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The New Freedom of Public Religion

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The civic catechisms and canticles of our day still celebrate Thomas Jefferson's experiment in religious freedom. To end a millennium of repressive religious establishments, we are taught, Jefferson sought religious freedom 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." "Public Religion" is a threat to civil society 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 citizen and church must 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 and tort law advantages of high cultural conformity and low political temperature. Every politician understands the calculus of courting religious favors without subvening religious causes. Religious privatization is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good. If only those right-wing killjoys of our day would learn proper patriotism, instead of pestering us with their Ten Commandments and faith-based initiatives!

Separation of church and state was certainly part of American law when many of today's civic opinion-makers were in school. In the landmark cases of Cantwell v. Connecticut (1940) and Everson v. Board of Education (1947), the United States Supreme Court for the first time used the First Amendment religion clauses to declare local laws unconstitutional. The Court also read Jefferson's call for "a wall of separation between church and state" as the essential meaning and mandate of the First Amendment. In more than 30 cases from 1947 to 1985, the Court purged public schools of their traditional religious teachings and cut religious schools from their traditional state patronage. Armed with these precedents, lower courts struck down many other traditional forms and forums of church-state cooperation in the public square.

After forty years of such cases, it is no surprise that Jefferson's metaphor of "a wall of separation between church and state" became for many the source and summary of American religious freedom. Indeed, many within and beyond these borders think Jefferson's words are enshrined in the First Amendment itself. It is often disconcerting for readers to discover that the First Amendment has much more restrained and

ambiguous language: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

“Metaphors in law are to be narrowly watched,” Justice Benjamin Cardozo once warned, “for starting as devises to liberate thought, they end often by enslaving it.” So it has been with the metaphor of a wall of separation. This metaphor has held popular imagination so firmly that many of us have not noticed that separation of church and state is no longer the law of the land.

In a long series of cases over the past fifteen years, the Supreme Court has abandoned much of its earlier separationism, and reversed several of its harshest cases on point. The Court has upheld government policies that support the public access and activities of religious groups -- so long as these religious groups are voluntarily convened, and so long as non-religious groups are treated the same way. So, church-affiliated pregnancy counseling centers could be funded as part of a broader federal family counseling program. Religious student groups could have equal access to state university and public school classrooms that were open to non-religious student groups. Religious groups could gain equal access to public facilities, forums, and funds that were already opened to other civic groups. Clergy were just as entitled to run for state political office as laity. 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.

The Supreme Court has defended these holdings on wide-ranging constitutional grounds, and it has not yet settled on a consistent new logic. One consistent teaching of these recent cases, however, is that public religion must be as free as private religion. Not because the religious groups in these cases are really non-religious. Not because their public activities are really non-sectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond, and against the cultural mainstream. They provide leaven and leverage for the polity to improve.

A second teaching of these cases is that the freedom of public religion sometimes requires the support of the state. Today's state is not the distant, quiet sovereign of Jefferson's day from whom separation was both natural and easy. Today's state is an intensely active sovereign from whom complete separation is impossible. Few religious bodies can now avoid contact with the modern welfare state's pervasive network of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, security, and other regulations. Both confrontation and cooperation with the modern welfare state are almost inevitable for any religion. When a state's regulation imposes too heavy a burden on a particular religion, the free exercise clause provides a pathway to relief. When a state's appropriation imparts too generous a benefit to particular religions alone, the establishment clause provides a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, constitutional objections are now rarely availing.

A third teaching of these cases is that freedom of public religion also requires freedom from public religion. Government must strike a balance between coercion and freedom.

The state cannot coerce citizens to participate in religious ceremonies and subsidies that they find odious. But the state cannot prevent citizens from participation in public ceremonies and programs just because they are religious. It is one thing to outlaw Christian prayers and broadcasted Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private religious speech in these same public schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who choose to educate their children in religious schools. 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 these same public forums.

A final teaching of these cases is that freedom of public religion is no longer tantamount to establishment of a common religion. Government support of a common civil religion might have been defensible in earlier times of religious homogeneity. It is no longer defensible in modern times of religious pluralism. Today, our public religion must thus be a collection of particular religions, not the combination of religious particulars. It must be a process of open religious discourse, not a product of ecumenical distillation. All religious voices, visions, and values must be heard and deliberated in the public square. All peaceable public religious services and activities must be given a chance to come forth and compete, in all their denominational particularity.

Some conservative Protestants and Catholics today have seized on this new insight better than most. Their recent rise to prominence in the public square and in the political process should not be met with hyperbolic name-calling, glib talk of censorship, or reflexive incantation of Jefferson's mythical wall of separation. The rise of the Christian right should be met with the equally strong rise of the Christian left, of the Christian middle, and of sundry Jewish, Muslim, Hindu, Buddhist, and other religious groups who test and contest its premises, prescriptions, and policies. That is how a healthy democracy works. The real challenge of the Christian right is not to the integrity of American politics but to the apathy of American religions. It is a challenge for peoples of all faiths, and of no faiths, to take their place in the marketplace.

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