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## UNPRECEDENTIAL ANALYSIS AND ORIGINAL INTENT

WILLIAM P. MARSHALL\*

Professor Harry Jones has argued that, in the interpretation of documents, constitutions, or statutes, the focus of professional and judicial attention shifts from the text of these materials to judicial precedent as the text gets older and interpretive materials accumulate.<sup>1</sup> In cases that require textual interpretation, then, the grounds of decision are derived not from text or history but from preexisting judicial interpretation.

Professors Kurland<sup>2</sup> and Laycock<sup>3</sup> argue, in my opinion correctly, that reliance on historic intent at best is not a definitive guide to resolving issues under the religion clauses and at worst is simply a false god being used in some quarters to justify personal political agendas. Because the text of the first amendment is open-ended, the religion clauses are classic examples of provisions for which no definitive resolution is mandated by either textual language or historical understanding. Seemingly, then, in the normal course of adjudication, the next appropriate focal point from which to generate actual case decisions would be judicial precedent.

This why the criticism aimed at the Court for its decisions during the 1984-85 Term is so startling. As Professor Kurland notes, the Court was criticized precisely for relying on its previous decisions.<sup>4</sup> It was criticized for doing what it should have been doing.

Superficially, of course, one easily can understand any criticism of the Court's judicial pronouncements concerning the religion clauses. Any jurisprudence suggesting that a constitutional difference exists between providing certain services to parochial school children on school grounds and providing those same services to

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1. Jones, *The Brooding Omnipresence of Constitutional Law*, 4 VT. L. REV. 1, 27-29 (1979).

2. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986).

3. Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

4. Kurland, *supra* note 2, at 840-41.

them in a mobile home across the street from the school<sup>5</sup> is not a jurisprudence that easily evokes intellectual respect. More importantly, the case against the Court's jurisprudence can be made on grounds far stronger than simply dubious line-drawing. At times, the Court has been guilty of obvious distortion. The suggestion that a predominantly secular purpose underlies the inclusion of a nativity scene in a Christmas display,<sup>6</sup> for example, is dubious at best. Equally suspect is the condemnation of a government program because it impermissibly entangled church and state,<sup>7</sup> even though that program had a nineteen-year history in which no such violation had occurred.<sup>8</sup>

Nevertheless, before overruling an entire jurisprudence wholesale, it is advisable to inquire into both the social effects inherent in such a displacement and the jurisprudential need for it. This inquiry, moreover, is particularly appropriate when the result of disavowing the former jurisprudence would be as radical as the result advocated by those who suggest a constitutional analysis based on so-called "original intent." Indeed, a review of constitutional law suggests that overruling an entire jurisprudence on the grounds proposed by the Justice Department would be unparalleled in its extremism. Even in *Brown v. Board of Education*<sup>9</sup> the Court did not purport to overrule the entire preexisting precedential framework; it suggested only that the previous understanding of equal protection had been determined inappropriately.

Perhaps the only instance in which the Court made a comparable refocusing of an entire area of law was *Erie Railroad v. Tompkins*,<sup>10</sup> when the Court announced, on second thought, that its 100-year understanding of the meaning of the Rules of Decision Act had been incorrect or, if correct, was unconstitutional.<sup>11</sup> *Erie*, however, did not provoke the reaction that undoubtedly would accompany a resort to so-called "original intent" analysis. Decisions

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5. Compare *Meek v. Pittenger*, 421 U.S. 349, 370-73 (1975) with *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977).

6. *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984).

7. See *Aguilar v. Felton*, 105 S. Ct. 3232, 3234-39 (1985).

8. See *id.* at 3243 (O'Connor, J., dissenting).

9. 347 U.S. 483 (1954).

10. 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

11. *Id.* at 73.

concerning the constitutionality of the application of federal common law in diversity cases do not compare with Court pronouncements concerning the proper relationship between church and state in our society's imaginations, hearts, and political health.<sup>12</sup>

In this respect, it is notable that Professor Kurland observed some twenty-four years ago that when *Engel v. Vitale*<sup>13</sup> and *Baker v. Carr*<sup>14</sup> were decided in the same year, *Engel* created all the controversy, not *Baker*, even though *Baker* much more dramatically affected the political entrenchment and power of a significant segment of the Nation.<sup>15</sup> Even now—or perhaps even more now—decisions concerning the religion clauses seem to evoke responses decibels higher than those accompanying other cases.<sup>16</sup> I, for one, appreciate the fact that the Court ducked a decision in *Bender v. Williamsport Area School District*,<sup>17</sup> if only because it saved the Nation either from cries that the Court had authorized the preaching of sex, Communism, and humanism while outlawing religion in the public schools or, if the decision had gone the other way, from cries that the Nation was one breath away from the inculcation of evangelical theology in public education. Yet the megaton explosion that might have enveloped *Bender* and that did envelop *Lynch v. Donnelly*<sup>18</sup> would be a hush compared to the conflagration that would occur if the Court constructed an entirely new direction based on one advocate's highly debatable claim of history "properly understood." The Court surely is correct in avoiding this controversy when the case for overruling its

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12. The lack of public attention devoted to *Erie* is noted in Younger, *Observation: What Happened in Erie*, 56 TEX. L. REV. 1011, 1029 (1978).

13. 370 U.S. 421 (1962).

14. 369 U.S. 186 (1962).

15. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 1 (quoting Lewis, *Supreme Court's Term Viewed as One of the Most Significant in its History*, N.Y. Times, July 2, 1962, at 12, col. 4).

16. See Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 97-98.

17. 106 S. Ct. 1326 (1986) (dismissing suit because party lacked standing).

18. 465 U.S. 668 (1984). For discussions of the Court's consideration of the municipally-supported creche at issue in *Lynch*, see Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 781-87; Redlich, *Nativity Ruling Insults Jews*, N.Y. Times, Mar. 26, 1984, at A19, col. 2.

purported errors has not been made strongly and when, as Professor Kurland suggests, the case cannot be made more strongly.<sup>19</sup>

By this point, attentive readers will have realized that all this Comment has done so far is suggest that those seeking to change the current jurisprudence may be misguided. The more important question, however, is whether the existing jurisprudence, which admittedly is inconsistent and at times incomprehensible, should be abandoned precisely because of its lack of clarity. This claim has been made, not so much by Attorney General Meese, but by then-Associate Justice Rehnquist in his dissent in *Wallace v. Jaffree*.<sup>20</sup>

I think this claim also is flawed. My conclusion, however, does not turn on yet another revisionist account of the Framers' intent; nor does it turn on a doctrinal defense of the Court's interpretations of the establishment and free exercise clauses, as announced in the leading cases, *Lemon v. Kurtzman*<sup>21</sup> and *Sherbert v. Verner*.<sup>22</sup> In fact, with respect to the Court's specific doctrinal approaches, I have argued previously that the Court's announced tests are not sufficient as normative bases for future decisionmaking and are not even satisfactory explanations of the cases themselves.<sup>23</sup> Rather, my defense of the Court rests on a general overview of its judicial precedents—the interpretive criterion advanced at the beginning of this Comment as being the most pertinent to contemporary constitutional interpretation.

Admittedly, this precedential record has been a limited one—primarily occupying only forty years—but the things that the Court has *not* accomplished in that time are notable. The Court has never adopted the separationist stance sought by liberals and their sometimes strange bedfellows, evangelicals. It has not

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19. See Kurland, *supra* note 2, at 841.

20. See 472 U.S. 38, 106-14 (1985) (Rehnquist, J., dissenting). Justice Rehnquist also suggested that the Court's historical understanding of the Framers' intent was misguided, but he acknowledged that this infirmity alone would not necessarily be fatal to existing doctrine. Rather, Justice Rehnquist criticized the doctrine mainly for failing to provide an intelligible precedential framework. *Id.* at 106-07.

21. 403 U.S. 602 (1971).

22. 374 U.S. 398 (1963).

23. See Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) [hereinafter cited as Marshall, *Establishment*]; Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

adopted the accommodationist stance sometimes sought by major religious groups seeking aid or by certain conservatives seeking affirmative approval of religion. It has not created a wall. It has not maintained a course of strict neutrality between religions or between religion and nonreligion. In short, it has kept absolutely nobody happy. If the Court, for example, was seen to have vindicated one side of the church and state controversy in the decisions of the 1984-85 Term, then it was perceived as having vindicated another in the decisions of the previous Term.

I have written elsewhere that the Court's jurisprudence may be more sensible than it initially appears.<sup>24</sup> Taking seriously my role as the Court's only champion, I even have suggested—to universal incredulity—that a sound policy basis underlies many of the Court's distinctions.<sup>25</sup> I do not and cannot argue, however, that the Court has embarked on anything remotely approaching a consistent course. Yet there may well be a potential benefit created by this wavering. Because there have been no clear winners, there also have been no clear losers, and it may be that it is the elimination of winners and losers that the religion clauses are ultimately about.<sup>26</sup> If no single approach to religious issues has dominated, then something must be right.

A concluding remark, which might be termed an "unhistorical postscript,"<sup>27</sup> is in order. It would seem that in the search for the original intent of the framers of the first amendment, one of the best sources would be early Supreme Court decisions on the subject. In the religion area, only one case fits this description—*Terrett v. Taylor*<sup>28</sup>—and a review of that case appears to reflect, albeit in dicta,<sup>29</sup> a less rigorous prohibition of state aid to religion than the cases decided in the succeeding years have

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24. See Marshall, *Establishment*, *supra* note 23, at 513-31.

25. *Id.* at 531-33.

26. See Kurland, *supra* note 2.

27. See S. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT (D. Swenson & W. Lowrie trans. 1941).

28. 13 U.S. (9 Cranch) 43 (1815). For a discussion of *Terrett*, see Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 901-05 (1982).

29. Justice Story's language is dicta because the Court did not decide the case on religion clause grounds. See Currie, *supra* note 28, at 902-04.

allowed.<sup>30</sup> In *Terrett*, after all, Justice Story wrote: “[T]he free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers [or] for the endowment of churches. . . .”<sup>31</sup>

On the other hand, in terms of ascertaining original intent, the facts that gave rise to *Terrett* are informative as well. The case involved an attempt by the Virginia legislature in 1801 to assert title to Episcopal Church property. Critically, however, the reason Virginia asserted title was its conclusion that two of its previous statutes, which had incorporated the church and had granted the church title to the property, were inconsistent with principles of religious freedom.<sup>32</sup> Virginia’s position, in short, was more hostile to public accommodation of religion than has been the position of the Court in contemporary cases.<sup>33</sup>

Although Virginia’s action was based upon the Commonwealth’s own constitutional provision, and not the first amendment,<sup>34</sup> the *Terrett* history is significant because, as Professors Kurland and Laycock have suggested, the contemporaneous Virginia experience, of which *Terrett* was a part, may provide some of the best historical evidence for determining the Framers’ original intent.<sup>35</sup> *Terrett*, therefore, potentially provides a strong argument that original intent analysis might lead to a prohibition against state incorporation of churches or grants of land title by states to churches—a conclusion that seems rather inconsistent with the political agenda of those who argue for a “return” to a jurisprudence of original intent.

Two lessons emerge from this semi-historical exploration of *Terrett*. First, even original intent analysis is not likely to clear the ambiguity or reconcile the conflicting strains that currently exist

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30. See *id.* at 904.

31. *Terrett*, 13 U.S. (9 Cranch) at 49.

32. *Id.* at 46-49; see Currie, *supra* note 28, at 901. Virginia’s position that incorporation of religious institutions violated principles of religious freedom apparently had emerged in 1786, when the Commonwealth had repealed its earlier incorporation of the Episcopal Church. *Id.* This date, of course, is five years earlier than the date on which the states ratified the first amendment.

33. See, e.g., *Walz v. Tax Commission*, 397 U.S. 664, 667-72 (1970).

34. See Currie, *supra* note 28, at 904 nn.116-17.

35. See Kurland, *supra* note 2, at 853-54; Laycock, *supra* note 3, at 895-96.

within religion clause jurisprudence. Second, those who play with loaded guns should develop some measure of certainty as to which way the barrels are pointed.