Review Essay

The First Freedoms: Church and State in America to the Passage of the First Amendment. By Thomas J. Curry. New York: Oxford University Press, 1986. Pp. viii, 276. $27.95. ISBN:0-19-503661-1.

The Establishment Clause: Religion and the First Amendment. By Leonard W. Levy. New York: Macmillan Publishing Co., 1986. Pp. xvi, 236. $16.95. ISBN: 0-02-918750-8.

RESPONDING TO THE NONPREFERENTIALISTS*

These two books review the history of church-state relations in the United States, with a focus on the meaning of the establishment clause. Both cover the colonial, revolutionary, and constitution-making periods. Curry ends with ratifications of the first amendment in 1791; Levy continues to the final disestablishment in Massachusetts in 1833. Levy also reviews and criticizes the Supreme Court's interpretations of the establishment clause.

Levy's book is a full scale attack on a group that he helpfully labels the nonpreferentialists. The nonpreferentialists argue that the Constitution means only what the framers intended it to mean, and that the framers of the establishment clause intended to permit government aid to religion so long as no particular faith is preferred over others. Nonpreferentialists have been around for a long time, and they have been refuted before, but they have gotten a second wind in the intellectual climate that accompanied the Reagan administration. Robert Cord's 1982 book[1] argued nonpreferentialism at great length, and Attorney General Meese[2] and Chief Justice Rehnquist have become the two most visible nonpreferentialists.[3]

Levy brings his considerable historical and rhetorical talents to bear on the nonpreferentialists, sometimes with devastating effect. But his zeal gets in the way of good history and even of good advo-

* Parts of this review are excerpted from the author's longer article on the same subject as the books reviewed. Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. —— (1986) (forthcoming).

1. R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

2. Meese, *Towards a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 5 (1986).

3. Wallace v. Jaffree, 105 S. Ct. 2479, 2508-20 (1985) (Rehnquist, J., dissenting).

cacy. Indeed, his two principal arguments seem to me demonstrably incorrect, even though he deploys them in support of correct conclusions. His last two chapters are a rambling tirade against everything he dislikes in modern establishment clause jurisprudence. He is right more often than not, but the tone of these chapters is not likely to persuade the uncommitted.

Levy's student, the Rev. Thomas Curry, has done better than the master. Curry's history is more thorough, more dispassionate, and more useful. Levy wrote an attack on the nonpreferentialists and used history where helpful. Curry wrote a history first and then considered its implications for both the nonpreferentialists and their opponents. As it happens, I think Curry is mistaken in his analysis of what the establishment clause means. But that mistake does not seriously affect his historical account. I have already used Curry's book in my own work, and it will be an indispensable reference for both historians and lawyers interested in church-state relations in the period. Both of these books collect a wealth of useful information. But if you can read only one, read Curry.

In the rest of this essay, I wish to consider the two books' principal arguments about nonpreferentialism. Curry, Levy, and I agree on the central point: the Framers of the establishment clause had no specific intention to permit nonpreferential aid to religion. Levy and I agree on the stronger formulation that the Framers intended the establishment clause to forbid such aid. Curry apparently believes that they intended the free exercise clause, but not the establishment clause, to forbid such aid. Each of us disagrees with the other two on important subsidiary points.

I. THE MEANING OF THE REJECTED DRAFTS

The strongest argument against the nonpreferentialists is that the Framers' generation repeatedly rejected nonpreferentialist proposals. The famous debates in Virginia were over a proposal to replace the exclusive Anglican establishment with a nonpreferential general assessment. Each taxpayer could designate the minister to receive his church tax, and nonbelievers could pay to a school fund.[4] The proposal was rejected. A similar proposal was defeated in Maryland amidst much public debate (Curry, pp. 155-57). In the drafting of the first

4. A Bill Establishing a Provision for Teachers of the Christian Religion, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 7274 (1947) (Appendix to opinion of Rutledge, J., dissenting).

amendment, Congress repeatedly rejected drafts of the establishment clause that were limited to a prohibition on preference for one church over another. Congress adopted language that forbids the establishment of religion; it rejected drafts that would have forbidden establishment of "a material religion," "one sect or society," or "any particular denomination of religion."[5]

Curry thinks that these repeated choices tell us nothing about the meaning of the establishment clause, because he thinks the Framers simply did not understand the distinction between preferential and nonpreferential establishment (pp. 207-15). Levy waffles on this issue. At one point he argues that Congress made a clear choice when it rejected nonpreferentialist drafts (pp. 82-84). Later, he seems to endorse Curry's judgment that the Framers did not recognize the difference (Levy, pp. 111-14).

Curry is surely right that not all of the Framers understood the distinction or had it in mind all the time. He collects examples where people used language loosely or without understanding the distinction, although not all of his examples support his point. He is unpersuasive in his broader claim that the Framers collectively failed to understand the distinction between preferential and nonpreferential establishments. Defenders of establishment often offered allegedly nonpreferential establishments as a compromise. The Congregationalist defenders of the New England establishments regularly contrasted them with the objectionable establishment in England—an exclusive Anglican establishment (Curry, pp. 131-32, quoting John Adams). The New England establishments remained preferential in fact, and the dissenting sects were not satisfied with their treatment. But the idea had been to make establishment fair to everyone.

The Maryland and Virginia proposals would have been much more effectively nonpreferential, if they had been thoroughly and recently debated. The 1776 statute that suspended collection of the Anglican tax in Virginia drew the distinction explicitly. It recited that the question of a general assessment for all faiths had aroused "a great variety of opinions" that "cannot now be well accommodated," so that "nothing in this act" "shall be construed to affect or influence" that question "in any respect whatever."[6] For the next ten years, the issue in Virginia would be whether to repeal the Anglican tax or ex-

5. This legislative history is reviewed in more detail in part II.A of my forthcoming article, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. —— (1986).

6. The provision is reprinted in T. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY

tend it to all denominations. It is inconceivable that James Madison had forgotten that distinction four years later. He likely had it in mind when he served on the Conference Committee that rejected the nonpreferentialist Senate draft and substituted the broad language that was ultimately ratified. Many others familiar with the debates of the 1780s must have also understood the distinction.

Curry refuses to draw this inference. What chiefly troubles him is the vocabulary of the debates over general assessments. There are three interwoven threads to this argument. But it is useful to separate them, because there is a different mistake in each.

First, he argues that general assessments were often debated on grounds of religious liberty rather than establishment (pp. 146, 210-11, 217). The mistake here is to equate religious liberty with free exercise. To subsume both free exercise and establishment under religious liberty is a perfectly sensible usage, and as Professor Kurland has noted, it was a common usage among the Framers.[7] And as Curry concedes, the word "establishment" was often used in debates over general assessments. Madison's *Memorial and Remonstrance Against Religious Assessments* uses "establish," "established," or "establishment thirteen times, and describes the general assessment bill as "the proposed establishment."[8]

Second, Curry notes that opponents of general assessment in Virginia argued that the bill would violate the free exercise clause in the Virginia Declaration of Rights.[9] Curry may exaggerate this: he is presumably reading "free exercise" every time they said "religious liberty." But they did invoke the free exercise clause, and the reason is plain. The Declaration of Rights did not have an establishment clause. The Declaration and the statute suspending the Anglican tax were passed in 1776, at the very beginning of the debate over what to do about the Anglican establishment. Together, the Declaration and the statute guaranteed free exercise and postponed decision on establishment. It is not surprising that advocates of religious liberty would

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VIRGINIA, 1776-1787 35 (1977) [hereinafter BUCKLEY], and in 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 305 (1950).

7. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. —— (1986) (forthcoming). Virginia opponents of financial aid to churches saw free exercise and disestablishment as inextricably linked. *See* BUCKLEY, *supra* note 6, at 18-19, 22.

8. ¶9; *see also* ¶¶ 6 and 8. The Memorial and Remonstrance has been reprinted widely. Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) (Appendix to opinion of Rutledge, J., dissenting); R. Cord, *supra* note 1, at 244-49; S. PADOVER, THE COMPLETE MADISON: HIS BASIC WRITINGS 299-306 (1953).

9. ¶16 (1776), 9 Hening's Statutes at Large 109, 111-23 (1821). The provision is quoted in T. BUCKLEY, *supra* note 6, at 19, and in 1 A. STOKES, *supra* note 6, at 303.

thereafter claim as much as they could for the free exercise clause; the rhetorical benefits of invoking a constitutional right were already understood. That rhetorical strategy is entirely consistent with believing that a general assessment would also and primarily be an establishment. Indeed, the 1776 agreement to postpone establishment questions would have been wholly illusory if the parties to the compromise had understood a general assessment to violate the free exercise clause.

Third, Curry concedes that general assessments were often attacked as establishments, but he argues that no one "attempted to show that a general assessment constituted an essentially different kind of establishment or to differentiate it from an exclusive state preference for one religion." (p. 210). On the opponents' side, this is true and entirely understandable. Their whole claim was that a tax for all churches is *not* essentially different from a tax for one church; they found any church tax objectionable. On the proponents' side, the statement is simply false. Their whole claim was that a tax for all churches *is* essentially different from a tax for one church. Curry's point apparently is that he found few statements like "We want an establishment, but it will be a different kind of establishment." I'm sure he didn't. Establishments were unpopular, and it was rhetorically more effective to avoid talking about establishment at all. Thus, Curry says, they defended their proposals "primarily as fair, equitable, and compatible with religious freedom and concerned themselves very little with the issue of establishment." (p. 217).[10] That is exactly how I would make the argument if I were hired as their medial consultant. Note also how Curry's formulation of this argument again depends on the equation of religious freedom with free exercise.

In my judgment, Curry's analysis of the debates ignores the realities of political rhetoric and elevates labels over substance. That many in the Framers' generation understood the difference between exclusive and nonpreferential establishments seems as certain as can be for a proposition about what people were thinking two hundred years ago. It is less certain that they understood the language of the House and Senate drafts to state the two competing propositions. Perhaps they paid no attention to the meaning of the language, and perhaps they never thought of the most prominent religious liberty issues of the period when they drafted that language. Those things are possible, but they are not likely.

10. The pro-assessment petitions are summarized in BUCKLEY, *supra* note 6, at 113-43.

Equally important in my view, is that, it is illegitimate to assume such things. If we are willing to assume that the Framers paid no attention to the meaning of what they wrote and that they were oblivious to the most prominent issues of their time, the Constitution really can mean anything at all. That is not a legitimate approach to constitutional interpretation.

II. THE ARGUMENTS FROM FEDERALISM

Part of Curry's argument, and a much larger part of Levy's argument, turns on a mistaken inference from the Framers' concern with federalism. The starting point for Curry is the position of two antifederalist supporters of establishment, Patrick Henry and Elbridge Gerry. Henry and Gerry are two of Curry's prime examples of Framers who did not understand the distinction between preferential and nonpreferential aid. Each of them proposed language that would have barred only preferential establishments. Curry finds this inconsistent with their anti-federalism: a ban on all establishments would have further restricted federal power. He therefore concludes that they did not understand the distinction, and that they intended to bar all establishments even though their language mentioned only preferential establishments (pp. 209, 214). Levy makes a similar point about Patrick Henry (pp. 74, 109-10).

This reliance on Henry and Gerry is an example of a larger background puzzle about the drafting of the Bill of Rights. The federalists erroneously believed that the amendments were unnecessary because the government had no power to do any of these things anyway. Their error was to focus on the lack of any express power to restrict speech or establish religion, etc., and to overlook the risk that delegated powers might be exercised in ways that would accomplish some of the same purposes.[11] If the establishment clause did not exist, the power to tax and spend for the general welfare would authorize a nonpreferential subsidy to religious organizations. That specific risk was probably not in contemplation at the time, but the underlying theory that the spending power is not limited by the enumeration of other legislative powers can be traced to Alexander Hamilton's Report on Manufactures in 1791.[12] In introducing the Bill of Rights, Madison explained that even limited powers could be abused, that

11. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 36 (1980).

12. *See* 10 THE PAPERS OF ALEXANDER HAMILTON 302-04 (H. Syrett & J. Cooke eds. 1966); *see also* United States v. Butler, 297 U.S. 1, 64-67 (1936).

Congress had discretion as to means, and that a Bill of Rights could protect against abusive measures that might otherwise be a necessary and proper means of implementing delegated powers.[13]

The federalist theory was widely held even though erroneous. On that theory, the amendments were of no substantive effect. A failure to bar nonpreferential aid in the establishment clause would not create a power to grant such aid; powers were conferred only by the original document.

It does not follow that the Framers paid no attention to the content of the amendments. Whatever the federalists thought, the anti-federalists were demanding amendments, and many uncommitted citizens believed amendments were necessary. To build support for the new government, the federalists indulged these fears and agreed to amendments. Thus, the anti-federalists believed, and the federalists assumed arguendo, that the Constitution might somehow confer dangerous powers that made the amendments necessary. The amendments were drafted on that assumption, and any effect to make sense of them must indulge the same assumption.

Once the Framers set to the task of drafting amendments, the evidence suggests that they tried to forbid only what they considered to be abuses. Thus, Representative Huntington was concerned that the establishment clause not preclude federal jurisdiction over suits to collect state church taxes; he did not notice the complete absence of any basis for such jurisdiction in article III.[14] Henry and Gerry proposed language inconsistent with their anti-federalism, but quite consistent with their continued support for some kind of establishment. Henry and Gerry simply proposed for the federal government the view of establishment they supported in Virginia and Massachusetts respectively. There is no reason to assume they did not understand the familiar language they proposed. Rather, these examples suggest that in the Framers' brief debate on the details of the religion clauses, their views on religious liberty were more salient than their views on federalism.[15]

Levy derives a much broader argument from the relationship between federalism and establishment. He argues that the federal gov-

13. 1 Annals of Cong. 449-50, 455-56 (June 8, 1789). The pagination is different in some printings.

14. *Id.* at 758 (Aug. 15, 1789). For an analysis of Huntington's remarks, see part II.B of my forthcoming article, *supra* note 5.

15. This attention to the merits when debating details coexisted with a willingness to support or oppose the whole Bill of Rights for the collateral purpose of increasing or reducing public support for the new Constitution. *See* Levy, pp. 87, 108-09.

ernment had no power to aid religion and that no one thought the establishment clause created such power. He therefore concludes that the establishment clause must forbid any aid to religion, even nonpreferential aid. He finds it inconceivable that the establishment clause implicitly creates a previously nonexistent power to grant nonpreferential aid (pp. xii, 65-66, 74, 84, 93, 106, 109-10, 114-17).

He is right that the clause creates no power, but that is not the issue. The issue is not what powers the clause creates, but what powers it forbids. Levy fallaciously assumes that the clause must forbid any power it does not create; he ignores the possibility that the clause might simply be neutral on some things. If no part of the Bill of Rights was necessary, as the federalists argued and as Levy insists, then *a fortiori* it was unnecessary for the prohibitions in the Bill of Rights to match point-for-point the powers not created by the original Constitution.

As I have already argued, the clause was debated on the assumption that there might be some power to aid religion. The Framers fought over how much of that hypothetical, unspecified, and possibly nonexistent power to protect against. They could have agreed to forbid or not to forbid nonpreferential aid to religion, without agreeing, or without having any view at all, on whether the rest of the Constitution created power to grant nonpreferential aid. The remarks of Henry, Gerry, and Huntington suggest that they did exactly that. At one point, even Levy recognizes a long list of federal powers that could be used in aid of religion (pp. 172-74). The Framers foresaw and even exercised some of these uses of federal power by appropriating funds for Congressional chaplains and for missionaries to the Indians, by setting aside federal land for the support of religious education, and by proclaiming a national day of Thanksgiving.[16] But Levy fails to see how these alternative sources of power affect his argument.

Certainly the modern nonpreferentialists are not guilty of claiming that the establishment clause creates power to aid religion. Under modern understandings of the spending power and of executive and legislative power to issue proclamations, resolutions, and endorsements, the federal government can aid religion unless the establishment clause forbids it. Moreover, Levy's argument is wholly irrelevant to the states. So far as the federal Constitution is concerned, the states have plenary power to aid religion unless the estab-

16. *See supra* notes 11-13.

lishment clause via the fourteenth amendment forbids it. It is therefore irrelevant to show that the establishment clause does not create a power to aid religion; Levy must show that the establishment clause affirmatively forbids such a power. The two are not the same.

III. LEVY'S VIEW OF THE SURVIVING STATE ESTABLISHMENTS

Levy views the establishments in New Hampshire (pp. 23-24, 3840), Vermont (pp. 44-46), Massachusetts (pp. 15-20, 26-33), and Connecticut (pp. 20-22, 41-44), as multiple rather than exclusive. He also notes that the constitutions of Maryland, South Carolina, and Georgia authorized multiple establishments, although he concedes that they were never put into effect (p. 47). Finally, he argues that the establishment in colonial New York was a multiple establishment (pp. 10-15).[17] He makes these arguments to show that multiple establishments were part of the Framers' concept of establishment, and therefore, that the establishment clause must have forbidden multiple as well as exclusive establishments (pp. 6-9, 61-62). This is a useful response to scholars who claim that "establishment" can only mean an exclusive establishment.[18]

Levy goes further, arguing that these multiple establishments were also nonpreferential, and that therefore the clause forbids nonpreferential establishments as well (pp. 61-62, 110). An essential part of this argument is to elide the distinction between multiple and nonpreferential establishments. An establishment can be multiple in the sense that more than one church gets state support, and also be preferential in the sense that one church gets more support than others. Indeed, this is a fair characterization of the New England establishments on which Levy bases most of his case. New England dissenters who were willing to take advantage of the coercive power of the state could get some forms of state aid, through their power to collect taxes from members who filed exemption certificates and through their occasional success in electing local ministers (pp. 15-16, 21-22, 28, 30-32, 40). Thus, Levy concludes, even the dissenters were established. He is right in a sense, and to that extent these were multiple rather than exclusive establishments. But they were not nonpreferential establishments. They were enacted by Congregationalist majorities for

17. However characterized, this establishment was abolished in 1777 (Levy, p. 26)

18. Such a claim appears in J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 204 (1949) (quoted in Levy, p. 6).

their own benefit, and the equality of Congregationalists and dissenters remained wholly theoretical.

Levy devotes two chapters to showing that there were multiple establishments in both the colonial and early national period (pp. 1-62). He devotes only scattered and conclusory passages to showing that these establishments were nonpreferential (pp. 20, 28-30, 61-62, 110).[19] It is significant that he has an index entry for multiple establishments but not for nonpreferential establishments (p. 231). He simply does not distinguish the two concepts on any sustained basis. At one point, he explicitly equates them.[20]

Levy and I agree that New England tried to cover establishment with a veneer of nonpreferentialism. I believe that he is fooled by that veneer and by his desire to show that the Framers were familiar with nonpreferential establishments. He emphasizes the nonpreferential legal theory of the New England establishments; he gives less weight to their oppressive practical operation, which he blames on unfair administration and the Congregationalist voting majority (pp. 19-20, 31, 40). He repeatedly says that Congregationalists benefitted from demography rather than law (pp. 19, 45, 61-62). But the demography was perfectly understood when the law was enacted, and as even Levy concedes in the case of Massachusetts (p. 15), the Congregationalists were the intended beneficiaries of the New England establishments. He agrees that dissenters were often oppressed by the system (pp. 20-22, 28, 31, 41-42), but he never reconciles this reality with his assertions that the establishment was nonpreferential. Nor does he make any effort to explain how a system could be nonpreferential when compliance violated the conscientious beliefs of two of the largest minority sects. In general, he elevates form far above substance.[21]

Levy also equates local option establishments with nonpreferential establishments. In a system in which each town could elect the established minister, it was possible for dissenters to win in a few

19. At one point he concedes that the establishment in Connecticut was preferential in fact, though not in theory (p. 41). At another point, he says the Connecticut establishment was nonpreferential (p. 22).

20. "Such an establishment can hardly be called an exclusive or preferential one, as in the case where only one church, as in the European precedents, was the beneficiary." (p. 62).

21. Commentators on Levy's work on freedom of speech and press have criticized a similar emphasis on the legal theory of seditious libel instead of the practical reality of a free press. *See, e.g.*, Anderson, *Levy vs. Levy* (Book Review), 84 MICH. L. REV. 777 (1986); Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 509-15 (1983); Jensen, *Book Review*, 75 HARV. L. REV. 456, 456-57 (1961). For Levy's response, conceding the validity of the criticism but only in part, *see* L. LEVY, EMERGENCE OF A FREE PRESS (1985); Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 767-70 (1985).

towns. Levy looks at this from a statewide perspective and proclaims it nonpreferential (pp.15, 29, 38-39, 45). But from a local perspective, each town had an exclusive establishment, mitigated only by the exemption available to those dissenters not conscientiously opposed to claiming it. And as noted, in a state with a large Congregationalist majority, Congregationalist dominance of local elections was foreseen and intended.

Whether the New England establishments were even-handed enough to be called nonpreferential is not crucial to either Levy's argument or mine. The effort to appear nonpreferential, in New England and elsewhere, shows that the Framers understood the concept of a nonpreferential establishment. Unlike Levy, I think an additional step is needed to complete the argument: that when the Framers squarely focused on the choice between nonpreferential establishment and no establishment at all, they chose no establishment at all.

Without that additional step, Levy's characterization of the surviving establishments as nonpreferential can be turned against him. A nonpreferentialist could respond that the establishment clause reflects the view of the large number of states that, in Levy's view, had recently replaced exclusive establishments with nonpreferential establishments. That response should fail, because the more direct evidence is to the contrary, and because Levy's characterization of the New England establishment as nonpreferential is so unconvincing. Surely not even today's nonpreferentialists believe that Congress could constitutionally mandate local option establishments modeled on the Massachusetts constitution of 1780. However they are characterized, the New England establishments were not the model for what is permitted under the establishment clause.

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