THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT. By Thomas J. Curry.[1] New York and Oxford: Oxford University Press. 1986. Pp. viii, 276. Cloth, $28.00; paper, $10.95.

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Of the recent books on the history and meaning of the religion clauses of the first amendment, this one stands out—for its objectivity, its clarity, and most of all its genuine usefulness in understanding the religion clauses. For the first seven of its eight chapters, *The First Freedoms* is a historian's history, a readable and undogmatic account of the controversies over religious freedom in each of the thirteen colonies from their founding to the ratification of the Constitution. These episodes provide an indispensable background for understanding the framers' work in 1789.

Only in the last chapter, on the drafting of the first amendment itself, does Curry begin to encroach on lawyers' territory and adopt some of the lawyers' vices. There he allows the agenda and the terms of debate to be set by the controversies of today. There he begins to lose the authentic voice of the historical struggle for religious freedom.

To understand the importance of the book, one must recognize the peculiar nature of the modern debate over church-state relations in the United States. That debate began with the famous dissents of Justice Rutledge in *Everson* and Justice Reed in *McCollum*, during the 1946 and 1947 Terms. Each based his opinion on the historical origins of the religion clauses, but the two men reached quite different conclusions. Justice Rutledge concluded that the framers intended "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Justice Reed, on the other hand, stated the governing principle as follows: "[t]he state cannot influence one toward religion against his will or punish him for his beliefs."

Rutledge thus stood for separation, Reed for voluntarism. The two interpretations, while pointing the same way in many cases,

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have quite different—even contradictory—implications. Not all contacts between government and religion pose a threat to religious choice, and an artificial divorcement can have the perverse effect of eliminating religious choice within areas of life supported, regulated, or even touched by government.

The Supreme Court adopted Rutledge's essential position (though from time to time it has recoiled from the practical consequences). So thorough was the intellectual victory that many Americans now think that "separation of church and state" is the constitutional command. Even some scholars have referred to the establishment clause as the "separation clause."[3] The Supreme Court's doctrine of "entanglement" is the doctrinal expression of the Rutledge view.[4]

As time wore on, the debate took a mischievous turn. Opponents of separation began to argue that the establishment clause forbids only government recognition of a single church, or group of churches. Thus, they contended that "nonpreferential" aid—allocated on a nondiscriminatory basis to all faiths—is constitutionally permissible, even if it is coerced from unwilling nonbelievers and unrelated to any of the secular purposes of government.[5] They supported this view with various statements from the framers to the effect that "no particular sect or society ought to be favored or established by law"—and especially James Madison's explanation on the floor of the House of Representatives that his proposed amendment was designed to allay fears that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."

The problem with the nonpreferentialist argument is not so much that it is wrong (though it probably *is* wrong) but that it obscures the real issue. In the great religious controversies of twentieth century America, the ideal of separation has come into more frequent conflict with the ideal of freedom than it did in an earlier age of minimalist government. As the scope of government expands into areas that formerly were private and often religious (such as

3. *See* P. KURLAND, RELIGION AND THE LAW 17 (1962).

4. *See* Aguilar v. Felton, 473 U.S. 402, 409-10 (1985); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

5. *E.g.*, Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978). An early version of the argument, written shortly after *Everson* and *McCollum*, is J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949). For the opposing view, see L. LEVY, THE ESTABLISHMENT CLAUSE (1986); Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

education and social welfare), excluding religion from the governmental sphere becomes a powerful engine of secularization. Since 1840, government has become the principal source of funds for elementary and secondary education. Must that financial leverage be used in ways that discourage religious choice in education? Since the New Deal, numerous regulatory schemes have arisen to control the activities of employers and businesses. Should these systems of control be extended to the religious sphere? In recent decades, free speech rights have been extended to public high school students. Should an exception be made for religious speech? These are the issues of today, and the nonpreferentialists' argument is of little assistance in resolving them. Religion, as such, is not asking for "aid," but only that it not be driven to the margins of public life.

Worse still, the nonpreferentialist argument has been used as a justification for invasions of the religious freedom of those who do not believe in the existence of a god or adhere to a religious faith. With the field divided between advocates of separation and proponents of nonpreferential aid, the principle of voluntarism has had no champion.

The First Freedoms not only provides the first serious historical rebuttal to the nonpreferentialist argument,[6] it casts doubt on separationism as well. Curry observes that many of those at the time of the founding who used seemingly nonpreferentialist *language* were "unmistakably opposed to proposals for non-discriminatory government assistance to religion," giving telling examples. John Leland proposed an amendment to the Massachusetts Constitution that the state should never "establish any religion by law, [or] give any one sect a preference to another," yet he was also one of the most radical opponents of coerced (nonpreferential) support for religion. One Massachusetts town, in the very course of denouncing the Commonwealth's system of nondiscriminatory aid, stated that "no subordination of any one Sect or Denomination to another shall ever be established by law." These examples, and others, suggest that nonpreferentialist language should not always be taken literally. "Eighteenth-century American history offers abundant examples of writers using the concept of preference," observes Curry, "when, in fact, they were referring to a ban on all government assistance to religion."

Nonetheless, Curry's account does not entirely invalidate the

6. Laycock, *supra* note 5, is a more thorough rebuttal, since it is devoted solely to the task of refuting nonpreferentialism. Laycock acknowledges at the beginning of his article that he relied on *The First Freedoms* as part of his own research. Laycock, *supra* note 5, at 875 n.3.

nonpreferentialist thesis. He notes that several states (most notably in New England) favored some form of mandatory support for religion, where individuals could choose which denomination to support. Substantial minorities in Virginia, Maryland, and possibly South Carolina agreed. It is quite possible, on the evidence, that the framers of the first amendment were sympathetic to this approach, and did not intend to prohibit it. Curry's contrary argument is as follows:

> [A]lthough these states demanded that religion in general be supported, no evidence sustains the viewpoint that in so doing they saw themselves as opting for a permissible, non-exclusive establishment. They never described themselves as designing an establishment at all.

Of course they didn't describe their own system as an "establishment"; that was a term of opprobrium, which they reserved for single establishments of the sort known in England and formerly some of the colonies. The point is that they might not have understood the first amendment's use of the word "establishment" as inconsistent with a nondiscriminatory scheme of aid. This is the best argument for reading the first amendment to keep open the nonpreferentialist alternative.

Curry makes the mistake of denigrating the best evidence for his position: the particular wording adopted by the framers of the religion clauses. Professor Laycock has argued that close attention to the wording of the various drafts of the amendment strongly suggests that the nonpreferential view was considered and deliberately rejected by its framers.[7] Curry, in contrast, asserts[8] that the Senate debate over the wording of the amendment should "be seen as a discussion about style, not substance." He states that "[t]o examine the two clauses of the amendment as a carefully worded analysis of Church-State relations would be to overburden them." While he may be correct, he weakens his own conclusion and makes close study of the framing seem a bit useless.

While explicitly, if not conclusively, debunking the nonpreferentialist interpretation of the religion clauses, *The First Freedoms* also demolishes—tacitly but thoroughly—the separationist reading.

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7. *Id.* at 879-85. For example, early in its deliberations the Senate adopted a draft proposal that "Congress shall make no law establishing one religious sect or society in preference to others." It later adopted a still weaker version: "Congress shall make no law establishing articles of faith or a mode of worship." These are "nonpreferentialist" alternatives. The House of Representatives, however, refused to accede to the Senate's version, and insisted upon the establishment clause in its current form. This appears to reflect a deliberate rejection of the nonpreferentialist view. *See id.* at 880-81.

8. Since there were no recorded debates, the argument on both sides is necessarily speculative.

In fascinating detail, Curry describes every important clash between religious and civil authority from the founding of the colonies to the adoption of the Constitution. Religion was a fertile source for controversy, and the ensuing arguments were varied and impressive. Yet not once in that one hundred and sixty-year period was the concept of "separation of church and state" invoked. Separation was simply not the issue. Liberty of conscience—something akin to Reed's voluntarism—was the issue.

When colonial governors attempted to interfere with the internal affairs of nonestablished churches—an obvious breach of "separation"—this was attacked as a violation of "liberty of conscience." When Quakers were required to pay money for the support of Congregational ministers in Massachusetts, they did not complain of a breach of "separation," of "aid to religion," or even of "establishment." They appealed to the colony's protections for "liberty of conscience." When advocates and opponents of a general assessment for religious teachers squared off in Virginia, they too "concerned themselves with showing whether it violated or did not violate freedom of religion." While some breaches of separation (what we would now call establishment clause violations) were vigorously opposed, this was not on the basis of an abstract adherence to separation, but on its practical implications for religious liberty. To call the establishment clause the "separation clause" is evidently an anachronism. Thomas Jefferson's metaphor of a "wall of separation" was not coined until the succeeding century. In *The First Freedoms*, the term "separation" is the dog that did not bark. If "separation of church and state" were the heart of the matter, one would expect to see some mention of it in contemporary sources.

Curry makes no mention of the absence of evidence for the separationist view (other than to comment in the preface that "the term 'separation of Church and State' . . . obscures rather than clarifies the issue"). Yet for every nonpreferentialist on the bench or in the academy, there have been two dozen separationists, loudly claiming that their construction of the first amendment is rooted in history. Given the obvious implication of the historical record, it is difficult to understand why Curry attacks nonpreferentialism while giving separationism a free ride.

The separationist interpretation of the establishment clause has caused the principles of the two religion clauses to diverge, and even to become inconsistent. The establishment clause is seen as prohibiting government "benefits" to religion, while the free exercise clause is seen as requiring them (under certain circumstances).[9]

9. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*,

The First Freedoms exposes the error of this view. The framers of the first amendment did not set forth two mutually inconsistent principles of church-state relations, nonestablishment and free exercise. Both were an outgrowth of the wider term, "liberty of conscience."

As Curry states, "Contemporaries did not, for example, distinguish between religious oppression as falling under the ban of the 'free exercise' clause and a general assessment as being prohibited by the 'establishment' clause." The two clauses represented a coordinated expression of the principle of voluntarism in religion—that the government may neither force nor prohibit, encourage nor discourage, the practice of religion. An interpretation of the religion clauses as in "tension" with one another should be rejected on historical, as well as logical, grounds. The establishment clause does not conflict with the free exercise clause; the "conflict" is due to the separationist interpretation of the clause.

Understandably but nonetheless unfortunately, Curry's inquiries have apparently been shaped by the historical debates in lawyers' briefs. Ever since *Everson* and *McCollum*, legal commentators have been preoccupied with the question: what is an "establishment of religion"? *The First Freedoms* helpfully draws attention to the ways the term "establishment" was used in the years preceding adoption of the first amendment. For reasons that remain mysterious, however, neither lawyers nor judges nor academics have seen fit to ask about the historical origins of the term "free exercise." Accordingly, Curry does little, at least directly, to elucidate this equally important problem.

His chapter, "Liberty of Conscience in Eighteenth-Century America," provides the attentive reader with much information to assist in the task, with ample instances of the factual circumstances that gave impetus to the concept of free exercise. Curry does not remark the fact, but many of these disputes, including the demand by religious dissenters for exemption from such general requirements as oath taking, military service, and tithing, in the name of "liberty of conscience," lend support to the Supreme Court's modern doctrine of religion-specific exemptions under the free exercise clause. In contrast to the "establishment" issue, however, the book contains little direct discussion of the terminological point. There is no discussion, for example, of the relation between the terms "liberty of conscience" and "free exercise of religion." Surprisingly, *The First Freedoms* does not even discuss the most pertinent debate

41 U. PITT. L. REV. 673, 677-78 (1980); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1-2.

on the matter: that between James Madison and George Mason over the wording of Virginia's "free exercise" provision, adopted in 1776. Nor does the book attempt to draw any inferences from the legislative history of the free exercise clause itself. Perhaps these omissions are attributable to Curry's general reluctance to engage in close analysis of the language of legal sources, which (as already noted) weakens his presentation on the establishment clause as well. Whatever the reason, this omission of a linguistic history of the term "free exercise" contributes, presumably unintentionally, to the establishment-centered orientation of the history and doctrine of the religion clauses.

The First Freedoms also gives insufficient attention to the relation between the Bill of Rights and the allocation of power between the federal government and the states. Since "incorporation" of the religion clauses against the states through the fourteenth amendment, this issue has faded in practical importance, but it cannot be ignored by a historian—not least because a failure to appreciate the original concerns about states' rights makes the positions of the participants difficult to understand. The debates over the religion clauses were as much about federalism as they were about religion. The establishment clause was specifically designed to preserve state prerogatives, including the prerogative to establish religion, against federal encroachment. A "law respecting an establishment of religion" is a law establishing, *dis*establishing, or in any way subjecting a state's religious establishment to federal control.[10]

Curry makes no effort to explain the "respecting" language, or to place it in the context of the federalism debate. His sole recognition of the federalism aspect of the problem is to assert, unconvincingly, that Anti-federalists Patrick Henry and Elbridge Gerry, both supporters of a form of establishment in their respective states, could not have favored a "narrow" interpretation of the establishment clause at the federal level, since they wanted to minimize the authority of the central government, and that for Madison to support a "narrow" interpretation would be an "inexplicable about turn," since it would "allow the federal government power over religion that he would not grant his own state."

These matters are certainly complicated, but Curry's off-hand accusation of inconsistency is far from ineluctable. Henry and Gerry had political, as well as ideological, motivations to criticize

10. W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1964); *see* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964); Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C.L. REV. 909 (1987).

Madison's handiwork, and in any event a narrow interpretation of "establishment" perfectly accords with the understanding of the meaning of the word they displayed in their own states' debates. Madison, for his part, believed that the threat of factions (for which his paradigm was the religious sect) was far more serious at the state than at the federal level; thus it made perfect sense for him to insist on more stringent constitutional restrictions at the state than the federal level.[11] This does not prove, of course, that either Madison or the Anti-federalists favored a "narrow" interpretation, but only that Curry's account of the federalism aspect of the controversy is too facile.

The main value of *The First Freedoms* is not its analysis of legal documents—statutes, constitutional provisions, legislative debates. Curry is far too quick to dismiss arguments based on the language of these sources as "literalism." The book's great contribution is the seven chapters describing the actual church-state controversies that inspired the state and federal constitutional protections for religious liberty. These controversies place the religion clauses in a far different light than the popular conception based on Rutledge's dissent in *Everson*. The religion clauses were not born in an Enlightenment spirit of secular distrust of the influence of religion on public life. Far from it. As *The First Freedoms* demonstrates, they were born primarily of the efforts of intensely religious people (Quakers, Presbyterians, above all Baptists) to free themselves from the shackles of state interference and control. The religion clauses were not intended to be a force for secularization of American life. They were intended to create a regime of liberty in which each religious group could "flourish according to the zeal of its adherents and the appeal of its dogma."[12] *The First Freedoms* is an important reminder of why we have a first amendment.

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11. *See* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1505-06 (1987).

12. Zorach v. Clauson, 343 U.S 306, 313 (1952).