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HISTORY MUST BE AIDED BY COMMON SENSE

Reading the Establishment Clause

NEAL DEVINS & BENJAMIN FEDER

WHAT WOULD the Founding Fathers think of Education Secretary William Bennett’s recent remark that “the fate of our democracy is intimately intertwined — ‘entangled,’ if you will — with the vitality of the Judeo-Christian tradition?” Would they claim that such views improperly ignore the “wall of separation” that divides church and state in our constitutional government? Or would they applaud Mr. Bennett’s statement as an appropriate recognition of the role that religious values should play in our social policy?

The answer to this question is of great significance; for the Supreme Court places great weight on the Founders’ intent in determining the manner in which church and state may interact in our society. In fact, Mr. Bennett’s comments were inspired by a series of Court rulings interpreting the constitutional prohibition against government establishment of religion. These rulings, to Mr. Bennett’s chagrin, found unconstitutional Alabama’s effort to encourage prayer in the public schools and a federally funded program that provided church schools serving low-income children with remedial instruction and secular subjects. In so ruling, the Court concluded that the Founders envisioned a “high and impregnable wall” separating church and state.

Whether the Founding Fathers would consider these Court decisions “somewhat bizarre” — as Attorney General Edwin Meese bluntly put it — is difficult to ascertain. Two sharply contrasting viewpoints, both adamantly purporting to rely on the history surrounding the framing and adoption of the Bill of Rights, have emerged concerning the proper meaning, scope, and application of the First Amendment’s Establishment Clause. One view (the “separationist”) considers most church-state interaction impermissible. The other view (the “revisionist”) conceives a wide range of church-state relations to be tolerated under the Constitution.

The separationist view was characterized with Victorian certainty by the constitutional lawyer David Dudley Field in 1893: “The greatest achievement ever made in the cause of human progress is the total separation of church and state.” In more practical terms, the separationist view, as summarized by constitutional lawyer Leo Pfeffer, is that “government may seek to achieve only secular ends, and in doing so may employ only secular means.”

Primary support for this view comes from the writings of Thomas Jefferson and James Madison. In fact, it was Jefferson who provided this view with its governing metaphor in his Danbury Baptist Letter of 1802: “I contemplate with sovereign reverence that Act of the whole American People which declared that their legislature should make no law respecting an establishment of religion or prohibiting the free exercise thereof, thus building a wall of separation between church and state.” (Italics added.) James Madison similarly observed in his Memorial and Remonstrance Against Religious Assessments that “We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”

The separationist view is attractive since it is an easily understood and easily applied principle. Additionally, Madison and Jefferson were very much responsible for shaping the intellectual content and structure of the early republic. Yet the separationists ignore the Constitutional Congress’s debates leading to the drafting of the First Amendment. These debates represent the prime source of the revisionists’ theory.

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According to the revisionists, these congressional debates indicate that the Framers sought to accomplish two things through the Establishment Clause: first, to prevent the establishment of a national church or religion and, second, to allow the states, unimpeded by the federal government, to deal with religious institutions according to their own preferences. In criticizing the separationists’ reading, the historian Robert L. Cord notes:

There appears to be no historical evidence that the First Amendment was intended to preclude federal government aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an absolute separation or independence of religion and the national state. The actions of the early Congress and presidents, in fact, suggest quite the opposite.

To support this claim, revisionists point to the religion clause which the prototypical separationist, James Madison, had originally proposed: “The Civil Rights of none shall be abridged [by the federal government] on account of religion, nor shall any national religion be established.” (Italics added.)

The Supreme Court, for the most part, has abided by the separationist reading of the First Amendment. In the 1947 Evers v. Board of Education decision, the Court set forth a reading of the Framers’ purpose that has been followed in the vast majority of Establishment Clause cases. Although the Evers Court upheld a New Jersey statute providing free bus transportation to parochial school students, all nine Justices agreed that the First Amendment’s purpose was not to strike merely the official establishment of a single sect, creed, or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Other Establishment Clause decisions, however, evidence a revisionist reading of the clause. For example, in its approval of Pawtucket, Rhode Island’s publicly funded display of the nativity scene, the Court placed great emphasis on the contention of Joseph Story (a nineteenth-century Supreme Court justice and early constitutional scholar) that the “real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should be given to an hierarchy the exclusive patronage of the national government.” The Court further noted that “an absolutist approach in applying the Establishment Clause is simplistic” in “our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas.”

Strict adherence to either separationist or revisionist history leads to unacceptable results. Separationist theory, if carried to its logical extreme, would require the removal of “In God We Trust” from our currency, the words “under God” from our Pledge of Allegiance; the purchase or display of some of the great works of art at our publicly funded museums; an end to tax exemption for religiously affiliated institutions as well as churches; the elimination of chaplains from the armed services and religion from the curriculum of our state universities. Strict compliance with separationist thinking would place religion at a positive disadvantage compared to secular world views or cultural expressions, which would be eligible for government exemptions and assistance. These consequences evidence the separationists’ insensitivity to the vital role that religion does and should play in our lives.

Revisionists, by ignoring the dangers inherent in close church-state entanglement, commit similar error. Application of their theory would allow the states to limit public funds, public employment opportunities, etc. to the sect of its choosing without violating the Establishment Clause. In fact, only federal efforts to establish a national religion would be prohibited by the revisionists.

The Supreme Court has done a poor job of reconciling separationist and revisionist history, apparently picking whichever interpretation best supports the desired outcome. In fact, in its 1982-83 term, the Court proffered three varying views of history. The Court adhered to the separationist view...
in striking down a Massachusetts statute which delegated certain zoning powers to schools and churches, claiming that "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice. . . . The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." In another case, the Court took a revisionist tack in validating Nebraska's practice of beginning each session of its state legislature with a prayer by a chaplain who was paid and approved by the state legislature. The Court, noting that the Framers provided for a legislative chaplain, viewed the Nebraska scheme as a "tolerable acknowledgement of belief widely held among the people of this country." Finally, the Court adhered to neither view of history when it upheld a Minnesota tax deduction scheme that permitted parents of public and private schoolchildren to deduct tuition and other educational expenses. Instead, the Court concluded that "at this point in the twentieth century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights."

THAT THE Court is unable to conform to a single view of history highlights the unworkable consequences of strict adherence to either separationist or revisionist theory. The simple solution to this problem is that more attention should be focused on the contemporary setting of whatever government program is at issue.

In other words, "what the Founding Fathers meant," while helpful, is an inadequate basis for keeping the Constitution alive and relevant to circumstances that arise two hundred years after its language was written; the Constitution is an ever-changing document, necessarily applied to evolving circumstances in a flexible — but not quixotic — way.

This perception — that the Constitution is a living document — is hardly a new idea. In 1819, Chief Justice John Marshall contended that the Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." In 1820, Marshall similarly characterized the Constitution as "designed to approach immortality as nearly as human institutions can approach it." Today, the Constitution has been interpreted as providing for a right of privacy guaranteeing, in turn, the right to choose an abortion; a right to equal protection under the laws which ensures a free education to illegal aliens; and a right to due process of law which prohibits a public school from suspending a student without a hearing. Although there are good reasons why one might disagree with any or several of those decisions, the Court was correct in placing the Framers' intent in a contemporary setting.

Constitutional interpretation must respond to contemporary needs. In a complex society, governmental and religious organizations inevitably impinge upon one another in a myriad of ways. Many of these interactions arise from the reality that, as organizations, churches and their affiliates own property, retain paid employees, receive and disburse funds, and avail themselves of various municipal services. Hence, religious institutions are inevitably engaged in activities administered, paid for, or regulated by governmental agencies at various levels. Even exempting them from governmental involvements that other organizations have, brings involvements of its own, if only in the form of establishing definitions, criteria, and procedures whereby government can be satisfied that they are bona fide religious organizations and thus are entitled to such exemptions. Put simply: the systematic exclusion of any official reference to, or entanglement with, religion assumes nothing less than the thorough-going secularization of society.

These unavoidable entanglements also suggest that the Supreme Court was in grave error in prohibiting the states from: providing remedial instruction to disadvantaged private school students, providing nonideological materials (maps, globes, charts) to private schools, permitting parents of low-income private schoolchildren to deduct from their taxable income a percentage of school tuition costs, or providing bus transportation for field trips of private schoolchildren. These (and several other) decisions ignored the valuable secular educational function provided by private schools, even — heaven forbid — church-affiliated ones.

Recognition of the vital role played by church-affiliated organizations should not result in judicial approval of all government programs which benefit religion. For example, government support of one particular kind of religious belief was the principal evil which the Establishment Clause sought to forestall. It follows that publicly funded displays of the cross or the nativity scene are examples of non-permissible government support of such religious belief. Just as governmental recognition of either our religious heritage or the valuable secular functions performed by church-affiliated schools, hospitals, and social welfare organizations seems proper, even laudable, governmental validation of majority preferences in religion sacrifices that diversity of thought and belief endemic to our republic.

This common sense approach to church-state interaction avoids the doctrinaire and unworkable use of history which characterizes both the separationist and revisionist viewpoints. The principle of religious liberty, which is essential to the Establishment Clause, requires a drawing of a fine line, not the building of a brick wall, or no wall at all.