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The First Amendment, which became part of the Constitution of the United States on December 15, 1791, as the leading article in the Bill of Rights, begins with this pair of clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Amendment then stipulates that Congress shall make no law “abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This juxtaposition prompts a question: Why wasn’t the Free-Exercise Clause (Congress shall make no law “prohibiting the free exercise” of religion) sufficient in itself? No other First Amendment right—freedom of speech, press, peaceable assembly, or petition—has a pair of clauses devoted to it.

In 1791, there were fourteen states in the United States, the original thirteen having been joined by Vermont, and half had religious establishments. What connection is there between the First Amendment’s Establishment Clause (“Congress shall make no law respecting an establishment of religion”) and this fact that seven of the fourteen states had establishments of religion? Could the purpose of the Establishment Clause have been to prevent the federal government from interfering with those religious establishments? Were the two religion clauses—establishment and free-exercise—coordinate protections of the right of the states to regulate religious matters within their borders? And what, exactly, is “an establishment of religion”? Each of these questions bears on the Supreme Court’s reversal over the past half century of the First Amendment’s prohibition against federal intrusion into religious matters.

Defining "Religious Establishment"

Let us first take up the question of what exactly a religious establishment is. In addressing this matter, one must understand that the Supreme Court’s ruling in 1962 in *Engel v. Vitale*—that a religious exercise in a public school represents an establishment of religion—redefined the meaning of a religious establishment. But it is even more important to understand that no court ruling can change the historical reality of what a religious establishment is. The Supreme Court possesses vast power, but that does not include the ability to rewrite history. The nature of religious establishments in the history of Western civilization is clear and cannot be altered by any court.

An establishment of religion is a declaration by a government, in a law, of a preference for one

particular religion, which the law names. This declaration of a preference is substantial and not just nominal, because the establishment law grants the preferred religion some substantial benefit that government alone can confer. The establishment law confers the benefit on the identified religion only; the churches of other religions, and persons unaffiliated with any organized religion, are excluded from receiving it. Typically, the benefit bestowed is the privilege of receiving institutional support from public revenues or the privilege to vote and hold public office—sometimes a combination of both. No establishment of religion exists when a government treats the members of every faith equally, tolerates free, public expression of any religious faith, and enacts no establishment law bestowing a substantial governmental benefit on one religion to the exclusion of all others.

In 1791, New Hampshire, New Jersey, and South Carolina had establishment laws that benefited “the Protestant faith”; in Delaware and Maryland, where there were numerous Roman Catholics, establishment laws benefited “the Christian faith”; establishment laws in Connecticut and Massachusetts bestowed exclusive privileges on the Congregationalist Church. The churches representing the religions established through these state laws were all supported by donations of money from the public treasuries of the seven states that had privileged them as the preferred churches of their governments. Only Massachusetts and Connecticut, however, had what could be termed strong religious establishments, since the establishment laws in those states gave preference to just one church and made membership in it a qualification for voting and holding public office.

During the next forty-two years—that is, between 1791 and 1833—the religious establishments in Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, and South Carolina were all abrogated by acts of state legislatures that revoked their establishment laws; no further establishment laws were ever enacted in the United States. Thus, it is a plain matter of historical record that since 1833 no establishment law has existed anywhere in the United States; hence, there have been no establishments of religion since that date.

Historically speaking, it is implausible to claim that personal expressions of religious belief—for example, voluntary participation in a group prayer or the silent prayer of an individual—could constitute a religious establishment just because they occur on public property with the approval of elected or lawfully appointed public officials. Yet that was what the Supreme Court held in its 1962 judgment in *Engel* and in its 1985 judgment in *Wallace v. Jaffree*. The former held unconstitutional voluntary participation in group prayer and the latter, individual silent prayer, in public schools when approved by school officials. In Engel v. Vitale the Supreme Court misconstrued “an establishment of religion” to mean the approval of religious exercises by public officials, even though their approval conferred no exclusive benefit on any religious congregation. In *Engel*, the Supreme Court moved from protecting religious exercises in public schools, under the First Amendment’s Free-Exercise Clause, to condemning them as religious establishments.

The Historical Purpose of the Religion Clauses

But before discussing how this reversal came about, the historical purpose of the First Amendment's two religion clauses must be carefully examined, especially their relationship to each other. In this regard, we must first note the reason for the addition to the Constitution of the set of amendments known as the Bill of Rights, which includes the First Amendment. A set of amendments to protect the rights of individuals and states was repeatedly urged in 1787–88 during the debates in the state ratifying conventions. Alexander Hamilton stated in Federalist 84 that "the most considerable of the remaining objections" to ratification was that there was "no bill of rights" in the proposed Constitution. The promise by pro-ratification delegates to the state conventions (the "Federalists") to add a Bill of Rights after ratification won over the states that feared that the authority being granted the new federal government would infringe upon existing rights. The most prominent Federalist of the 1780s, James Madison, "the Father of the Constitution," duly drafted and introduced the promised Bill of Rights in the first session of the First Congress.

Yet Madison's wording of the First Amendment's Establishment Clause was significantly changed in what was finally approved by Congress and sent to the states for ratification. In attempting to understand the purpose of the Establishment Clause, we must examine that change.

The religion clauses for the First Amendment that Madison introduced in the House of Representatives read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." This awkward wordiness was amended by a majority of his colleagues in the House, under the leadership of Fisher Ames of Massachusetts, to read: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." The Senate then amended that language further to, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." All three of these statements had the evident aim of prohibiting Congress from enacting a law that would, in Madison's words, establish "any national religion." And despite their various styles and various degrees of specificity, all of them protected the free exercise of religious beliefs.

As with bills today, it was a conference committee that reconciled the House and Senate versions and produced the final language of the First Amendment that Congress sent to the states for ratification. Two members of this six-member committee, Oliver Ellsworth and Roger Sherman, were from Connecticut, a state with a strong religious establishment. The language of the conference committee's final version kept the Free-Exercise Clause that both houses of Congress preferred to Madison's diffuse wording but rephrased the Establishment Clause in a way that significantly broadened its frame of reference. That clause's final wording ("Congress shall make no law respecting an establishment of religion") succinctly prohibited Congress from both enacting an establishment law of its own and disturbing the establishment laws that then existed in half the states of the Union.

The key term in this significant revision was “respecting,” a word meaning “in regard to,” according to Noah Webster’s 1806 Compendious Dictionary of the English Language, the dictionary of American usage closest in time to the writing of the First Amendment. That meaning was also given in Webster’s more scholarly, more comprehensive dictionary of 1828, An American Dictionary of the English Language, which defined “respecting” as “regarding; having regard to; relating to.” One should notice also that the reworded clause says “respecting an [i.e., any] establishment of religion” rather than “respecting the establishment of a religion.” The conference committee rejected wording that would have applied only to Congress’s passing a law to establish a religion; the chosen wording denied Congress that power, of course, but it also denied Congress the power to negate or modify by federal law any of the religious establishments in the states. Thus, the final wording of the Establishment Clause of the First Amendment that three-fourths of the states ratified in 1791 contained a double prohibition on federal authority. It forbade Congress from enacting an establishment law of its own and from interfering with any state’s existing establishment.

The establishment and free-exercise clauses in the First Amendment were thus complementary constitutional provisions with a common purpose. Each restricted federal authority with regard to religion, and together they prohibited the federal government from trespassing on the authority of the states to decide religious matters, even when that authority was used to establish a religion.

The purpose of the political promise made during the state ratifying conventions—to write a Bill of Rights for the U.S. Constitution, a promise the First Congress duly kept—was to encourage ratification of the Constitution. The Establishment Clause likewise had a political purpose—to encourage ratification of the First Amendment. For it accommodated the seven states that had establishments of religion by stipulating that “Congress shall make no law respecting an establishment of religion,” which satisfied them that under no circumstances would the powers being granted the federal government include the authority to interfere with their religious establishments.

Engel v. Vitale and Jefferson's "Wall of Separation"

None of this history of the Establishment Clause, however, restrained the Supreme Court in 1962 in its school prayer decision. In *Engel*, the Court ignored both the historical meaning of an establishment of religion and the Establishment Clause’s history. The Court in this case applied an unhistorical meaning of religious establishments and claimed an unwarranted jurisdiction to regulate religious practices in the states.

Engel v. Vitale came before the Court as a dispute about a prayer. The state of New York,

acting through its Board of Education, had approved a prayer to be recited at the beginning of each school day for the stated purpose of “moral instruction.” The children of parents or guardians who did not want them to participate in the exercise were excused from reciting the prayer. Lawyers for the plaintiffs argued, however, that the prayer offended their clients’ religious sensibilities and was an establishment of religion, even though reciting it was voluntary, because an agency of the state of New York had approved the prayer. That no governmental benefit was bestowed on any specific church by the prayer’s recitation, that the prayer was nondenominational, and that participation in its recitation was voluntary meant nothing to the plaintiffs’ lawyers. This was the prayer at issue: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.”

Lawyers for the state of New York pointed out that this nondenominational prayer acknowledging man’s dependence on God as the source of blessings was intended to serve the purpose of moral education only for those students whose parents wanted them to recite it. It was not a mandatory prayer. The plaintiffs’ lawyers reiterated that the prayer offended the sensibilities of their clients and represented to them an establishment of religion. Therefore, it was a violation of their clients’ right (according to their understanding of the First Amendment) to be federally protected from establishments of religion. That argument ignored the palpable fact that the purpose of the Establishment Clause, as the House and Senate revised it and three-fourths of the states ratified it, was to forbid the federal government from regulating religious practices in the states. Nevertheless, the Supreme Court embraced the plaintiffs’ reasoning and ruled that approval by a state of a brief, voluntarily recited, nondenominational prayer constituted an establishment of religion—and moreover, that the establishment of religion by any level of government in the United States was unconstitutional.

Now, nearly fifty years on from Engel, the logic of this decision has become second nature for many Americans. Certainly, our history textbooks celebrate it as an achievement in the march of American liberty. But what did the decision really mean? In fact, the Supreme Court was canceling the free-exercise rights of those parents in the state of New York who wanted their children to recite the prayer the state’s Board of Education had approved. The Court justified depriving them of their free-exercise right under the First Amendment by trumping that right with the Establishment Clause, thus using one provision of the Constitution to cancel another provision. In effect, the Court regarded the Free-Exercise Clause as if it did not exist; or at least, the Court regarded it as radically subordinate to the apparent—but unhistorical—value of secularity which was deduced from the Establishment Clause. Moreover, the Court ignored the fact that recitation of the prayer in question neither conferred any governmental benefit on a particular religious denomination nor showed an exclusive preference for one religion over other religions—both of those results being inherent purposes of religious establishments.

What about the famous “wall of separation between Church & State” that Thomas Jefferson referred to in his letter of January 1, 1802, to the Baptists of Danbury, Connecticut? The major political issue lying behind this letter was President Jefferson’s refusal to declare a day of thanksgiving (to God) for a peace treaty just reached between France and Britain. The Anglo-French conflict had threatened to draw the young American nation into war, and on a rather less momentous occasion in 1796, President Washington had himself declared a day of

national thanksgiving. Jefferson's stance would seem to indicate a settled conviction against any even symbolic connection between religion and government generally. But here it must also be observed that Jefferson, as governor of Virginia in 1779, had proclaimed a day of fasting and prayer in that state when requested to do so.

Based on this historical record, a natural inference is that Jefferson did not think that he had, as president of the United States, the constitutional power to authorize a national religious exercise. In other words, Jefferson saw in the Constitution confirmation of the reserved right of the states to regulate religious matters and a denial to the federal government of the power to do so. We can be certain that such was his understanding of the First Amendment because he said as much in his most public statement on the separation of church and state, which was also his most emphatic statement on the issue. The occasion was his second inaugural address in 1805, in which he declared to the whole country, "In matters of religion, I have considered its free exercise is placed by the Constitution independent of the powers of the general [i.e., federal] government." In other words, Jefferson's wall metaphor in his 1802 letter was referring to the First Amendment's prohibition of federal interference with the authority of the states in religious matters. It was a wall to prevent federal trespass. On the issue of religion, as with other matters, Thomas Jefferson emerges as a believer in what might be called states' rights.

The Harmful Consequences of Judicial Error and Misjudgment

Engel v. Vitale was the Supreme Court decision that banned expressions of belief in God from American public schools and enforced a bizarrely expansive definition of religious establishment. But it was *Everson v. Board of Education*, fifteen years earlier in 1947, in which that expansive definition was first articulated.
Everson v. Board of Education
was the case that originally misconstrued and misapplied Jefferson's wall metaphor. Everson concerned a New Jersey law that reimbursed from public money the cost of transporting children to "schools other than public schools." Since most of the nonpublic schools in New Jersey in the 1940s were operated by the Roman Catholic Church, Arch Everson's lawsuit raised the issue of whether a state government's payment of transportation costs for students attending a religious school represented an establishment of religion. The Supreme Court decided it did not and so upheld the New Jersey law. In ruling against Everson, the Court found that state payment of transportation for children in religious schools was a public service similar to providing police and fire protection or sidewalks at public expense. It did not represent an endorsement of a particular religion by the state of New Jersey; therefore, it was not an establishment of religion.

In reaching this decision in *Everson*, however, the Court vigorously embraced the idea of separation of church and state and retailed a gross misunderstanding of the purpose of the First

Amendment's Establishment Clause. Crucial particulars of the Court's opinion, written for the majority by Justice Hugo Black, were illogical and factually incorrect. Justice Black described an establishment of religion and separation of church and state in these terms:

The "establishment of religion" clause in the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[1]

Black was historically in error in declaring that the First Amendment prohibited states from having an establishment of religion: in fact, the First Amendment was ratified by states that had religious establishments. He was also factually incorrect and made a monumental blunder of reasoning in stating that an establishment of religion encompassed aid to "all religions." If that were true, the very point of having religious establishments would be contradicted. Furthermore, in claiming that the definition of an establishment of religion included aid to all religions, Black contradicted the Court's own ruling in Everson! For aid to all religions was precisely what the New Jersey law was providing in paying for the cost of transporting students to religious schools, regardless of the religion they professed. And that was why the Court had decided in Everson that the law did not represent a religious establishment. By defining an establishment of religion as aid to all religions, Justice Black was contradicting both history and the very ruling for which he was writing the majority opinion.

By relying in 1962, in *Engel v. Vitale*, on Hugo Black's grossly inflated definition of religious establishment in his 1947 *Everson* decision, the Supreme Court was building its precedents on an illogical foundation. But the 1962 decision was unsound in other ways as well. For it is certainly unsound jurisprudence, even in the most freewheeling theory of constitutional interpretation, to use one provision of the Constitution to suppress another provision, as was done in
Engel v. Vitale
when the Establishment Clause was used to suppress the First Amendment's Free-Exercise Clause. The provisions of the Constitution must be presumed, on principle, to be parts of the same coherent law, and interpreted as being consistent with each other and in no sense containing mutual contradictions.

This consideration of the principle of the consistency and coherence of the Constitution's provisions leads to an interesting question. Can the Fourteenth Amendment's Equal Protection Clause, which has been invoked to empower federal courts to decide religious matters in the states, be justly used to nullify the First Amendment's prohibition against federal regulation of religion in the states? But the Fourteenth Amendment became part of the Constitution as a consequence of the need, following the Civil War, to protect the freed slaves from being deprived of their rights as citizens. Its purpose was not to empower the federal government to regulate religion.

In any event, the *Engel v. Vitale* decision makes a muddle of the constitutional principle of equal protection. The plaintiffs in Engel protested through their lawyers that their sensibilities were

offended by the recitation in public schools of a prayer approved by the State of New York. In ruling to protect the plaintiffs' feelings, the Supreme Court was choosing to safeguard the sensibilities of one group of citizens at the expense of other citizens, whose sensibilities were doubtless offended by the decision to curtail the free exercise of religion in public schools. In its verdict in *Engel* the Court was declaring that the plaintiffs' sensibilities had greater legitimacy than those of the parents who felt their children should recite the prayer affirming belief in God. It is difficult to see how this outcome constitutes equal protection.

And when it comes to feelings, especially those touching upon religion, is it even possible to provide equal protection? In any large population, what gratifies the religious sensibilities of one person or group of persons is bound to offend the sensibilities of another person or group of persons. If we attempt to solve this problem by banning all offensive expressions of religious belief, we are in effect abolishing freedom of religion as a right. To permit in public places only the expression of religious beliefs that are inoffensive to everyone is to forbid all public expressions of religion, because there are no universally inoffensive religious beliefs. Nothing in the Constitution warrants suppressing public religious exercises because they will be offensive to someone. And if we restrict religious freedom to like-minded persons in homes, churches, and private schools, so that the free exercise of religion will give offense to no one, we emasculate this First Amendment freedom by restricting it in a way that none of the other First Amendment freedoms is restricted. Would we permit only the private circulation of petitions for the redress of grievances? How about allowing only private publication and distribution of books? Would we limit assemblies to private property only?

Legal arguments based on offended feelings have dubious constitutional legitimacy. No provision in the U.S. Constitution guarantees citizens immunity against having their religious or political sensibilities offended by the orderly, public expression of the political or religious beliefs of other citizens. To have meaningful rights with respect to freedom of religion, freedom of speech, freedom of the press, freedom of peaceable assembly, and freedom of petition, the equal protection of every citizen's feelings is an inherently impossible goal. When it comes to exercising First Amendment rights, the equal protection of feelings is not something government can aim to accomplish.

Conclusion

Engel v. Vitale produced a torrent of Supreme Court regulation—restriction—of religious expression in the states. Prior to *Engel*, going back as far as the 1879 Mormon polygamy case, only eight lawsuits involving religion came before the Supreme Court; before 1879 there were none. Since 1962, there has been on average more than one such case each year. By means of the authority of judges—most importantly the justices on the Supreme

Court—the First Amendment's Establishment Clause has been disjoined from the Free-Exercise Clause and has in the past five decades gained an ascendancy over the Free-Exercise Clause that is now almost absolute. This has been done despite the fact that these twin clauses in the First Amendment were conceived and born together, to ensure that the federal government did not interfere with the states' reserved rights with respect to religion.

The inconsistencies and vacillations, the historical inaccuracies and injudicious rationalizations, the occasional ideological dogmatism and sometimes the sheer absence of logic that one encounters in reviewing the opinions of the Supreme Court on religious matters since 1947 have led one commentator to observe that the Court's jurisprudence regarding religion is "an intellectual mess."[2] But how to correct this mess? Over the past two decades, a sophisticated literature has emerged that plainly reveals the historical fallacies and tendentious theorizing that lie at the basis of the Court's religion decisions. Yet still, decisions such as *Engel* have not been overturned. The Court remains adamant in its defense of the secularism of public institutions. It seems only a new constitutional amendment could return us to the religious liberty envisioned in the First Amendment. One thing is certain: to relegate freedom of religion solely to nonpublic venues is an unconstitutional suppression of belief in God, a belief that has been of central importance to Americans throughout their history.

Professor McElroy's most recent book is *Divided We Stand: The Rejection of American Culture Since the 1960s* (2006). This essay is republished by permission from *Intercollegiate Review*, published twice a year by the Intercollegiate Studies Institute (ISI). Copyright 2011 by ISI. The *Review* is provided free to members of the Institute. Archives of this and another ISI journal, *Modern Age*, which is published quarterly, are available online at: http://www.isi.org/journals.html

Endnotes

1. *Everson v. Board of Education*, 330 U.S. 1.
2. Terry Eastland, "A Court Tilting Against Religious Liberty," in *A Country I Do Not Recognize: The Legal Assault on American Values*, ed. Robert H. Bork (Stanford: Hoover Institution Press, 2005), 86.

Quotations

"[N]o court ruling can change the historical reality of what a religious establishment is. The Supreme Court possesses vast power, but that does not include the ability to rewrite history. The nature of religious establishments in the history of Western civilization is clear and cannot be altered by any court."

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