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Public Prayer and the Constitution

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PUBLIC PRAYER AND THE CONSTITUTION. By *Rodney K. Smith.* Wilmington: Scholarly Resources, Inc. 1987. Pp. xv, 294. $35.

A literal reading of the first amendment's religion clauses[1] has long revealed a natural contradiction between an order not to establish religion and a command not to inhibit its practice. The issue of public prayer sharply illustrates this conflict, as a doctrinaire reading of either order could render publicly-supported prayer either impossible or untouchable. In an attempt to reconcile this conflict, Professor Rodney Smith[2] argues that the values suggested by the first amendment's constitutional history provide the "very treasure" (p. 7) needed to resolve difficult public prayer cases. While Smith does rehash much of the frequently analyzed history of the religion clauses,[3] this book does more than merely reexamine historical data; much of *Public Prayer and the Constitution* demonstrates how the modern Supreme Court could apply these historical underpinnings to make its current public prayer decisions more consistent and legitimate. By using this history to suggest guidelines for the Court, Smith joins the growing ranks of interpretivist scholars who advocate originalism as the proper tool for modern constitutional analysis.[4]

Public Prayer basically undertakes three tasks: an examination of the relevant constitutional history, an overview of the Supreme Court's treatment of public prayer, and suggestions for how the judici-

1. Labeled the establishment and free exercise clauses, the religion clauses require that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. Associate Professor of Law, Delaware Law School of Widener University. Major portions of this book first appeared in Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions,* 20 WAKE FOREST L. REV. 569 (1984), and Smith, *Now Is the Time for Reflection:* Wallace v. Jaffree *and Its Legislative Aftermath,* 37 ALA. L. REV. 345 (1985).

3. One scholar has concluded that the "search for original meaning and historical purpose underlying this language [of the first amendment's religion clauses] has yielded inconclusive results, and it would not be profitable to explore this matter in detail. In the end the Supreme Court is free to give this language the meaning it chooses . . . ." P. KAUPER, RELIGION AND THE CONSTITUTION 47 (1964).

4. In assuming that originalism is the obvious choice of constitutional interpretation, Smith's treatment of the major interpretation debate is cursory at best. However, great disagreement exists as to the proper utilization of the history of the Constitution's framing. *Compare* Sandalow, *Constitutional Interpretation,* 79 MICH. L. REV. 1033 (1981) (historical evidence of the framers' intent cannot constrain modern interpretation) *and* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. REV. 204 (1980) (guessing how the framers would view today's radically different society is an inappropriate way to protect constitutional guarantees) *with* Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981) (the nondemocratic nature of the Court mandates self-restraint and an originalist reading) *and* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971) (the historically demonstrable intentions of the framers should be binding on contemporary interpreters of the Constitution).

ary could render decisions compatible with original intent. While the first part proves useful, Smith's attempt to clarify the thorny public prayer issue ultimately fails because no clear and consistent approach can be fashioned from either the framers' intent or the values prevalent in colonial America.

Smith begins his analysis by demonstrating that America's concern for individual religious liberty and free exercise was paramount during the colonial era. As a consequence, a high degree of religious tolerance existed during this period, since the "pluralistic nature of the religious and economic forces in the colonies" (p. 35) mandated a spirit of cooperation. From this religious climate emerged two distinct positions delineating the extent of American religious freedom: (1) those who viewed Christianity as the national and "established" religion, and (2) those who felt that individual expression could be accommodated but no one religion preferred.

Smith associates the former position with Justice Joseph Story, since Story later became a leading proponent of nondenominational Christianity during the early eighteenth century (p. 108). As to the latter principle, Smith credits James Madison, often considered the primary framer of the first amendment. In fact, Smith states that "it is Madison's role along with that of other advocates of religious liberty . . . that must be examined to ascertain the intent of the framers " (p. 64).

It is a crucial assertion of *Public Prayer and the Constitution* that the views of Story and Madison form the outer parameters for judicial interpretation of the religion clauses. While these positions admittedly delineate a broad latitude for constitutional decisionmaking, and in some cases even allow for judicial discretion, Smith asserts that no legitimate Supreme Court doctrine can exist outside of these two poles. Doctrine that effectively bars, or mandates, governmental involvement with religion operates outside of this framework, and is therefore constitutionally suspect (p. 293).

For Madison, the state's nonpartisan treatment of all religions was most important. In response to a state bill that would have supported Christianity as the established religion of America, Madison produced his *Memorial and Remonstrance,* written in 1785 and considered by Smith to be the "critical document" (p. 50) for understanding both Madison's views and ultimately the values behind the language of the first amendment. According to Smith, Madison's "primary concern" in *Memorial* was "with securing religious liberty rather than with assuring that the government prohibit all public expressions of religious faith" (p. 56). To secure this liberty, Madison felt it was vital that no single religion or sect be aided or established to the exclusion of less popular religions. As the right to free exercise was an "inalienable right," the Madisonian position held that a government "acted in der-

ogation of th[is] inalienable right" (p. 59) if it preferred one religion over another.[5]

While these Madisonian ideals influenced the framers, Smith notes that Justice Story played a major role in the initial application and interpretation of the religion clauses. The view that Christianity should serve as the national religion arose in the first half of the eighteenth century, and culminated in the 1833 publication of Story's *Commentaries on the Constitution*, a major work on the probable intentions of the first amendment's framers. Story notes that the framers encouraged the public promotion of nondenominational Christianity, so long as other religions were tolerated (p. 108). In addition, the *Commentaries* concluded that "[a]n attempt to level all religions, and to . . . hold all in utter indifference, would have created universal disapprobation if not universal indignation."[6]

Based on these writings, Smith asserts that both Story and Madison concurred in the belief that free exercise was the preeminent value protected by the first amendment; "the Establishment Clause merely helped to effectuate [this value]."[7] Whether one adopted the Madisonian position or a view more supportive of Christianity as the national religion, Smith states that in the revolutionary era "there was little if any support for the principle that government should be precluded from accommodating or recognizing religious exercise in any form."[8] In demonstrating how prevalent religion was in the public sector, Smith notes that in the Declaration of Independence there were four references to God, and that in 1777 the Continental Congress had imported nearly twenty-thousand Bibles.

After describing the major positions on religious liberty during the revolutionary era, Smith analyzes the debates and congressional wrangling over the drafting of the first amendment. The debates suggest that Congress also viewed the free exercise portion of the amendment as paramount, as several Senators, especially those who advocated a

5. In another recently published work on the subject, Thomas Curry has argued that Madison opposed all governmental assistance of religion, even nonpreferential support. T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 209 (1986).

6. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593 (2d ed. 1851).

7. P. 111. Indeed, Smith presents some evidence indicating that the First Congress saw the sole function of the establishment clause merely as a prohibition against establishing a national religion, not as a general preclusion against all government sponsorship. P. 95.

8. P. 66. One prominent revolutionary figure who did support this principle was Thomas Jefferson. In an 1802 letter, Jefferson declared that the religion clauses "built a wall of separation between Church and State." P. 61. While contemporary strict separationists have used this comment to support their position, Smith thinks the letter of little value. First, Smith maintains that Jefferson's metaphor did not mean strict separation "in the sense that those terms have been used in the twentieth century." P. 62. And even if Jefferson did intend such a result, Smith contends that "Jefferson's role with regard to the adoption of the First Amendment was peripheral at best." P. 63.

Christian republic, voiced concern over the chilling effect that a generalized establishment clause might produce. In support of his conclusion that the First Congress "did not intend to render all public manifestations of religious devotion unconstitutional," (p. 97) Smith notes that both the House and Senate adopted a national day of public fasting and prayer in celebration of the passage of the Bill of Rights. Using these and other examples (such as a congressionally approved treaty establishing a national church for an Indian group) (p. 105), Smith concludes that no support can be found for the "strict separation of church and state as we know it today" (p. 105).

Much of the modern "strict separationism" that Smith decries,[9] and much of what he sees as the current constitutional illegitimacy, can be traced to the Supreme Court's first treatment of the religion clauses. For Smith, both *Reynolds v. United States*[10] and *Everson v. Board of Education*[11] represent a gross misapplication of constitutional history. In *Reynolds,* its first free exercise case, the Court held that polygamy, practiced by many orthodox Mormons of the time, could be proscribed if it "br[oke] out into overt acts against peace and good order."[12] This rationale was far more restrictive of individual religious freedom than either the Madison or Story positions, which would have allowed a limitation on this inalienable right only when the religious activity was "manifestly injurious" to the state's interests (p. 122). "Fortunately," Smith notes, more recent decisions have partially redressed this initial misapplication; the current test allows regulation of religious practices only "when there is a compelling state interest that justifies such regulation" (p. 124). While this less intrusive test does reduce governmental regulation of religion, Smith urges the Court to support its rationale with specific references to Madison and Story.

The *Everson* decision, however, arouses Smith's greatest ire. In its first establishment clause case, the Court, per Justice Black, allowed public funds to be used to provide bus transportation for children attending parochial schools, despite objections that this action actively "established" religion. Although this result was consistent with both the Madison and Story views (p. 126), Smith harshly criticizes Black's application of the relevant constitutional history. By concluding that "individual religious liberty could be achieved best under a government which . . . [did not] interfere with the beliefs of any religious

9. Smith is so critical of the modern "strict separationists" — those who view any governmental accommodation of religion as constitutionally impermissible — that one begins to wonder if this critique is not the real purpose behind the book. Smith asserts that this view emanates not from the colonial or founding era, but rather from "the second quarter of the twentieth century." P. 56.

10. 98 U.S. 145 (1878).

11. 330 U.S. 1 (1947).

12. *Reynolds,* 98 U.S. at 163.

individual or group,"[13] Justice Black credited the framers with adopting a view of strict separation, a position Smith feels too severely restricts individual rights of free exercise (p. 129). Smith points out that Black could have avoided such language by supporting his result with Madison's *Memorial and Remonstrance* or the ratifying debates, as both demonstrate that nonpreferential aid to sectarian students is permissible. Even worse for Smith, subsequent decisions concerning religious expression have relied on *Everson*'s improper reading of the framers, thereby entrenching the Court in decades of constitutional conflict (p. 131).

After exposing the weak historical foundations of the Court's establishment clause doctrine, Smith discusses several public school prayer cases and in each instance demonstrates how the Court could have maintained fidelity to original intent by deciding the case using either the Madison or Story positions. The Court first examined school prayer in *Engel v. Vitale*[14] and *School District v. Schempp*.[15] In *Engel,* the Court prohibited the in-class reading of a short, nondenominational prayer commissioned by a state agency, holding that the "union of government and religion tends to destroy government and to degrade religion."[16] In *Schempp,* the Court held that the establishment clause prohibited the Pennsylvania legislature from mandating the reading of several Bible verses before the start of each school day.

Smith acknowledges that the Court could have decided *Engel* and *Schempp* either way, as the diverging Madison and Story positions produce conflicting outcomes. Proponents of Story's view believed that a tolerant, but nondenominational, Christianity should be the national religion; therefore, they would have upheld the prayer practice in *Engel* and the Bible recitation in *Schempp*. Madison, however, would require the state to refrain from preferring or adopting any particular mode of worship; therefore, neither the *Engel* nor the *Schempp* practice would survive first amendment review.

Had the Court confined its reasoning within these positions, Smith asserts, the Justices could have achieved greater legitimacy as well as greater fidelity to original intent (p. 185). Instead, both *Engel* and *Schempp* are "heavily imbued with the strict-separationist rationale first articulated in *Everson*" (p. 172), and as such pose the same problem presented by *Everson:* the results were constitutionally supportable, but the Court's rationale — in limiting the importance of individual religious exercise — surely was not.

Besides the issue of vocal prayer recitations presented by *Engel* and *Schempp,* Smith reviews the Court's recent performance in *Wal-*

13. *Everson,* 330 U.S. at 11.

14. 370 U.S. 421 (1962).

15. 374 U.S. 203 (1963).

16. *Engel,* 370 U.S. at 431.

lace v. Jaffree,[17] the seminal silent prayer case. The issue of silent prayer, Smith admits, is "the most difficult problem covered in this book, in terms of applying the views of Story and Madison" (p. 214). In *Wallace,* the Court struck down a state statute mandating a one-minute period of silence for meditation or voluntary silent prayer, concluding that the legislature intended to convey a message of state approval for religious activities in the public schools. Again, Smith demonstrates how the Story view would have supported such silent activity, especially given that its major purpose was to encourage voluntary prayer (p. 210). But for Madison, the issue would be less clear given the language "voluntary prayer," which could be interpreted as promoting a particular mode of worship (in which case Madison would not support it), or as facilitating individual exercise (in which case the practice would be permissible). Because neither the Madison nor Story position serves as a panacea for the silent prayer issue, Smith acknowledges that the courts are not so constrained by original intent. Using this greater discretion, courts are thus free to "engage in independent balancing of various policies" (p. 214).

Not only does Smith admit that the result in several recent decisions is constitutionally legitimate (p. 234), he also notes the increasing use the Court has recently made of the relevant history. For example, Justice Rehnquist's dissent in *Wallace* examined Madison's writings as well as Story's *Commentaries* in a search for the implicit values contained within the religion clauses. Further, the Court's opinion in *Marsh v. Chambers,*[18] a case upholding the Nebraska legislature's right to hire a chaplain to preside over the opening prayer, is replete with references to the religious practices of the ratifying era. Rather than relying on the three-part test announced in *Lemon v. Kurtzman,*[19] Chief Justice Burger's opinion adheres closely to the Story view, which permits hiring a chaplain so long as no Christian sect is preferred over another (p. 257). Even the dissent, authored by an ardent nonoriginalist (Justice Brennan), utilizes certain Madisonian principles to argue against the chaplain's use.

For Smith, the debate in *Marsh* is highly encouraging since it proceeds within his framework of legitimate constitutional analysis. In addition, the Court gives due deference to "definite historical roots"

17. 472 U.S. 38 (1985).

18. 463 U.S. 783 (1983).

19. 403 U.S. 602, 612-13 (1971). It is odd that Smith does not find space to criticize the *Lemon* Court's three-pronged test for establishment clause violations. This test analyzes all suspect legislation by inquiring: (1) whether the statute has a secular purpose; (2) whether the statute's primary effect either advances or inhibits religion; and (3) whether the statute fosters an "excessive entanglement" with religion. Smith admits that this test "certainly inhibits individual religious exercise," but he makes no effort to argue, as others have, that this test is the real cause behind the Court's inconsistent establishment clause opinions. P. 284. *See, e.g.,* Laycock, *A Survey of Religious Liberty in the United States,* 47 OHIO ST. L.J. 409, 450 (1986) (arguing that the *Lemon* test is "so elastic in its application that it means everything and nothing").

(p. 258), another factor Smith would accord great weight. Yet Smith, perhaps doubting whether other "legitimate" decisions will arise again, warns the Court that disregarding the originalist parameters will trigger a justified "time for concerted legislative action" (p. 235).

Continuing this none-too-subtle warning, Smith's final chapter suggests ways to change the Court's role in religion cases. While expressing disapproval of the recent attempts to limit the court's jurisdiction in public prayer cases,[20] Smith sees no problem with ultimately revising the first amendment. He suggests that a "general, principled amendment could be fashioned . . . after the Madisonian approach" (p. 293) so as to protect individual expression from the "tyranny of the majority" (p. 275 n.32). However, Smith concludes that the time for such a revision has not yet come since the Court has remained relatively faithful to the Madisonian position. Because it has "continued to render decisions within the limits set by the framers' intent" (p. 275 n.32), the Court has not yet provided the justification for dramatic action by either Congress or the nation.

This conclusion is a troubling one and undermines much of the book's force. By first asserting that the Supreme Court has fallen prey to the conflicting orders inherent in the religion clauses, but then admitting that the recent Court has been faithful to original intent, Smith weakens his key premise that this original intent provides the values necessary to resolve these conflicting orders. Also, merely stating that greater respect should be accorded the value of individual expression is not helpful, since Smith fails to explain how this respect would avoid the thorny problem of government entanglement that has plagued the Court in past cases. Thus, Smith's major goal remains unfulfilled: neither the Madison nor Story position provides the Court with enough vision to fashion a clear and consistent approach to the public prayer cases.[21]

Finally, Smith adds nothing to the controversial debate over original intent analysis.[22] He devotes very little effort to rebutting the arguments of the noninterpretivists, and the values Smith derives from original intent seem to lead not to a heightened legitimacy for Supreme Court doctrine but rather to the same inconsistencies that have beset those who advocate interpretivism. While Smith provides a

20. *See, e.g.*, S.47, 99th Cong., 1st Sess. (1985) (bill introduced by Senator Helms would eliminate federal court jurisdiction in cases involving voluntary prayer, Bible reading, and religious meetings in the public schools).

21. Actually, this book would be more aptly titled, as its unspoken purpose suggests, "An Attack on the Strict Separationists." Here, Smith achieves some success by demonstrating that none of the framers advocated the type of government prohibition espoused in Everson v. Board of Educ., 330 U.S. 1 (1947). But even this success is diminished by Smith's admission that several recent Supreme Court decisions have respected individual religious exercise to a greater degree than in past cases. Pp. 257-58.

22. See note 4 *supra* for a brief summary of the major positions.

useful summary of the major positions surrounding the framing of the religion clauses, neither the Court nor the combatants on either side of this first amendment debate will gain much new insight from *Public Prayer and the Constitution.*

— *Ethan M. Posner*