
Misstating the Establishment Clause: Not What the Founders Had in Mind

James Dueholm

A graduate of the University of Wisconsin and Harvard Law School, James Dueholm has lectured at Hamline University Law School in St. Paul. He is a partner at Faegre and Benson in Minneapolis and the author of "Bush and Gore in Florida: The U.S. Supreme Court Got It Right" in the spring 2001 issue of American Experiment Quarterly.

The Cleveland public schools were on the ropes. For a generation and more, they had been among the worst schools in the country. They failed to meet **all** statewide performance standards. Over two-thirds of their students dropped out or flunked out, and only 10 percent of their ninth graders could pass basic proficiency exams. Twenty-five percent of their twelfth graders failed to graduate.

In 1995 the federal district court stepped in, placing the Cleveland school district under state control. Ohio responded with an array of assistance to Cleveland students, including public community and magnet schools and a voucher program for students

who chose to attend religious or non-religious private schools.

The voucher program was challenged under the First Amendment ban on laws "respecting an establishment of religion," generally known as the Establishment Clause. The challenge was upheld by the federal district court and the federal court of appeals, but rejected by the Supreme Court in **Zelman v. Simmons Harris**, a 5-4 decision delivered on the last day of the Court's 2001-02 term.

Citing a long line of cases, the majority upheld the voucher program because the aid was given to students, who were free to use it at either religious or nonreligious schools, rather

than directly to the religious schools. The vouchers were a tool to provide education to students in a failed system, a legitimate secular purpose, and not an aid to religion. The fact that 96 percent of the voucher students chose parochial schools, cited by the dissenters as evidence of state aid to religion, was dismissed by the majority on the grounds that multiple private choices don't add up to state action and that the ratio of religious to non-religious aid drops sharply when the voucher program is thrown in with the other programs, including community and charter schools, that Ohio adopted in response to the Cleveland crisis.

Zelman breathes life into the voucher movement, allowing its supporters to go to the states freed from the threat of and resort to federal judicial power that have been used by voucher opponents to discourage adoption of voucher programs and to attack those that have been adopted. The programs still face fierce political opposition and, in many states, the state constitutional barriers erected by the Blaine amendments (which I will discuss later), but the federal courts no longer pose a threat to state and federal use of vouchers to rescue students in failing schools and to generate healthy competition with public schools.

Useful as vouchers are, however, there are limits to the benefits they can deliver. Individually directed aid generally provides no capital funds to the recipient schools, and it provides an unpredictable source of operating funds that is subject to change from semester to semester, making it difficult if not

impossible for the recipient schools to base enrollment, staffing, capital funding, and other decisions on the public aid. While no one in the school choice movement, in Minnesota or elsewhere, has advocated direct public aid to religious schools, and such aid faces daunting policy and political barriers, a voucher program would be more effective if it could be coupled with direct public aid to parochial schools, providing them with a relatively secure, predictable source of operating and capital funds that would enhance their ability and incentive to compete with the public schools for voucher and non-voucher students.

Under **Zelman** and other Establishment Clause cases, direct aid to parochial schools is not an available option. Aid funneled through students or parents is acceptable, but direct aid is not. The federal courts have thus erected an impassible roadblock to the use of direct aid as a supplement to vouchers. The courts are wrong on the law, basing their position on a misreading of the Establishment Clause and its application to the states.

The Wall of Separation

The first case to apply the Establishment Clause to the states was **Everson v. Board of Education**, decided in 1947. In that case, Justice Hugo Black, quoting an 1802 letter in which Thomas Jefferson said that the Establishment Clause imposed "a wall of separation between church and state," said that a state could not pass any laws that aid religion. Based upon **Everson**,

the courts have consistently struck down laws that aid or endorse religion or religious expression.

Basing constitutional law on the offhand comments of famous people is dangerous, and this is particularly true with Jefferson. Jefferson was a great and generally a wise man, but in his private utterances and actions he was often outrageous and irresponsible. Advocating violent revolution each generation, Jefferson said that “the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” Emotionally and politically wedded to the French Revolution, in a letter written when he was U.S. secretary of state, he justified the Jacobin bloodbath with the observation that “I would [see] half the earth desolated. Were there but an Adam and Eve left in every continent, and left free, it would be better than it is now.” While he was vice president of the United States, bound by a solemn oath to the Constitution, he secretly authored a resolution enacted by the Kentucky legislature that asserted that states had a “natural right” to nullify federal laws. And he was a zealot on the separation of church and state. The inscription on his tomb, which he wrote, announces that he authored the Virginia Statute for Religious Freedom, but fails to mention that he was president of the United States.

The “wall of separation” was thus constructed by a suspect builder, but that is not the end of its problems. The Establishment Clause cases built upon the wall of separation provide exquisite proof of Justice Oliver Wendell

Holmes’s theorem that “general propositions do not decide concrete cases.” In *Everson* itself, the Court, with Justice Black writing the majority opinion, split 5–4 in upholding a New Jersey statute providing transportation reimbursement to parochial school students, showing that the nine judges agreed that there was a wall, but didn’t know where it was. The post-*Everson* cases could not have been predicted by and cannot be explained or reconciled by the wall of separation metaphor or any other governing principle. Among other things, the courts have held that it is acceptable to bus parochial school students to class, but not on field trips; that it is all right to provide parochial school nurses, but not guidance counselors; that the states can give parochial schools books that contain maps, but not the maps themselves; that a crèche is okay if it is part of a Christmas exhibit, but not if it stands alone; that a menorah is okay, but a crèche is not; that the state can lend textbooks, but not a film or film projector, to a parochial school; that textbooks can be lent if they are returned unaltered, but not if students have written on them; that the state can pay for diagnostic services for parochial school students, but not for therapeutic services; and that the state can pay parochial schools for state written tests, but not for teacher-prepared tests on nonreligious topics. (The opinions in these cases tend to be interminable, proving that the strength of an argument is inversely proportional to the number of words used to advance and support it.)

Even when the Supreme Court agrees that there has been a violation of the Establishment Clause, its majority members often do not agree why they agree. Here is the Supreme Court's own introduction to the welter of opinions in the 1989 decision (*County of Allegheny v. ACLU*) that concluded that the Establishment Clause allowed a menorah but nixed a crèche:

Blackmun, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which Brennan, Marshall, Stevens, and O'Connor, JJ., joined, an opinion with respect to Parts I and II, in which Stevens and O'Connor, JJ., joined, an opinion with respect to Part III-B, in which Stevens, J., joined, an opinion with respect to Part VII, in which O'Connor, J., joined, and an opinion with respect to Part VI. O'Connor, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which Brennan and Stevens, JJ., joined . . . Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined . . . Stevens, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined . . . Kennedy, J., filed an opinion concurring in part and dissenting in part, in which Rehnquist, C. J., and White and Scalia, JJ., joined.

This passage reads like a *Saturday Night Live* parody of legalese, but it in fact spotlights nine fog-bound, policy-oriented judges vainly and separately searching for the wall of separation.

As a guide for decision, the wall of separation metaphor has been a disaster. It is not grounded in the language and history of the Establishment Clause, and it is impossible to apply. In practice, it is simply a fount of judicial policy preferences and power. And, as the Ninth Circuit's recent rejection of "under God" in the Pledge of Allegiance demonstrates, it is a corrupting power, unfettered by historical perspective, sense of proportion, reason, wisdom, judgment, or common sense.

It was of course a mistake from the start to use the metaphor as the basis for applying the Establishment Clause. No responsible historian would use a casual, after-the-fact comment from a known partisan to divine the meaning of a constitutional provision. To determine what the Establishment Clause ban on establishment of religion is, we need to determine what an "establishment of religion" was when the clause was ratified in 1791.

Establishment of Religion

In 1791 a few of the states imposed taxes for the support of churches. Some supported a single, preferred church, while others made the support available to all churches, or to all Protestant churches. Most provided nonpreferential support, prompting Leonard Levy to state, in *The Establishment Clause: Religion and the First Amendment*, that "the American establishment of religion as of about 1790 authorized the taxation of everyone for the support of religion but allowed each person's tax to be remitted to the church of the person's choice."¹

Even as the establishments persisted, however, their days were numbered. One by one they fell to the liberalizing impulses born of the American Revolution, continuing a movement that began during the Revolution. In 1776 New Jersey had adopted a constitution that provided that “no person shall be obliged to pay tithes, taxes or other rates, for the purpose of building or repairing any . . . church or churches, place or places of worship, or for the maintenance of any minister or ministry.” In that same year, North Carolina’s constitution provided that no person would be compelled “to pay for the purchase of any glebe, or the building of any house of worship, or for the maintaining of any minister or ministry,” and Pennsylvania’s constitution stated that “no man ought to be compelled to . . . erect or support any place of worship or maintain any ministry.” Vermont’s 1777 constitution prohibited support of “any place of worship or minister.” The Virginia Statute for Religious Freedom, adopted in 1786, stated that “no man shall be compelled to support any religious worship, place or ministry.” Delaware adopted Pennsylvania’s disestablishment provision in 1792, and in 1798 Georgia adopted the New Jersey formulation. In 1810 Maryland prohibited taxes for the support of any religions, and Connecticut decreed in 1818 that “no one shall be compelled to support any religious society.”

The establishments and disestablishments of religion immediately preceding and following adoption of the Establishment Clause disclose that,

whether defined by friend or foe, an “establishment of religion” in 1791 was the targeted use of tax dollars to provide structural and operational support to organized religious groups in pursuit of their core missions of ministering to the faithful and reaching out to the heathens, with no secular purpose being served. This is the meaning recognized even by Jefferson’s Statute for Religious Freedom, which, far from erecting a wall against all aid to or endorsement of religion, outlawed only support for “religious worship, place or ministry.” It is a meaning Jefferson acknowledged in actions if not in words, for he advocated use of public funds for a school of theology, suggested that a room at the University of Virginia be set aside for religious services, and allowed the establishment of independent religious schools within the University of Virginia campus.² It is a meaning, moreover, that survived long after the Establishment Clause was adopted. Wisconsin’s 1848 constitution states that no man would “be compelled to . . . support any place of worship, or to maintain any ministry,” and Minnesota’s 1857 constitution contains a virtually identical provision.

None of the laws or actions struck down by the courts fit within this definition. Religious schools provide a primarily secular education recognized by states, colleges, and employers. They provide the same secular education as public schools, and often do it better. Direct state aid to parochial schools thus serves a secular purpose. It provides no structural support to churches

or ministries, and any operational support to religion is limited and incidental and directed more to religious education than to ministry.

Other things struck down by the courts fall even farther from the establishment tree. Manger scene exhibits, Ten Commandments displays, and voluntary student recitals of the Pledge of Allegiance are largely ceremonial and are at worst general endorsements or expression of religious belief that require virtually no tax dollars and provide no support of any kind to any organized religious group.

Pointing to language in the Establishment Clause that bans laws “respecting” an establishment of religion, apologists for the Establishment Clause decisions argue that the clause reaches not only establishments of religion, but also all laws and acts that tend to establish religion. Even if this argument has force, it only extends the Establishment Clause to things that, if multiplied, would create an establishment of religion—an establishment cannot be built of straw. The laws and symbols the courts have attacked are all straw. We don’t need wise men to lead us to the conclusion that 1,000 (or 10,000) manger scenes do not establish a church, and state aid to parochial schools retains its secular character, purpose, and effect whether it is provided by one state or fifty (or by the federal government).

Nativity scenes, publicly displayed Ten Commandments, “under God” in the Pledge of Allegiance, opening prayers in Congress, and the like undoubtedly convey an endorsement of

or support for religion that offends some people (mainly People for the American Way). These religious endorsements are not coercive, however. Unlike required school prayers or restrictions on religious practices, for example, they do not require anyone to do or to refrain from doing anything. Some people just don’t like them. One has no constitutional right to be free from state conduct that he finds offensive but that does not otherwise affect him. Some people object to use of their tax dollars to wage war or perform abortions. Most conservatives are offended by, among many other things, officially sanctioned racial and ethnic preferences; liberal bias in the public schools; the repressive, politically correct conformity many public universities impose upon their students in the name of diversity; and the imposition of this conformity by faculties so politically and culturally nondiverse that less than 5 percent of their membership is politically conservative.³ ACLU members have no more right to be shielded from offensive government action than, say, members of Center of the American Experiment.

The Supreme Court’s error in determining the scope of the Establishment Clause is compounded by a further error. Almost all cases that have arisen under the Establishment Clause, including the Pledge of Allegiance case, involve state, as opposed to federal, action. Even if the Establishment Clause prohibited all government aid to or endorsement of religion, as the Supreme Court claims, there is no basis to impose that prohibition on the states.

The Incorporation Doctrine

The First Amendment to the U.S. Constitution states that “**Congress** shall make no law respecting an establishment of religion” (emphasis added). By its express terms, the Establishment Clause does not apply to the states. Yet **Everson** applied the clause to the states, and all Establishment Clause cases since then have followed suit. They avoided the language confining the Establishment Clause to Congress by a doctrine known as “incorporation.”

The first ten amendments to the Constitution were adopted as a package and are known collectively as the Bill of Rights. In addition to the Establishment Clause, and among other things, the Bill of Rights assures freedom of speech, press, assembly, and religion; confers protection from unreasonable searches and seizures; imposes procedural safeguards in criminal proceedings; and prohibits cruel and unusual punishment. Like the Establishment Clause, the rest of the Bill of Rights applies only to the federal government, but the Supreme Court has applied most of its provisions to the states through the provision in the Fourteenth Amendment to the Constitution, which dictates that “no state shall deprive any person of life, liberty or property without due process of law.” The Court has held that “liberty” in this provision, commonly known as the Due Process Clause, incorporates most of the specific protections of the Bill of Rights. In **Everson**, Justice Hugo Black employed this doctrine of incorporation to apply the Establishment Clause to the states.

The incorporation doctrine is a boon to liberals. The Due Process Clause protects “liberty” and “property” equally, and it protects liberty as a general concept, suggesting a nonspecific right to do as you please or to be left alone. During the seventy years between the ratification of the Fourteenth Amendment in 1868 and the end of the New Deal, the Supreme Court construed “liberty” in this sense, applying it not only to protect civil liberties but also to insulate contractual relationships and the ownership and use of property from unreasonable restrictions and regulations. The incorporation doctrine shifts the focus from liberty as a general concept to the specific personal liberties protected by the Bill of Rights, and it ignores property rights, allowing the liberals to find constitutional protection for nearly unlimited personal freedom and conduct while restricting and regulating property to their hearts’ content. The courts have held, for example, that the states cannot constitutionally protect a six-and-a-half-month-old fetus from competing personal liberty claims, but can protect spotted owls, snail darters, and even wild grasses from competing economic liberty and property claims. In short, the incorporation doctrine allows liberals on and off the bench to have their cake and edicts too.

The incorporation doctrine is an absurdity. There is a Due Process Clause in the Bill of Rights, buried deep in the Fifth Amendment. Based both upon presumed intent and rules of statutory construction, the Due Process Clause in the Fourteenth Amendment

means the same thing as it does in the Bill of Rights. The Due Process Clause in the Bill of Rights obviously confers protections in addition to, and therefore different from, the other provisions of the Bill of Rights, so neither it nor the identical clause in the Fourteenth Amendment “incorporates” the other provisions of the Bill of Rights.

Beyond this textual impossibility lies the more obvious point that, if Congress in adopting the Fourteenth Amendment had intended to apply the Bill of Rights to the states, it would have done so in plain English, either by restating the Bill of Rights as applicable to the states or by providing that “the first ten amendments to the Constitution shall apply to the states.” It would not have relied on language so general and ambiguous that nobody claimed for decades after its adoption that the Due Process Clause incorporated the Bill of Rights. It certainly would not have used a provision that was already a part, and a very small part, of the Bill of Rights. If a congressional staffer who was asked to propose a constitutional amendment that applied the Bill of Rights to the states had responded with the Due Process Clause, he would have been fired on the spot.

Even if the Due Process Clause did incorporate and apply to the states those provisions of the Bill of Rights that protect individual liberties, the incorporation would not include the Establishment Clause. The Due Process Clause by its terms applies only if a “person” is deprived of “liberty.” When a state spends money to send kids to parochial schools or to install a

manger scene in a park or post the Ten Commandments in a public building, no “person” is affected except as a taxpayer, and it is well established that tax payment, without more, does not confer constitutional standing.⁴ No “liberty” is protected by the Establishment Clause, which operates not to create or preserve individual rights, but only as a limit on government power. Thus state support for religion, in the absence of coercive impact on individuals, involves no “person” and no “liberty,” placing it beyond the reach of the Due Process Clause.⁵

Shortly after adoption of the Due Process Clause, Congress explicitly acknowledged that the Due Process Clause did not apply the Establishment Clause to the states. In 1875, seven years after the Due Process Clause was ratified, Congressman James G. Blaine proposed a constitutional amendment stating, among other things, that “no state shall make any law respecting an establishment of religion.” Congress rejected the proposed amendment. Blaine was in Congress when the Due Process Clause was proposed by Congress in 1866, as were many of the other congressmen who voted on the Blaine amendment. Even those new to Congress in 1875 were presumably politically active adults in 1866. Thus the congressmen voting in 1875 were aware of the background of the Due Process Clause and the tenor of the debates that attended its adoption by Congress and ratification by the states. Leonard Levy, who studied the debates on the Blaine amendment and who generally supports the Supreme Court’s

interpretation of the Establishment Clause, says that “the [proposed Blaine amendment] itself as well as comments made during the debates [on the amendment] demonstrated without doubt that the framers of the Fourteenth [Amendment, which includes the Due Process Clause] had not meant to apply the establishment clause against the states.”⁶

Under the Constitution, a constitutional amendment proposed by Congress requires ratification by three-fourths of the states. Following the defeat of the Blaine amendment, a number of states, including most of the states that had ratified the Due Process Clause, amended their constitutions to specifically prohibit aid to religious organizations and institutions. These amendments were of course unnecessary if, as the Supreme Court held in 1947, the Due Process Clause from its ratification in 1868 prevented the states from giving aid or comfort to religion. The legislators adopting these state law amendments were in 1868 either members of the ratifying legislatures or adults who were well aware of the background of and debates on the Due Process Clause. In adopting the Blaine-type restrictions, these legislators were therefore providing informed testimony that the Due Process Clause did not in fact impose restrictions on religion.

A fair summary of this historical background is as follows. Both Congress and the ratifying states, informed by personal knowledge and experience, offer contemporaneous testimony that the Establishment Clause does not

apply to the states through the Due Process Clause. This testimony rings true, for the Due Process Clause was presumably adopted to protect the recently freed slaves, not to keep crèches and the Ten Commandments out of public places or to charge the Supreme Court with the high mission of finding the constitutionally significant differences between textbooks and maps, nurses and guidance counselors, and diagnostic and therapeutic services. The 1947 Supreme Court, composed of members the oldest of whom (Felix Frankfurter) was born in Europe fourteen years after the Due Process Clause was ratified, ignores this testimony and decides, without examining the history of the Due Process Clause or the intention of those who proposed and ratified it, that the Due Process Clause “incorporates” the Establishment Clause. Whatever one’s view of elected officials is, it is easy to give the palm to the legislators in this face-off between the legislative and judicial branches.

Whither Establishment Cases?

Everson and its descendants are based upon bad law and worse history, but they are now entrenched, and their champions would no doubt seek to preserve and extend them by enlisting the doctrine of precedent—the principle that a court is bound by its past decisions even if they are wrong. The Supreme Court, however, has regularly overruled its prior decisions. The New Deal Supreme Court dismantled a judicial structure that had stood for sixty

years. *Brown v. Board of Education* overruled a long line of “separate but equal” cases. The “one man—one vote” case rejected a number of earlier decisions holding that reapportionment was a political rather than a judicial issue. In the last term alone, the Court overruled its recent cases allowing execution of the mentally retarded and permitting the trial judge, rather than the jury, to decide whether execution was a fitting punishment. The list could go on.

The Establishment Clause cases are so clearly wrong that they have less going for them than many of the cases the Supreme Court has in the past dumped in history’s dustbin. There is, therefore, ample precedent to ignore precedent, and good reason to do so. The question is whether five justices on the Court could be persuaded now or in the near future to haul the Court’s Establishment Clause cases to the dustbin.

There is reason for hope. Four of the current justices on the Court have expressed a decided hostility to the Establishment Clause cases. In dissent in a 1985 case (*Wallace v. Jaffree*), now Chief Justice William Rehnquist stated that the purpose of the Establishment Clause was to prevent establishment of a single preferred church. While he was technically wrong on his history—it appears that the Establishment Clause was designed to prevent establishment of multiple churches as well as a preferred church—Rehnquist’s opinion shows that he recognizes the limited scope of the Establishment Clause. In a 1990 concurring opinion (*Westridge Community Schools v. Mergens*), Justice

Anthony Kennedy, joined by Justice Antonin Scalia, said that there is no establishment of religion unless (1) government “gives direct benefit to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so,” and (2) there is coercion of individuals. In *Zelman*, Justice Clarence Thomas expressed some reluctance in applying the Establishment Clause cases to the states, and while he was not on the Court to join in the Rehnquist and Kennedy opinions, it is probably safe to assume, based upon his general judicial philosophy, that Thomas is in the Rehnquist-Kennedy-Scalia camp. These justices may well be prepared to give practical effect to their hostility to the Establishment Clause cases. In recent interstate commerce and state immunity cases, they have displayed a willingness to pluck constitutional weeds that the Supreme Court has sown over the past sixty years.

We may in short be only a single vote from relieving the courts of their religion police duties. With George W. Bush in the White House, that vote may be within reach. If the Supreme Court does reject the *Everson* rationale and the cases that are based upon it, the federal government would be free to achieve its goals through direct aid to religious groups that perform secular functions, and states would be free to do so subject only to state constitutional restrictions. I will briefly explore those restrictions and the political and policy issues posed by direct aid to religious groups and endorsement of religion.

Life without Everson

Most of the states impose their own constitutional restraints on religious aid. Some have state equivalents of the Establishment Clause. Some have the more restrictive “Blaine amendment” constitutional provisions. Many states, including Minnesota, have both an establishment clause and a Blaine amendment.⁷

If *Everson* is rejected, the state establishment clause provisions may not pose a significant problem. On constitutional issues, state courts are inclined to follow the Supreme Court’s lead, so a Supreme Court decision rejecting *Everson* could convince many state courts to similarly construe their establishment clauses.

The Blaine amendments are more problematic, although the extent of the problem varies from state to state depending on the precise wording of the Blaine amendment in each state. According to Richard Komer and Clint Bolick of the Institute for Justice, a number of state courts have determined that their Blaine amendments are no broader than the Establishment Clause. In states that construe the Blaine amendment more broadly than the Establishment Clause, the institute proposes to cite the anti-Catholic pedigree of the Blaine amendments and the discriminatory impact of the amendments to challenge the amendments as an unconstitutional discrimination against religion under the Free Exercise Clause of the First Amendment (which I will discuss later). If a state extends aid to nonreligious private schools,

that state’s Blaine amendment may be subject to attack under the Equal Protection Clause of the Fourteenth Amendment. Beyond these legal challenges, it may be possible to amend state constitutions to eliminate the Blaine amendments. Most state constitutions can be amended much more easily than the U.S. Constitution.

Direct aid to religious groups in support of education or other secular missions of those groups poses political and policy issues. Overburdened taxpayers resist further spending to support functions for which they are already taxed. Public employees’ unions are strong and aggressive. Public aid for the secular mission of religious groups comes with strings the groups may be loath to accept.

These issues and concerns are impeding the progress of President Bush’s faith-based initiative, but the political process is grappling with them, and the initiatives are politically viable and generally viewed as a legitimate attempt to use faith-based groups to deliver social services. The same should be true of direct aid to parochial schools if the Supreme Court steps aside. Direct aid to parochial schools would provide a dependable source of revenues to the schools that would allow them to upgrade and expand their facilities, expand their enrollment, offer scholarships to low-income students, and reduce their tuition to a level that will make them more competitive with public schools. The competition would in all likelihood target failing or underperforming schools, since the parents of students in those

schools would be less reluctant than other parents to bear the double burden of taxation and tuition if tuition is affordable.

The death of *Everson* would not threaten anybody. Aid to parochial schools, faith-based initiatives, and the like involve the expenditure of public monies but do not impose restrictions or mandates on individuals or groups. Publicly displayed crèches and Ten Commandments, voluntary Pledge of Allegiance recitals, and other ceremonial support for or endorsement of religion do not require anyone to do or refrain from doing anything. Indeed, it is the very absence of coercive effect in these areas that forces *Everson* and its followers to employ the Establishment Clause rather than the Free Exercise Clause of the First Amendment, which prohibits laws that abridge the “free exercise” of religion.

For over fifty years, the Supreme Court has misconstrued the Establishment Clause. It is time for the Court to recognize and remedy its error, allowing state and federal governments to use churches and faith-based groups to improve education, deliver health and social services, and generally improve the human condition.

Notes

1. Leonard Levy, *The Establishment Clause: Religion and the First Amendment*, 2nd ed. (Chapel Hill: University of North Carolina Press, 1994), p. 10.
2. *Ibid.*, p. 70
3. See Alan Charles Kors and Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on American Campuses* (New York: Harper, 1998), and *American Enterprise* magazine, September 2002.
4. Taxpayers could challenge the classic establishment taxes, which were special levies imposed solely to support churches. Religious aid would now be paid from general revenues and would be an infinitesimal fraction of total government expenditures, with negligible impact on any individual taxpayer.
5. I once had occasion to discuss this issue with Harvard law professor Laurence Tribe, a renowned and very liberal constitutional law scholar. He agreed, based upon the “person” and “liberty” requirements, that there was no basis for applying the Establishment Clause to the states.
6. Levy, *Establishment Clause*, p. 148.
7. See Richard Komer and Clint Bolick, “School Choice: The Next Step: The State Constitutional Challenge” (Washington, D.C.: Institute for Justice, July 1, 2002). ■