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1987

Book Review. Church-State Relationships in America by Gerald V. Bradley

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Recommended Citation

Fraher, Richard M., "Book Review. Church-State Relationships in America by Gerald V. Bradley" (1987). *Articles by Maurer Faculty*. Paper 1853.

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BOOKS REVIEWED

Church-State Relationships in America. By Gerald V. Bradley. Contributions to Legal Studies, Number 37. New York: Greenwood Press, 1987. xiv., 166 pp.

First Amendment of the United States Constitution contains a deceptively simple formulation of the nation's fundamental law governing relations between church and state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Since the English colonies in North America were founded in large part by refugees from religious intolerance and oppression on the other side of the Atlantic, the pursuit of religious liberty was already a venerable motif in American history when the First Amendment was ratified in 1789. Hence, both the Establishment Clauses and the Free Exercise Clause carry with them a deeply-rooted mythic significance, but the constitutional language itself conveys far less than a detailed legal blueprint of the proper relationship between religion and the apparatus of government. Since the *Everson* decision in 1947, the Supreme Court has relied very heavily on historical arguments of religion by law was intended to erect 'a wall of separation between church and state.' " Under the current Supreme Court doctrine first articulated in *Lemon v. Kurtzman*, any state or federal government action violates the Establishment Clause if the action is intended to advance a religious rather than a secular purpose, if the action has the effect of advancing religion, or if the action results in excessive entanglement between government and religion. The Court has exempted from the coverage of the *Lemon* test certain government programs that have the intention and the effect of advancing religion, but that also carry the historical pedigree of having been created or carried forward by the same founding fathers who drafted or voted to approve the First Amendment.

Professor Bradley's book is the latest addition to a rapidly expanding literature criticizing the Supreme Court's historical reading of the First Amendment and the justices' vision of the proper relationship between government and religion. Many commentators have derided the *Lemon* test as a doctrine devoid of any principled content and incapable of consistent application. Even some members of the Court, in their more lucid moments, have conceded that current Establishment Clause doctrine yields no predictability about the outcomes of actual cases.

This volume, despite the grand sweep of its title, actually mounts a much narrower attack on the Court's Establishment Clause jurisprudence. Most of the book consists of an historical study aimed at disproving the Supreme Court's pronouncement that the original understanding of the First Amendment was that his restriction on government would erect a wall of separation between church and state. But Bradley's agenda neither begins nor ends with

an accurate historical reading of the Establishment Clause. The author's purpose is polemical. He refutes the Supreme Court's historical conclusions for the express purpose of convincing his readers that sect-neutral governmental aid to religion is perfectly consonant with the Establishment Clause.

To those who are familiar with the cases in this area of constitutional law, Bradley's historical argument will look as if it essentially reiterates and amplifies Justice Rehnquist's dissent in *Wallace v. Jaffree*. The bulk of this book consists of a strenuous "original intent" assault upon the *Everson* Court's originalist arguments in favor of the wall of separation between church and state. Further, Bradley's historical argument challenges the currently fashionable view that "there is no clear history as to the meaning of the [religion] clauses." Nowak, Rotunda, and Young, *Constitutional Law* 3rd ed. 1986, p. 1031. In fact, Bradley has assembled a very powerful case against the theory that the original understanding of the Establishment Clause amounted to anything like a wall of separation. The analysis begins with a survey of the pattern of church-state relations that existed in each of the states during the founding era. While some states, most notably in Congregationalist New England, continued to maintain an established religion into the nineteenth century, many states experienced the disestablishment of Anglicanism during the Revolutionary War. From these disestablishment states, Bradley has pieced together a convincing argument that during the founding era, "establishment" meant that the state enforced the hegemony of a single sect, while "disestablishment" meant governmental neutrality as among Protestant sects. Governments in non-establishment states cheerfully saddled papists, Jews, and non-believers with various disabilities, while routinely rendering aid to the religious groups that huddled together beneath the "sacred canopy" of Protestantism. Disestablishment in 1789 did not mean, and could not have meant, governmental neutrality as between religion and irreligion.

Bradley next turns to the ratification of the Constitution, in order to prove that the First Amendment marked no departure from the previously widely accepted notions of establishment and disestablishment. This argument directly challenges Justice Black's historical fairy-tale in *Everson*, in which the First Amendment supposedly marked a revolutionary departure from a colonial history replete with intolerance, oppression, and persecution. Bradley's rejoinder to Justice Black is a survey of the ratification process, beginning in 1788 with the Antifederalists' resistance to adopting the Constitution. Bradley devotes a chapter to the states' demands for restraints upon federal power over religion, another to the congressional drafting of the First Amendment's religion clauses, and a third to the states' ratification of the text that was to define the relationship between the federal government and religion in America. It is absolutely clear that neither the state nor the Congress intended to depart from the existing meaning of non-establishment. What emerges most powerfully from the historical narrative is a widespread federalist concern that the national government be forced to abstain from interfering with the states' varied regimes of establishment or disestablishment. Where the federal govern-

ment ruled directly, as in the Northwest Territory, the First Amendment operated to require non-establishment as commonly understood, that is, to permit governmental support for religion on a sect-neutral basis. Insofar as the religion clauses represented primarily a constraint on the federal government vis-a-vis the states, Bradley makes the point that the Fourteenth Amendment cannot by any operation of logic have subsequently incorporated the Establishment clause as a restraint upon the powers of state governments.

The historical evidence collected in this book is devastating to the naive and over-broad historical arguments employed by the Supreme Court in support of its Establishment Clause jurisprudence since *Everson*. If Bradley's agenda had proceeded no further than to underscore the unreliability of the Court's historical claims, the worst criticism that one could level at Bradley's work might be a charge of intemperance. Contrary to Bradley's belief, the justices have probably not been dishonest so much as they have been prone to jump at whatever historical evidence tends to support their a priori positions and to employ that evidence carelessly, without regard for context. The justices, if they ever do respond to criticism from academic commentators, might learn a valuable lesson from the embarrassment that should follow from the disrobing of *Everson's* history: he (or she) who ventures an historical interpretation of a legal text bears the burden of proving that the interpretation is accurate in light of all the known historical context. Citing a convenient phrase or two from Jefferson or Madison is a slipshod form of persuasion that does not create a credible basis for a stable, enduring jurisprudence.

Unfortunately, Bradley's argument does not stop with the conclusion that the Supreme Court has crossed its historical wires. Instead, Bradley charges headlong from his carefully built-up premise, that "no establishment" in 1789 meant sect-neutral governmental support for religion, to the wondrously wrong-headed conclusion that there now remains no argument for a constitutional ban upon governmental aid to religion, so long as such support remains sect-neutral. This kind of flight from originalist interpretation steeped in the context of 1789 to constitutional pronouncements for 1987 and the future is the kind of argument that gives legal historians a bad name. Simply because the Court's historical arguments in *Everson* and its progeny have been discredited, it does not follow that the legal conclusions reached in those cases were necessarily incorrect, but rather that the bases for the decisions must be re-examined to discover whether the Court's analysis can be supported without the historical props. During the past forty years, the Court has been examining the relationship between religion and government in a social context much changed from the one that gave the original meaning to the First Amendment's religion clauses. The state has displaced religious corporations as the primary purveyor of education, health care for the indigent, and poor relief. Religion itself has become ever more amorphous as a social and legal category. Assuming that one were to accept Bradley's conclusion and were to permit sect-neutral governmental support for religion, could a state support, for example, Protestant schools, Catholic schools, and Jewish schools without sup-

porting Unification Church schools, or secular humanist schools, or schools for the advancement of atheism? On what non-discriminatory basis would it be possible to distinguish between "real" religion and "fake" or non-religion? More disturbing still is Bradley's assumption that the universal, unchallenged preference for religion over irreligion in 1789 is still warranted in 1987. Just as the Supreme Court's fears of sectarian strife have proved to be a sort of jurisprudential bogey-man, without foundation in reality, so too the founders' conviction that tolerating unbelief would lead immediately to the dissolution of society. What now remains of the founding generation's belief in the need for governmental aid to religion? How might government pursue those goals without invidious discrimination against those individuals who expressly profess disbelief in religion? Can the government go any farther than merely accommodating religious believers, without encroaching upon the free exercise rights of disbelievers? Admittedly, the Court has addressed these issues with inconsistency and vacillation as to whether we are a people who place a positive value upon religious belief or a people who do not discriminate between belief and disbelief. Bradley has simply ignored the hard questions.

Reasonable people will continue to disagree over the direction that the Supreme Court should take with regard to church and state in America. Reputable scholars will continue to disagree with one another over the question of whether some of the framers might have intended to erect a wall of separation between religion and government, and if so, what might be the present-day legal significance of that intention. What is clear is that the vast majority of the founding generation did not believe or intend that the First Amendment's prohibition of establishment would require any departure from sect-neutral governmental support for Protestant belief. Bradley is right to insist that the Court must abandon the discredited historical rationale that has served as the basis for Establishment Clause jurisprudence since *Everson*. Bradley does not make a convincing argument that the wall of separation must be torn down, but he does leave those who would maintain the wall in need of a new foundation.

Richard M. Fraher

HUMAN RIGHTS: FACT OR FANCY? By Henry B. Veatch. Baton Rouge and London: Louisiana State University Press, 1985.

In the marketplace of ideas, the currency of contemporary legal, political, and ethical commerce is clearly the Right, not as in Rights and Wrongs, but as in Rights and Duties, and among the various denominations of Rights in circulation at present, the Human Right is clearly preferred over the others. The question presented in *Human Rights: Fact or Fancy?* is not whether human