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in the Humanities & Social Sciences

Leonard W. Levy. *The Establishment Clause: Religion and the First Amendment.* Chapel Hill: University of North Carolina Press, 1994. xxiii + 273 pp. $39.95, cloth, ISBN 978-0-8078-2156-5.

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Published on H-Law (March, 1995)

This is a revision of Levy's original 1986 book. Its primary aim is to provide a historical overview of the meaning of the Establishment Clause during the American Founding, to review the current tests used by the Court to determine violations of this Bill of Rights provision, and to respond to critics, especially Michael McConnell and other "nonpreferentialists," including Chief Justice William Rehnquist and Bush and Reagan administration officials who argued that the original and historical meaning of the Establishment Clause was simply to bar state sponsorship of a single national religion. To a lesser extent, the book also addresses other high wall or separationist positions, such as that of American Civil Liberties Union, that contended that the first edition of the book provided too much ammunition to those seeking to support state aid to religion.

The book is divided into two parts. The first part, composed of five chapters, is an excellent historical analysis of the practice of establishment in the original thirteen colonies and Vermont, from the period before the Declaration of Independence, through state constitutional revisions after the Declaration, and into the early nineteenth century. These chapters also examine the debates surrounding the congressional adoption of the Establishment Clause, state legislative debate on this Clause, and a detailed study of the views of several of the Framers, especially James Madison and his "Memorial and Remonstrance against Religious Assessments." The second part of the book, made up of the last three chapters, conclusion, and epilogue, examines judicial interpretations of the Establishment Clause in the areas of aid to parochial schools and the public display of religious symbols. Levy also uses these chapters to discuss the "Lemon" test, a set of rules the Supreme Court devised in 1971 to understand the Establishment Clause, and to criticize those who use historical intent to support the nonpreferentialist position.

According to Levy, there was no single colonial or early American state experience when it came to establishment. While prior to the American revolution most colonies had establishments of some type (p. 1), criticism of the establishment of the Church of England in America drew resent-

ment from religious leaders and colonists as general attack on England mounted, providing some of the impetus for the practice of disestablishment leading up to the First Amendment.

In terms of the actual practice of establishment, Levy notes that only the colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia had singularly established one religion. Yet, in the colonies of New York, Massachusetts, Connecticut, and New Jersey, there were multiple establishments of religion, and in five other colonies, Rhode Island, Pennsylvania, Delaware, and New Jersey, there were no colonial establishments (p. 11). For Levy, these diverse practices and experiences reveal that by the time of the framing of the First Amendment, there were no one set pattern of what establishment meant and that in fact there was significant experience with multiple establishments and patterns of church state relations among the colonials and in the early state constitutions leading up to 1787. Levy's point here is to show that the European model of establishment was not the only pattern Americans knew of and that the historical meaning of the word "establishment" does not narrowly and exclusively refer to bans on only state endorsement of one religion.

After demonstrating the multiple patterns of establishments in the colonies and states before and after 1776, and after discussing the momentum away from any establishments as a result of the Revolutionary War, Levy then examines Madison's intent in introducing what would eventually become the Establishment Clause of the First Amendment. Drawing upon debates in Congress, Madison's "Memorial and Remonstrance," as well as other statements by Madison early in his career and later as President, Levy argues that "Madison never altered his early view, which was widely shared by the other framers of the Constitution, that Congress had no power to legislate on any matter concerning religion" (p. 119). Hence, the intent of the Establishment Clause was to preclude any government aid to religion, even beyond simple establishment of one or multiple religions, or to show any preference for religion at all.

In examining House and Senate debates on the various versions and permutations of the Establishment Clause, Levy provides solid detail on efforts by the Senate to narrow the scope of the original House version. These efforts to narrow the intent all sought language simply to prevent Congress from preferring one sect to others. All three efforts were rejected, prompting Levy to conclude that efforts at a more narrow nonpreferentialist reading of the establishment Clause were defeated and that Madison's House Amendment, with a broader scope, was the meaning assigned to the Amendment (pp. 102-104). Moreover, Levy also turns to Madison's other Amendments, aimed at limiting state restrictions on freedom of press, conscience, and trial by jury, as further evidence of the broad scope of the religious ban that Madison had in mind.

Finally, when evidence of the state ratification of the First Amendment is examined, Levy finds that in nine states there was perfunctory ratification and, hence, little debate to create a record. Only in Virginia is there a record of debate, yet it too supports the broader meaning of the Establishment Clause (p. 111). Overall, for Levy, the historical record of the Establishment Clause, colonial and early American experience, and Madison's and many other framers' views seem not to support nonpreferentialist claims.

Levy then turns to a detailed examination of the nonpreferentialists' arguments offered by contemporary legal scholars and religious conservatives. The nonpreferentialist argument and use of historical intent is most clearly articulated in Rehnquist's dissent in ***Wallace V. Jaffree***. In this case the majority of the Court struck down a moment of silence in school as a violation of the Establishment Clause. Rehnquist responded by contending that the experience of the Framers with

establishment was of a single establishment of religion and that this was all that the clause was meant to prevent. Hence, Rehnquist, articulating a position held by others including Michael McConnell, and Bush and Reagan administration officials, asserted that the most appropriate test to determine whether the establishment clause had been violated is the coercion test. By that, so long as the government does not coercive individuals, voluntary school prayers would be permissible.

Levy devotes a significant amount of time to refuting rather persuasively the nonpreferentialist position. In addition to using his historical analysis from the first part of his book to counter Rehnquist's historical claims, Levy also drives two additional claims against the nonpreferentialists. One, without the First Amendment, it would be impossible to argue that the national government had any authority to aid religion in any way because the Framers argued that the Constitution did not confer power to Congress, absent an express or clear delegation of the power in the constitutional text. Since it is impossible to claim that the Constitution gave the national government power to aid religion, the adoption of the First Amendment can not be considered an affirmation of national power to aid religion when the purpose of Bill of Rights protections was to limit national power (p. 115). Two, Levy argues that the choice of a definite or indefinite article in the phrasing of the Establishment Clause was less of a concern to the Framers than it has been given to debates today (p. 137). This means that questions to resolve church state disputes overemphasize word choices of 200 years ago to resolve important church state disputes today.

Having challenged the nonpreferentialists on the use of historical evidence to support their positions, Levy finally discounts the use of history to resolve Establishment Clause issues. Contending that simple appeals to original intent ignore evolving American legal traditions or lead us to constitutional absurdities like Dred Scott V. Sanford_, Levy argues for what he thinks is a common sense middle ground when interpreting the Amendment. Here the book is at its weakest. Having first discounted many past tests to define the meaning of the Establishment Clause as unworkable, or as manipulated by particular ideologies, Levy argues that the words of the Establishment Clause are not simply "empty vessels" (p. 244) into which a Justice may pour in any meaning. While offering strong arguments to why separation of church and state will benefit religion and protect children from persecution in school like they used to face, Levy is unable to offer a good argument to show how we should actually read the Establishment Clause, except by making vague reference to various American political traditions or by reference to the once articulated "child benefit" theory that would allow state aid to religion if the real purpose were secular and aimed to assist children.

For example, in the epilogue, Levy contends that the Court erred in its decision in ***Board of Education of the Kiryas Joel Village School District V. Grument*** when it struck down the creation of a special school district to allow for the education of orthodox Jewish students with learning disabilities. While the Court contended that this was establishment, Levy claimed it was not, arguing that there was a legitimate case of a state tending to the special needs of children. Perhaps true, but this is hardly enough upon which to construct a theory of Establishment Clause jurisprudence.

An overall assessment of Levy's book indicates that it succeeds on many counts as noted above, but that it fails to resolve the dispute regarding what the Establishment Clause should mean. Additionally, while Levy's historical arguments are persuasive, they are incomplete in one important respect. By that, while the book is about the Establishment Clause, it is impossible to understand the full scope of this Clause without also examining the debates surrounding the Free Exercise Clause of the First Amendment. The two

provisions were debated together and, as Michael McConnell has shown in his discussion of the Free Exercise Clause, historical evidence reveals that neither the framers nor the states were willing to grant special exemptions to religion from otherwise neutral and general laws (McConnell, pp. 1435).

McConnell's claims here, as well as his other arguments discussing the important role of religious groups in the First Amendment debates, could do much to clarify and round out the historical record surrounding what Free Exercise and Establishment mean when considered together. Afterall, both are part of the Bill of Rights and need to be examined together to discover a more coherent picture regarding what the framer's attitude was towards religion and how we should approach conflicts between the mobilization and articulation of religious interests in America and what limits the courts can place upon such articulation (Schultz pp. 242-245).

References:

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