religious believers should be kept out of politics should reflect on abolition. Those who think that there are no risks of religion intruding into politics should meditate on Prohibition. There are good stories and bad stories about religious participation in politics. The bad stories are about intolerance and failure to accommodate differing views in a pluralistic society; but there are equally bad stories about secular movements of all sorts. In a society where a David Duke can be taken seriously as a candidate for president, I am not uniquely or especially worried about religious participation in politics.

22. Conkle, *supra* note 18, at 345-46.

