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Beyond the Separation of Church and State in America

John Witte, Jr. and Justin J. Latterell
Center for the Study of Law and Religion
Emory University, Atlanta (USA)

Abstract

This Essay analyzes the convergence of secularization theory and separation of church and state logic in mid-20th century American law and culture. It also shows that First Amendment law has moved beyond this separationist logic in recent opinions, and suggests a new integrative theory of religion, culture, and politics in its support.

Keywords: secularization; separation of church and state; First Amendment; religious freedom; public religion; religion and politics; religion and culture; United States Supreme Court

For more than a century, leading scholars – from Nietzsche and Weber to Rawls and Habermas -- have predicted the decline and political marginalization of religion. According to various theories of secularization, traditional religious worldviews would not be able to withstand the power and promise of modernity. As the autonomy of science, government, and technical rationality waxed, the metaphysical and moral authority of “religion” would wane.

But religion has not waned. In the course of the twentieth century, religion has defied the easy assumptions of the Western academy that the spread of Enlightenment reason and science would slowly eclipse the sense of the sacred. Religion also defied the evil assumptions of Nazis, Fascists, and Communists alike that gulags and death camps, iconoclasm and book burnings, propaganda and mind controls would inevitably drive religion into extinction. Yet another great awakening of religion is now upon us— global in its sweep, massive in its diversity, and frightening in its power.

Even in Canada and Western Europe, where secularization and modernization were due to dominate, new Muslim and other immigrant communities have been transforming the religious landscape – testing the laws and the logics of harmonious multiculturalism and comfortable *laïcité*. Similarly in the United States, the new prominence of Catholics, Mormons, and Evangelicals in public life, and the explosion of

new religious groups – more than 1200 varieties all told – have defied the predictions of those who welcomed or lamented the supposed erosion of America’s religious roots.

In this essay, we present the recent history of American constitutional law as a case study in secularization logic and its gradual refinement in the face of new religious realities. From the 1940s to the 1980s, we show, the United States Supreme Court actively promoted a distinct form of “secularization” by demanding a “high and impregnable wall of separation between church and state,” and insisting that state laws have a clear “secular purpose” and “primary secular effect.” Since the mid-1980s, however, the Court has relaxed its strict separationist logic and called instead for “state neutrality” toward religion and “equal treatment” of religion and non-religion in public and private life. But under both phases of constitutional logic, religion has continued to flourish in America not only in private but also increasingly in public forms.

The Secularization Process and the First Amendment Religion Clauses

Sociologist José Casanova has argued that processes of secularization have at least three dimensions: 1) the functional/institutional differentiation of the economic, scientific, and governmental spheres from the religious sphere, along with the specialization of religion within its own distinct sphere, 2) the decline of religious belief and practice in an ethnic community or political nation, and 3) the privatization of religion, that is, the marginalization and diminishing authority of religious values and symbols in public discourse. Importantly, Casanova argues that secularization theorists often confuse “the historical processes of *secularization proper* with the alleged and anticipated consequences which those processes were supposed to have upon religion.” “Secularization proper,” according to Casanova, refers to the “functional differentiation and emancipation of the secular spheres ... from the religious sphere and the concomitant differentiation and specialization of religion within its own newly found sphere.”¹ But the differentiation and specialization of institutional spheres does not necessarily coincide with or require the decline or privatization of religion.

While in some countries, all three features of secularization – differentiation, decline, and privatization – coincide, this has not been true in the United States. While the Supreme Court has famously called for “a wall of separation between church and state,” this constitutional logic has facilitated neither a decline of religion nor a withdrawal of religion from public life. To the contrary, “separation of church and state” logic has served to free all peaceable religions to flourish without governmental interference.

Many have argued that this was the original intent of the First Amendment, whose religious liberty provisions require that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” This constitutional text, which became the law of the land in 1791, was designed to immunize the new

¹ José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994), 19.

American nation against the scourge of religious wars and persecution that had long plagued Europe. The First Amendment was designed to grant religious freedom to all and religious establishment to none.

Though largely dead letter for the first 150 years of the American republic, the Supreme Court first began applying the First Amendment religious liberty provisions in the 1940s to review federal, state, and local laws alike. In its early cases, from the 1940s to the 1980s, the Court relied heavily on Thomas Jefferson's view that separation of church and state was the best way to assure disestablishment of religion and protection of religious freedom. Writing in the early 1800s, Jefferson had insisted, more firmly than others in his day, that religion is "a concern purely between our God and our consciences." Politics, he said, must be conducted with "a wall of separation between church and state." "Public religion" is a threat to private religion, and must therefore be discouraged. "Political ministry" is a menace to political integrity and must therefore be outlawed.²

The Supreme Court read this Jeffersonian understanding of religious liberty into the First Amendment, particularly in cases involving religion and education. In *Everson v. Board of Education* (1947), the first modern establishment clause case on point, Justice Hugo Black explained for the Court:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another...No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'³

This logic remained prominent in the Supreme Court's cases on religion and education for the next three decades. In *McCollum v. Board of Education* (1948), the Court overturned a public school program in which students were released from regular classes once a week to participate, if they and their parents wished, in religion courses taught gratis by various clergy who visited the school. The Court found this unacceptable:

Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.⁴

² See generally Merrill D. Petersen, ed. *Jefferson: Autobiography, Notes on the State of Virginia, Public and Private Papers, Addresses, Letters* (Modern Library of America Edition, 1984).

³ *Everson v. Board of Education of the Township of Ewing et al*, 330 U.S. 1, 17-18 (1947).

⁴ 333 U.S. 203, 209-211 (1948).

In *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), the Court struck down a state law mandating the recitation of a prayer and the reading of the Bible at the beginning of each public school day. Children could be excused from this part of class with a written note from their parents. But the Court again explained that the First Amendment was intended to remove religion from state institutions like the public school:

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object [of the First Amendment] was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.⁵

These cases were part and product of a general trend during this period toward a relatively strict separation of church and state. In more than 30 cases from 1947 to 1985, the Court purged public schools of most other forms of traditional religious teachings and trappings, and cut religious schools from much of their traditional state patronage. Public schools and religious schools were to stand separately and on their own.

But while separating religion and state in public schools in accordance with the First Amendment establishment clause, the Court protected the private expressions of religion as a mandate of the First Amendment free exercise clause. The Court repeatedly protected religious schools and their rights to teach in accordance with their own religious customs and convictions. The Court repeatedly granted other religious institutions the autonomy to govern themselves, to resolve their own internal disputes, to define their own labor relations without state interference. The Court further granted individuals various exemptions from general laws that ran afoul of core claims of their conscience or the central commandments of their faith. Thus Saturday Sabbatarians were excused from mandatory Saturday work, conscientious objectors were relieved from swearing oaths or serving in the military, Amish agrarian communitarians were excused from full compliance with mandatory high school education for their children. Separation of church and state logic, as the Court saw it in the 1960s and 1970s, required a strong "no establishment" clause and a strong "free exercise" clause working together. This would allow both religion and the state to flourish -- without interfering with or depending upon one another.

From Separation of Church and State to Equal Treatment of Religion and Non-Religion

⁵ *School District of Abington Township, Pennsylvania, et al. v. Schempp, et al.*, 374 U.S. 203, 217 (1963); citing *Everson* at 31-32.

Since the mid-1980s, the Supreme Court has relaxed its strict separationist logic and reversed several of its firmest separationist cases. The Court has adopted instead a new constitutional logic that calls for state “neutrality” toward religion, and “equal treatment of religion and non-religion.” This logic has yielded a weaker free exercise and establishment clause and a more overt protection of both public and private expressions of religion.

First, the Court in the 1980s gradually reduced the First Amendment free exercise to a simple guarantee of neutral, generally applicable laws. In *Employment Division v. Smith* (1990), the Court formally abandoned its traditional practice of granting individual litigants free exercise exemptions from general laws, even if those laws threatened to crush their consciences or obstruct a central practice of their faith. So long as the laws in question were religiously neutral and non-discriminatory against religion, the *Smith* Court held, they would pass constitutional muster. Religiously-based exemptions were to be granted by the legislatures, not by the courts. In response, both the federal and state legislatures over the past two decades have created hundreds of new statutory exemptions for religious individuals and groups, and the Supreme Court and lower federal courts have repeatedly upheld these statutes when they have been challenged as violations of the First Amendment establishment clause. It is no establishment of religion, or violation of the religious neutrality of the state for a legislature to protect the distinct religious liberty needs of its citizens.

At the same time, the Court since the mid-1980s has gradually reduced the First Amendment establishment clause to a simple guarantee of neutral and general laws as well. So long as religious and non-religious parties are treated equally, the Court has concluded, there is no constitutional prohibition on state recognition, cooperation, or even funding of religious parties. Absolute boundaries between the state and religion are unnecessary, counter-productive, and even discriminatory. Thus, in recent years the Court has ruled that qualified religious counselors could be funded as part of a broader federal family counseling program. Religious student groups could have equal access to public classrooms that were open to non-religious student groups. Religious organizations could have the same access to public facilities, forums, and funds that were already available to other civic organizations. Religious student newspapers were just as entitled to public university funding as those of non-religious student groups. Religious schools were just as entitled to participate in a state-sponsored school voucher program or tax deduction plan as other private schools. And religiously-based civic groups were just as entitled as their secular counterparts to run after-school recreational and remedial programs for public school elementary students.

Lessons from the American Experiment in Religious Liberty?

Global advocates of democracy and human rights have sometimes pointed to the United States Constitution as a model for secular government and religious liberty. As political foment continues to boil over in parts of Africa and the Mideast, however, and

as debates about multiculturalism rage in Europe, Canada and elsewhere, America's commitment to separation of church and state has often been mischaracterized. Separation of church and state has never meant that America was committed to the secularization of society or the privatization of religion, but instead to the religious liberty of all peaceable parties. Separation of church and state has also never been the exclusive constitutional principle of America's experiment in religious liberty. It stood alongside principles of freedom of conscience and religious exercise, religious equality and confessional pluralism, and no federal or state establishments of religion. These principles, together, were designed to foster religious freedom for all, and they have largely succeeded in doing so. This multi-principled approach to religious freedom was true even in the heyday of strict separation of church and state in the 1960s and 1970s. It has become even clearer with the Supreme Court's more recent emphasis on equal treatment of religion and religious neutrality by the state.

One consistent teaching of the Supreme Court's recent cases is that citizens' public expressions of religion must be as free as their private expressions of religion. All religious and non-religious voices, visions, and values should be heard and deliberated in the public square. Not because the religious groups in these cases are really non-religious. Not because their public activities are really non-sectarian. Not because their public expressions are really part of the cultural mainstream. To the contrary, they deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond, and against the mainstream. Religions, the Court has insisted, provide leaven and leverage for the polity and society to improve.

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

A third teaching of these cases is that freedom of religion also requires freedom from religion. The state must strike a balance between coercion and equality. The state cannot coerce citizens to participate in religious ceremonies and subsidies that they find odious. But the state cannot prevent citizens from participation in public ceremonies and programs just because those citizens happen to be religious. It is one

thing to outlaw Christian prayers and broadcasted Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private religious speech in these same public schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who choose to educate their children in religious schools. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike.

Finally, and perhaps most importantly, religious rights are only as good as the democratic duties with which they are coupled. Welcoming serious public deliberation by people of faith demands deep and sincere empathy: learning to understand the deep convictions and cardinal practices of the other, even if only by distant analogy. It demands long and respectful patience: spending the time to listen and to deliberate every serious position before rushing to cultural or political judgment. And it demands unswerving commitment to the first premises of democracy: that there be religious freedom for all and religious establishment for none.