

119 RHR

Draft

Published in *Journal of Church and State* 48 (2006): 15-46

Facts and Fictions About the History of Separation of Church and State

John Witte, Jr.¹

Abstract

Responding to several new histories of church and state in America, this Article warns against the emerging view that separation of church and state is a distinctly American and relatively modern invention that has been used principally to harm religion and religious freedom. The Article traces the historical roots and routes of the principle of separation of church and state in biblical, patristic, Catholic, Protestant, and Enlightenment sources. It then shows how the eighteenth-century American founders used this principle to press five religious liberty concerns: protection of the state from the church; protection of the church from the state; protection of liberty of conscience from both church and state; protection of the new states from the federal government in their treatment of religion; and protection of citizens from unwelcome support and participation in religion. Finally, the article analyses the uses and misuses of this principle in the later history of American law.

Keywords: law, religion, theology, church and state, separationism, establishment, free exercise, First Amendment, American founding, jurisprudence

In the past decade, a veritable cottage industry of important new books, articles, briefs, and judicial opinions has emerged devoted to the history of separation of church

¹ JOHN WITTE, JR. J.D. (Harvard), is Jonas Robitscher Professor of Law and Director of the Center for the Study of Law and Religion at Emory University. A specialist in legal history, marriage, and religious liberty, he has published 120 articles and 18 books, including recently, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (2002); *Religion and the American Constitutional Experiment* (2d ed., 2005); *Sex, Marriage and Family Life in John Calvin's Geneva*, 3 vols. (2005-) (with Robert M. Kingdon); and *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, 2 vols. (2005) (with Frank S. Alexander). The author presented earlier versions of this article as the keynote lecture at the American Society of Legal History Annual Meeting on November 13, 2004 and as a lecture at a conference of the United States Court of Appeals, District of Columbia Circuit co-sponsored by George Mason University School of Law, on June 12, 2004. Portions of this text are adapted from his review essay, "That Serpentine Wall of Separation," *Michigan Law Review* 101 (2003): 1869-1905.

and state.² We now know a great deal more about the history of separationist rhetoric from Thomas Jefferson's famous 1802 Letter to the Danbury Baptist Association to Justice Hugo Black's opinion in the 1947 Supreme Court case of *Everson v. Board of Education*. We know more about the odious manipulation of separationist rhetoric by the Ku Klux Klan and other nativist groups against Catholics, Jews, and other minority faiths and immigrant groups in the later nineteenth and early twentieth centuries. And we now see more clearly than before that Justice Black drew some of his inspiration and instruction from these teachings, particularly those of the Ku Klux Klan of which he had been a member, in crafting his famous *Everson* opinion.

But some of this new history is beginning to create its own ample distortions of the historical record. The first distortion is the argument that the principle of separation of church and state was an invention of nineteenth-century anti-clerical and anti-religious elites, starting with Thomas Jefferson. The second distortion is the argument that this principle was hijacked by later nineteenth-century anti-Catholic, and sometimes anti-religious, nativists who introduced all manner of prejudicial changes in American law in the name of separation of church and state but to the detriment of religious liberty.³ Because of its recent paternity and because of its odious pedigree, it is now argued in various quarters that we should discard the principle of separation of church and state and some of the harsher laws that it occasioned, including old laws against state funding and support of religious institutions.

I respectfully disagree with these two emerging arguments. My reading of the sources leads me to conclude that separation of church and state has a much longer history, and much more complex and wholesome pedigree than some recent historiography allows. Long before Jefferson penned his 1802 letter to the Danbury Baptists, the eighteenth-century American founders had at least five understandings of separation of church and state, several with millennium-long Western roots. Each of these understandings made important contributions to the protection of religious liberty in the eighteenth and nineteenth centuries and still hold enduring lessons for us today.

The European Roots of American Separationism

Separation of church and state is often regarded as a distinctly American and relatively modern invention. In reality, separationism is an ancient Western teaching rooted in the Bible. In the Hebrew Bible, the chosen people of ancient Israel were

² See, e.g. Mark D. McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (Dekalb, Ill.: Northern Illinois University Press, 2004); Forrest Church, ed., *The Separation of Church and State* (Boston: Beacon Press, 2004); James Hitchcock, *The Supreme Court and Religion in American Life*, 2 vols. (Princeton: Princeton University Press, 2004); Philip A. Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002); Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: NYU Press, 2002); Stephen M. Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (New York: NYU Press, 1997); Jo Renée Formicola and Hubert Morken, eds., *Everson Revisited: Religion, Education, and Law at the Crossroads* (Lanham, MD: Rowman Littlefield, 1997); Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: Norton, 1996).

³ See esp. Hamburger, *Separation of Church and State*.

repeatedly enjoined to remain separate from the Gentile world around them⁴ and to separate the Levites and other temple officials from the rest of the people.⁵ The Hebrew Bible also made much of building and rebuilding "fortified walls"⁶ to protect the city of Jerusalem from the outside world and to separate the temple and its priests from the commons and its people⁷—an ancient tradition still recognized and symbolized in the Jewish rituals and prayers that take place at the Western (Wailing) Wall.

The New Testament commanded believers to "render to Caesar the things that are Caesar's and to God the things that are God's,"⁸ and reminded them that "two swords" were enough to govern the world.⁹ Christians were warned that they should "be not conformed to this world"¹⁰ but remain "separate" from the world and its temptations,¹¹ maintaining themselves in purity and piety. Echoing the Hebrew Bible, St. Paul spoke literally of a "wall of separation" (*paries maceriae*) between Christians and non-Christians interposed by the Law.¹² Interspersed among these various political dualisms, the Bible included many other dualisms—between spirit and flesh, soul and body, faith and works, heaven and hell, grace and nature, the kingdom of God and the kingdom of Satan, and much more.¹³

Early Catholic Views. These various biblical dualisms were repeated in some of the early church constitutions. Among the earliest was the *Didaché* (ca. 120 c.e.), which opened with a call for believers to separate from the world around them: "There are two Ways, one of Life and one of Death; but there is a great separation between the two Ways."¹⁴ The Way of Life follows the commandments of law and love. The Way of Death succumbs to sins and temptations. The two ways must remain utterly separate, and those who stray from the Way of Life must be cast out. *The Epistle of Barnabas* (ca. 100-120 c.e.) provided similarly: "There are two ways of teaching and of authority, one of light and one of darkness. And there is a great difference between the two ways. For over one are set light-bearing angels of God, but over the other angels of Satan. And the one is Lord from eternity to eternity, but the other is prince of the present time of darkness."¹⁵

⁴ 1 Esdras 7-9; Exodus 34:11-16; Ezra 6:21, 10:1; 1 Kings 8:53; Leviticus 20:24-5; Nehemiah 9:1-15, 10:28-31, 13:1-3; 2 Samuel 22:26-7.

⁵ 1 Chronicles 23:13; Deuteronomy 10:8, 32:8; Ezekial 40-42; Leviticus 21:1-22:16; Numbers 8:14, 16:9.

⁶ Jeremiah 1:18, 15:20.

⁷ Ezekial 42:1; Jeremiah 1:18-19, 15:19-21; 1 Kings 3:1; Nehemiah 3:1- 32, 4:15-20, 12:27-43.

⁸ Mark 12:17; Matthew 22:21; Luke 20:25.

⁹ Luke 22:38.

¹⁰ Romans 12:2.

¹¹ 2 Corinthians 6:14-18.

¹² Ephesians 2:14. See historical interpretation of this text in Markus Barth, *The Anchor Bible: Ephesians* (Garden City, NY: Doubleday, 1974), 263-265, 283-287.

¹³ Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996), 82-119, 193-211.

¹⁴ Philip Schaff, *The Teaching of the Twelve Apostles* (New York: Funk and Wagnalls, 1889), 162-163 (my translation). Several comparable formulae from the apostolic sources are quoted in *ibid.*, 163 n.1. See comparable language in Deuteronomy 30:15; Jeremiah 21:8; Matthew 7:13-14; and 2 Peter 2:2.

¹⁵ In Schaff, *The Teaching of the Twelve Apostles*, 227-228.

These dualistic adages and images recurred in scores of later apostolic and patristic writings of the second through fifth centuries—both in the East and in the West.¹⁶ They became the basis for one persistent model of separationism in the Christian West—the separation of the pure Christian life and community governed by religious authorities from the sinful and sometimes hostile world governed by political authorities. This apostolic ideal of separationism found its strongest and most enduring institutional form in monasticism, which produced a vast archipelago of communities of spiritual brothers and sisters, each walled off from the world around them.¹⁷ But separationism in this sense also remained a recurrent spiritual ideal in Christian theology and homiletics—a perennial call to Christians to keep the Way of Life in the church of Christ separate from the Way of Death in the company of the Devil.

By the fifth century, Western Christianity had distilled these early biblical teachings into other models of separationism. The most famous was the image of two cities within one world, developed by St. Augustine, Bishop of Hippo (354-430). In his *City of God* (ca. 413-427),¹⁸ Augustine contrasted the City of God with the city of man. The City of God consisted of all those who were predestined to salvation, bound by the love of God, and devoted to a life of Christian piety, morality, and worship led by the Christian clergy. The city of man consisted of all the things of this sinful world, and the political and social institutions that God had commanded to maintain a modicum of order and peace.¹⁹ Augustine sometimes depicted this dualism as two walled cities separated from each other²⁰—particularly when he was describing the sequestered life and discipline of monasticism or the earlier plight of the Christian churches under Roman persecution.²¹ But Augustine's more dominant teaching was that dual citizenship in both cities would be the norm until these two cities were fully and finally separated at the Last Judgment of God.²² For Augustine, it was ultimately impossible to achieve complete separation of the City of God and the city of man in this world. A Christian remained bound by the sinful habits of the world, even if he aspired to greater

¹⁶ Ibid., 18; Gerard E. Caspary, *Politics and Exegesis: Origen and the Two Swords* (Berkeley: University of California Press, 1979); Lester L. Field, Jr., *Liberty, Dominion, and the Two Swords: On the Origins of Western Political Theology* (Notre Dame: University of Notre Dame, 1998), 180-398; Adolf Harnack, *The Constitution and Law of the Church in the First Two Centuries*, trans., F.L. Pogson, ed. H.D.A. Major, (New York: G.P. Putnam's Sons, 1910).

¹⁷ Gerd Tellenbach, *Church, State and Christian Society at the Time of the Investiture Culture*, trans., R.F. Bennett (Oxford: Blackwell, 1959), 25-29; Marilyn Dunn, *The Emergence of Monasticism: From the Desert Fathers to the Early Middle Ages* (Oxford: Blackwell, 2000); David Knowles, *Christian Monasticism* (New York: McGraw-Hill, 1969); C.H. Lawrence, *Medieval Monasticism: Forms of Religious Life in Western Europe in the Middle Ages* (New York: Longman, 2001).

¹⁸ Augustine of Hippo, *City of God*, trans., Gerald G. Walsh et al., ed., Vernon J. Bourke (Garden City, NY: Image Books, 1958), 84-89, 460-473, 483-506.

¹⁹ Ibid., 494-506.

²⁰ Ibid., 466-472; Henry Paolucci, ed., *The Political Writings of St. Augustine* (South Bend, IN: Gateway Editions, 1962), 241-275, 305-317.

²¹ Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame: University of Notre Dame Press, 1995); J. van Oort, *Jerusalem and Babylon: A Study into Augustine's City of God and the Sources of His Doctrine of the Two Cities* (New York: E.J. Brill, 1991); Eugene TeSelle, *Living in Two Cities: Augustinian Trajectories in Political Thought* (Scranton: University of Scranton Press, 1998).

²² Augustine, *City of God*, 481-493.

purity of the Gospel. A Christian remained subject to the authority of both cities, even if she aspired to be a citizen of the City of God alone.

It was crucial, however, that the spiritual and temporal powers that prevailed in these two cities remain separate in function. Even though Christianity became the one established religion of the Roman Empire, patronized and protected by the Roman state, Augustine and other Church Fathers insisted that state power remain separate from church power. All magistrates, even the Roman emperors, were not ordained clergy but laity. They had no power to administer the sacraments or to mete out religious discipline. They were bound by the teachings of the Bible, the decrees of the ecumenical councils, and the traditions of their predecessors. They also had to accept the church's instruction, judgment, and spiritual discipline. Pope Gelasius (d. 496) put the matter famously in 494 in a letter rebuking Emperor Anastasius:

There are indeed, most august Emperor, two powers by which this world is chiefly ruled: the sacred authority of the Popes and the royal power. Of these the priestly power is much more important, because it has to render account for the kings of men themselves at [the Last Judgment]. For you know, our very clement son, that although you have the chief place in dignity over the human race, yet you must submit yourself faithfully to those who have charge of Divine things, and look to them for the means of your salvation.²³

This "two powers" passage became a locus classicus for many later theories of a basic separation between pope and emperor, clergy and laity, regnum and sacerdotium.²⁴

In the course of the Papal Revolution of the eleventh to thirteenth centuries, this model of two separate powers operating within the extended Christian empire was transformed into a model of two swords ruling a unified Christendom by law.²⁵ In the name of "freedom of the church" (*libertas ecclesiae*), Pope Gregory VII (1015-1085) and his successors threw off their political patrons and protectors and established the Catholic Church itself as the superior legal and political authority of Western Christendom. The church now claimed more than a spiritual and sacramental power over its own affairs, a spiritual office within the Christian empire. It claimed a vast new jurisdiction, a political authority to make and enforce laws for all of Christendom. The pope and the clergy claimed exclusive personal jurisdiction over clerics, pilgrims, students, heretics, Jews, and Muslims. They claimed subject matter jurisdiction over doctrine, liturgy, patronage, education, charity, inheritance, marriage, oaths, oral promises, and moral crimes. And they claimed concurrent jurisdiction with state

²³ In Sidney Z. Ehler and John B. Morrall, *Church and State Through the Centuries: A Collection of Historical Documents With Commentaries* (Newman, MD: Burnes & Oates, 1954), 10-11.

²⁴ See, e.g., Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957); Karl Frederick Morrison, *The Two Kingdoms: Ecclesiology in Carolingian Political Thought* (Princeton, NJ: Princeton University Press, 1964).

²⁵ For the transmutation of the two-powers image to two swords, see Brian Tierney, *The Crisis of Church and State 1050-1300* (Englewood Cliffs, NJ: Prentice-Hall, 1964), 53.

authorities over secular subjects that required the Church's special forms of Christian equity.²⁶

This late medieval system of church government and law was grounded in part in the two-swords theory. This theory taught that the pope is the vicar of Christ, in whom Christ has vested his whole authority.²⁷ This authority was symbolized in the "two swords" discussed in the Bible,²⁸ a spiritual sword and a temporal sword. Christ had metaphorically handed these two swords to the highest being in the human world—the pope, the vicar of Christ. The pope and lower clergy wielded the spiritual sword, in part by establishing canon law rules for the governance of all Christendom. The clergy, however, generally delegated the temporal sword to those authorities below the spiritual realm—emperors, kings, dukes, and their civil retainers, who held their swords "of" and "for" the church. These civil magistrates were to promulgate and enforce civil laws in a manner consistent with canon law. Under this two swords theory, civil law was by its nature preempted by canon law. Civil jurisdiction was subordinate to ecclesiastical jurisdiction. The state answered to the church.²⁹ Pope Boniface VIII (d. 1303) put this two-swords theory famously and forcefully in 1302:

We are taught by the words of the Gospel that in this Church and in its power there are two swords, a spiritual, to wit, and a temporal.... [B]oth are in the power of the Church, namely the spiritual and [temporal] swords; the one, indeed, to be wielded for the Church, the other by the Church; the former by the priest, the latter by the hand of kings and knights, but at the will and sufferance of the priest. For it is necessary that one sword should be under another and that the temporal authority should be subjected to the spiritual.... If, therefore, the earthly power err, it shall be judged by the spiritual power; if the lesser spiritual power err, it shall be judged by the higher, competent spiritual power; but if the supreme spiritual power [i.e., the pope] err, it could be judged solely by God, not by man.³⁰

Two communities, two cities, two powers, two swords: These were four main models of separationism that obtained in the Western Catholic tradition in the first 1500 years. Each model emphasized different biblical texts. Each started with a different theory of the church. But each was designed ultimately to separate the church from the

²⁶ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), 85-119, 165-200; Udo Wolter, "Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert," *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 105 (1988): 246-280.

²⁷ Brian Tierney, *The Origins of Papal Infallibility, 1150-1350* (Leiden: E.J. Brill, 1972), 39-45, 82-121.

²⁸ Luke 22:38.

²⁹ Otto von Guericke, *Political Theories of the Middle Age*, trans., Frederic William Maitland (Cambridge: Cambridge University Press, 1958), 7-21; Ewart Lewis, *Medieval Political Ideas*, vol. 2 (New York: Knopf, 1954), 506-38.

³⁰ In Ehler and Morrall, *Church and State*, 91-92; see other sources in Tierney, *The Crisis of Church and State*, 180.

state. On one extreme, the apostolic model of two communities was a separationism of survival—a means to protect the church from a hostile state and pagan world. On the other extreme, the late medieval model of two swords was a separation of preemption—a means to protect the church in its superior legal rule within a unified world of Christendom.

Early Protestant Views. The sixteenth-century Protestant Reformation began as a call for freedom from the late medieval "two swords" regime—freedom of the church from the tyranny of the pope, freedom of the individual conscience from canon law and clerical control, freedom of state officials from church power and privilege. "Freedom of the Christian" was the rallying cry of the early Reformation.³¹ Catalyzed by Martin Luther's (1483-1546) posting of the Ninety-Five Theses in 1517 and his burning of the canon law books in 1520, early Protestants denounced church laws and authorities in violent and vitriolic terms, and urged radical reforms of church and state on the strength of the Bible.

After a generation of experimentation, however, the four branches of the Protestant Reformation returned to variations of the same four models of separationism that the earlier Catholic tradition had forged—two communities, two cities, two powers, two swords—adding new accents and applications.

The Anabaptist tradition—Amish, Hutterites, Mennonites, Swiss Brethren, German Brethren, and others—returned to a variation of the apostolic model of two communities. Most Anabaptist communities separated themselves into small, self-sufficient, intensely democratic communities, cordoned off from the world by what they called a "wall of separation."³² These separated communities governed themselves by biblical principles of discipleship, simplicity, charity, and nonresistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance, without appeal to the state or to secular law.³³

The state, most Anabaptists believed, was part of the fallen world, and was to be avoided so far as possible. Though once the perfect creation of God, the world was now a sinful regime "beyond the perfection of Christ"³⁴ and beyond the daily concern of the Christian believer. God had allowed the world to survive by appointing magistrates who used the coercion of the sword to maintain a modicum of order and peace. Christians should thus obey the state, so far as Scripture enjoined, such as in paying their taxes or

³¹ See sources and discussion in John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 33-64.

³² The phrase is from Menno Simons, quoted in Dreisbach, *Thomas Jefferson and the Wall of Separation*, 73. See comparable sentiments in *The Complete Writings of Menno Simons, c. 1496-1561*, trans. L. Verduin, ed. J.C. Wenger (Scottsdale, PA: Herald Press, 1984), 29, 117-120, 158-159, 190-206. See also the call for "separation" in the *Schleitheim Confession (1527)*, art. 4, in Howard J. Loewen, *One Lord, One Church, One Hope, and One God: Mennonite Confessions of Faith in North America* (Elkhart, IN: Institute of Mennonite Studies, 1985), 79-84. For the Biblical roots of this Anabaptist separationism, see *Biblical Concordance of the Swiss Brethren, 1540*, trans., Gilbert Fast and Galen A. Peters, ed., C. Arnold Synder (Kitchener, ON: Pandora Press, 2001), 56-60.

³³ Walter Klaassen, ed., *Anabaptism in Outline* (Scottsdale, PA: Herald Press, 1981), 101-114, 211-232.

³⁴ *Schleitheim Confession (1527)*, art. 6, in Loewen, *One Lord*, 80-81.

registering their properties. But Christians were to avoid active participation in and interaction with the state and the world. Most early-modern Anabaptists were pacifists, preferring derision, exile, or martyrdom to active participation in war. Most Anabaptists also refused to swear oaths, or to participate in political elections, civil litigation, or civic feasts and functions.³⁵

This early Anabaptist separationism was echoed in the seventeenth century by Rhode Island founder Roger Williams (1604-1680), who called for a "hedge or wall of Separation between the Garden of the Church and the Wilderness of the world."³⁶ It was elaborated by American Baptist and other Evangelical groups born of the Great Awakening (ca. 1720-1780). These latter American groups were principally concerned to protect their churches from state interference. They strove for freedom from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government, state collection of religious tithes and taxes, and more. Some American Baptist groups went further to argue against tax exemptions, civil immunities, and property donations as well. Religious bodies that received state benefits, they feared, would become too beholden to the state and too dependent on its patronage for survival.³⁷

The Lutheran tradition returned to a variation on Augustine's two-cities theory. The fullest formulation came in Martin Luther's complex two-kingdoms theory, which provided what Luther called a "paper wall" between the spiritual and temporal estates.³⁸ God has ordained two kingdoms or realms in which humanity is destined to live, Luther argued, the earthly kingdom and the heavenly kingdom. The earthly kingdom is the realm of creation, of natural and civic life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel forms of righteousness and justice, government and order, truth and knowledge. They interact and depend upon each other in a variety of ways. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin and governed by the Law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free in his or her conscience, called to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law, and called to obey the natural orders and offices of household, state, and visible church that God has ordained and maintained for the governance of this earthly kingdom.

³⁵ Klaassen, *Anabaptism in Outline*, 244-263.

³⁶ Roger Williams, "Letter from Roger Williams to John Cotton (1643)," in *The Complete Writings of Roger Williams*, 7 vols. (New York: Russell and Russell, 1963), 1:392.

³⁷ See sources in William G. McLoughlin, *New England Dissent, 1630- 1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge: Harvard University Press, 1971); William G. McLoughlin, *Soul Liberty: The Baptists' Struggle in New England, 1630-1833* (Hanover: University Press of New England, 1991); Isaac Backus, *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789*, ed., William G. McLoughlin (Cambridge: Belknap Press, 1968).

³⁸ See Witte, *Law and Protestantism*, 87-117.

In Luther's view, the church was not a political or legal authority. The church has no sword, no jurisdiction, no daily responsibility for law. The church and its leadership were to separate itself from legal affairs and attend to the principal callings of preaching the word, administering the sacraments, catechizing the young, and helping the needy. While the church should cooperate in implementing laws, and its clergy and professors were to preach against injustice and advise the magistrates when called upon, formal legal authority lay with the state. The local magistrate was God's vice-regent called to elaborate natural law and to reflect divine justice in his local domain.

The Calvinist Reformation returned to a variation on the two-powers model, in which both church and state exercised separate but coordinate powers within a unitary local Christian commonwealth. Calvinists insisted on the basic separation of the offices and operations of church and state. Adverting frequently to St. Paul's image of a "wall of separation," John Calvin (1509-1564) insisted that the "political kingdom" and "spiritual kingdom" must always be "examined separately." For there is "a great difference ... between ecclesiastical and civil power," and it would be unwise to "mingle these two, which have a completely different nature."³⁹ But Calvin and his followers insisted that the church play a role in governing the local Christian commonwealth. In Calvin's Geneva, this role fell largely to the consistory, an elected body of civil and religious officials, with original jurisdiction over cases of marriage and family, charity and social welfare, worship and public morality. Among most later Calvinists—French Huguenots, Dutch Pietists, Scottish Presbyterians, German Reformed, and English Puritans—the Genevan-style consistory was transformed into the body of pastors, elders, deacons, and teachers that governed each local church congregation without state interference and cooperated with state officials in defining and enforcing public morals.⁴⁰ These early Calvinist views on separationism came to especially prominent expression in the New England colonies and states.⁴¹

The Anglican tradition returned to a variation on the two-swords theory, but now with the English Crown, not the pope, holding the superior sword within the unitary Christian commonwealth of England.⁴² In a series of Acts passed in the 1530s, King Henry VIII (1491-1547) severed all legal and political ties between the Church in England and the pope. The Supremacy Act of 1534 declared the English monarch to be "the only supreme head" of the Church and Commonwealth of England, with final spiritual and temporal authority.⁴³ The English monarchs and Parliaments thus

³⁹ *Ioannis Calvini Institutio Religionis Christianae* (1559), translated as *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles (Philadelphia: The Westminster Press, 1960), bk. 3, ch. 19.15; bk. 4, ch. 11.3; bk. 4, ch. 20.1-2. See further John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, forthcoming), ch. 1.

⁴⁰ Josef Bohatec, *Calvins Lehre von Staat und Kirche mit besonderer Berücksichtigung des Organismusgedankens* (Breslau: M. and H. Marcus, 1937); Richard C. Gamble, ed., *Calvin's Thought on Economic and Social Issues and the Relationship of Church and State* (New York: Garland, 1992).

⁴¹ Witte, *The Reformation of Rights*, ch. 5.

⁴² Philip Edgecumbe Hughes, *The Theology of the English Reformers* (London: Hodder and Stoughton, 1965), 235-253.

⁴³ In Carl Stephenson and Frederick G. Marcham, eds., *Sources of English Constitutional History*, rev. ed. (New York: Harper & Row, 1972), 311.

established a uniform doctrine, liturgy, and canon by issuing the Book of Common Prayer (1559), the Thirty-Nine Articles (1563/71), and the Authorized (King James) Version of the Bible (1611). They also assumed jurisdiction over poor relief, marriage, education, and other activities, delegating some of this responsibility back to Convocation, the church courts, or parish clergy. Clergy were appointed, supervised, and removed by the Crown and its delegates. Communicant status in the Church of England was rendered a condition for citizenship status in the Commonwealth of England. Contraventions of royal religious policy were punishable both as heresy and as treason.

A whole battery of apologists rose to the defense of this alliance of church and state, most notably Richard Hooker (ca. 1553-1600). Hooker's lengthy apologia for the Anglican establishment included a sustained rebuke to English separationists. In the later sixteenth and seventeenth centuries various non-Anglican Protestant groups in England—Puritans, Brownists, Independents, and other self-styled "Separatists"⁴⁴—had called the English church and state to a greater separation from each other and from the Church of Rome. They also had called their own faithful to a greater separation from the Church and Commonwealth of England. Hooker had no patience with any of this. In his massive eight-book *Laws of Ecclesiastical Polity* (ca. 1593-1600), Hooker recognized a "natural separation" between the Church and the Commonwealth of England. But he insisted that these two bodies had to be "under one chief Governor."⁴⁵ For Hooker, Separatists who sought to erect "a wall of separation" between Church and Commonwealth would destroy English unity and deprive its church of the natural and necessary patronage and protection of the Crown. It was a short step from this argument to the bitter campaigns of persecution in the early seventeenth century that drove many thousands of Separatists from England to Holland and to North America.

Early Enlightenment Views. The principle of separation of church and state also had solid grounding in early Enlightenment sources. One of the earliest and most influential sources was the famous *Letter Concerning Toleration* (1689) of John Locke (1632-1704), which had a great influence on several American founders, notably Thomas Jefferson (1743-1826). In this tract, Locke had distilled the liberal English and Dutch learning of the seventeenth century into an elegant plea for church and state to

⁴⁴ On various English and New England "separatists" see Norman Allen Baxter, *History of the Freewill Baptists: A Study in New England Separatism* (Rochester, NY: American Baptist Historical Society, 1957); Edward H. Bloomfield, *The Opposition to the English Separatists, 1570- 1625* (Washington, DC: University Press of America, 1981); Stephen Brachlow, *The Communion of Saints: Radical Puritan and Separatist Ecclesiology 1570-1625* (Oxford: Oxford University Press, 1988); Champlin Burrage, *The Early English Dissenters in the Light of Recent Research (1550-1641)* (Cambridge: Cambridge University Press, 1912); James Robert Coggins, *John Smyth's Congregation: English Separatism, Mennonite Influence, and the Elect Nation* (Scottsdale, PA: Herald Press, 1991), pp. 29-68, 128-32; Timothy George, *John Robinson and the English Separatist Tradition* (Macon, GA: Mercer University Press, 1982); C.C. Goen, *Revivalism and Separatism in New England, 1740-1800* (New Haven: Yale University Press, 1962); B.R. White, *The English Separatist Tradition: From the Marian Martyrs to the Pilgrim Fathers* (London: Oxford University Press, 1971); and Verne Dale Morey, *The Brownist Churches: A Study in English Separatism, 1553-1630* (unpublished Ph.D. dissertation, Harvard University, 1954).

⁴⁵ Richard Hooker, *Of the Laws of Ecclesiastical Polity*, ed., Arthur Stephen McGrade (Cambridge: Cambridge University Press, 1989), 129-138.

end their corrosive alliances and to end their corrupt abridgments of the liberty of conscience.⁴⁶ “[A]bove all things,” Locke pleaded, it is “necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.”⁴⁷ The church, Locke wrote, must be “absolutely separate and distinct from the commonwealth.”⁴⁸ For the church is simply “a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God, in such manner as they judge acceptable to Him, and effectual to the salvation of their souls.”⁴⁹ Church members are free to enter and free to exit this society. They are free to determine its order and organization and arrange its discipline and worship in a manner they consider most conducive to eternal life. “Nothing ought, nor can be transacted in this society, relating to the possession of civil and worldly goods. No force is to be made use of upon any occasion whatsoever: for force belongs wholly to the civil magistrate....”⁵⁰

State force, in turn, cannot touch religion, Locke argued. The state exists merely to protect persons in their outward lives, in their enjoyment of life, liberty, and property. “True and saving religion consists in the inward persuasion of the mind,” which only God can touch and tend.⁵¹ A person cannot be compelled to true belief of anything by outward force—whether through “confiscation of estate, imprisonments, [or] torments” or through mandatory compliance with “articles of faith or forms of worship” established by law. “For laws are of no force without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.”⁵² “It is only light and evidence that can work a change in men’s [religious] opinions: which light can in no manner proceed from corporal sufferings, or any other outward penalties” inflicted by the state. Every person “has the supreme and absolute authority of judging for himself” in matters of faith.⁵³

Locke did not press this thesis to radical conclusions. His *Letter Concerning Toleration* presupposed a magistracy and community committed to a common Christianity. State laws directed to the common good, he believed, would only “seldom appear unlawful to the conscience of a private person” and would only seldom run afoul of conventional Christian beliefs and practices. Catholics, Muslims, and other believers “who deliver themselves up to the service and protection of another prince” have no place in this community. Moreover, “those are not at all tolerated who deny the being of a God”—for “promises, covenants, and oaths which are the bonds of human society, can have no hold upon an atheist.”⁵⁴ Locke strengthened these qualifications even more in his theological writings—arguing in his volumes, *The Reasonableness of Christianity*,

⁴⁶ John Locke, *Letter Concerning Toleration* (1689), in *The Works of John Locke*, 12th ed., 9 vols. (1824), 5:1–58. Locke wrote two subsequent such letters and had a fragment of a fourth letter underway on his death in 1704. It was the first letter of 1689 that was best known in America.

⁴⁷ *Ibid.*, 9.

⁴⁸ *Ibid.*, 21.

⁴⁹ *Ibid.*, 13.

⁵⁰ *Ibid.*, 16.

⁵¹ *Ibid.*, 11.

⁵² *Ibid.*

⁵³ *Ibid.*, 41.

⁵⁴ *Ibid.*, 47.

Essays on the Law of Nature, and Thoughts on Education for the cogency of a simple biblical natural law and endorsing in his several commentaries on St. Paul's epistles the utility of a moderate Christian republicanism.⁵⁵

James Burgh (1714-1775), a Scottish Whig who was popular among several American founders, notably James Madison (1751-1836), was less equivocal in advocating the principle of separation of church and state. In his influential writings of the 1760s and 1770s, Burgh lamented the "ill consequences" of the traditional "mixed-mungrel-spiritual-secular-ecclesiastical establishment."⁵⁶ Such conflation of church and state, said Burgh, lead to "follies and knaveries," and make "the dispensers of religion despicable and odious to all men of sense, and will destroy the spirituality, in which consists the whole value, of religion."⁵⁷ "Build an impenetrable wall of separation between sacred and civil," Burgh enjoined.⁵⁸ "Do not send the graceless officer, reeking from the arms of his trull [i.e., prostitute], to the performance of a holy rite of religion, as a test for his holding the command of a regiment. To profane, in such a manner, a religion, which you pretend to reverence, is an impiety sufficient to bring down upon your heads, the roof of the sacred building you thus defile."⁵⁹

The French revolutionary Marquis de Condorcet (1743-1794), who influenced Thomas Paine (1737-1809) and others, put his case "to separate religion from the State," in the shriller anti-Catholic terms that would dominate the French Revolution. While it was important "to leave to the priests the freedom of sacraments, censures, [and] ecclesiastical functions," Condorcet conceded, the state must take steps to remove the traditional influence and privileges of the Catholic Church and clergy in society. The state was "not to give any civil effect to any of their decisions, not to give [them] any influence over marriages or over birth or death certificates; not to allow them to intervene in any civil or political act; and to judge the lawsuits which would arise, between them and their citizens, for the temporal rights relating to their functions, as one would decide the similar lawsuits that would arise between the members of a free association, or between this association and private individuals."⁶⁰ Such anti-clerical and anti-Catholic separationist sentiments were quite typical of the French revolutionaries. And, in the following decades, these kinds of sentiments inspired a

⁵⁵ John Locke, *The Reasonableness of Christianity*, in Locke, *Works*, 6:1–158, at 140–143; id., *Essays on the Law of Nature*, ed. W. von Leyden [ca. 1662] (Oxford: Oxford University Press, 1954); *The Educational Writings of John Locke*, ed. James L. Axtell (London: Cambridge University Press, 1968). See Nicholas P. Wolterstorff, *John Locke and the Ethics of Belief* (Cambridge: Cambridge University Press, 1996); Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge/New York: Cambridge University Press, 2002); John Perry, "Locke's Accidental Church: The Letter Concerning Toleration and the Church's Witness to the State," *Journal of Church and State* 47 (2005): 269-288.

⁵⁶ Dreisbach, *Thomas Jefferson and the Wall of Separation*, 79-82.

⁵⁷ James Burgh, *Crito, or Essays on Various Subjects*, 2 vols. (London: Messrs. Dodsley, 1767), 2:117–119 (emphasis removed)

⁵⁸ *Ibid.*, 2:118.

⁵⁹ *Ibid.*, 2:119.

⁶⁰ Condorcet's notes on Voltaire, in *Oeuvres Completes de Voltaire* (Kehl: De L'Imprimerie de la Société Littéraire-Typographique, 1784), 18:476, using translation in Hamburger, *Separation of Church and State*, 60.

devastating political and popular attack on the clergy and property of the Catholic Church.⁶¹

Five Understandings of Separation of Church and State in the Founding Era

The eighteenth-century American founders called on this European and colonial legacy to press at least five concerns in the name of separation of church and state.

First, the founders invoked separationism to protect the church from the state. This had been a common Christian understanding of separation of church and state since the first century. It was captured in the Christian clergy's perennial call in subsequent centuries for "freedom of the church" -- or what the Edict of Milan of 313 had called the "free exercise and practice of religious groups."⁶² This understanding of separation of church and state was prominent in eighteenth-century America. The American founders' principal concern was to protect church affairs from state intrusion, the clergy from the magistracy, church properties from state interference, ecclesiastical rules and rites from political coercion and control. Elisha Williams (1694-1755), the New England Puritan jurist, spoke for many churchmen when he wrote in 1744: "[E]very church has [the] right to judge in what manner God is to be worshipped by them, and what form of discipline ought to be observed by them," and what clergy are to be "elected by them," from all of which the state must be "utterly separate."⁶³ George Washington (1732-1799) 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.⁶⁴ Thomas Jefferson called for government to resist "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.⁶⁵ A decade later, Tunis Wortman (d. 1822), a Jeffersonian, wrote:

It is your duty, as Christians, to maintain the purity and independence of the church, to keep religion separate from politics, to prevent an union between the church and the state, and to preserve the clergy from temptation, corruption and reproach.... Unless you maintain the pure and primitive spirit of Christianity, and prevent the cunning and intrigue of statesmen from mingling with its institutions, you will become

⁶¹ Russell Hittinger, "Introduction to Catholicism," in *Modern Christian Teachings on Law, Politics and Society*, ed., John Witte, Jr. and Frank S. Alexander (New York: Columbia University Press, 2005), 1-34.

⁶² In Lactantius, *De Mortibus Persecutorum* [c. 315], 48.2-12, ed. and trans. J. L. Creed (Cambridge: Cambridge University Press, 1984), 71-73.

⁶³ Elisha Williams, *The Essential Rights and Liberties of Protestants* (Boston: S. Kneeland and T. Green, 1744), 46.

⁶⁴ Quoted by Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, 84-85.

⁶⁵ 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.

exposed to a renewal of the same dreadful and enormous scenes which have not only disgraced the annals of the church, but destroyed the peace, and sacrificed the lives of millions.⁶⁶

This first understanding of separation of church and state was captured especially in 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 several early state constitutions and implementing legislation.⁶⁷

This understanding of separationism was also implicit in the First Amendment free exercise guarantee. Earlier drafts of the First Amendment, and the cryptic House debates that have survived about these drafts, spoke repeatedly of the need to protect religious sects, denominations, groups, or societies, to guarantee their rights to worship, property, and practice.⁶⁸ None of this concern for the detailed rights of religious groups was rejected in the House debates – and can at least be plausibly read into the generic free exercise guarantee that was ultimately passed.

Second, the founders invoked the principle of separationism to protect the state from the church. This was a more recent Western understanding, but it became increasingly prominent in the seventeenth and eighteenth centuries. “The sorest tyrannies have been those, who have united the royalty and priesthood in one person,” wrote the authors of *Cato’s Letters* in 1723. “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.⁶⁹ In the same vein, John Adams (1735-1826) devoted much of his 1774 *Dissertation on the Canon and the Feudal Law* to documenting what he called the “tyrannous outrages” that the medieval Catholic Church and early modern Protestant churches had inflicted through their control of the state. This was “a wicked confederacy between two systems of tyranny,” Adams wrote with ample bitterness.⁷⁰ Drawing on these same historical lessons, John Jay (1745-1829) urged his fellow constitutional conveners in New York “not only to expel civil tyranny, but also to guard against that spiritual oppression and

⁶⁶ Tunis Wortman, “A Solemn Address to Christians and Patriots (1800),” in *Political Sermons in the American Founding Era, 1730-1805*, ed., Ellis Sandoz (Indianapolis, IN: Liberty Press, 1991), 1477, 1482, 1487–88.

⁶⁷ See esp. Chester J. Antieau, Phillip Mark Carroll and Thomas Carroll Burke, *Religion Under the State Constitutions* (Brooklyn: Central Book Co., 1965).

⁶⁸ Reprinted and analyzed in John Witte, Jr., *Religion and the American Constitutional Experiment*, 2d ed. (Boulder/London: Westview Press, 2005), 80-105, 261-263.

⁶⁹ 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.

⁷⁰ John Adams, *The Works of John Adams*, ed. J.F. Adams, 10 vols. (Boston: Beacon Press, 1850-1856), 3:447.

intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind.”⁷¹

This second understanding of separation of church and state helped to inform the movement in some states to exclude ministers and other religious officials from participating in political office. Such exclusions had been commonplace among seventeenth-century American Puritans and Anabaptists. But arguments for such clerical exclusions became more commonplace in eighteenth-century America. 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 congregants or their 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 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.⁷² Besides, ministers often made poor politicians; they were, as John Adams put it, “universally too little acquainted with the World, and the Modes of Business, to engage in civil affairs with any Advantage.”⁷³

These kinds of arguments led seven of the original thirteen states, and fifteen later states to ban ministers from serving in political office.⁷⁴ The South Carolina Constitution (1778) contained typical language:

And whereas, ministers of the Gospel are by their profession dedicated to the service of God and the cure of souls, and ought not to be diverted from their great duties of their function, therefore no minister of the Gospel or public preacher of any religious persuasion, while he continues in the exercise of his pastoral function, and for two years after, shall be eligible either as governor, lieutenant-governor, a

⁷¹ New York Constitution (1777), Arts. XXXVIII-XXXIX.

⁷² 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): 213-252, at 242ff.; Hamburger, *Separation of Church and State*, 79-88.

⁷³ Letter to Abigail Adams (September 17, 1775), quoted in Derek Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* (Oxford/New York: Oxford University Press, 2000), 69. Adams was complaining about the Georgia delegate Rev. John Zubly, whose stern Calvinist positions are ably described in Joel A. Nichols, “A Man True to His Principles: John Joachim Zubly and Calvinism,” *Journal of Church and State* 43 (2001): 297.

⁷⁴ 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; Davis, *Religion and the Continental Congress*, 50-51, 73-94.

member of the senate, house representative, or privy council in this State.⁷⁵

These state prohibitions on clerical participation in politics lingered in a few states until they were finally outlawed by the Supreme Court in *McDaniel v. Paty* (1978).⁷⁶

Third, the 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. This had been an early and enduring understanding of separationism among colonial Anabaptists and Quakers. This argument became more prominent in eighteenth-century America. "Every man has an equal right to follow the dictates of his own conscience in the affairs of religion," Elisha Williams wrote. This is "an equal right with any rulers be they civil or ecclesiastical."⁷⁷ James Madison put this case in his 1785 Memorial and Remonstrance calling for what he called "a great barrier" between church and state to defend the religious rights of the individual. Thomas Jefferson's 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 all his natural rights*, convinced he has no natural right in opposition to his social duties.⁷⁸

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. Jefferson is not talking of separating politics and religion altogether. Indeed, in the very next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents. He wrote: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man."⁷⁹

⁷⁵ South Carolina Constitution (1778), Art. XXI. See also New York Constitution (1777), Arts. XXXVIII-XXXIX; Delaware Constitution (1776), Art. XXIX; Maryland Constitution (1776), Art. XXXVII; North Carolina Constitution (1776), Art. XXXI.

⁷⁶ *McDaniel v. Paty*, 436 U.S. 618 (1978).

⁷⁷ Williams, *Essential Rights and Liberties*, 7-8.

⁷⁸ In Dreisbach, *Thomas Jefferson and the Wall of Separation*, 148 (emphasis added).

⁷⁹ *Ibid.*

Fourth, the founders occasionally used the principle of separation of church and state to argue for the protection of individual states from interference by the federal government in governing local religious affairs. As Daniel Dreisbach has shown, 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: "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."⁸⁰ 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 vis-à-vis these 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.

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 establishment, which both their state legislatures and constitutional conventions had just defined and defended in the prior decade, often against strong opposition from religious dissenters. Moreover, Virginia had just passed Jefferson's bill for the "*establishment* of religious freedom," also against firm opposition, now from supporters of the traditional Anglican establishment. 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 is a plausible reading of the "respecting" language in the First Amendment, though the evidence for this reading is very thin.⁸¹ This federalist reading of the establishment clause is becoming more prominent in the literature today, and found a new champion in Justice Clarence Thomas.⁸²

Fifth, the founders invoked the principle of separation of church and state as a means to protect society and its members from unwelcome participation in and support for religion. Already in later colonial America several writers, particularly Baptists like Isaac Backus and John Leland, used separationism to argue against the established church policies of mandatory payments of tithes, required participation in swearing

⁸⁰ Quoted and discussed in *ibid.*, 152.

⁸¹ For the evidence that does exist, see Witte, *Religion and the American Constitutional Experiment*, 93-96.

⁸² See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas J. conc.); *Zelman v. Simmons-Harris*, 536 U.S. 639-677-680 (2002) (Thomas J. concurring); *Van Orden v. Perry*, 125 S.Ct. 2854 (Thomas J. concurring). See Steven K. Green, "Federalism and the Establishment Clause: A Reassessment," *Creighton Law Review* 38 (2005): 761; Symposium, "Interactive Federalism," *Emory Law Journal* 56 (2006) (forthcoming).

oaths, forced attendance at religious services, compulsory registration of church properties and more.⁸³ At the turn of nineteenth century, the language of separation of church and state also began to fuel broader campaigns to remove traditional forms and forums of religion in law, politics, and society altogether, and of special state protection, patronage, and participation in religion.

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 rhetorical currency in the nineteenth century, as Philip Hamburger has recently shown.⁸⁴ The first notorious instance came in 1800 during the heated election debates between Thomas Jefferson's Republican party and John Adams' Federalist party. Adams' party accused Jefferson of being "the anti-Christ" and the new "whore of Babylon," a "Jacobin infidel" and secularist bent on destruction of the necessary religious foundations of law and necessary alliances of church and state. Jefferson's party accused Adams of being a "Puritan pope" and "religious tyrant" bent on subjecting the whole nation to his suffocating beliefs and to his smug, self-serving ministers who stood "foursquare against liberty and progress."⁸⁵

These proved to be only the opening shots in a century-long American battle over the meaning and means of separating church and state. The battles broke out thereafter over dueling, freemasonry, lotteries, drunkenness, Sunday laws, slavery, marriage, divorce, women's property rights, women's suffrage, religious education, blasphemy prosecutions, state 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, 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.

Let me just focus on one running episode in this great nineteenth-century battle, namely, the repeated clashes between Protestants and Catholics over separationism. The long and sad story of the anti-Catholicism of nineteenth-century American Protestants is well known. Around 1800, American Protestants and Catholics had seemed ready to put their bitter and bloody battles behind them. But with the swelling tide of Catholic émigrés into America after the 1820s -- all demanding work, building schools, establishing charities, converting souls, and gaining influence -- native-born Protestants and patriots began to protest. Catholic bashing became a favorite sport of preachers and pamphleteers. Then rioting and church-burnings broke out in the 1830s

⁸³ See McLoughlin, *New England Dissent*; McLoughlin, ed., *Isaac Backus on Church, State, and Calvinism; The Writings of the Late Elder John Leland* (New York, 1845), and several pamphlets analyzed in John Witte, Jr., "A Most Mild and Equitable Establishment of Religion': John Adams and the Massachusetts Experiment," *Journal of Church and State* 41 (1999): 213-252, at 228-232, 242-245.

⁸⁴ Hamburger, *Separation of Church and State*.

⁸⁵ *Ibid.*, 111-143.

and 1840s, followed by even more vicious verbal pillorying and repressive actions against Catholics.

What several recent studies have made clear is that the principle of separation of church and state became one of the strong new weapons in the anti-Catholic arsenal. Foreign Catholics were for the union of church and state, the propagandists claimed. American Protestants were for the separation of church and state. To be a Catholic was to oppose separationism and American-style liberties. To be a Protestant was to defend separationism and American-style liberties. To bash a Catholic was thus not a manifestation of religious bigotry, but a demonstration of American patriotism. Protestants and patriots began to run closely together, often tripping over each other to defend separationism and to decry and deny Catholics for their failure to do so. All this is a proper corrective that students of American religious liberty need to hear.

But it is important that the corrected story not now be read as a simple dialectic of Protestant separationist hawks versus Catholic unionist doves. And it is important to be clear that the Protestant-Catholic battle over separation of church and state had two sides, with Catholics giving as well as taking, winning as well as losing.

First, it must be remembered that many American Catholic clergy in antebellum America were themselves separationists, building their views in part on ancient patristic models of two communities, two cities, and two powers. Moreover, a good number of American Catholic clergy saw separation of church and state as an essential principle of religious liberty and embraced the doctrine without evident cavil or concern. Alexis de Tocqueville (1805-1859), for one, noted this in his *Democracy in America* (1835):

In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival. As a practicing Catholic I was particularly close to the Catholic priests, with some of whom I soon established a certain intimacy. I expressed my astonishment and revealed my doubts to each of them; I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.⁸⁶

Second, many Protestant anti-Catholic writings started not so much as gratuitous attacks upon American Catholics as counterattacks to several blistering papal

⁸⁶ Alexis de Tocqueville, *Democracy in America*, trans., George Lawrence, ed., J.P. Mayer (Garden City, NY: Anchor Books, 1969), 295 (paragraph breaks removed).

condemnations of Protestantism, democracy, religious liberty, and separation of church and state. In *Mirari vos* (1832), for example, Pope Gregory XVI (d. 1846) condemned in no uncertain terms all churches that deviated from the Church of Rome, and all states that granted liberty of conscience, free exercise, and free speech to their citizens. For the pope it was an "absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone."⁸⁷ The pope "denounced freedom to publish any writings whatever and disseminate them to the people.... The Church has always taken action to destroy the plague of bad books."⁸⁸ He declared anathema against the "detestable insolence and probity" of Luther and other Protestant "sons of Belial" [i.e., the Devil], those "sores and disgraces of the human race" who "joyfully deem themselves 'free of all'."⁸⁹ Even worse, the pope averred, were "the plans of those who desire vehemently to separate the Church from the state, and to break the mutual concord between temporal authority and the priesthood."⁹⁰ The reality, the pope insisted, was that state officials "received their authority not only for the government of the world, but especially for the defense of the Church."⁹¹

In the blistering *Syllabus of Errors* (1864), the papacy condemned as cardinal errors the propositions that:

18. Protestantism is nothing more than another form of the same true Christian religion, in which it is possible to be equally pleasing to God as in the Catholic Church.

19. The Church is not a true, and perfect, and entirely free society, nor does she enjoy peculiar and perpetual rights conferred upon her by her Divine Founder, but it appertains to the civil power to define what are the rights and limits with which the Church may exercise authority....

24. The church has not the power of availing herself of force, or any direct or indirect temporal power....

55. The Church ought to be separate from the State, and the State from the Church.⁹²

In place of these cardinal errors, the papacy declared that the Catholic Church was the only true church, which must, as in medieval centuries past, enjoy power in both spiritual and temporal affairs, unhindered by the state.⁹³ Six years later, the Vatican Council declared the pope's teachings to be infallible and again condemned Protestants

⁸⁷ Gregory XVI, *Mirari vos (On Liberalism and Religious Indifferentism)* (1832), para. 14.

⁸⁸ *Mirari vos*, paras. 15-16.

⁸⁹ *Mirari vos*, para. 19. "Belial" means the "spirit of evil personified" or "fallen angel." "Belial," *Oxford English Dictionary* (Oxford: Oxford University Press, 1971).

⁹⁰ *Mirari vos*, para. 20.

⁹¹ *Mirari vos*, para. 23.

⁹² Pius IX, *The Papal Syllabus of Errors* (1864), in Phillip Schaff, *Creeds of Christendom with a History and Critical Notes*, 3 vols. (New York: Harper, 1877), 2:213, 217-219, 227.

⁹³ *The Papal Syllabus of Errors*, 2:218-33, esp. paras. 20, 24-35, 41-44, 53-54, 75-80.

as "heretics" who dared subordinate the "divine magisterium of the Church" to the "judgment of each individual."⁹⁴

It is perhaps no surprise that American Protestants repaid such alarming comments in kind—and then with interest. The pope, as Americans heard him, had condemned the very existence of Protestantism and the very fundamentals of American democracy and liberty—effectively calling the swelling population of American Catholics to arms. Many Protestants saw in the papacy's favorable references to its past medieval powers⁹⁵ specters of the two-swords theory by which the papacy had claimed supreme rule in a unified Christendom. This simply could not be for Protestants. Conveniently armed with new editions of the writings of Martin Luther,⁹⁶ John Calvin,⁹⁷ and others,⁹⁸ American Protestants repeated much of the vitriolic anti-Catholic and anticlerical rhetoric that had clattered so loudly throughout the sixteenth century.

At least initially, the loud commendation of America's separation of church and state and loud condemnation of Catholicism's union of church and state was more of a rhetorical quid pro quo to the papacy than a political low blow to American Catholics. Inevitably, there was plenty of political imitation and plenty of cheap shots taken at the American Catholic clergy, particularly those who echoed the papacy. And inevitably, this rhetoric brought anti-Catholicism and pro-separationism into close association—particularly when it was taken up by secular political groups, few of whom spoke for mainstream Protestants.

A third and final caveat is that when local anti-Catholic measures did pass, both the United States Supreme Court and Congress did sometimes provide Catholics with relief, often using separation of church and state as their guiding principle. Thus in *Cummings v. Missouri* (1866), the Court held that a state may not deprive a Catholic priest of the right to preach for failure to take a mandatory oath disavowing his support for the confederate states.⁹⁹ In *Watson v. Jones* (1871) and *Bouldin v. Alexander* (1872), the Court required civil courts to defer to the judgment of the highest religious authorities in resolving intrachurch disputes, explicitly extending that principle to Catholics.¹⁰⁰ In *Church of the Holy Trinity v. United States* (1892), the Court refused to uphold a new federal law forbidding contracts with foreign clergy, a vital issue for Catholic clergy.¹⁰¹ In *Bradfield v. Roberts* (1899), the Court upheld, against an establishment clause challenge, a federal grant to build a Catholic hospital in the District

⁹⁴ *The Dogmatic Decrees of the Vatican Council Concerning the Catholic Faith and the Church of Christ* (1870), in Schaff, *Creeds of Christendom*, 2:234, 236.

⁹⁵ *Dogmatic Decrees of the Vatican Council*, 2:221, para. 34.

⁹⁶ See Eric W. Gritsch, *A History of Lutheranism* (Minneapolis, MN: Fortress Press, 2002), 179-216; Eric W. Gritsch and Robert W. Jenson, *Lutheranism: The Theological Movement and Its Confessional Writings* (Philadelphia: Fortress Press, 1976).

⁹⁷ See Wulfert de Greef, *The Writings of John Calvin*, trans., Lyle D. Bierma (Grand Rapids, MI: Baker Books, 1993).

⁹⁸ See, e.g., John Adams, *A Dissertation on the Canon and Feudal Law* (1774), in Adams, Works, 3:447 (denouncing Catholic canon law and papal authority for its intrusions on liberty).

⁹⁹ 71 U.S. (4 Wall.) 277 (1866).

¹⁰⁰ 80 U.S. (13 Wall.) 679 (1871); 82 U.S. (15 Wall.) 131 (1872).

¹⁰¹ 143 U.S. 457 (1892).

of Columbia.¹⁰² In *Quick Bear v. Leupp* (1908), the Court upheld the federal distribution of funds to Catholic schools that offered education to Native Americans.¹⁰³ In *Order of Benedict v. Steinhauser* (1914), the Court upheld a monastery's communal ownership of property against claims by relatives of a deceased monk.¹⁰⁴ In *Pierce v. Society of Sisters* (1925), the Court invalidated a state law making public school attendance mandatory, thereby protecting the rights of Catholic parents and schools to educate children in a religious school environment.¹⁰⁵ A good number of these Supreme Court holdings were, in part, expressions of the principle of separation of church and state. And there were many more such Catholic victories in state courts, in cases where separation was again used as a means to protect religious consciences, clergy, and corporations from state interference.¹⁰⁶

This is not to say that anti-Catholic and broader anti-religious measures were always struck down, and it is not to say that separation of church and state was not sometimes put to blatantly discriminatory purposes in the last half of the nineteenth century and the early decades of the twentieth. A number of state constitutions adopted the spirit of separation of church and state (though not the language) in the context of education and state funding. Thirty-five state constitutions ultimately insisted that state and local governments grant no funds to religious schools. Fifteen state constitutions insisted that state schools remain free from "sectarian influence" or from the control of religious officials and institutions. These provisions were certainly motivated, in part, by the growing bias against emerging Catholic primary and secondary schools.¹⁰⁷ But these provisions also testified to the growing number and power of Baptists and Methodists who, following their eighteenth-century forbearers, urged a greater separation of church and state for their own distinctive theological reasons that had nothing to do with anti-Catholicism.

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. The Nevada Constitution (1864), for example, provided briefly: "No public funds of any kind or character whatever, State, county, or municipal, shall be used for sectarian purpose[s]."¹⁰⁸ Several states echoed the strong language of the 1870 Illinois Constitution:

Neither the General Assembly nor any county, city, town, township, school district or other public corporation shall ever make any appropriation or pay from any public fund

¹⁰² 175 U.S. 291 (1899).

¹⁰³ 210 U.S. 50 (1908).

¹⁰⁴ 234 U.S. 640 (1914).

¹⁰⁵ 268 U.S. 510 (1925).

¹⁰⁶ See Carl Zollman, *American Church Law*, repr. ed. (St. Paul, Minn.: West Publishing, 1933); W. Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill: University of North Carolina Press, 1948).

¹⁰⁷ See John C. Jeffries, Jr. and James E. Ryan, "A Political History of the Establishment Clause," *Michigan Law Review* 100 (2001): 279, 297ff.; Hamburger, *Separation of Church and State*, 219-229, 321-322, 340-341, 412-418

¹⁰⁸ Constitution of Nevada (1864), Art. XI.10.

whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation to any church or for any sectarian or religious purpose.¹⁰⁹

Today, these state constitutional provisions against funding of religion and religious education are often called “state-Blaine” or “mini-Blaine” amendments, in reference to the Representative Blaine’s proposed amendment to the Constitution that was narrowly defeated in the Congress in 1875.¹¹⁰ The anti-Catholic and sometimes anti-religious and anti-clerical prejudices that Blaine and others championed certainly figured in some states – particularly in new Western states on whose new state constitutions Congress imposed its prejudices as a condition for granting the rights of statehood. But again this evidence should not be over-read. First, a number of the state constitutional provisions against religious funding antedated Blaine’s efforts, and the language they used was often very different from Blaine’s proposed federal amendment. Second, a number of the state constitutional delegates who sought to outlaw government aid to religion were themselves clerics, who used familiar seventeenth- and eighteenth-century Protestant and Enlightenment arguments for separation of church and state that had little to do with anti-Catholicism or anti-clericalism.¹¹¹ Third, it must be remembered that these separationist arguments against government funding of some religions were often coupled with separationist arguments for religious tax exemptions for all religions. Thirty-three state constitutions ultimately included new provisions exempting from taxation all properties devoted to religious worship, religious charity, and religious education, and others introduced detailed new statutes on point.¹¹² These new tax exemption provisions were not just Pyrrhic victories -- attempts by religious bodies to seize indirect funding now that they lacked the political power to command direct funding. Tax exemption provisions were presented as a better way to ensure non-preferential state support to all religious organizations, rather

¹⁰⁹ Constitution of Illinois (1870), Art. VIII.3.

¹¹⁰ 4 Congressional Record 5190 (1876); Alfred W. Meyer, “The Blaine Amendment and the Bill of Rights,” *Harvard Law Review* 64 (1951): 939; F. William O’Brien, “The Blaine Amendment, 1875–1876,” *University of Detroit Law Journal* 41 (1963): 137–205; F. William O’Brien, “The States and ‘No Establishment’: Proposed Amendments to the Constitution Since 1789,” *Washburn Law Journal* 4 (1965): 183–210; Steven K. Green, “The Blaine Amendment Reconsidered,” *American Journal of Legal History* 36 (1992): 38.

¹¹¹ See examples in Thomas E. Buckley, “After Disestablishment: Thomas Jefferson’s Wall of Separation in Antebellum Virginia,” *Journal of Southern History* LXI (1995): 445; Thomas E. Buckley, “The Use and Abuse of Jefferson’s Statute: Separating Church and State in Nineteenth-Century Virginia,” in *Religion and the New Republic: Faith in the Founding of America*, ed. James H. Hutson (Lanham, MD: Rowman and Littlefield, 2000), 41–64; Thomas E. Buckley, “‘A Great Religious Octopus’: Church and State at Virginia’s Constitutional Convention, 1801–1802,” *Church History* 72 (2003): 333.

¹¹² Twenty-seven of the thirty-three state constitutions that explicitly outlawed state funding of religion also explicitly authorized such exemptions, and the remaining seven states had strong statutory provisions in effect providing for the same. Witte, *Religion and the American Constitutional Experiment*, 265–271.

than continuing to give preferential state support to those religious groups who had majoritarian power to extract funding from the legislatures.¹¹³

What Place for Separation of Church and State Today?

The story of separation of church and state changed rather dramatically with the Supreme Court 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 to the states: "Congress shall make no law....", now became, in effect, "Governments of any kind shall make no law respecting an establishment of religion" – a rejection of the original federalist understanding of separation of church. Second, Justice Black read into the establishment clause a strict separationist logic that was amply coated and coded with the anti-religious sentiments that Black had absorbed as a former member of the Ku Klux Klan. The anti-Catholic and sometimes broader anti-religious sentiments of the later nineteenth century were suddenly lifted to a constitutional mandate for the entire nation.

The First Amendment establishment clause "means at least this," Justice Black wrote for the *Everson* court: "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."¹¹⁴

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."¹¹⁵ 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."¹¹⁶ "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."¹¹⁷

The Supreme Court applied its strict separationist logic with special vigor in cases challenging the traditional state patronage and protection of religious education.

¹¹³ John Witte, Jr., "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Precept," *Southern California Law Review* 64 (1991): 363-415.

¹¹⁴ *Everson*, 330 U.S. at 15-16.

¹¹⁵ *Engel v. Vitale*, 370 U.S. 421, 430-432 (1962).

¹¹⁶ *Board of Education v. Allen*, 392 U.S. 236, 251-252 (1968) (Black, J., dissenting).

¹¹⁷ *Everson*, 330 U.S. at 18.

The Court purged religion from the public school and removed religious schools from many traditional forms of state support. 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, 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.¹¹⁸

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.¹¹⁹ 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.

Some of these establishment clause cases in the name of separation of church and state helped to extend the ambit of religious liberty, particularly for minority faiths. But some of these cases also helped to erode the province of religious liberty by effectively empowering a single secular party to veto popular laws touching religion that caused him or her only the most tangential constitutional injury. 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 reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These two religion clauses 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 favor of religion, or improperly ally the state with churches or other religious bodies. No burden on, no coercion of conscience.

¹¹⁸ See detailed case discussion in Witte, *Religion and the American Constitutional Experiment*, 185-232.

¹¹⁹ 403 U.S. 602 (1971).

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 establishment clauses afford reciprocal and complementary protections to liberty of conscience, freedom of religious expression, religious equality, and separation of church and state.¹²⁰

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 governmental or religious bodies. Today, as much as in the past, government officials have no constitutional business interfering in the internal affairs of 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 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 core principle 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, public school, or public court. Separationism must be viewed as a shield not a sword in the great struggle to achieve religious liberty for all. A categorical insistence on the principle of separation of church and state 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."¹²¹ 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, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."¹²² 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." Government must strike a balance between coercion and freedom. The

¹²⁰ Witte, *Religion and the American Constitutional Experiment*, 21-106.

¹²¹ Letter to Rev. Jasper Adams (1833), reprinted in Daniel L. Dreisbach, *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate* (Lexington, 1996), 117-121, at 120 (emphasis added).

¹²² *Ibid.*, 120.

state cannot coerce citizens to participate in religious ceremonies or subsidies, or in religious programs or policies 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 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 the "unessentials" not only "trivializes" the place of religion in public and private life, as Stephen Carter argues.¹²³ 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 no 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."¹²⁴

Individuals should exercise a comparable prudence in seeking protection from public religion. In the public religion schemes of nineteenth-century America, it was not so much the courts as the frontier that provided this freedom--a place away from it all, where one could escape with one's conscience and co-religionists. Today, the frontier still provides this freedom--if not physically in small towns and wild mountains, then virtually in our ability to sift out and shut out the public voices of religion that we do not wish to hear.

Both modern technology and modern privacy make escape to the frontier considerably easier than in the days of covered wagons and mule trains. Just turn off Pat Robertson or Jerry Falwell. Turn away the missionary at your door. Close your

¹²³ Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivializes Religious Devotion* (New York: Basic Books, 1993).

¹²⁴ *Abington School District v. Schempp*, 374 U.S. 203, 313 (Stewart, J., dissenting).

eyes to the city crucifix that offends. Cover your ears to the public prayer that you can't abide. Forgo the military chaplain's pastoral counseling. Skip the legislative chaplain's prayers. Walk by the town hall's menorah and star. Don't read the Decalogue on the classroom wall. Don't join the religious student group. Don't vote for the collared candidate. Don't browse the Evangelicals' newspapers. Avoid the services of the Catholic counselors. Shun the readings of the Scientologists. Turn down the trinkets of the colporteurs. Turn back the ministries of the hate-mongers. All these escapes to the virtual frontier, the law does and will protect -- with force if necessary. Such voluntary self-protections from religion will ultimately provide far greater religious freedom for all than pressing yet another tired constitutional case.