Preface

The establishment clause of the First Amendment ("Congress shall make no law respecting an establishment of religion . . .") does more than buttress freedom of religion, which the same amendment separately protects. Given the extraordinary religious diversity of our nation, the establishment clause functions to depoliticize religion; it thereby helps to defuse a potentially explosive situation. The clause substantially removes religious issues from the ballot box and from politics. Mr. Dooley, Finley Peter Dunne's

irrepressible Irish wit, whom Justice Felix Frankfurter called a "great philosopher," said of church and state: "Rellijon is a quare thing. Be itself it's all right. But sprinkle a little pollyticks into it an' dinnymit is bran flour compared with it. Alone it prepares a man f'r a better life. Combined with polyticks it hurries him to it." The establishment clause separates government and religion so that we can maintain civility between believers and unbelievers as well as among the several hundred denominations, sects, and cults that thrive in our nation, all sharing the commitment to liberty and equality that cements us together.

Notwithstanding the establishment clause, religion saturates American public life. Every president swears the oath of office with one hand on the Bible and often says "So help me God." Almost every president has proclaimed days of prayer and thanksgiving to God, and, since 1952, when Congress decreed that a specific date be set aside each year for Americans to pray, the president has annually declared a National Day of Prayer on the first Thursday in May. The Supreme Court opens its session after the bailiff has asked God to save the Court and the United States. Every state legislature as well as Congress starts its daily session with a prayer from a chaplain whose salary is paid with public tax monies. All of us, including schoolchildren, when pledging allegiance to the flag, invoke God on behalf of our nation. Witnesses in court swear to tell the truth, "So help me God." Our money announces that we trust in God. Our churches and synagogues are exempt from taxation. One of our great libertarian enactments, the Virginia Statute of Religious Freedom, calls upon God, as does the Preamble to the Declaration of Independence, both written by Thomas Jefferson, the advocate of a wall of separation between church and state.

Whether the duty we owe our Creator and the manner of discharging it require government aid or whether the establishment clause requires each individual to retain the sovereign power to decide for himself or herself is the subject of this book. A former president of the United States declared a National Bible Year and then lamented that God has been expelled from our public life, enough reason to examine the meaning of the establishment clause as well as the president's mind. The same president, Ronald Reagan, believed that if evolution is taught in the public schools, "the Biblical story of creation should also be taught."

When public officials, including the nation's attorney general, urge a return to the original intent of the clause, an examination of history is especially warranted. Still, the observation of Clinton Rossiter, the conservative constitutional scholar, should be kept in mind. "Most talk about the intent of the Framers," he wrote, "—whether in the orations of politicians, the opinions of judges, or the monographs of professors—is as irrelevant as it is unpersuasive, as stale as it is strained, as rhetorically absurd as it is historically unsound." Rossiter added that men of power who know least about the intent of the framers are most likely to appeal to that intent for support of their views.

Meanwhile, real questions of public policy arise, take on a constitutional dimension, and require resolution by our courts in conformity with the establishment clause. Can any part of our public taxes be spent to cover the costs of parochial schools? Can such taxes underwrite the costs of at least the secular portions of the curriculum, assuming that there are any in schools whose mission is to teach religion when teaching literature, history, biology, and physical education? Can government aid to private sectarian schools or to their pupils be provided without excessively entangling the government with religion as a result of the need to monitor the severing of the secular and the sectarian? Is the textbook, the laboratory, the field trip, the diagnostic test, or the remedial service of a religious character, as judged by government employees? Can children read the Bible in public schools, study comparative religion, see the Ten Commandments posted on the bulletin board, or use school time for devotional exercises of a sectarian or of a nonsectarian religious character (if there are such)? Aside from the unintended profanity of associating the Lord with commercialism, does the motto "In God We Trust" have a legitimate secular purpose and effect that conform to the establishment clause? Can the United States, which is barred from promoting religion, supply chaplains to our armed forces, our federal prisoners, or our representatives in Congress? Does the display of a nativity scene in a public square at Christmastime or of a menorah on the city hall steps at Chanukah violate the clause? Does requiring a kosher butcher to close his shop on Sunday endorse the Christian sabbath, thereby accommodating state policy with the needs of religion, contrary to the principle of separation of church and state? Does aid to religion given impartially and without preference comport with the policy embodied in the establishment clause? Does the exemp-

tion of churches from pubic taxation violate the clause? Do interfaith prayers at public school commencements? May a state enforce a statute against consumer frauds by prosecuting sellers of kosher food that an Orthodox Jewish sect claims is not kosher?

What indeed did the clause mean to those who framed and ratified it? Why did they insist on its inclusion in the First Amendment? What does history show about the meaning of the clause? Does its historical meaning shed light on the questions that nag us today? Should we be bound by the original intent? Were those responsible for the establishment clause committed to a high and impregnable wall of separation between government and religion? Was the clause the product of the "secular humanists" of their time—rationalists, Unitarians, and Deists, like Benjamin Franklin and Thomas Jefferson—or were its supporters evangelical Christians, like John Leland and Caleb Wallace, seeking to protect religion from government just as rationalists sought to protect government from religion and both seeking to secure religious liberty?

To such queries nonpreferentialists provide a set of answers that accommodate the needs of religion. Nonpreferentialists are those who believe that if public policy does not prefer one sect or religion above others but treats all without preference, nothing in the Constitution bans government aid and sponsorship of religion. They narrowly interpret the establishment clause, trying to keep it as confined as possible, a constitutional clause of slight importance, subordinate in every conceivable way to the free-exercise clause that guarantees religious liberty.

One nonpreferentialist of distinction, William Bennett, when secretary of education, made a speech on restoring morality to the public schools, as if they were immoral. He advocated that students be allowed to pray voluntarily, as if they could not now do so and as if morality resulted from prayer. Students can, of course, pray whenever they wish, silently, but Bennett wanted to orchestrate prayers under state auspices; he wanted the state to promote religious exercises, which would introduce coercion into religious obligations and, according to the Supreme Court, would violate the establishment clause. It would also violate Matthew 6:5–6 (pray privately). Bennett claimed that so long as no church or denomination receives preference over others, government aid to religion does not violate the amendment's prohibition against laws respecting an establishment of religion.

Bennett holds the narrow view of the establishment clause. History supports the Supreme Court's broad view that government aid to religion, even without preference to any church, violates the establishment clause. Bennett thinks that recent decisions by the Court on public assistance to parochial schools and on religion in public schools are "false to the intentions of the framers" of the First Amendment. The thesis of this book is that nonpreferentialists are wrong about the framers' intentions, not just because the framers had no position on schools, parochial or public, but because the narrow view is based on a misunderstanding of what they meant.

Another nonpreferentialist, Edwin Meese, when attorney general, told the American Bar Association that the establishment clause was designed to prevent Congress from establishing "a national church." He said too that the clause prevents government from "designating a particular faith or sect . . . above the rest," implying that government aid to all without preference to any would be constitutional. He compounded his errors when he said that government neutrality between religion and irreligion undermines religion. It does not; religion flourishes best when left to private voluntary support in a free society.

Chief Justice William H. Rehnquist of the Supreme Court, another nonpreferentialist, flunked history when he wrote an opinion in 1985 in which he sought to prove that the establishment clause merely "forbade the establishment of a national religion and forbade preference among religious sects or denominations." The clause, he claimed, "did not . . . prohibit the federal government from providing nondiscriminatory aid to religion." Thus Rehnquist miraculously converted the ban on establishments of religion into an expansion of government power. He did not consider that the establishment clause prohibits even laws respecting (concerning) an establishment of religion, so that any law on the subject, even if falling short of an establishment of religion, is unconstitutional. He did not know that the clause meant to its framers and ratifiers that there should be no government aid for religion, whether for all religions or one church; it meant no government sponsorship or promotion or endorsement of religious beliefs or practices and no expenditure of public funds for the support of religious exercises or institutions. Rehnquist, Meese, and the nonpreferentialists wish to be bound by the original intent of the framers of the establishment clause

because they mistakenly think that the original intent supports their view. In fact, it contradicts their view.

President George Bush, who catered to the Christian right, favored a voucher plan that would enable parents to choose schools where their children would be in a "religious setting and with religious instruction." He also wanted "to put the faith of our fathers back into our schools," and so backed what he called voluntary school prayers. He even said that one could not be president of the United States without faith in God, although the Constitution bans religious tests for federal officeholders. Kenneth Star, Bush's solicitor general, wanted the law to permit government "a non-coercive, ceremonial acknowledgement of the heritage of a deeply religious people." Governments tend to sponsor ceremonial religion that encourages civic virtues like obedience.

The Justice Department under Bush advocated construction of the establishment clause in terms of a coercion test. In the absence of coercion, a government policy would not violate the clause. Such a view, which has not prevailed, would render the clause superfluous, because the presence of coercion would violate the free-exercise clause. Such a view would not only constitutionalize prayer in the schools, especially in ceremonial matters; according to the American Civil Liberties Union, the Bush administration argued "that the government has a right to endorse Christianity as an official national religion so long as it does not force anyone to practice it." Bush scorched the Democratic party in 1992 for failing to mention God in its party platform. The Republican platform ostentatiously supported voluntary prayers in schools and the right to pray publicly at commencements and other community ceremonies. At the Republican convention, spokespersons for the Christian right attributed cultural degeneration—ghetto riots, secular humanism, abortion, pornography, and homosexuality—to what they called the absolute separation of church and state. The establishment clause is a perennially disputatious topic, fraught with emotion.

What did the clause mean in the minds of those who framed and ratified it? The historical evidence on this matter does not speak in a single voice with clarity and insistence. That evidence lends itself to conflicting interpretations. Indeed, my good friend, the Right Reverend Thomas J. Curry, who has reviewed the same evidence as I for the

period up to ratification of the First Amendment, holds that the framers retained an image of an establishment of religion quite different from that which I find in evidence. Monsignor Curry and I completely agree, however, that the nonpreferentialist position is historically groundless and without constitutional merit.

Nevertheless, no scholar or judge of intellectual rectitude should answer establishment-clause questions as if the historical evidence permits complete certainty. It does not. Anyone employing evidence responsibly should refrain from asserting with conviction that he or she knows for certain the original meaning and purpose of the establishment clause. The framers and the people of the United States, whose state legislatures ratified the clause, probably did not share a single understanding. Scholars or judges who present an interpretation as the one and only historical truth, the whole historical truth, and nothing but the historical truth delude themselves and their readers. Being sure is more a function of presuppositions than of certainty. The subject of this book is fraught with emotion and partisanship.

Accordingly, I try to recognize and quash my policy preferences when evaluating evidence. My sympathies are clearly with the separationists but are irrelevant to my selection and interpretation of evidence. I go wherever it points and seek to avoid subjectivity. Moreover, my presuppositions are not one-sided. When opinion is at issue, as distinguished from conclusions that must follow from the evidence, I think of myself as a middle-of-the-roader. Others do not. Indeed, many reviewers of the first edition of this book, like Richard John Neuhaus, to my astonishment characterized me as a "strict separationist." Michael McConnell, a law professor who favored the Bush administration's coercion test for use in establishment clause cases, quoted me approvingly on the Supreme Court's difficulty in recognizing an establishment of religion but hastened to add that he stood at a pole opposite mine on most establishment clause issues. One author, Father Richard P. McBrien, an otherwise reasonable man, names me first in his book among the "absolute separationists" whom he placed "on the left."

If people like Neuhaus, McConnell, and McBrien were right, I would not support several of the accommodations to religion that I favor. Strict or absolute separationists, for example, do not criticize the Court's decision against the posting of the Ten Commandments in

public schools or approve of Rehnquist's dissent from that decision. Strict separationists do not believe, as I do, that the American Civil Liberties Union too often acts inadvisedly in church-state cases. Strict separationists do not disagree with the Court's opinions as to auxiliary services that aid parochial school students and in particular do not lambaste Justice William Brennan for his opinion in *Aguilar v. Felton* (1985), which prevented New York City from using federal funds to provide highly specialized services to certain disadvantaged parochial school students.

Strict separationists deplored this book. One of them, Albert J. Menendez, an editor of the *Humanist*, finding anomalous my support of public aid to the purely secular functions of parochial schools, exclaimed, "This from a man who praises Jefferson and Madison to the hilt, supports the move to disestablish religious enterprises, and calls for a totally nonsectarian public school system." Menendez is sure that I fail to see that aid to church schools does "exactly" what I condemn in other areas of public life. *Church and State*, a strict separationist publication, found me less persuasive in my analysis of modern church-state issues than in my historical analysis, because I "inexplicably" abandoned strict separation. I thought I had explicated in considerable detail.

Being misunderstood by both accommodationists and strict separationists is tolerable, but not by one whose views are essentially similar to mine. I used to think I was misunderstood by readers because I was not sufficiently clear. I have come to believe that those who differ will distort and refuse to understand; many readers demand clarity and simplicity where the historical record, providing none, shows inconsistencies, lacunae, and complexity. Too many readers want complete adherence to their views, allowing for no exceptions or deviations. Some people seem to read with such blindness that there seems to be no way to shatter the stupefied integument of their biases.

Oliver Wendell Holmes once said that the "chief end of man is to form general propositions, adding that no general proposition is worth a damn." He was wrong on both counts: generalizing is not the chief end of man, and some generalizations are valuable and right. But no general proposition about the establishment clause seems worth a damn unless it is noncontroversial—for example, that there shall be no state church. Anyway, general propositions do not decide real cases.

The establishment clause, like any other controversial clause of the Constitution, is sufficiently ambiguous in language and history to allow few sure generalizations. "Law, like other branches of social science," Justice Benjamin Cardozo observed, "must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty." The evidence demonstrates that by an establishment of religion the framers meant any government policy that aided religion or its agencies, the religious establishments. Even that statement must be qualified; scarcely any clear rule is without exceptions. The exemption of church properties from taxation is certainly a major exception to the rule that aid to religion is unconstitutional.

We live in an imperfect constitutional universe cluttered with ambiguities, mysteries, and inconsistencies. History confounds us. It is delphic and scorns those who seek clarity, certainty, and consistency. Language has a similar effect because words, as Socrates said, "are more plastic than wax is" and therefore are as likely to engender disputes as to settle them. That might not be so if absolutes inhabited the constitutional universe. But no provision of the Bill of Rights guarantees a perfect or unqualified liberty. Chief Justice John Marshall once happily noted that the Constitution has none of the prolixity of legal code. It has rather the virtue of muddy brevity. Even the seemingly specific injunctions of the Bill of Rights do not exclude exceptions, nor are they self-defining.

What indeed in an "establishment of religion" and what is law "respecting" an establishment of religion? History suggests answers but the constitutional text does not. "No law respecting" means no law concerning or touching the subject of, but that still leaves unresolved the meaning of "establishment of religion." The prohibition, one must remember (and what judges forget), is not laid down against establishments of religion but against laws respecting them or on the subject thereof.

Those who wrote our glorious Bill of Rights were vague if not careless draftsmen. Their text offers us no clue as to what constitutes an "unreasonable" search or seizure, or the "probable" cause on which to base the issuance of a warrant. It does not tell us what is an "infamous" crime or what is the nature of the compulsion whose imposition exempts a person from being a witness against himself in a criminal case.

Nor does the text indicate what process of law is "due" before life, liberty, or property may be taken or what is a "public use" and "just" compensation. It is silent on the meaning of a "speedy" trial, "excessive" bail, and a punishment that is "cruel and unusual." The text does not always mean what it says. It does not, for example, really guarantee that the many rights of the Sixth Amendment extend to "all" criminal prosecutions.

If we look to our "first freedoms," we find that the First Amendment (which was originally intended to be the third) tells us nothing about the freedom of speech and press that Congress may not abridge. The very verbs in the First Amendment add to our perplexity. We can understand "no law abridging" but not the use of "prohibit" with respect to the free exercise of religion. Nowhere in the making of the Bill of Rights was the original intent and meaning clearer than in the case of religious freedom. The phrasing was "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof. . . ." The meaning, I submit, was this: Congress shall make no law concerning religion or abridging the free exercise thereof. The actual phrasing suggests the avoidance of the obvious and the deliberate use of a different verb: prohibiting. But Congress can pass laws regulating and even abridging the free exercise of religion without prohibiting it altogether. The difference here is more than one of degree; it is the difference between diminishing and abolishing. If, then, the text meant what is says, it does not at all protect religious liberty with the amplitude we all assume.

With little guidance from the constitutional text, we may better understand the establishment clause if we understand the American experience with establishments of religion at the time of the ratification of the Bill of Rights in 1791. After the American Revolution seven of the fourteen states that comprised the Union in 1791 authorized establishments of religion by law. Not one state maintained a single or preferential establishment of religion. An establishment of religion meant to those who framed and ratified the First Amendment what it meant in those seven states, and in all seven it meant public support of religion on a nonpreferential basis. It was specifically this public support on a nonpreferential basis that the establishment clause of the First Amendment sought to forbid.

In this revised and updated edition, which is considerably longer than the first, I have added an analysis of Jefferson ideas on church and state; I have fleshed out many of the arguments in chapters 6 through 9; I have added a presentation of the establishment-clause cases of the past seven terms of the Court. And I have taken into consideration a variety of criticisms of the original edition.

Leonard W. Levy
Ashland, Oregon
1993