

BOOK REVIEWS

No Establishment of Religion: America's Original Contribution to Religious Liberty

T. Jeremy Gunn and John Witte, Jr., editors
New York: Oxford University Press, 2012
415 pages, \$99.00 cloth, \$35.00 paper

Reviewed by: Mark A. Noll

The editors of this sterling collection recruited an all-star lineup of contributors to explain, apply, and (in good lawyerly fashion) argue about the guarantee in the First Amendment of the U.S. Constitution that “Congress shall make no law regarding an establishment of religion.” The questions receiving fullest attention are the following: What did “establishment” mean in the eighteenth century? What did the first U.S. Congress and the state ratifying conventions intend when they approved the First Amendment? What are the contemporary implications of controversies surrounding the 1876 Blaine Amendment, which if passed would have prohibited public funding of “sectarian” schools while allowing “nonsectarian” practices in public schools like reading from the King James Version of the Bible? How wise was the famous *Everson* decision of 1947 that applied (“incorporated”) the First Amendment to the states, established a strict principle of church-state separation, but allowed the New Jersey law to stand that provided publically funded bus transport to students attending Catholic schools? And how has recent understanding of “no establishment” been shaped by the Supreme Court’s *Zelman* decision of 2002 that allowed parents,

under specified conditions, to use state-funded vouchers for their children's education, even at parochial schools?

Historians, legal scholars, political scientists, jurists, legislators, and an interested general public should all benefit from this book. All of the contributions merit close reading, including those on the relation of constitutional separation to general questions of religion in public life (T. Jeremy Gunn), the understandings of "establishment" in the eighteenth century that the First Amendment did and did not intend to prohibit (Michael McConnell), the legislative and judicial record in the early national period (separate essays by Mark McGarvie and Daniel Driesbach), the Puritan contribution to the Establishment Clause (David Little), the influence of colonial New York, especially its Jewish inhabitants, on the First Amendment (Paul Finkelman), the much-debated role of Thomas Jefferson and James Madison in defining the meaning of "no establishment" (Ralph Kethcam), the influence of the Continental Congress in moving toward the First Amendment (Derek Davis), and the way that notions of "Christian America" confuse efforts to understand the meaning of "no establishment" (Martin Marty).

For my particular historical interests, four of the essays stand out as the best of the best. Carl Esbeck's meticulous examination of the legislative history behind the final wording of the First Amendment allows him to speak authoritatively about recent efforts to apply "original intent" to contested contemporary questions. For Esbeck, responsible historical investigation must conclusively rule out both "nonpreferentialism" (that government can support religious matters if done without distinction among different religious groups) and a limitation of "no establishment" to just protecting liberty of conscience. Esbeck's careful investigation also predisposes him against the notion that the main intent of the clause was to establish a principle of federalism (sorting out relations between state and national governments), while leading him to support a "jurisdictional" interpretation (an intention to manage relations between government and church authorities). Steven Green's chapter on nineteenth-century judicial decisions, mostly on the state level, augments the very impressive works he

has recently published (*The Second Disestablishment: Church and State in Nineteenth-Century America* [2010] and *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Debate* [2012]). His contention, after wide-ranging citations including the Blaine Amendment debates, is that nineteenth-century jurisprudence pointed directly to the strong separationist conclusion of *Everson*. Thomas Berg, by contrast, uses an even more painstaking examination of contemporary arguments surrounding the Blaine Amendment, along with a careful investigation of the legal history between Blaine and *Everson*, to conclude the opposite: *Everson's* strict separationism ignored the implications of the twentieth-century welfare state (with massively more direct government assistance to individuals) and pushed separationism to unjust and poorly grounded conclusions.

The reasons why two exquisitely expert legal historians like Green and Berg could differ so dramatically are explained most skillfully in Kent Greenawalt's chapter devoted to "fundamental questions about the original understanding of the establishment clause." As in his two recently published volumes (*Religion and the Constitution, Vol. 1: Free Exercise and Fairness* [2006] and *Vol. 2: Establishment and Fairness* [2008]), Greenawalt patiently unpacks many of the assumptions and carefully examines the logic of argument behind the main positions interpreting the history and applications of the "no establishment" clause. Greenawalt's approach is as helpful as it is refreshing, not necessarily because his conclusions carry dispositive force, but because the steps by which he comes to those conclusions are so clear, self-conscious, and transparent. Agree or disagree, all who read Greenawalt carefully are in the very best position to both trace the history and understand current contentions about what the "no establishment" clause did and should mean. His chapter provides a superb summation for a superb book.

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