

Book Review

WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION

By Patrick M. Garry, Published by the Catholic University of America Press, Washington, D.C., 2006. 230 Pages. Hardcover (\$49.50).

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Much has been written about whether the Framers' intention when drafting the Establishment Clause of the First Amendment was to exclude religion from the state by a "wall of separation," by some lesser measure, or by no measure at all.¹ On one side of the debate, Justice Brennan and prominent commentator Erwin Chemerinsky, among others, advocate a strict separation of church and state, highlighting the benefits of secular government and noting that reliance on history in interpreting the Establishment Clause is of little use due to ambiguity in the historical record.² Scholars such as Noah Feldman also advocate for a separation approach but on a slightly different basis – the contention that the underlying principle of liberty of

¹ Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1 (2006); Vincent Philip Munoz, *The Original Meaning of the Establishment Clause And The Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); Steven K. Green, *Bad History, The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL OF RTS. J. 73 (2005); Douglas G. Smith, *Thomas Jefferson's Retrospective on the Establishment Clause*, 26 HARV. J.L. & PUB. POL'Y 369 (2003); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); Erwin Chemerinsky, *Why the Rehnquist Court Is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221 (2001); Carl H. Esbeck, *The Establishment Clause As A Structural Restraint On Governmental Power*, 84 IOWA L. REV. 1 (1998); Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Jurisprudence*, 61 NOTRE DAME L. REV. 311 (1986).

² Chemerinsky, *supra* note 1, at 222-23.

conscience animated the Framers' true intent in enacting the Establishment Clause.³ A few scholars have taken a middle road, interpreting the purpose of the Establishment Clause as a jurisdictional device that intended to leave all control over religious issues with the states and not the federal government.⁴ Other academics and Justices of the United States Supreme Court take an opposing view, finding sufficient indication in the history of the Framers' actions to interpret the Establishment Clause so as to only bar the government's literal creation of a national church. Patrick M. Garry furthers the last perspective in his latest book.⁵ In *Wrestling with God*, Garry offers a contribution to ongoing debate surrounding the religious clauses and integrates the logical tensions, historical record, and one potential nonpreferentialist solution to the interpretative problem.

True to its title, *Wrestling with God* begins by outlining the numerous tensions between the religious clauses of the First Amendment and other constitutional and jurisprudential doctrines. Other commentators have discussed the tensions within the First Amendment and beyond.⁶ Garry, however, offers comprehensive treatment of the myriad tensions: the tension between the Establishment Clause and protection of freedom of speech;⁷ the tension between the establishment clause and the wall of separation metaphor;⁸ the tension between the Establishment Clause and history;⁹ the tension between the Establishment Clause and the

³ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 349-50 (2002).

⁴ Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

⁵ PATRICK M. GARRY, *WRESTLING WITH GOD*, (Catholic University of America Press) (2006).

⁶ See also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1201 (Foundation Press, 1988).

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.* at 3. Mary Ann Glendon, *Law Communities, and the Religious Freedom Language of the Constitution*, 60 GEORGE WASHINGTON LAW REVIEW 672, 679 (1992).

exercise clause;¹⁰ and the tension between the cultural and legal community over the place of religion in society.¹¹

In the middle and final chapters, Garry moves beyond highlighting tensions to a substantive critique of the Court's tortured jurisprudence involving the religious clauses, which include the Establishment Clause and the Free Exercise Clause. Garry concentrates on critiques of the endorsement and neutrality approaches to the Establishment Clause. Critical to each critique is Garry's presentation of the appropriate historical record to evaluate Establishment Clause jurisprudence against. Finally, Garry offers his nonpreferentialist solution to the interpretative problem surrounding the establishment clause.

This review proceeds in four parts: (1) discussing the recent court decisions that now frame the debate surrounding the proper interpretation of the establishment clause; (2) Garry's presentation of the interpretative tension surrounding the religious clauses of the First Amendment; (3) Garry's analysis of the Court's religious clause jurisprudence; and (4) historical background of the clauses combined with Garry's suggested nonpreferentialist solution.

A. FRAMING THE DEBATE

A brief recall of the recent addition to Establishment Clause jurisprudence will set the stage for a complete understanding of how and where *Wrestling with God* fits into the ongoing debate. Although the Supreme Court's embrace of the neutrality principle seemed well-entrenched, the Court complicated its Establishment Clause jurisprudence in two cases from the

¹⁰ *Id.* at 3-4. *See also* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 299 (2002).

¹¹ *Id.* at 5.

2005 term, *Van Orden v. Perry*¹² and *McCreary County v. ACLU*.¹³ One decision attacked the neutrality principle and one decision affirmed the principle's place in constitutional law.¹⁴ At the present moment, the Court is at a critical point of interpretative change with regard to the Establishment Clause.¹⁵

In *Van Orden*, the issue before the Court was whether a Ten Commandments monument located on the Texas State Capitol grounds violated the Establishment Clause, despite purchase of the monument by a civic organization and placement of the monument among sixteen other monuments and twenty-one historical markers on the twenty-two acre grounds.¹⁶ For the Court, Justice Rehnquist penned a plurality opinion upholding the Ten Commandments monument.¹⁷ Although the monument undoubtedly carries religious significance, Rehnquist stated “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”¹⁸ Rehnquist continued, noting that the Court [has] not, and [does] not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.¹⁹ Rather, “[r]ecognition of the role of God in our Nation’s heritage has . . . been reflected in our decisions. We have acknowledged, for example,

¹² *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹³ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

¹⁴ Laura S. Underkuffler, *Through A Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST. AMEND. L. REV. 59, 59-60 (2006).

¹⁵ *Id.*

¹⁶ *Van Orden*, 545 U.S. at 688.

¹⁷ *Id.*

¹⁸ *Id.* at 690.

¹⁹ *Id.* at 684.

that ‘religion has been closely identified without history and government’²⁰ For Justice Rehnquist, no one could deny that the religion clauses do not operate as a comprehensive prohibition on preferences or accommodations of religion, not even the *Van Orden* dissenters.²¹

In *McCreary*, however, the *Van Orden* dissenters now joined by Justice Breyer, the concurring and decisive vote in *Van Orden*, struck down the actions of two county executives in Kentucky that placed displays in the county courthouses containing the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact.²² The *McCreary* majority held that the Establishment Clause requires religious neutrality, a principle that does not permit any sort of preference for religion over non-religion, or for one religion over another.²³ For the majority, “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”²⁴ Thus, because the displays referenced the religious history of Jews and Christians in addition to promoting the existence of a monotheistic god, the displays advanced religion and violated the Establishment Clause.²⁵

Together, the decisions created two inapposite positions. As Professor Underkuffler noted, the *Van Orden* plurality position may be summarized as follows:

²⁰ *Id.* at 687.

²¹ *Van Orden*, 545 U.S. at 707.

²² *McCreary*, 545 U.S. at 848.

²³ *Id.* at 860.

²⁴ *Id.*

²⁵ *Id.*

Religion and religious traditions have played a strong role throughout our Nation's history. In particular, there is a rich and continuing tradition of the acknowledgment of the Creator/One God/the Almighty by government. We are a religious people. . . . Government can purposely engage in the acknowledgment, preference, accommodation, even assistance of religion in this monotheistic sense. . . . Government cannot actively intervene in religious matters.²⁶

According to Underkuffler, the *McCreary* majority position, on the other hand, is “[a]s an official matter, government must remain neutral between religion and non-religion, and between religion and religion. . . . [T]o violate this principle of neutrality is to make some citizens feel like outsiders. . . . Government cannot convey the message that some are outsiders, whatever their percentage of the population may be.”²⁷ In Underkuffler's view, however, the *Van Orden* position would still accept “neutrality between religion and non-religion [as] a valid principle where public aid or assistance (presumably, financial assistance) to religion is concerned.”²⁸

B. LOGICAL TENSION: THE ESTABLISHMENT, FREE EXERCISE, AND SPEECH CLAUSES

The primary tension for Garry is the relationship between the Establishment Clause, the Free Exercise Clause, and the Free-Speech Clause.²⁹ Garry begins by noting the similarities between the other religious clause, the Exercise Clause, and the Free-Speech Clause, remarking, “The exercise clause which guarantees religious liberties, ‘embraces a freedom of conscience and worship that has close parallels’ with the free-speech clause. And yet, over the course of the last half-century, courts have taken a very different approach to the two freedoms.”³⁰ Garry

²⁶ Underkuffler, *supra* note 14, at 71-72.

²⁷ *Id.* at 72-73.

²⁸ *Id.* at 74.

²⁹ GARRY, *supra* note 5, at 18.

³⁰ *Id.*

attributes this disparity to “how the courts have applied the establishment clause.”³¹ As compared to the Free-Speech Clause, applications of the Establishment Clause have frequently focused on “the reactions of objecting viewers and listeners . . . sometimes accord[ing] near veto power in religious-expression cases, whereas viewer or listener sensibilities are rarely considered in free-speech cases, even when the speech is highly offensive.”³²

Other elements of tension surround the benefit free-speech cases receive from more careful scrutiny than religious claims.³³ “Cases involving content regulation of speech trigger a heightened judicial review. Normally, strict scrutiny. . . . Under the test, laws regulating content are upheld only when they are justified by compelling government interests and employ the least restrictive means to achieve those interests.”³⁴ “[C]ontent-neutral laws [also gets close scrutiny], generally . . . some variation of intermediate scrutiny.”³⁵ With religious exercise, however, the courts apply lesser scrutiny. Under *Employment Division v. Smith*,³⁶ a law that is neutral and generally applicable, even if it does burden religion is presumptively constitutional; even some non-facially neutral laws receive less than strict scrutiny.³⁷ “Aside from differing levels of scrutiny, the two freedoms and religious exercise also differ in their relative scope: Free-speech doctrines protect not only speech but any conduct ‘commonly associated’ with speech or

³¹ *Id.* at 19.

³² GARRY, *supra* note 5, at 19.

³³ *Id.* at 23.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Employment Division v. Smith*, 494 U.S. 872 (1990).

³⁷ GARRY, *supra* note 5, at 25-26.

‘normally engaged in the purpose of communicating ideas,’ which can include a “location where the speech occurs and the means by which speech is communicated.”³⁸

Such tensions, Garry contends, generate a “constitutional distortion forcing [a] plaintiff seeking religious protection [to] frequently abandon the exercise clause and resort instead to the free-speech clause . . . Thus free speech is incorporating more than it should, and exercise clause is emptied.”³⁹ Rather, according to Michael Paulsen, “the establishment clause prohibits the use of the coercive power of the state to prescribe religious exercise, while the exercise clause prohibits the use of government compulsion to proscribe religious exercise.”⁴⁰ Garry proclaims that “[i]nstead of one being the brake on the other, the two clauses should be seen as protecting a single central liberty—religious liberty—though from two different angles.”⁴¹

C. “TORTURED” JURISPRUDENCE AND THE APPROPRIATE HISTORICAL BACKGROUND

Garry next moves to what he terms “judicial experiments in establishment [clause] doctrines.”⁴² Garry notes that although the courts have tried many tests to find an Establishment Clause violation, all tests, including the infamous Lemon test and its progeny, have been unable to offer a principled and consistent evaluative foundation.⁴³ Aptly, Garry emphasizes that “[t]here is no underlying theory of religious freedom that has captured a majority of the Court,”

³⁸ *Id.*

³⁹ *Id.* at 38-43.

⁴⁰ *Id.* at 22.

⁴¹ *Id.*

⁴² GARRY, *supra* note 5, at 55.

⁴³ *Id.* at 55.

and every new case ‘presents the very real possibility that the Court might totally abandon its previous efforts and start over.’”⁴⁴

Since moving away from the Lemon test, Establishment Clause tests such as the endorsement, coercion and neutrality tests have found use by the Court.⁴⁵ Garry quickly dismisses the strength of the coercion test and begins with critique of the endorsement test.⁴⁶ Garry classifies the endorsement test as querying whether the government “endorses” religion when some state preference or benefit is bestowed upon an organization by the government.⁴⁷ For Garry, “[t]he endorsement test is [inappropriately] grounded . . . on Justice O’Connor’s premise that the establishment clause prohibits the government from conveying ideas that divide the community into outsiders and insiders.”⁴⁸ A second problem with the endorsement test is its level of subjectivity “as to what impression viewers might have of some religious display or speech” that is implicit in a determination of a constitutional violation.⁴⁹ Furthermore, Garry argues that courts often concentrate on the facts “that might suggest government sponsorship of religion” and that “no concrete boundary exists as to where establishment begins and ends.”⁵⁰

Particularly problematic for Garry is the Court’s “preferred” neutrality approach to Establishment Clause issues.⁵¹ Despite the historical record, Garry notes that “[t]he neutrality

⁴⁴ *Id.*

⁴⁵ *Id.* at 56-57.

⁴⁶ *Id.* 57-58.

⁴⁷ *Id.* at 58.

⁴⁸ *Id.* at 67.

⁴⁹ *Id.* at 59.

⁵⁰ *Id.* at 63.

⁵¹ *Id.* at 69.

doctrine prevents the government from conferring any special benefits on religion in general.”⁵²

Thus, in Garry’s view, the neutrality approach is “more of a compromise between competing forces - a means of ending all the conflicts and discriminations caused by the ‘wall of separation’ approach.”⁵³

Garry also argues that the neutrality approach has had profound effects on the exercise clause. The exercise clause has been essentially transformed into a subspecies of equal protection, with the focus not on religious practitioner but on whether the government is making some distinction between religion and non-religion.⁵⁴ By leveling religion on the same plane as the secular, neutrality ignores constitutional text and history. It ignores unique aspects of religions, as well as the role that the framers envisioned for it in American society.⁵⁵

With the shortcomings of the various establishment clause approaches set forth, Garry recounts the historical record to provide support for a differing approach to Establishment Clause jurisprudence.⁵⁶ Garry begins by emphasizing that few eighteenth century Americans believed that the presence of religion, religious values in civil laws, or public accommodations of religion constituted an establishment clause violation.⁵⁷ For Garry, such a historical record demonstrates that reliance on the wall of separation metaphor has inappropriately directed the course of establishment clause doctrine in the modern era.⁵⁸ Rather, Garry writes the metaphor actually

⁵² *Id.*

⁵³ *Id.* at 69-70.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ GARRY, *supra* note 5, at 87.

contradicts the relationship between religion and government that existed in eighteenth century America.⁵⁹

Most important for Garry is the institutional relationship between the government and religious organizations on an institutional level. Simply, “[s]eparation of church and state was a concept focused on ensuring the institutional integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies.”⁶⁰

With such a general understanding of the historical record, Garry asks whether a clear opinion existed on “whether states could support and promote an individual Christian denomination.” Garry submits that no clear opinion existed, but nevertheless contends that “overwhelming agreement” existed toward the notion that government could assist religion, with the caveat that such assistance was available universally across denominations.⁶¹ Specifically, Garry notes “[b]oth before and after the revolution, Americans made a conscious distinction between two types of state action: the granting of exclusive privileges to one church, and nonexclusive assistance to all churches. Only the former was considered the establishment of religion.”⁶²

According to Garry, this “nonpreferentialist tradition,” the ability of government to assist religion so long as the assistance does not continually go toward on particular sect, “hinged on the belief that the exercise clause is preeminent to the establishment clause.”⁶³ The debates

⁶⁰ *Id.* at 94.

⁶¹ *Id.* at 95.

⁶² *Id.* at 95-96.

⁶³ *Id.* at 98.

surrounding the adoption of the First Amendment, for Garry, supported the premise that the most critical religious freedom was the exercise of one's conscience, whereas the Establishment Clause was one manner in which to support such free exercise.⁶⁴ Yet after the "wall of separation" metaphor in the Court's decision in *Everson*, the recognition of such relationship between the two religious clauses was lost, no matter whether "cultural attitudes and beliefs rather than from constitutional precedent" informed the *Everson* decision.⁶⁵ For Garry, the "high and impregnable wall of separation between church and state" became an ever present reality in constitutional law, as the Court turned away "from history as a guide to its religion decisions."⁶⁶

Here, a reader of Garry's book is bound to ask two questions. First, without the very specific account of the historical record, could an alternative jurisprudential theory stand? That is, does the historical record command such authority that no other approach to the Establishment Clause is legitimate? Second, what is novel or new about this presentation of the historical record or about the critique of the endorsement and neutrality approaches to the Establishment Clause? I believe that the answers to each question demonstrate that the Garry's discussion is useful for documenting one side of Establishment Clause debate, but not necessarily useful for advancing the nonpreferentialist position to a new status or to defending such a position to well-documented criticisms.

As for the first question, one recent commentator has put the use of history in constitutional interpretation into a new perspective, especially in the context of the Establishment

⁶⁴ *Id.* at 100-02.

⁶⁵ *Id.* at 99.

⁶⁶ *Id.* at 105-06.

Clause and especially within an originalist interpretative approach.⁶⁷ For Green, the use of history in constitutional interpretation should be especially careful just as Justice Brennan cautioned.⁶⁸ “The drawbacks to primary reliance on historical records are many.”⁶⁹ Green suggests three reasons to be weary of an over reliance on the historical record:

First, it must be recognized that the historical record of any period – the Founding period being no exception – is always incomplete. We have only those documents that have survived the ravages of time and have been transcribed, compiled, and published. . . . Second, judges and lawyers must acknowledge that all historical accounts are selective and interpretive – that ‘objective facts’ or ‘historical truths’ do not exist. By so doing, jurists will place the appropriate emphasis on historical material while affording history its essential autonomy from the present. . . . Third, lawyers and judges should resist drawing conclusions from particular statements or events in the record. Even if we could agree that history should bind us through the answers it provides, the meaning of many events is too indeterminate to be of help.⁷⁰

Instead, only general principles may be ascertained from the historical record. Such principles include “rights of conscience, no compelled support of religion, no delegation of government authority to religious institutions, and equal treatment of all sects.”⁷¹ Thus, Garry could have strengthened his argument by noting some of the shortcomings of strict reliance on the historical record, instead of relying on some of the more established general principles coming from the founding era. Without the historical record, Garry’s support for his nonpreferentialist position falls away.

As for the second question, the use of history to discredit the “wall of separation” metaphor and the *Everson* approach to history generally has been a topic of heated debate

⁶⁷ Green, *supra* note 1, at 1719.

⁶⁸ *Id.* at 1732.

⁶⁹ *Id.* at 1731.

⁷⁰ *Id.* at 1731-34.

⁷¹ *Id.* at 1734.

recently. Influential works from Phillip Hamburger (*Separation of Church and State*) and Daniel Dreisbach (*Thomas Jefferson and the Wall of Separation Between Church and State*) have persuasively and rigorously offered a perspective of history favorable to an accommodationist or nonpreferentialist approach to religion by the government. Garry draws on the work of each scholar in his presentation of history, and Garry offers little new historical analysis of his own. Moreover, the critiques of Hamburger and Dreisbach's work and of too heavy a reliance on the historical record abound. Yet, Garry offers nothing to combat such critiques or to move the nonpreferentialist position beyond such criticism. Overall, Garry's presentation is persuasive and thorough, but not novel.

D. AWAY FROM NEUTRALITY, AND TOWARD NONPREFERENTIAL AID AND ACCOMMODATION

After critiquing and dismissing the Court's current approaches to the Establishment Clause, and after recount of the arguably proper historical record, Garry suggests movement away from neutrality and toward a system of nonpreferential aid accompanied by accommodation.⁷² The premise underlying Garry's approach is that history demonstrates that the Establishment Clause was "only to keep the government from singling out certain religious sects for preferential treatment, not prevent the government from giving nonpreferential aid to religion in general."⁷³ According to Garry, religion was to have a "special place in society" and government was to promote such a position through necessary support.⁷⁴ Because neutrality fails to recognize this unique place for religion, Garry advocates for a doctrinal shift.

⁷² GARRY, *supra* note 5, at 147.

⁷³ *Id.*

⁷⁴ *Id.* at 150-51.

For Garry, the only critique of the nonpreferential aid system is modest.⁷⁵ Garry questions whether a system of nonpreferential aid would have the potential to corrupt the religious organization that would receive governmental benefits.⁷⁶ Here, Garry offers anecdotal evidence from Europe, noting that although nonpreferential aid is common in Europe, religion is declining perhaps because the citizenry does not trust that such religious organizations could exist without government support.⁷⁷

It is difficult to see how this professed approach is that different from previous suggestions by current members of the Court. In fact, Justices Thomas and Scalia have interpreted the historical record so to allow nonpreferential aid to religious institutions.⁷⁸ For Scalia, “history imposes no requirement that government be neutral between religion and non-religion, and even supports preferential treatment of monotheism over other belief systems.”⁷⁹ Moreover, Justice Thomas in *Van Orden* remarked that “our task would be far simpler if we returned to the original meaning of the word ‘establishment’ than it is under the various approaches this Court now uses.”⁸⁰

Thus, the best contribution Garry offers to the current Establishment Clause debate may be his illustration of the tensions within the First Amendment itself. Although the book persuasively sets forth the nonpreferential position, the conceptual foundations for such a position are not new. Furthermore, Garry only offers positive arguments, leaving his position

⁷⁵ *Id.* at 164-65.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Green, *supra* note 1, at 1719.

⁷⁹ *Id.* at 1727.

⁸⁰ *Id.* (citing McCreary, *supra* note 13, at 849).

open to the numerous critiques of an originalist/nonpreferentialist tilt already present in the academia. *Wrestling with God* is worth reading for a comprehensive understanding of one side of the Establishment Clause debate – especially for anyone unfamiliar with the history of the clause and the Court’s interpretation.