

Separation of Church and State



The American Revolution was a radical experiment in liberty. Nowhere was its character more evident than in what Thomas Jefferson called a “novel innovation”—the First Amendment’s separation of church and state. The language was unmistakably direct: “Congress shall make no law respecting an establishment of religion.” The establishment clause, as it is known, forbids government from supporting or favoring religion or any particular religious belief or practice. It also outlaws discrimination in favor of religion. When linked to its companion clause—“Congress shall make no law . . . prohibiting the free exercise thereof”—the amendment embraces the now classic American principles of liberty of conscience, freedom of religious expression, religious equality, and separation of church and state.

In adopting the amendment, the framers drew upon their own experience but went beyond it to reject the history they had inherited from Europe. For a thousand years, governments in Western Europe accepted the idea that there was only one true religion, Roman Catholicism, that encompassed the entire society. The state’s role was to enforce uniform belief and practice by any means necessary, including the torture and execution of heretics and infidels. Even after the Protestant Reformation, the sixteenth-century revolt against the Catholic Church, governments continued to use their power to uphold the authority of a single national church. Church and state were partners in maintaining the good order of society. Too much was at stake in heaven and on earth to consider any other arrangement.

In England, the most troublesome challenge to conformity came from Puritans and others who believed the Church of England was corrupt. These religious dissenters founded several of the early American colonies, but, despite their alienation from the national church, they rejected neither the idea of a single faith nor a state church. They did not seek religious freedom for everyone but only the right to practice what they believed. Rhode Island was an early exception to this history. Its founder, Roger Williams, insisted on complete religious freedom. The charter for the colony, issued in 1663, promised residents “at all times hereafter, freely and fully [to] have and enjoy. . . their own judgments and consciences, in matters of religious concernments.” Williams advanced an important principle, but his small colony was an isolated outpost in a world that accepted close ties between religion and government as natural. In 1682, Pennsylvania adopted a liberal policy that tolerated or accepted the diverse practice of religion for people who believed in God, but only Rhode Island proclaimed complete religious liberty.

Toleration gradually grew in American soil, despite these early barriers. The European ideal of one church in one nation never fit the circumstances of the colonies, where distance and diversity were barriers to conformity. Not all of the

“All civil states with their officers of justice, in their respective constitutions and administrations, are. . . essentially civil, and therefore not judges, governors, or defenders of the Spiritual, or Christian, State and worship. . . . God requireth not an uniformity of religion to be enacted and enforced in any civil state; which enforced uniformity, sooner or later, is the greatest occasion of civil war, ravishing consciences, persecution of Christ Jesus in His servants, and of the hypocrisy and destruction of millions of souls.”

—Roger Williams, *The Bloody Tenent* (1644)

colonies were English in origin—New York, for instance, was initially Dutch, with its Reformed tradition—and the Spanish and French settlements, all Catholic, bounded the English on all sides. During the eighteenth century especially, the arrival of new immigrants from different cultures, including non-Anglican or dissenting preachers, led to religious toleration in practice and, increasingly, in law. The first Great Awakening, a colonies-wide religious revival of the 1730s and 1740s, spurred a flowering of new sects. Slowly a new pattern of religious liberty replaced the older European model of a state church and an official creed, even though at the time of Revolution, most colonies still had an established church, usually the Church of England, supported by taxes from members and nonmembers alike.

For the revolutionaries, political liberty was meaningless without religious liberty, and disestablishment, the separation of church and state, was necessary to guarantee freedom of the soul, the most precious of all liberties. Even before the Bill of Rights prohibited a state church, the framers of the Constitution had signaled their radical break with the past by refusing to require officeholders to meet a religious test, that is, to subscribe to certain religious beliefs—or even to believe at all. Earlier, the Virginia Statute for Religious Freedom (1786), the model for much of our language about religious liberty, made clear that the state would not support any churches—or Christianity more generally—much less one faith. Thomas Jefferson, proud author of the law, argued that religion must be protected from the state, and the state from religion, because it was so essential to mankind’s happiness and well-being. True religion could spread only by reason and persuasion, never by governmental edict. The First Amendment, Jefferson believed, enshrined this principle by building a “wall of separation” between church and state.

The founding generation embraced the idea, but the nineteenth century proved that old habits were hard to discard. The First Amendment restrained only the central government, and not until 1833 did all state constitutions guarantee full freedom of religion and remove all remnants of earlier religious establishments. For much of the century, state officials promoted common Christian beliefs and practices—in the form of Bible verses and Christian symbols inscribed on public buildings, for example—and state taxes supported missionaries and religious schools on the American frontier. This general but unofficial conformity weakened over time under pressure from waves of immigrants from Ireland, Germany, and other parts of Europe that did not share a strictly Protes-

tant culture.

In the late nineteenth century, the United States became even more diverse in its population and religious practices, especially with new immigration from Italy, Greece, and eastern Europe, with their Catholic, Orthodox, and Jewish faiths, and from Asia. In response, some states rewrote their constitutions to prohibit such things as direct state aid for religious education. Other states responded by trying to reinforce the traditional, cozy relationship between Protestantism and the state, for instance, by denying Roman Catholics the legal right to establish state-approved schools or by refusing to allow Jehovah's Witnesses to preach on public streets. Denied relief from religious discrimination in state courts, dissenters began to turn to federal courts.

In the nineteenth century, few cases involving religion made it to the Supreme Court, but by the 1940s the justices were responding forcefully to the rights of religious dissenters. Two landmark cases, *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), established free exercise and separation of church and state, respectively, as part of the liberty protected by the Fourteenth Amendment's guarantee of due process of law. By incorporating them into the due process clause, the Court allowed for these protections to restrain both state and federal governments. For the justices, these freedoms, like other First Amendment rights, were essential to the democratic process. Without the liberty to discuss, write, believe, and act, Americans could not participate effectively in governing themselves.

The religion cases often were controversial because they challenged long-standing popular assumptions about the role of religion in public life. Then as now, Americans were an observant people, especially when compared to Europeans. Surveys from the 1940s and 1950s reported that nine in ten respondents believed in God, and five in ten attended worship regularly, figures still true today. The United States, as many citizens understood its history, was divinely blessed. Although keeping church and state separate was part of a prized heritage of liberty, many people believed it was acceptable for the government to honor God in schools, courthouses, and other public places. When the Supreme Court ruled that prescribed prayers did not belong in public schools, a firestorm of criticism erupted, challenging the decision and spurring a decades-long debate that continues today.

The 1950s were a tense decade for Americans. Freedom and security remained at risk a few short years after the defeat of Hitler. The military battlefields of World War II had been replaced by the Cold War, a struggle between two superpowers, the United States and the Soviet Union. The enemy this time was "Godless, atheistic communism," as it was called, an ideology opposed to democracy and one that officially repudiated religion. One response to this threat was to elevate the public role of religion. For example, Congress adopted the slogan "In God We Trust" as the national motto and added "under God" to the Pledge of Allegiance, in part to symbolize differences between the United States and Soviet Union.

In New York the state board of regents, which was responsible for public education, reflected the national mood by crafting a nondenominational prayer for schoolchildren to recite each morning. The prayer seemed innocuous—"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country"—but when a Long Island school district made it part of the school day, Lawrence Roth objected. Roth was a manufacturing executive who was actively involved in a local

committee for better schools. He also was Jewish, and although not observant personally, he was bothered by Christian symbols in the school his son attended. When the board decided to adopt the regents' prayer, Roth felt something had to be done: "If the state could tell us what to pray and when to pray," he said, "there was no stopping it." With other parents, he asked the board president, William Vitale, Jr., to withdraw the policy, but the board refused, claiming the prayer was voluntary. Children could sit quietly or leave the room, if parents provided an excuse. Board members, who earlier had refused to allow a discussion of Hanukkah during the Christmas season, could not see the problem. The prayer was ecumenical—it included all religions—so who could object?

Roth requested the New York Civil Liberties Union (NYCLU) to sue the school board for violating the First Amendment's ban on an establishment of religion. In taking the case, the NYCLU asked Roth to find other individuals who were upset by the practice and who would become plaintiffs with him. Although he located more than fifty families who responded, in the end only five people withstood community pressure and joined the lawsuit. Stephen Engel, Roth's next-door neighbor, was one of them. Like the other litigants, he believed that religious instruction was the responsibility of parents, not the duty of the state.

Public sentiment mounted against Roth and the other plaintiffs. Opponents claimed they were anti-Christian, even anti-God, and accused them of being unpatriotic. Roth's two sons experienced anti-Semitic abuse from fellow classmates, and their teachers were antagonistic toward them. All five families received sacks of hate mail, snubs from friends, and threats of various sorts, from unemployment to arson and child kidnapping.

After losing in state courts, Roth, Engel, and the other petitioners appealed to the U.S. Supreme Court. Their argument before the high bench was straightforward: the state, by composing its own prayer for an institution with compulsory attendance, was engaged in an establishment of religion. In response to the school board's claim that the prayer was voluntary, the plaintiffs countered that the practice of isolating children who did not take part placed them under enormous peer pressure, thus making the prayer, in effect, compulsory for this vulnerable population.

The justices agreed. In June 1962, they ruled, 6 to 1, that the regents' prayer was unconstitutional because a government body had placed its "official stamp of approval" on an obvious religious activity. Justice Hugo Black rejected the view that the decision was anti-religion or anti-prayer. The framers of the First Amendment, he wrote, knew that "governmentally established religions and religious persecutions go hand in hand." The Bill of Rights ensured that, in America, government could not "shackle men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to."

A deafening protest greeted the decision in *Engel v. Vitale*. The public reaction was among the most hostile in the Court's history. Former President Herbert Hoover lamented the destruction of "a sacred American heritage," and the Catholic cardinal of New York blasted the justices for crippling the "very heart of the godly tradition in which America's children have so long been raised." Congressmen railed against the decision, some claiming that the Court had made God unconstitutional. States in the Bible Belt sought to defy the ruling by allowing teachers to decide whether to pray or not, a practice later ruled illegal.

The controversy did not fade quickly, as the plaintiffs soon discovered. Lawrence Roth received thousands of hate letters; one read, "If you don't like

our God, then go behind the Iron Curtain where you belong, Kike, Hebe, Filth!” Threatening telephone calls hounded all the petitioners. Not all the threats were idle. Someone planted a bomb in the Roths’ basement; another burned a cross in their lawn. Two busloads of protestors appeared in front of Engel’s house, screaming and terrifying his children until neighbors with pitchforks and shovels forced the demonstrators off his property. Through all the public vilification, Roth and his fellow litigants remained satisfied with their role in protecting religious freedom, but their attorney was glad for another reason: “If the First Amendment came up today, it wouldn’t pass,” he noted thirty years after the decision, “Thank God we are stuck with it.”

The debate over government and religion continues today, even though the Supreme Court has hewed close to its position in *Engel v. Vitale*. Subsequent decisions have stoked the fires of protest. Reciting the Lord’s Prayer and reading from the Bible in public schools also were violations of the First Amendment’s establishment clause, the justices decided the year after *Engel*. Other cases forbade public schools from endorsing a religious practice or belief, teaching theology or creationism, displaying the Ten Commandments or Bible verses, or using the facilities of religious schools or the services of religious officials.

In 1971, a threefold test emerged in *Lemon v. Kurtzman* to gauge whether a law concerning religion was constitutional: Did it have a secular, or nonreligious, purpose? Did the law neither advance nor inhibit religion? Did it foster or encourage no excessive entanglement between church and state? If the answer to each of these questions was yes, then the law was constitutional; answering no to any of them cast doubt on the measure. More recently, the Court has relaxed this standard somewhat to allow laws that affect religious activity but are religiously neutral in their language, intent, and application. Church groups, for example, can use school facilities on an equal basis with nonreligious groups, and states can provide remedial or disability services to students in religious and public schools alike. Still, the basic principle remains: government must be strictly neutral on questions of religion; faith and belief are matters for the individual conscience alone.

This stance continues to cause unease among people who think government should promote morality. With the exception of Ireland, the United States is the most religious society in the Western world, with nearly 90 percent of Americans identifying themselves as religious believers, so why must government remain strictly neutral? Most people who make this argument do not seek an

“I believe in an America where the separation of church and state is absolute—where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote—where no church or church school is granted any public funds or political preference—and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.”

—John F. Kennedy, address to the Greater Houston Ministerial Association, September 12, 1960

established church, but they desire public policies that foster religious beliefs, regardless of denomination. Some would go further, advocating that government should enshrine traditional, largely Protestant, values in laws governing moral choices.

Even though government support of religion generally might sound appealing, especially in times of unsettling social change, many strongly religious people oppose any level of government involvement. We are too diverse in our religious beliefs, they argue, to make this approach practical, even if it could be done constitutionally. They also note that the separation of church and state is responsible for the vitality of religion in the United States. Without an established faith, denominations and creeds compete with each other for membership, thus increasing the public presence of religion.

Not everyone accepts this conclusion. Some groups claim that a strict separation of church and state has resulted in hostility, not neutrality, toward religion. They want government to take positive steps to ensure that religious groups are not excluded from government funding solely because they are religious. In a case from 1995, for example, a question arose from the University of Virginia, founded by Thomas Jefferson: could a public university refuse to spend student-fee monies to support a magazine that advocated an evangelical Christian point of view, when this funding was available to support a wide range of other student publications, including some antagonistic to religion? In *Rosenberger v. University of Virginia*, the Supreme Court, by a 5-to-4 vote, ruled that the establishment clause did not bar the support as long as the distribution of funds was neutral and evenhanded, even though the magazine promoted a particular religious message. More recently, President George W. Bush's administration put into practice what it termed a "faith-based initiative" to allow religious groups to compete equally with other not-for-profit agencies to deliver government-funded social services, such as homeless shelters or child care. A religious group that receives these monies may not require participants to accept its beliefs and it cannot force them to join worship, but neither does it have to hide its religious convictions.

The modern debate about the meaning and purpose of the separation of church and state is dressed in new language, but it fundamentally is the same debate we have had since the adoption of the First Amendment. Competition of ideas, including religious ideas, was central to the thought of the framers. It was the free pursuit of ideas, no matter how strange they may seem to others, that promised truth—and from truth came liberty. The framers believed as well that truth came from the application of reason and logic, and they sought to ensure that government was powerless to interfere with its pursuit. Religion was necessary for democracy, they argued, but only if individual citizens had freedom of thought without any governmental pressure to believe certain things and disbelieve others. Here was the heart of their opposition to government entanglement with religion.

As a society we have accepted this view for practical as well as philosophical reasons. Competing religious groups realize that it is better to keep the government neutral in matter of religion than it is to have their opponents gain control over government. Today, we have more than 1,500 organized religious groups in the United States, representing all the world's faith traditions. How could government choose among them? Who is to say which religion, if any, holds such truth that government should endorse it and give it protection? Even some advocates of a faith-based initiative began to waver or lose enthusiasm

“Three such tests may be gleaned from our cases [to judge that a law does not violate the First Amendment’s establishment clause]. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”

—Chief Justice Warren Burger,
Lemon v. Kurtzman (1971)

when they learned that denominations they did not favor were eligible to compete for government grants.

We cannot base our understanding of the separation of church and state—or any other right—solely on the views of the framers, but neither should we dismiss them casually. The religious contention we witness today is an age-old problem. Official neutrality toward religion, we have learned, works both to enhance democratic government as well as to foster religious vitality. We have also discovered that the separation of church and state does not mean a denial of all public expressions of religion. What is new—or, at least, what is more pronounced now—is the presence in our society of all the world’s religions. We are no longer a nation of Protestants, Catholics, and Jews, as sociologists described the United States in the 1950s and earlier. We are also a nation of Muslims, Buddhists, Confucians, Hindus, Sikhs, and countless other faith traditions, as well as millions of people who do not subscribe to any faith. How we respond to these new circumstances—how we define the relationship between church and state, as well how we understand the public role of religion—will help to determine whether our great experiment in liberty and democracy continues to thrive.

An Argument against State-Supported Religion

In 1785, the Virginia General Assembly considered a bill to levy an assessment, or general tax, to support teachers of Christian religions. The measure, supported by a group of citizens led by Patrick Henry, sought to use public funds to encourage a plural establishment, that is, a state that supported all Christian religions. Henry and others believed the law would help to create a virtuous citizenry.

James Madison and Thomas Jefferson opposed the bill because it violated their belief in the separation of church and state. In 1779, Jefferson had drafted the Virginia Act for Establishing Religious Freedom, but the general assembly had not adopted it. Madison submitted his “Memorial and Remonstrance against Religious Assessments” in 1785, in opposition to the tax bill, and the legislature then tabled the proposed tax and adopted Jefferson’s bill for religious liberty.

The “Memorial and Remonstrance” remains a powerful argument against state-supported religion. In the three sections below, Madison argues that state power used to favor religion can also force people to conform to a particular religion (number 3). He then argues that it violates the principle of equality on which the new nation was founded (number 4). Finally, he believes it will destroy the harmony among religions that distinguished American experience from the religious warfare of Europe.

3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because the Bill violates the equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and

therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “equal title to the free exercise of Religion according to the dictates of Conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists [Mennonites] the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to believe that they either covet pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the

measure. . . . 11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been split in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and

prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed “that Christian forbearance, love and charity,” which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

“A Wall Between Church and State”

A 1941 New Jersey law authorized boards of education to reimburse parents, including those whose children went to Catholic schools, for the cost of transportation to and from school. Arch Everson was a Trenton resident and taxpayer who believed this practice violated the First Amendment’s establishment clause. By a 5-to-4 vote, the U.S. Supreme Court did not agree, and it upheld the New Jersey law. Writing for the majority in Everson v. Board of Education (1947), Justice Hugo Black cited James Madison’s “Memorial and Remonstrance” of 1785, in which Madison successfully fought against a tax to support a state church in Virginia. In his opinion, Black argued that the First Amendment requires the state to be strictly neutral, neither supporting nor inhibiting religion, but it does not require the state to be an adversary of religion. Everson remains good law today.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government

can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.” . . .

[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them...

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.