

The Historical Purpose and Meaning of the First Amendment's Establishment Clause

If you cannot understand that history can be objectively known, then you will believe that history bears no certainty. If you cannot understand that specific words used within a specific context convey a specific meaning, then you will believe that words can mean anything you want. And if you cannot understand that truth and reality remain constant, then you will believe that “truth” and “reality” will be relative to your personal expectations. Read on, and you *will* understand.

Americans have better odds of finding pearls in their cornflakes than they have of finding an evenhanded, “let-the-answers-fall-where-they-may” chronicling of the historical events that supply an objective meaning to four of this nation’s most ill-understood words: “an establishment of religion.” History confirms that the meaning of those words remains straightforward, but that reality has been obliterated by a Supreme Court that in 1947 decided to, in effect, concoct its own version of reality on its own say-so.

The United States Constitution’s First Amendment—indeed, the historic Bill of Rights itself (the first set of constitutional amendments written by the inaugural 1789 Congress)—begins not with any reference to “speech” or “press” but with the following ten words, known as the “Establishment Clause”:

Congress shall make no law respecting an establishment of religion . . . [.]¹

The Establishment Clause and the very next clause in the First Amendment—the Free Exercise Clause (“Congress shall make no law . . . prohibiting the free exercise [of religion]”)—comprise the First Amendment’s religion clauses. All other First Amendment rights follow the religion clauses.²

The average American’s need for a book about the history and

meaning of the Constitution's Establishment Clause became all too apparent at the moment that three realities collided:

- Thomas Jefferson's figurative "wall of separation" represents the sum total of what our nation's citizenry knows about the Constitution's relationship to "religion";

- the Supreme Court has demonstrated repeatedly—for decades—that it knows Establishment Clause history in the same way it knows rocket science; and,

- the average reader—you or your next-door neighbor—cannot locate a straightforward, readable, objective, accurate, historical chronicle of the Establishment Clause within a local bookstore or library.

Indeed, the public's unfamiliarity with the Supreme Court's mangling of one of the most important provisions in our nation's Bill of Rights prompted this book. Because of that unfamiliarity, the average American . . .

- cannot recite the first ten words of the First Amendment in our nation's Bill of Rights ("Congress shall make no law respecting an establishment of religion . . ."—the Establishment Clause);

- has no idea what the phrase "an establishment" has always meant in the context of religion, or what the phrase "establishment of religion" meant when Congress wrote the First Amendment in 1789;

- believes that our nation's Constitution speaks of "separation of church and state";

- has never been informed that the source of the "separation" colloquialism—Thomas Jefferson—concocted his figurative "wall" almost thirteen years *after* Congress wrote the Establishment Clause (something that Jefferson had nothing to do with), and that he merely objected to a predominant institutional "state church" or a European-type "church-state"; and,

- remains woefully uninformed of the reality that the Supreme Court has flunked First Amendment history miserably and declared a nonsensical meaning for the first ten words in our nation's Bill of Rights that their author would find simply incomprehensible.

But the average American *wants* to know . . . to know why the "Pledge of Allegiance" has suddenly become vulnerable to challenge by a single person, to know why our nation's schools shudder at the mention of God or a Christmas holiday, to know why longstanding public displays of historical symbols of our nation's religious heritage may well be endangered, to know why a recurring holiday display on public property may include a Hanukkah menorah but not

a crèche depicting the Christian nativity scene, to know how the phrase “wall of separation” became part of our vernacular.

“Congress shall make no law . . .” The first five words in the First Amendment bear no contextual uncertainty. Nonetheless, the Supreme Court has declared that, notwithstanding its uncomplicated and unambiguous limitation to “Congress,” the Establishment Clause applies to the states as well—an oddity explained in Chapter 12.³

“. . . respecting an establishment of religion.” These five words incorporate both a compromise dictated by the language of 1789 politics and a well-understood term of art among the states in the 1700s, yielding a historically and contextually plain purpose, function, and meaning. The 1789 Congress, which crafted those ten words during August and September 1789, aimed to thwart a *single* government-*preferred*, government-*sanctioned*, government-*financed* ecclesiastical institution (or religion, church, denomination, faith, sect, creed, or religious society) from usurping or assuming governmental functions, but nothing more. Unfortunately, the Supreme Court’s confounding incapacity to read historical text has promoted a freewheeling escapade of judicial “*ipse dixit*-isms” with respect to the Establishment Clause.

(The Latin term *ipse dixit* means, literally, “he himself said it.”⁴ More colloquially, it insinuates the truth of a declaration solely on the basis of the speaker having declared it. The Supreme Court has historically larded its opinions with instances of “*ipse dixit*-isms”—judicial peculiarities that endure only because the Court can say pretty much whatever it wants. As one of the Court’s members once acerbically observed, “We are not final because we are infallible, but we are infallible only because we are final.”⁵ Less elegantly stated, Justice William J. Brennan, one of the most liberal justices on the Court during the mid-to-late twentieth century, once boasted to his law clerks that “you can do anything around here with five votes.”⁶)

Historical reality leaves it remarkably free from doubt that when Congress wrote the Establishment Clause in the summer of 1789, it knew full well the meaning of the term “an establishment” within the context of “religion,” and history affords no justification for any dispute with that observation; the term “establishment” had long been a well-known concept as used in the Establishment Clause. (Within the “establishment” context, history reveals that the terms “religion,” “church,” “denomination,” “faith,” “sect,” “creed,” and “religious society” had been used interchangeably to reference a particular ecclesiastical institution.)

But when the United States Supreme Court imagines that the use of public funds for the provision of “field trip transportation” to students of nonpublic schools somehow implements an institutional ecclesiastical “establishment” on the order of a “state” church,⁷ and when it conceives that a recurring Christmas display on public property, consisting of a crèche depicting the Christian nativity scene and a Hanukkah menorah, yields an institutional ecclesiastical “establishment” for the former but not the latter,⁸ matters have come perilously close to a Lewis Carroll-like scenario in which black-robed Supreme Court justices leap through a hole into a dimensionless absurdity and expect everyone else to do the same.

It might be a hilarious comedy routine to have a group of highly educated judges solemnly expounding on something that everybody knows to be utter nonsense. But it isn’t nearly as funny when this solemn discourse about nonsense takes place on the Supreme Court of the United States—and when most people are unaware of what nonsense the learned justices are talking.⁹

Opinions proliferate, but impartial chronicles do not. During a 1994 political debate, the late four-term New York senator and former United Nations ambassador Patrick Moynihan framed the ultimate argument-ender with characteristic understated simplicity: “You’re entitled to your own opinions. You’re not entitled to your own facts.”¹⁰ Or your own reality.

Thus, you can, for instance, have your own opinion about the consequence or significance of historical reality, but in a rational society you cannot press your own version of historical reality as truth. Similarly, you can have your own opinion about the meaning of language, but in a rational society you cannot press your own belief about meaning as truth. And truth matters. Unfortunately, the United States Supreme Court’s decisions betray an institutional spurning of the truth when it comes to the historical meaning of the first ten words of our Constitution’s Bill of Rights.

Bearing in mind the Supreme Court’s decades-old catchphrase that “a page of history is worth a volume of logic,”¹¹ the page after page after page of historical records that underlie the genesis of the Establishment Clause inform their readers of four paramount historical realities.

First, the First Congress designed the Establishment Clause—and confined it to “Congress”—to mimic at the federal level the correlative

disestablishment assurances implemented within the various colonial constitutions in the 1770s and 1780s.

Second, the disestablishment aspect of the Establishment Clause meant in 1789—and thus means today—nothing more than its well-understood meaning throughout the 1600s and 1700s in the states within the context of religion, *viz.*

a (1) *single*, dominant government-recognized, government-preferred, government-mandated, and government-financed ecclesiastical institution (or religion, church, denomination, faith, sect, creed, or religious society) that (2) functioned to the detriment of other, non-preferred, ecclesiastical institutions.

Third, the Supreme Court flunked First Amendment history when it opined that Jefferson's allegorical "wall of separation" may be accepted almost as an authoritative declaration of the scope and effect of the Establishment Clause. To say that the Court's view defies rational thought would be to shroud such a colossal gaffe in understatement. Jefferson's figurative "wall of separation" not only postdated the Establishment Clause by almost thirteen years, but Jefferson played no role in the genesis of the Establishment Clause—he lived in France from 1784 to late 1789, and his relationship to the 1789 congressional proceedings consisted of nothing beyond infrequent exchanges of letters with James Madison and others, none of which concerned the Establishment Clause. Might the offhand musings of the uninvolved ascribe "meaning" to someone else's words written years earlier? Never.

And *fourth*, the Supreme Court has flunked the First Amendment's Establishment Clause history miserably, rendering it problematic for our schools and public institutions to dare utter words like "God" or "Christianity" or even "religion."

The narrative that follows begins with an objective chronicling of pertinent historical events and concludes with an assessment of the meaning of the phrase "respecting an establishment of religion" wholly within that context. The historical genesis of the Establishment Clause reveals that, from any objective perspective, the Supreme Court has inexplicably disregarded history and has yet to arrive upon the readily discernible meaning of the words "respecting an establishment of religion" within the historical context in which their author crafted them.

(The notes that accompany the text throughout serve two purposes.

First, they demonstrate both the abundance and agreement of historical sources, thus assuring an enduring objectivity. *Second*, they furnish a wealth of additional historical details for those who enjoy roaming beyond the text.)