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John H. Garvey

The Catholic University of America, Columbus School of Law

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**A COMMENT ON *CHURCH AND STATE IN
SEVENTEENTH AND EIGHTEENTH
CENTURY AMERICA***

*John H. Garvey**

Thomas Curry's synopsis of church-state practices in seventeenth and eighteenth century America is notable for its modesty and balance. When lawyers and judges paint the religious history of that period they picture events like cows on a hillside—all pointing in the same direction. (Of course the cows point different ways in different pictures; it depends on which way the wind is blowing.) The scene Curry describes is more disorderly. This makes it harder to identify trends that we might say were embodied in first amendment principles. But it prefigures, and helps explain, our messy first amendment practices.

Curry argues that two topics dominated church-state discussions from 1600 to 1800: (1) the government's power to legislate about religion, and (2) public financial support for ministers. As to the first issue, Americans gradually accepted the principle, espoused by Roger Williams, that government had no power over matters of religious worship and practice. But they did not live up to this principle. They passed laws about sabbath observance, blasphemy, days of prayer and fasting, and religious qualifications for office. In this, they followed the practice of John Cotton, who thought that the two tables of the Ten Commandments (religion and morals) must stand or fall together. "The principle was the principle of Williams, but the practice was the practice of Cotton." As to the second issue, financial support for ministers, practice converged more with principle. But there were exceptions, as in New England. And those who opposed support often did so for no principle more lofty than the fear that it would go to the Church of England.

I want to make three points about this historical summary. First, I think Curry is right in concluding that the picture he paints does not settle many modern questions. This in itself is important. For the past ten years, there has been a lot of controversy in Constitutional Law circles about the role that the framers' intentions should

* Ashland Professor of Law, University of Kentucky College of Law. B.A., Notre Dame University, J.D., Harvard Law School. Editors' Note: The paper commented on appears at 7 J. LAW & RELIG. 261 (1989).

play in interpreting the Constitution. The political right is said to believe that intentions should matter;¹ the left, that they should not.² Oddly enough, however, both sides look to history for answers when interpreting the religion clauses.³ Curry's work suggests that they are both wrong.

But what Curry says suggests a second, and perhaps more important, point. It may be that history has a strong appeal in this area because we find the same *questions* there. The two religious questions that have most often engaged the Court's attention in this century are remarkably like those Curry addresses. They are: first, the government's power to legislate about religious belief and practice (in such matters as school prayer,⁴ the teaching of evolution,⁵ and creches⁶); and second, public financial support for religious schools.⁷

The controversy over the first question is fueled by sentiments remarkably like those that moved John Cotton to favor religious legislation. It is often said, for example, that the anarchy in our public schools dates from 1962, when prayer went out and left a vacuum to be filled by secular humanism.⁸ We see at work here the conviction that one cannot teach morality without religion—one cannot separate the Second Table from the First. The Court has, somewhat inconsistently, approved for adults the liturgy (creches, chaplains' prayers) it denies to children. But it is hard to accept these diluted observances as real acts of devotion. They are more like a kind of civil religion that functions for the community the way songs and rituals do for the

1. See E. Meese, Speech before the American Bar Association (July 9, 1985), *reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1* (The Federalist Society 1986).

2. See W. Brennan, Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *reprinted in THE GREAT DEBATE, supra* note 1, at 11.

3. Compare *Larson v. Valente* 456 U.S. 228, 244-46 (1982) (Brennan, J.) with *Marsh v. Chambers*, 463 U.S. 783, 787-92 (1983) (Burger, C.J.), and *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

4. *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Board of Education v. Margens*, — U.S. —, 110 S. Ct. 2356 (1990).

5. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aquillard*, 482 U.S. 578 (1987).

6. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny County v. ACLU*, 492 U.S. —, 109 S. Ct. 3086 (1989); *Chabad v. ACLU*, 842 F.2d 655 (3d Cir.), *cert. denied*, 109 S. Ct. 488 (1988). *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983).

7. See the cases cited in Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 67 Table I.

8. Compare *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963) with *Epperson v. Arkansas*, 393 U.S. 97 (1968).

Lions, the Rotarians, and the Phi Gammas. They unite us in a common faith (the First Table) and thereby keep the peace (the Second Table).

As to the second issue, financial support, it is hard to miss the fact that Catholics have replaced Anglicans as the likely beneficiaries of public financing. And it would be naive to suppose that this has not played a part in the opposition to school aid. The debate is usually conducted on the higher plane of principle, but the school aid cases are renowned for drawing lines that no principles can explain. One can only say that here, as with the first issue, the Court has given each side something. Some bus rides, books, and deductions are permissible; other bus rides, maps, and credits are not.⁹

The most arresting feature of this jurisprudence is its homemade quality. The rules the Court has laid down—or perhaps I should just say, the Court's decisions—seem to conform better to circumstances than to theories. They have a very messy and pragmatic character, with something for everyone. Curry notes the same phenomenon in this period: "The tension between what Americans proclaimed and what they did in matters of Church and State can be partially explained by the fact that Church-State developments emerged in response to circumstances rather than to clear patterns of thinking."

This brings me to my third point: perhaps the reason why these questions have shown such endurance is that the establishment clause itself exalts pragmatism over principle. To put it more bluntly, perhaps the clause cannot be made to do as much work as we would like it to, and that is why we have this persistent muddle over church-state relations.

When I say that the clause exalts pragmatism over principle, I mean that it does not create rights like other provisions in the Bill of Rights. Rights have the compelling quality of being able to trump arguments of social utility.¹⁰ They thus steer us away from ad hoc practices and lend a bit of consistency to government-private relations. But the establishment clause has proven hard to cram into the rights mold.

A right must belong to some person—the right-holder, or claimant.¹¹ Some rights identify that person by name. ("*T*)he accused

9. See Garvey, *supra* note 7.

10. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* chs. 4, 7 (1977).

11. The person may be a legal 'person,' such as a corporation. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

shall enjoy the right to a speedy and public trial.”¹²) Others give strong hints. (“Freedom of speech” must belong to speakers.) But it has never been exactly clear who can claim the benefit of the establishment clause. It speaks about relations between institutions, not between individuals and government. It seems designed to prevent the federal government from establishing a national church, and from interfering with established churches in the states.¹³ The clause thus regulates affairs between government and the churches, much as the original Constitution regulates affairs between government and the states. (We see this institutional aspect in modern cases where the Court talks about entanglement.¹⁴)

Who in this scheme is the right-holder? Church-state relations certainly have individual effects. But so do federal-state relations.¹⁵ And Article I does not give me a right that the federal government not exceed its commerce power. I may raise the issue, but only as a third party complaining on the states’ behalf. I can’t even do that unless I can show some independent harm of my own (apart from the violation).¹⁶

This is why we have had a succession of difficult establishment clause standing cases—on school prayer, *Engel*¹⁷ and *Schempp*;¹⁸ on school aid, *Flast*¹⁹ and *Valley Forge*.²⁰ Though the plaintiffs usually get into court, they do so only because the Court has relaxed the usual rules. School prayer plaintiffs can sue even if they are not coerced. (Flag salute plaintiffs have to show coercion.²¹) School aid plaintiffs can sue as taxpayers. (Maternity aid plaintiffs cannot.²²) These

12. U.S. CONST. amend. VI.

13. See the slightly varying accounts in R. CORD, *SEPARATION OF CHURCH AND STATE* (1982); M. HOWE, *THE GARDEN AND THE WILDERNESS* ch. 1 (1965); W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 8-10 (1964).

14. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *Aguilar v. Felton*, 473 U.S. 402 (1985); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970).

15. Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380-395.

16. *Com. of Massachusetts v. Mellon*, 262 U.S. 447 (1923).

17. *Engel v. Vitale*, 372 U.S. 421 (1962). See Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

18. *School District v. Schempp*, *supra* note 4. See Brown, *Quis Custodiet Ipsos Custodes?—the School-Prayer Cases*, 1963 SUP. CT. REV. 1.

19. *Flast v. Cohen*, 392 U.S. 83 (1968).

20. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

21. Brown, *supra* note 18, at 31-33.

22. *Com. of Massachusetts v. Mellon*, 262 U.S. 477 (1923). See also *United States v. Richardson*, 418 U.S. 166 (1974).

claimants have a distinctly non-Hohfeldian character. Their role is to bring problems to the Court's attention. But the Court does not resolve those problems by asking what are the contours of the plaintiffs' rights . . . what kind of performance is due *to them*. Instead it asks whether, all things considered, we want the government doing this.

Those who complain that the Supreme Court has not been consistent about forbidding prayer and school aid sometimes lose sight of this point. If the Court is not constrained by some principle like the rights of the parties before it, it has discretion to draw lines in arbitrary places. Take school aid. Providing books but not maps is arbitrary, but there is nothing wrong with it. Legislatures do such things all the time. The Court does too, where rights are not involved. In separation of powers cases it takes a "pragmatic, flexible approach"²³ so long as each branch can perform its "essential functions."²⁴ It did the same thing in federalism cases until 1985.²⁵

This brings me to a second point about rights. Constitutional rights entitle claimants to some kind of service (jury trial, counsel) or forbearance (no unreasonable searches, no interference with abortions) by the government. If the government falls down in its duty to serve or forbear, the claimant suffers some recognizable harm: she is unjustly convicted, gives birth to an unwanted child, etc. The occurrence of this harm is what entitles the claimant to complain. This is how rights are violated.

The establishment clause seems to demand forbearance: "Congress shall make no law respecting an establishment of religion[.]" But in most of the modern cases it is hard to identify the individual harm caused by a violation. Suppose that public school officials call for voluntary prayer initiated by students. Or suppose the government offers chapter I aid to students at all religious schools. These practices are clearly unconstitutional under the current rules. The first has the purpose, the second the effect, of aiding religion. But it is not clear that they cause harm to the claimants who complain about them.

This is not to say that there is no harm. We can construct sensible long-range, or slippery-slope, or cost-benefit arguments against either practice, and any of these may suffice to forbid it under the establishment clause. But we cannot reach into our hand and pull out

23. *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 422 (1977).

24. *United States v. Nixon*, 418 U.S. 683, 707 (1973); *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 2618-22 (1988).

25. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-47 (1985).

a right that trumps any card played by proponents of prayer or school aid.

Let me conclude by adding a little perspective to what I have said. If Curry is right about the predominant problems, principles, and practices in seventeenth and eighteenth century America, then it is remarkable how little things have changed. To be sure, there are differences. We do not now have laws (against blasphemy, for example²⁶) that coerce religious choices. And we seldom have laws that discriminate against one religion and in favor of another.²⁷ But issues of coercion and discrimination fit easily into the model of rights: coercion violates the right of free exercise; discrimination violates the right to equality.²⁸ We continue to wrestle with problems of nondiscriminatory assistance to religion. For all practical purposes, that is the exclusive focus of the establishment clause. But it may be asking too much to expect a simple answer to those problems, because the clause eschews the path of rights in favor of pragmatism.

26. Compare *People v. Ruggles*, 8 Johns. 225 (1811) with *Epperson v. Arkansas*, 393 U.S. 97, 107 n.15 (1968). And compare the reaction in Iran to Salman Rushdie's, *Satanic Verses*, with the reaction in this country to Martin Scorsese's film based on Nikos Kazantzakis' *The Last Temptation of Christ*.

27. *Larson v. Valente*, 456 U.S. 228 (1982), is a fairly unusual case.

28. Cf. LOCKHART, KAMISAR, CHOPER & SHIFFRIN, *CONSTITUTIONAL LAW* 1122 (6th ed. 1986) ("I think discrimination among religions—preference of one religion over another—[should] be treated under the free exercise clause,") (remarks of Dean Choper).