

## DRAFT

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### The Shifting Walls of Separation Between Church and State in the United States

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The civic catechisms and canticles of our day still celebrate Thomas Jefferson's experiment in religious liberty. To end a millennium of repressive religious establishments, we are taught, Jefferson sought liberty in the twin formulas of privatizing religion and secularizing politics. Religion must be "a concern purely between our God and our consciences," he wrote in 1802. Politics must be conducted with "a wall of separation between church and state."<sup>1</sup> Public religion is a threat to private religion, and must thus be discouraged. Political ministry is a menace to political integrity and must thus be outlawed.

These Jeffersonian maxims remain for many today the cardinal axioms of a unique American logic of religious freedom to which every patriotic individual and institution should yield. Every public school student learns the virtues of keeping his Bible at home and her prayers in the closet. Every church knows the tax law advantages of high cultural conformity and low political temperature. Every politician understands the calculus of courting religious favors without subverting religious causes. Religious privatization is the bargain we must strike to attain religious freedom for all. A high and impregnable wall of separation is the barrier we must build to contain religious bigotry for good.

"A page of history is worth a volume of logic," Oliver Wendell Holmes, Jr. once said. And careful historical work in the past three decades has begun to call a good deal of this popular Jeffersonian logic into question. Not only are Jefferson's views on the separation of church and state considerably more nuanced than this simple wall metaphor would have us believe. But the fuller account now available of the genesis and exodus of the American experiment in religious liberty suggests that separation of church and state is only one principle of religious freedom in American law, and it is balanced by other founding principles of religious freedom -- liberty of conscience, freedom of exercise, religious pluralism, religious equality, and no establishment of religion.

In this brief essay, I analyse five distinct understandings of separation of church and state at work in the American founding era of 1776-1812 when the federal and first state constitutional guarantees of religious freedom were drafted and ratified. I sketch briefly the continued influence and manifestations of each of these five understandings in current American constitutional law. The last section argues that separation of church and state is a valuable constitutional ideal, so long as it used prudentially not

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<sup>1</sup> H. Washington, ed., *The Writings of Thomas Jefferson*, 10 vols. (Washington, DC: Taylor and Maury, 1853-1854), 8:113.

categorically, and so long as it remains balanced with other founding principles of religious freedom.<sup>2</sup>

### Separation of Church from State

First, the eighteenth-century American founders used the idea of separation to protect the church from the state. This had been a common Christian understanding of separation of church and state from the beginning, and it was captured in the Christian clergy's perennial call for "freedom of the church" -- or what the Edict of Milan of 313 had called the "free exercise and practice of religious groups."<sup>3</sup> This understanding of separation of church and state was prominent in eighteenth-century America, and remains so this day. The founders' principal concern was to protect church affairs from state intrusion, the clergy from the magistracy, church properties and polities from state interference, ecclesiastical rules and rites from political coercion and control. George Washington wrote in 1785 of the need "to establish effectual barriers" so that there was no threat "to the religious rights of any ecclesiastical Society," including particularly beleaguered minorities like Jews, Catholics, and Quakers, to whom he wrote several tender letters.<sup>4</sup> Thomas Jefferson called for government to resist what he called "intermeddling with religious institutions, their doctrines, discipline, or exercises." "Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own peculiar tenets," Jefferson wrote. And none of this can "concern or involve" the state.<sup>5</sup>

This first understanding of separation was captured especially in early American state constitutional guarantees of the free exercise rights of peaceable religious groups -- the right of religious bodies to incorporate and to hold property, to appoint and remove clergy and other officials, to have sites and rites of worship, education, charity, mission, and burial, to maintain standards of entrance and exit for their members, and more -- all of which were specified in early state constitutional laws.<sup>6</sup> This understanding of separation was also implicit in the First Amendment guarantee that government was not to establish religion but to leave religion to the free exercise of individuals and groups.

This first understanding of separation of church and state has long been a vital part of American constitutional law. In more than 20 cases from 1872 to 2012, the United States Supreme Court has held that religious organizations have the right to organize their own internal religious affairs without state interference, to resolve their

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<sup>2</sup> This article draws in part from John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3d ed. (Boulder, CO: Westview Press, 2011), which includes detailed citations. Hereafter noted as "RCE".

<sup>3</sup> In Lactantius, *De Mortibus Persecutorum* [c. 315], 48.2-12, ed. and trans. J. L. Creed (Cambridge: Cambridge University Press, 1984), 71-73.

<sup>4</sup> Using critical version in Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: NYU Press, 2002), 84-85.

<sup>5</sup> Thomas Jefferson, Letter to Rev. Samuel Miller (1808), in *The Founders' Constitution*, ed. Philip Kurland and Ralph S. Lerner, 5 vols. (Chicago: University of Chicago Press, 1987), 5:98-99.

<sup>6</sup> See esp. Chester J. Antieau, Phillip Mark Carroll and Thomas Carroll Burke, *Religion Under the State Constitutions* (Brooklyn: Central Book Co., 1965).

own internal disputes without judicial intrusion, and to hire and fire employees who do not share their religious vision.<sup>7</sup> Today, the exact edges of these “corporate free exercise rights” or claims to “church autonomy” are being closely tested. Are secular organizations run by sincere religious individuals -- say a hardware or hobby store, run by a Catholic businessman -- deserving of religious freedom protection? Are services like schooling, charity, or emergency relief deserving of special religious freedom protection, when secular organizations offer comparable services? Is every activity of a religious organization – say its decisions about hiring a janitor or ordering paper for the Sunday bulletin – protected by religious freedom norms? These and other hard new questions of application, however, do not change the reality that religious organizations are presumptively protected from the state.

### **Separation of State from Church**

Second, the American founders invoked the principle of separation to protect the state from the church. This was largely a post-Westphalian concern in Western Europe, but it, became prominent among some American founders, too. “The sorest tyrannies have been those, who have united the royalty and priesthood in one person,” wrote the authors of *Cato’s Letters*. “Churchmen when they ruled states, had not only double authority but also double insolence and remarkably less mercy and regard to conscience, property,” and the domains and demands of statecraft.<sup>8</sup> In the same vein, John Adams documented at length what he called the “tyrannous outrages” that the medieval Catholic Church and early modern Protestant churches had inflicted through their control of the state. Adams called this “a wicked confederacy between two systems of tyranny.”<sup>9</sup> Drawing on these same historical lessons, John Jay urged his fellow constitutional conveners in New York “not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind.”<sup>10</sup>

This understanding of separation helped to inform the movement in some states to exclude ministers and other religious officials from participating in political office. Ministers in political office, it was commonly argued, could use the threat of spiritual reprisal to force their congregants, including fellow politicians who sat in their pews, to acquiesce in their political positions. Ministers could be conflicted over whose interests to represent and serve – the interests of their religious congregants or their political constituents. Ministers could have disproportionate influence on the political process since they represented both religious congregants and political constituents. Ministers who tried to serve both God and the state could be distracted from their fundamental callings of preaching and teaching, and tempted to train their religious messages toward

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<sup>7</sup> See cases in RCE, 241-62 and most recently *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. \_\_\_ (2012).

<sup>8</sup> John Trenchard and Thomas Gordon, *Cato’s Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*, [1720-23], 2 vols., ed. Ronald Hamowy (Indianapolis: Liberty Fund Press, 1995), 2:467-468.

<sup>9</sup> *The Works of John Adams*, ed. J.F. Adams, 10 vols. (Boston: Little Brown, 1850-56), 3:447.

<sup>10</sup> New York Constitution (1777), Arts. XXXVIII-XXXIX.

political causes. Ministers could not enjoy both the benefit of exemption of taxation for themselves and the power to impose taxation on all others; this was even more odious than the great offense of taxation without representation.<sup>11</sup>

These kinds of arguments led seven of the original thirteen states, and fifteen later states to ban ministers from serving in political office.<sup>12</sup> In 1978, the Supreme Court struck down these per se prohibitions on clerical participation in politics.<sup>13</sup> And in 1983, the Court upheld the long tradition of having chaplains serve in state legislatures - and in the military, in state prisons, in public hospitals, asylums, and other state-run service organizations.<sup>14</sup> But the custom of keeping clergy out of daily politics and keeping overt religious arguments out of political deliberations has remained strong. And, federal tax and bankruptcy laws still require that tax exempt religious organizations refrain from direct participation in political elections or clear endorsement of one political party or candidate.

### Separation and Freedom of Conscience

Third, the American founders sometimes invoked the principle of separation of church and state as a means to protect the individual's liberty of conscience from the intrusions of either church or state, or both conspiring together. James Madison put this case in his famous 1785 "Memorial and Remonstrance Against Religious Assessments," calling for what he called "a great barrier" between church and state to defend the religious rights of the individual. Thomas Jefferson's equally famous 1802 letter to the Danbury Baptist Association also tied the principle of separation of church and state directly to the principle of liberty of conscience. After his opening salutation, Jefferson's letter reads thus:

Believing with you that *religion is a matter which lies solely between a man and his God*, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to *restore to man*

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<sup>11</sup> See sources in John Witte, Jr., "A Most Mild and Equitable Establishment of Religion': John Adams and the 1780 Massachusetts Constitution," *Journal of Church and State* 41(1999): 242ff.

<sup>12</sup> Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," *Journal of Church and State* 38 (1996): 261-295.

<sup>13</sup> *McDaniel v. Paty*, 435 U.S. 618 (1978).

<sup>14</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

*all his natural rights*, convinced he has no natural right in opposition to his social duties.<sup>15</sup>

In Jefferson's formulation here, separation of church and state assured individuals of their natural right of conscience, which could be exercised freely and fully to the point of breaching or shirking social duties.

This idea of separation remains strong today in modern American constitutional laws that protect parties from coerced participation in religious activities or associations that they find odious: So public school teachers cannot require their students to participate in prayers, Bible reading, or worship. Military or prison chaplains cannot force their soldiers or prisoners to attend religious worship services. Government officials cannot be required to swear a religious oath as a condition for office, nor did may courts require a party or witness to swear an oath as a condition of their appearance or testimony. For the government to coerce religious exercises, the Court has repeatedly said, violates both the liberty of conscience of the coerced party and the limitation on government action imposed by the separation principle.<sup>16</sup>

### **Separation and Federalism**

Fourth, the American founders occasionally used the principle of separation of church and state to argue for the protection of the individual states from interference by the federal government in governing local religious affairs. Jefferson pressed this federalist jurisdictional sense of separation as well. He said many times that the federal government had no jurisdiction over religion; religion was entirely a state and local matter in his view. As he put it in his Second Inaugural Address as President: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the [federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities."<sup>17</sup> The separation that Jefferson had in mind here was between local church-state relations and the federal government. The federal government could not interfere in the affairs of local churches. And the federal government could not interfere in the affairs of local states in their governance of local churches. Under this federalist jurisdictional reading of separationism, state governments were free to patronize and protect religion, or to prohibit or abridge religion, as their own state constitutions dictated. But the federal government was entirely foreclosed from the same and from interference.

Some scholars have imputed this fourth understanding of separation of church and state into the First Amendment provision that "Congress shall make no law *respecting* an establishment of religion." The argument is that Congress shall make no laws respecting any *state establishment* of religion. In 1789, when the First Amendment was being drafted, seven of the original thirteen states still had some form of religious

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<sup>15</sup> In Dreisbach, *Thomas Jefferson*, 148 (emphasis added).

<sup>16</sup> See cases in RCE, 191-98, 223-36.

<sup>17</sup> Quoted in Dreisbach, *Thomas Jefferson*, 152.

establishment, which both their state legislatures and constitutional conventions defined and defended, often against strong opposition. Moreover, Virginia had just passed Jefferson's bill for the "*establishment* of religious freedom," also against firm opposition. Having just defended their state establishments (of whatever sort) at home, the new members of Congress were not about to relinquish control of them to the new federal government.

This federalist reading of the establishment clause is becoming more prominent in the literature today, especially as neo-federalist movements have emerged in other areas of American constitutional law. This reading has recently captured the imagination of Justice Clarence Thomas of the Supreme Court who several times has called for the Court to abstain from First Amendment review of state and local government action.<sup>18</sup> This reading has also encouraged state's rights activists to push for the development of new state and local laws on religious freedom, some more permissive, some less permissive than allowed under the First Amendment.

### **Separation of Religion from Political and Public Life**

Fifth, a few of the American founders invoked the principle of separation to call for the separation of religion from public life altogether. Already before the American Revolution of 1776, several religious groups used separation of church and state language to argue against the established church policies of mandatory payments of tithes, required participation in swearing oaths, forced attendance at religious services, compulsory registration of church properties and more. At the turn of nineteenth century, the language of separation of church and state also began to fuel broader campaigns for a much stricter separation of religion from political and public life altogether.

These new strict separationists taught that the state should not give special aid, support, privilege, or protection to religious doctrines or groups -- through special tax appropriations or collections of tithes, special donations of goods and realty, special laws of religious incorporation, or special criminal laws against blasphemy, sacrilege, and Sabbath-breaking. The state should not predicate its laws on explicitly religious premises or direct them to exclusively religious purposes. The state should not draw on the services of religious officials to discharge its political tasks, nor interfere in the order, organization, or orthodoxy of religious bodies. As James Madison put it in 1822: "[A] perfect separation between ecclesiastical and civil matters" is the best course, for "religion and Government will both exist in greater purity, the less they are mixed together."<sup>19</sup>

This was the most novel, and most controversial, understanding of separation of church and state in the young American republic. But it began to gain traction in the series of nineteenth-century series battles over duelling, freemasonry, lotteries,

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<sup>18</sup> See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas J. concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639-677-680 (2002) (Thomas J. concurring).

<sup>19</sup> Letter to Edward Livingston (July 10, 1820), in *The Writings of James Madison*, ed. G. Hunt, 9 vols. (New York: G.P. Putnam's Sons, 1900-1910), 9:98, 102.

drunkenness, Sunday laws, slavery, marriage, divorce, women's property rights, women's suffrage, religious education, blasphemy prosecutions, enforcement of Christian morals, and more. These were battles fought in Congress and in the courts, in states and on the frontier, in churches and in the schools, in clubs and at the ballot box. They were largely wars of words, occasionally wars of arms. The battles included many familiar foes -- Republicans and Federalists, Catholics and Protestants, the north and the south, native Americans and new emigrants. They also included a host of newly established political groups: the Know-Nothing Party, the American Protective Association, the National Liberal League, the American Secular Union, the Ku Klux Klan, and dozens of other new groups.<sup>20</sup>

The largest battles over the meaning and means of separating church and state erupted over religious education and state funding. Thirty-five state constitutions ultimately prohibited state funding of religious schools. Fifteen state constitutions further insisted that state schools remain free from "sectarian influence" or from the control of religious officials and institutions. These provisions were motivated, in no small part, by growing Protestant biases against emerging Catholic schools. In the later nineteenth and early twentieth centuries, twenty-nine state constitutions broadened their rule of no-state-funding-for-religion to apply not only to religious schools but to all religious causes and institutions.<sup>21</sup>

It was this fifth version of strict separation of church and state logic that the Supreme Court highlighted in its landmark case of *Everson v. Board of Education* (1947). This case made two major moves at once. First, the Court applied the First Amendment establishment clause for the first time to federal, state, and local government alike – creating a uniform religious freedom law for the nation. Second, Justice Black read a strict separationist understanding into this First Amendment establishment clause:

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.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or 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."<sup>22</sup>

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<sup>20</sup> See articles collected in T. Jeremy Gunn and John Witte, Jr., *No Establishment of Religion: America's Original Contribution to Religious Liberty* (New York: Oxford University Press, 2012), 180-340.

<sup>21</sup> See *ibid.* and Philip A. Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), 219-229, 321-322, 340-341, 412-418.

<sup>22</sup> *Everson v. Board of Education*, 330 U.S. 1, 15-16.

In later cases, Justice Black stressed that “a union of government and religion tends to destroy government and to degrade religion.” “Religion is too personal, too sacred, [and] too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”<sup>23</sup> Religion is also too powerful, too sinister, and too greedy to permit its unhindered pervasion of a civil magistracy. “[T]he same powerful religious propagandists” who are allowed to succeed in making one inroad on the state and its laws, Justice Black wrote, “doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it is nearly always by insidious approaches that the citadels of [religious] liberty are more successfully attacked.”<sup>24</sup> “The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>25</sup>

The Supreme Court applied its strict separationist logic with special vigor in cases challenging the traditional state patronage and protection of religious education. In more than two dozen cases after *Everson*, the Court held that public schools could not offer prayers or moments of silence, could not read Scripture or religious texts, could not house Bibles or prayerbooks, could not teach theology or creationism, could not display Decalogues or creches, could not use the services or facilities of religious bodies. At the same time, states could not provide salary and service supplements to religious schools, could not reimburse them for administering standardized tests, could not lend them state-prescribed textbooks, supplies, films, or counseling services, could not allow tax deductions or credits for religious school tuition the Court purged religion from the public school and removed religious schools from many traditional forms of state support.<sup>26</sup>

In *Lemon v. Kurtzman* (1971), the Court distilled the separationist logic of its early cases into a general test to be used in all establishment clause cases. Henceforth every law challenged under the establishment clause would pass constitutional muster only if it could be shown (1) to have a secular purpose; (2) to have a primary effect that neither advances nor inhibits religion; and (3) to foster no excessive entanglement between church and state.<sup>27</sup> When read strictly, the *Lemon* test rendered the establishment clause a formidable obstacle to many traditional forms and forums of church-state cooperation. Particularly the lower courts used this *Lemon* test to outlaw all manner of government subsidies for religious charities, social services, and mission works, government use of religious services, facilities, and publications, and much more. Eventually, it did not take law suits to effectuate these reforms. Particularly local governments, sensitive to the political and fiscal costs of constitutional litigation, often voluntarily ended their prayers, removed their Decalogues, and closed their coffers to religion long before any case was filed against them.

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<sup>23</sup> *Engel v. Vitale*, 370 U.S. 421, 430–432 (1962).

<sup>24</sup> *Board of Education v. Allen*, 392 U.S. 236, 251–252 (1968) (Black, J., dissenting).

<sup>25</sup> *Everson*, 330 U.S. at 18.

<sup>26</sup> RCE, 191-214.

<sup>27</sup> 403 U.S. 602 (1971).



## Separation of Church and State Today

While the *Lemon* test remains formally in place, the strict separation of church and state is no longer the law of the land. In the past two decades, the Supreme Court has abandoned much of its earlier separationism and reversed several of its harshest precedents on point. In more than a dozen cases, the Court has upheld government policies that support the public access and activities of religious groups -- so long as these religious groups are voluntary and so long as non-religious groups are treated the same way. Religious counsellors could be funded as part of a broader federal family counselling program. Religious student groups could have equal access to public classrooms that were open to non-religious student groups. Religious groups could have the same access to public facilities, forums, and funds that were already opened to other civic groups. Religious student newspapers were just as entitled to public university funding as those of non-religious student groups. Religious schools were just as entitled to participate in a state-sponsored school voucher program as other private schools. Religious and non-religious parties that are like-positioned can now usually count on equal treatment and protection from the federal courts, and from many state courts as well.<sup>28</sup>

While religion today usually gets equal treatment from the courts, it sometimes gets special treatment from the American legislature. Over the past 25 years, as the Supreme Court relaxed its application of separation of church and state, Congress began expanding its accommodation of religion by government. In well over two hundred separate pieces of legislation and regulation issued since 1990, Congress has built in new special exemptions, privileges, immunities, benefits, and treatments for religious parties. These are not just the familiar 501(c)(3) income tax exemptions for religious groups or the famous Religious Freedom Restoration Act (RFRA) and its successor, the Religious Land Use and Institutional Persons Act (RLUIPA). Largely unnoticed by the public and largely unchecked by the courts is a vast sprawling network of special religious rights that have been steadily sown into federal laws governing all manner of subjects – laws of evidence and civil procedure, disability, labour, employment, unions, civil rights, interstate commerce, bankruptcy, ERISA, workplace, military, immigration and naturalization, food and drugs, prisons, hospitals, land use, and much more. And federal laws are only part of this network. State laws creating special religious rights for some of these same areas, as well as for local issues like property tax, zoning, non-profit organizations, education, charity, and the like number in the thousands.

These recent cases and statutes, in my view, have ultimately served to enhance religious freedom in America rather than contract it. It must be remembered that separation of church and state is only one principle that the establishment clause embraces, and that the establishment clause is only one guarantee the First Amendment embraces for the protection of religious liberty, the other being the free exercise clause. The First Amendment says: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These two religion

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<sup>28</sup> RCE, 184-85, 198-204, 214-20.

clauses, in my view, hold complementary guarantees of religious freedom. The free exercise clause outlaws government proscriptions of religion -- actions that unduly burden the conscience, restrict religious expression, discriminate against religion, or invade the autonomy of churches and other religious bodies. The establishment clause outlaws government prescriptions of religion -- actions that coerce the conscience, mandate forms of religious expression, discriminate in favour of religion, or improperly ally the state with churches or other religious bodies. No burden on, no coercion of conscience. No undue restrictions on, no undue mandating of religious expression. No discrimination against, no discrimination for religion. No government intrusions within, no government alliances with religious bodies. Read together this way, the First Amendment free exercise and no-establishment guarantees afford reciprocal and complementary protections to liberty of conscience, freedom of religious exercise, religious equality of a plurality of peaceable faiths, and separation of church and state.

When viewed in isolation, the principle of separation of church and state serves religious liberty best when it is used prudentially not categorically. Separationism needs to be retained, particularly for its ancient insight of protecting religious bodies from the state and for its more recent insight of protecting the consciences of religious believers from violations by government or religious bodies. Today, as much as in the past, government officials have no constitutional business interfering in the internal affairs of peaceable religious groups. Religious officials have no constitutional business converting the offices of government into instruments of their mission and ministry. Government has no business funding, sponsoring, or actively involving itself in the core religious exercises of a particular religious group or religious official alone. Religious groups have no business drawing on government sponsorship or funding for their core religious exercises. All such conduct violates the basic understanding of separation of church and state and should be outlawed.

The principle of separation of church and state, however, also needs to be contained, and not used as an anti-religious weapon in the culture wars of the public square, the public school, or the public court. Separationism must be viewed as a shield not a sword in the great struggle to achieve religious freedom for all. A categorical insistence on the principle of separation of church and state in its fifth and strictest sense avails us rather little.

James Madison warned already in 1833 that "it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points."<sup>29</sup> This caveat has become even more salient today. The modern welfare state, for better or worse, reaches deeply into virtually all aspects of modern life -- through its network of education, charity, welfare, child care, health care, construction, zoning, workplace, taxation, and sundry other regulations. Madison's solution was "an entire abstinence of the Government from interference [with religion] in any way whatever,

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<sup>29</sup> Letter to Rev. Jaspar Adams (1833), in Daniel L. Dreisbach, *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate* (Lexington, KY: University Press of Kentucky, 1996), 117-121, at 120 (emphasis added).

beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."<sup>30</sup> This traditional understanding of a minimal state role in the life of society in general, and of religious bodies in particular -- however alluring it may be in theory -- is no longer realistic in practice.

It is thus even more imperative today than in Madison's day that the principle of separation of church and state not be pressed to reach, what Madison called, the "unessentials." It is one thing for the Court to outlaw daily Christian prayers and broadcasted Bible readings from the public school, quite another thing to ban moments of silence and private displays of the Decalogue in the same schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who wish to educate their children in the faith. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike. It is one thing to outlaw governmental prescriptions of prayers, ceremonies, and symbols in public forums, quite another thing to outlaw governmental accommodations of private prayers, ceremonies, and symbols in public forums. To press separationist logic too deeply into "unessentials" not only "trivializes" the place of religion in public and private life, as Stephen Carter argues.<sup>31</sup> It also trivializes the power of the constitution, converting it from a coda of cardinal principles of national law into a codex of petty precepts of local life.

Too zealous an interpretation of the principle of separation of church and state also runs afoul of other constitutive principles of the First Amendment -- particularly the principles of liberty of conscience and religious equality. The Court must be at least as zealous in protecting religious conscience from secular coercion as protecting secular conscience from religious coercion. The Court should be at least as concerned to ensure the equal treatment of religion as to ensure the equality of religion and non-religion. It is no violation of the principle of separation of church and state when a legislature or court accommodates judiciously the conscientious scruples of a religious individual or the cardinal callings of a religious body. It is also not violation of this principle when government grants religious individuals and institutions equal access to state benefits, public forums, or tax disbursements that are open to non-religionists similarly situated. To do otherwise is, indeed, to move toward what Justice Stewart once called "the establishment of a religion of secularism."<sup>32</sup>

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<sup>30</sup> Quoted by *ibid.*, 120.

<sup>31</sup> Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivializes Religious Devotion* (New York: Basic Books, 1993).

<sup>32</sup> *Abington School District v. Schempp*, 374 U.S. 203, 313 (Stewart, J., dissenting).