

# William & Mary Law Review

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Volume 27 (1985-1986)  
Issue 5 *Religion and the State*

Article 7

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June 1986

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## COERCION: THE LOST ELEMENT OF ESTABLISHMENT

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Professor Kurland has warned against “law office” history—the history that “brief writers write,” “picking and choosing statements and events favorable to the client’s cause”.<sup>1</sup> His warning is well-taken. Few areas of the law have suffered so much from law office history as have the religion clauses of the first amendment. Perhaps I betray my recent past as a brief writer in this field, however, if I suggest that the damage wrought by the brief writers’ law office histories pales into insignificance when compared to the law office history of the United States Supreme Court.

In these days of the Meese-Brennan debate about the significance of the original intention of the framers of the Constitution, it is like stepping into a time warp to read the establishment clause opinions of the 1940’s, 1950’s, and 1960’s. Was it really Justice Brennan in *Abington School District v. Schempp*<sup>2</sup> who told us that, in deciphering the first amendment, “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?”<sup>3</sup> Mr. Meese, I have a promising candidate for you for a judicial appointment.

Of course, a few changes have occurred since 1963. Not least among them has been the Court’s realization—painful, as in cases like *Marsh v. Chambers*<sup>4</sup>—that its rigorously separationist picture of the intentions and actions of the Founding Fathers was seriously misleading as a matter of history. One no longer can maintain, as Justice Rutledge did, that the Framers originally intended the religion clauses “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively

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1. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841-42 (1986).

2. 374 U.S. 203 (1963).

3. *Id.* at 294 (Brennan, J., concurring).

4. 463 U.S. 783 (1983).

forbidding every form of public aid or support for religion."<sup>5</sup> Whatever directions our historical research ultimately may lead, it now seems beyond doubt that, as Justice Harlan observed, "the historical purposes of . . . the First Amendment are significantly more obscure and complex than [the Supreme] Court has heretofore acknowledged."<sup>6</sup>

The Supreme Court's response to these developments has not been encouraging. Essentially, what once was declared necessary because of history now is declared necessary because of precedent.<sup>7</sup> In his Article, Professor Kurland has refused "to dwell on whether the true meaning of the Constitution can be determined by seeking the intention of the Framers."<sup>8</sup> For present purposes, I intend to follow his lead. In the jurisprudential shift from original intention to general principles, however, it seems only right to call time out to reexamine those holdings of the Court that were products of faulty history and that have yet to be justified on any other theoretical basis.

One such holding is the Court's statement in *Engel v. Vitale*<sup>9</sup> that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."<sup>10</sup> Before looking to the historical support, or lack of it, for this proposition, three brief observations about how this proposition came to enter the law are appropriate.

First, the Court's statement was without the support of precedent. In *Cantwell v. Connecticut*,<sup>11</sup> the Court had paraphrased the establishment clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship,"<sup>12</sup> and the presence or lack of compulsion, respectively, had been

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5. *Everson v. Board of Educ.*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

6. *Flast v. Cohen*, 392 U.S. 83, 125 (1968) (Harlan, J., dissenting).

7. At least, that is how I read the majority opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

8. Kurland, *supra* note 1, at 841.

9. 370 U.S. 421 (1962).

10. *Id.* at 430.

11. 310 U.S. 296 (1940).

12. *Id.* at 303.

central to the Court's decisions in *McCollum v. Board of Education*<sup>13</sup> and *Zorach v. Clauson*,<sup>14</sup> which concerned release time programs in the public schools. And just one year before *Engel*, Chief Justice Warren had explained the distinction between Sunday closing laws and the release time program in *McCollum* on the basis that Sunday closing laws did not compel religious participation.<sup>15</sup> Finally, *Engel* itself conspicuously fails to supply supporting authority for the Court's position.

Second, the Court's statement was unnecessary to its decision. After informing us that compulsion—or at least “direct” compulsion—is not an element of an establishment clause claim, the Court pointed out, in its next breath: “This is not to say, of course, that [school prayers] do not involve coercion. . . . When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>16</sup> I agree. If I did not agree, I would find it difficult to identify any substantial constitutional right violated by public school prayers.

My third observation is that the Court's decision to abjure coercion as an element of an establishment clause claim essentially was without explanation. In *Engel*, the Court stated that the purposes of the establishment clause “go much further” than preventing even indirect religious compulsion.<sup>17</sup> The Court's reasons, however, were that a fully compulsory established church in the United States and in England historically had “incurred the hatred, disrespect and even contempt of those who held contrary beliefs,”<sup>18</sup> and that established churches “go hand in hand” with religious persecution.<sup>19</sup> These facts seem merely to reinforce that compulsion—yes, even persecution—had been an element of the established church as our forefathers knew it.

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13. 333 U.S. 203 (1948).

14. 343 U.S. 306 (1952).

15. *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961).

16. *Engel*, 370 U.S. at 430-31.

17. *Id.* at 431.

18. *Id.*

19. *Id.* at 432.

The Court's statement in *Engel*, therefore, is mysterious in many ways. Nonetheless, without precedent, without explanation, and, as the Court admitted, without relevance to the case in which it was announced, the notion has been introduced into the law that the establishment clause does not involve an element of coercion. The proposition has been passed down, with an ever-lengthening string of citations, to be applied in cases in which so-called establishments can be found by courts even though nobody's religious liberty has been infringed in any way.

Lest it be thought that only the separationists have disregarded the coercion element of an establishment, then-Associate Justice Rehnquist seems to have done likewise in his dissenting opinion in *Wallace v. Jaffree*.<sup>20</sup> According to Justice Rehnquist, the establishment clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations"<sup>21</sup>—nothing more. Despite having quoted Madison's words, Justice Rehnquist failed to mention that under the first amendment Congress cannot "compel men to worship God in any manner contrary to their conscience"<sup>22</sup> or compel them to "conform"<sup>23</sup> to any religion not of their own choosing. It is easy to imagine forms of nonpreferential aid, short of establishing a national church, that nonetheless would have the effect of coercing a religious observance. While the majority of the justices concern themselves with whether measures favor religion over nonreligion, and their opponents focus instead on whether measures favor one religion over another, the central issue of religious choice is disregarded by both sides.

Let us turn then to the historical record. In the debates in the First Congress concerning the wording of the first amendment, James Madison, the principal draftsman and proponent, said of the committee draft that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship

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20. 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

21. *Id.* at 106.

22. 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (Aug. 15, 1789). Different editions of the *Annals of Congress* have different pagination; the date is the surest way to find particular passages.

23. *Id.* at 731.

God in any manner contrary to their conscience."<sup>24</sup> Upon further questioning by those who feared that the proposed amendment "might be taken in such latitude as to be extremely hurtful to the cause of religion,"<sup>25</sup> Madison clarified the point. He stated that he "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."<sup>26</sup> Is compulsion an element of an establishment clause violation? If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment.

Curiously, in all the pages of the United States Reports canvassing the history of the period for clues as to the meaning of the religion clauses, no majority or concurring opinion ever has relied on these words by Madison. Indeed, until Justice Rehnquist dissented in *Wallace v. Jaffree*,<sup>27</sup> no justice ever had seriously analyzed the debates on the framing of the first amendment in any opinion on any side of any religion clause question. This is not because history was deemed irrelevant, because during much of that time the Court had purported to be judging in accordance with original intent. Nor is it because Madison's views were deemed unimportant. Madison's opinions concerning church-state questions propounded before the amendment, after the amendment, at every time except when he was explaining the meaning of the amendment to the First Congress, have been treated as key to an understanding of the amendment. Under ordinary principles of legislative history, Madison's statements on the floor of Congress are of the greatest weight.

But let us look as well at Madison's famous *Memorial and Remonstrance Against Religious Assessments*,<sup>28</sup> what Justice Rutledge called Madison's "complete, though not his only, interpreta-

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24. *Id.* at 730.

25. *Id.* (Rep. Huntington).

26. *Id.* at 731.

27. 472 U.S. 38, 91-114 (Rehnquist, J., dissenting).

28. Madison, *A Memorial and Remonstrance* (circa June 20, 1785) [hereinafter cited as *Memorial and Remonstrance*]. The *Memorial and Remonstrance* has been reprinted widely. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (1947) (appendix to opinion of Rutledge, J., dissenting).

tion of religious liberty."<sup>29</sup> The Court has relied on the *Memorial and Remonstrance* many times in its search for the original intent of the framers of the religion clauses. What does the *Memorial and Remonstrance* have to say about compulsion and establishment? It states: (1) that the proposed bill for the support of teachers of the Christian religion would be a "dangerous abuse"<sup>30</sup> if "armed with the sanctions of a law";<sup>31</sup> (2) that religion "can be directed only by reason and conviction, not by force or violence";<sup>32</sup> (3) that government should not be able to "force a citizen to contribute"<sup>33</sup> even so much as three pence to the support of a church; (4) that such a government would be able to "force him to conform to any other establishment in all cases whatsoever";<sup>34</sup> (5) that "compulsive support" of religion is "unnecessary and unwarrantable";<sup>35</sup> and (6) that "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general."<sup>36</sup> Again, legal compulsion to support or participate in religious activities would seem to be the essence of an establishment.

The result of Madison's *Memorial and Remonstrance*, as Professor Kurland has recounted, was passage of Virginia's Act for Establishing Religious Freedom.<sup>37</sup> Professor Kurland already has directed our attention to the key words: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."<sup>38</sup> It is difficult to see, on this evidence, how an establishment could exist in the absence of some form of coercion.

Professor Kurland also has noted that the religion clauses can be best understood "not merely by examining what its authors and

29. *Everson*, 330 U.S. at 37.

30. *Memorial and Remonstrance*, *supra* note 27, preamble.

31. *Id.*

32. *Id.* ¶ 1.

33. *Id.* ¶ 3.

34. *Id.*

35. *Id.*

36. *Id.* ¶ 13.

37. Ch. 34 (1786), 12 HENING'S STATUTES AT LARGE 84 (1823).

38. *Id.* § II, 12 HENING'S STATUTES AT LARGE at 86, *quoted in* Kurland, *supra* note 1, at 852.

contemporaries said about them, but also by examining the problems that the Founding Fathers encountered, remembered, and sought to solve."<sup>39</sup> Here again, the problems that the Founders had encountered were that the government had sought to compel adherence to one religion or, in some colonies, one of several religions, and that the government had sought to restrain adherence to the others. The establishment and free exercise clauses arose out of these very problems.

Subsequent history confirms this thesis. Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on. These actions, so difficult to reconcile with modern theories of the establishment clause, are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed. Even if one would take a different view on the specific issues today, perhaps because of a broader sense of coercions stemming from the pervasive influence of the modern welfare-regulatory state, these examples demonstrate that noncoercive supports for religion were not within the contemporary understanding of an establishment of religion. Strong evidence suggests that discrimination among religious sects also was proscribed by the establishment clause, but I have run across no persuasive evidence that the Framers of the first amendment considered evenhanded support for all religions or religion in general, in the absence of a coercive impact an establishment of religion.

Why does this matter? At the most obvious level, it suggests that the courts are wasting their time when they draw nice distinctions about various manifestations of religion in public life that entail no use of the taxing power and have no coercive effect.<sup>40</sup> The simple answer to most such lawsuits is that the plaintiff has no standing to sue. More importantly, the analysis suggests that the

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39. Kurland, *supra* note 1, at 845.

40. *E.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984).



courts should be more hospitable to liberty-enhancing accommodations of religion, like the Connecticut law struck down last year that prevented workers from being fired for refusing to work on their chosen Sabbath.<sup>41</sup>

On the other hand, my analysis suggests that aid to religion must not be structured to influence or distort religious choice. Merely because aid may be neutral among religions does not mean that it is consistent with the noncoercion standard. For example, a program of tuition grants to attend private schools, limited to religious private schools, would be neutral among religions but obviously would interfere with religious choice. A noncoercion standard protects nonbelievers and those indifferent to religion no less than it protects believers.

Doctrinally, renewed attention to coercion suggests that the Court's three-part test for an establishment of religion<sup>42</sup> should be modified. A rule that forbids government actions with the purpose or effect of advancing religion fails to distinguish between efforts to coerce and influence religious belief and action, on the one hand, and efforts to facilitate the exercise of one's chosen faith, on the other. It is meaningless to speak of "advancing" religion without specifying the reference point. To protect religious freedom against persecution "advances" religion, as does treating religion neutrally if the prior practice had been to discriminate against it.

Recognition of the centrality of coercion—or, more precisely, its opposite, religious choice—to establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action. Under this standard, the Court would sustain many worthwhile, progressive social programs that it has struck down in the past—programs such as remedial education for economically and educationally deprived children on the premises of their own schools.<sup>43</sup> The point here is not that the government may undertake to aid religion, but that it can pursue its legitimate purposes even if to do so incidentally assists the various religions.

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41. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

42. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

43. *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

A noncoercion standard, of course, would not answer all questions. For example, it obviously would not answer the question, "What is coercion?" Enormous variance exists between the persecutions of old and the many subtle ways in which government action can distort religious choice today. This is no less true under the establishment clause than it is under the free exercise clause, where the Court has recognized the problem.<sup>44</sup> But while there will be room for continuing debate and disagreement concerning the definition of coercion, at least attention again would be directed to the right question. Not what flunks the three-part test, but what interferes with religious liberty, is an establishment of religion.

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44. *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).