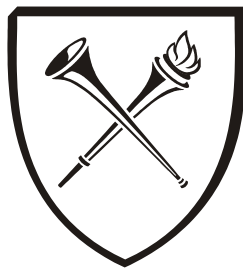


Emory University School of Law

Public Law & Legal Theory Research Paper Series

Research Paper No. 04-1

EMORY



FROM ESTABLISHMENT TO FREEDOM OF PUBLIC RELIGION

John Witte, Jr.
Emory University School of Law

This paper can be downloaded without charge from:
The Social Science Research Network Electronic Paper Collection:
<http://papers.ssrn.com/abstract=537422>

From Establishment to Freedom of Public Religion

John Witte, Jr.¹

Abstract

This Article juxtaposes the theories of religious liberty developed by Thomas Jefferson and John Adams. It argues that Jefferson's notion of a "wall of separation between church and state" was a minority view in his day, and in the century to follow. More commonplace was Adams' view that balanced the freedom of all peaceable private religions with the "mild and equitable establishment" of one public religion. Adam's model of religious liberty dominated much of nineteenth-century law and culture, Jefferson's model a good bit of twentieth-century law and culture. In its most recent cases, the U.S. Supreme Court seems to be developing a new model of religious liberty that draws on the insights of both Jefferson and Adams, but rejects their respective calls for the privatization or the establishment of religion. The Court's formula is that both private and public forms of religion deserve constitutional freedom and support, though neither may be given preferential treatment.

Introduction

The civic catechisms and canticles of our day still celebrate Thomas Jefferson's experiment in religious liberty. To end a millennium of repressive religious establishments, we are taught, Jefferson sought liberty in the twin formulas of privatizing religion and secularizing politics. Religion must be "a concern purely between our God and our consciences," he wrote. Politics must be conducted with "a wall of separation between church and state."²

¹ Jonas Robitscher Professor of Law, Director of Law and Religion Program, and Director of Center for the Interdisciplinary Study of Religion at Emory University. This text is a lecture at a conference on "Faith and Law," sponsored by the Ohio State Bar Association in Columbus, Ohio, on November 12, 2003. I wish to thank Robert E. Reber, Stephen Cianca, and Ward Cornett for their kind invitation for me to participate in the event.

² 8 The Writings of Thomas Jefferson 113 (H. Washington, ed., 1853-1854).

"Public Religion"³ is a threat to private religion, and must thus be discouraged. "Political ministry" is a menace to political integrity and must thus be outlawed.

These Jeffersonian maxims remain for many today the cardinal axioms of a unique American logic of religious freedom to which every patriotic individual and institution should yield. Every public school student learns the virtues of keeping his Bible at home and her prayers in the closet. Every church knows the tax law advantages of high cultural conformity and low political temperature. Every politician understands the calculus of courting religious favors without subverting religious causes. Religious privatization is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good. If only those right-wing killjoys of our day would learn proper patriotism, instead of pestering us with their Decalogues and faith-based initiatives!

"A page of history is worth a volume of logic," Justice Holmes once said.⁴ And careful historical work in the past two decades has begun to call a good deal of this popular Jeffersonian logic into question. Not only are Jefferson's views on disestablishment and free exercise considerably more delphic than was once imagined.⁵ But the fuller account now available of the genesis and exodus of the American experiment in religious liberty suggests that Jefferson's views were hardly conventional in his own day--or in the century

³ A popular source of this phrase in American history is Benjamin Franklin, *Proposals Relating to the Education of Youth in Pensilvania* (1749), in *Benjamin Franklin: Representative Selections* 203 (C. Jorgenson & F. Mott eds. 1962). The school curriculum, said Franklin, must give "frequent opportunities of showing the Necessity of a *Publick Religion*, from its Usefulness to the Publick; the Advantage of a Religious Character, among private Persons; the Mischiefs of Superstition, &c., and the Excellency of the CHRISTIAN RELIGION above all antient and modern. *Ibid.*, 203 (spelling and emphases in original). See discussion of Franklin in Martin E. Marty, *On a Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 *Emory L J* 9, 16-17 (1990) and later formulations in Robert N. Bellah and Phillip B. Hammond, *Varieties of Civil Religion in America* (1980); Robert N. Bellah, *The Broken Covenant: American Civil Religion in Time of Trial*, 2d ed. (1992).

⁴ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

⁵ See esp. Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002); Philip A. Hamburger, *Separation of Church and State* (2002); John Witte, Jr., "That Serpentine Wall of Separation," 101 *Michigan Law Review* __ (2003).

to follow. Indeed, the Jeffersonian model of religious liberty came to constitutional prominence only in the 1940s, and then largely at the behest of the United States Supreme Court. During much of the time before that, the American experiment was devoted not so much to privatizing religion and to secularizing politics, as to balancing the freedoms of all private religions against the establishment of one public religion.

The implications of these new historical insights have only begun to be worked out. The hard religious right has woven these historical insights into a crusade to reclaim the nation's Christian roots and to reestablish its Christian traditions in place of the current establishment of secularism. The hard religious left has converted them into a new appreciation for the bold prescience of the United States Supreme Court to anticipate the needs of our fragmented postmodern and post-Christian polity. The Supreme Court itself, however, has quietly abandoned much of its earlier separationist logic in recent years, and moved gradually toward the recognition that both private and public forms of religion deserve constitutional freedom.

To relate this story and its implications a bit more fully, permit me to revisit Jefferson's model of religious liberty, now viewed in juxtaposition with the model of religious liberty developed by John Adams, his life-long friendly rival. It was Adams' model, more than Jefferson's, I shall argue, that dominated American constitutional law for the first 150 years of the republic. It was Jefferson's model that the Supreme Court revived in the 1940s to overcome the abuses and limitations that Adam's model had betrayed. Today, I shall conclude, neither model standing alone is adequate, but the insights of both models can be combined into a new understanding of the freedom of public religion.

I. Jefferson v. Adams on Religious Liberty

As our civic catechism has taught us, Thomas Jefferson did regard his 1786 Law for the

Establishment of Religious Freedom in Virginia as a "fair" and "novel experiment."⁶ This law, declared Jefferson, defied the ancient assumptions of the West: that one form of Christianity must be established in a community, and that the state must protect and support it against all other religions. Virginia would no longer suffer such state prescriptions or proscriptions of religion. All forms of Christianity must now stand on their own feet and on an equal footing with the faiths of "the Jew and the Gentile, ... the Mahometan, the Hindu, and [the] Infidel of every denomination."⁷ Their survival and growth must turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.

True religious liberty, Jefferson argued, requires both the free exercise and the disestablishment of religion. On the one hand, the state should protect the liberty of conscience and free exercise of all its subjects--however impious or impish their religious beliefs and customs might appear. "Almighty God hath created the mind free," Jefferson wrote, and thus "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."⁸

On the other hand, the state should disestablish all religion. The state should not give special aid, support, privilege, or protection to religious doctrines or groups--through special tax appropriations and exemptions, special donations of goods and realty, or special laws of incorporation and criminal protection. The state should not direct its laws to religious purposes. The state should not draw on the services of religious associations, nor seek to interfere in their order, organization, or orthodoxy.

⁶ The Complete Jefferson, Containing His Major Writings 538 (Saul K. Padover, ed., 1943).

⁷ Thomas Jefferson, Autobiography (1821), in *ibid.*, 1147.

⁸ 12 The Statutes at Large ... of Virginia 84-86 (W.W. Hening, ed., 1809-1823).

As Jefferson put it in his famous 1802 letter to the Danbury Baptist Association: "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 legislative powers of government reach actions only, and not opinions, I contemplate ... a wall of separation between church and State."⁹

Clergy were to respect this wall of separation as much as politicians. Clergy needed to stick to their specialty of soulcraft rather than interfere in the specialty of statecraft. Religion is merely "a separate department of knowledge," Jefferson wrote, alongside other specialized disciplines like physics, biology, law, politics, and medicine. Preachers are the specialists in religion, and are hired to devote their time and energy to this specialty. "Whenever, therefore, preachers, instead of a lesson in religion, put them off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they were salaried."¹⁰

Jefferson life-long friendly rival, John Adams, wrote an equally spirited defense of the Massachusetts "experiment" in religious liberty. "It can no longer be called in question," Adams wrote, that "authority in magistrates and obedience of citizens can be grounded on reason, morality, and the Christian religion," without succumbing to "the monkey of priests or the knavery of politicians."¹¹ The 1780 Massachusetts Constitution, which Adams largely drafted, guarantees the liberty of conscience and free exercise of all its citizens. But it also institutes a "mild and equitable establishment of religion," featuring special state protections and privileges for

⁹ The Complete Jefferson, supra note 6, at 673-76, 946-47, 957-58; 11 The Works of Thomas Jefferson 7-9 (P.L. Ford, ed., 1904-1905). See analysis of Jefferson's views in Driesbach, supra note 5; at Edwin S. Gaustad, Sworn on the Altar of God: A Religious Biography of Thomas Jefferson (1996).

¹⁰ Thomas Jefferson, Letter to P.H. Wendover (March 13, 1815), quoted and discussed in Hamburger, supra note 5, at 152-54.

¹¹ John Adams, A Defense of the Constitutions of Government in the United States of America (1787), preface, in 4 The Works of John Adams 290 (J.F. Adams, ed., 1850-1856).

preferred forms of Christian piety, morality, and charity.¹²

True religious liberty, Adams argued, requires the state to balance the freedom of many private religions with the establishment of one public religion.

On the one hand, every civil society must protect a plurality of private religions—whose rights are limited only by the parallel rights of juxtaposed religions and the duties of the established public religion. The notion that a state could coerce all persons into adherence and adherents to a common public religion alone was for Adams a philosophical fiction. Persons would make their own private judgments in matters of faith. Any attempt to coerce their consciences would only breed hypocrisy and resentment. Moreover, the maintenance of religious plurality was essential for the protection of civil society and civil liberties. "Checks and balances, Jefferson," Adams wrote to his friend in Monticello, in the political as well as the religious sphere "are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of Christians would persecute Deists, as either Sect would persecute another, if it had unchecked and unballanced Power. Nay, the Deists would persecute Christians, and Atheists would persecute Deists, with as unrelenting Cruelty, as any Christians would persecute them or one another. Know thyself, Human nature!"¹³

On the other hand, every polity must establish by law some form of public religion, some image and ideal of itself, some common values and beliefs to undergird and support the plurality of protected private religions. The notion that a state could remain neutral and purged of any public religion was, for Adams, equally a philosophical fiction. Absent a commonly adopted set of values and beliefs, politicians would invariably hold out their private convictions as public ones. It was thus essential for each community to define and defend the basics of a

¹² Ibid., 2:399, 3:451; 4:290-97; 8:232. See further analysis in John Witte, Jr., "'A Most Mild and Equitable Establishment of Religion': John Adams and the Massachusetts Experiment," 41 *J of Church & State* 213-52 (1999).

¹³ The Adams-Jefferson Letters 333-35 (Lester J. Cappon, ed., 1959).

public religion. In Adams's view, its creed was honesty, diligence, devotion, obedience, virtue, and love of God, neighbor, and self. Its icons were the Bible, the bells of liberty, the memorials of patriots, the constitution. Its clergy were public-spirited ministers and religiously-committed politicians. Its liturgy was the public proclamation of oaths, prayers, songs, and election and Thanksgiving Day sermons. Its policy was state appointment of chaplains for the legislature, military, and prison, state sanctions against blasphemy, sacrilege, and iconoclasm, state administration of tithe collections, test oaths, and clerical appointments, state sponsorship of religious societies, schools, and charities. "Statesmen may plan and speculate for liberty," Adams wrote in defense of his views, "but it is religion and morality alone which can establish the principles upon which freedom can securely stand." A "Publick Religion" sets "the foundation, not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society."¹⁴

Here are two models of religious liberty offered by two of the greatest luminaries of the American founding era. There were many other models available in their day—some more theological, some more philosophical in tone. But these two models, given the eminence of their authors and the importance of their states of Virginia and Massachusetts, were of central importance. Both Jefferson and Adams were self-consciously engaged in a new experiment in religious liberty. Both started with the credo of the American Declaration of Independence which they drafted: that "all men are created equal" and that they have "certain unalienable rights." Both insisted upon bringing within the mantle of constitutional protection every peaceable private religious belief and believer of their day.

But while Jefferson advocated a robust freedom of exercise, Adams condoned only a "tempered" religious

¹⁴ Works of John Adams, *supra* note 11, at 2:399, 3:448-64; 4:193-209, 227-28, 290-97; 8:232; 9:419-20, 635-36; 10:253-54, 415-416; *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805-1813* 75-77, 191-195, 224-226, 338-340 (John A. Schutz and Douglass Adair, eds. 1966).

freedom. While Jefferson urged the separation of church and state, Adams urged only a division of religious and political offices. While Jefferson advocated the disestablishment of all religions, Adams insisted on the "mild" establishment of one public religion.

For Jefferson, to establish one public religion was to threaten all private religions. To encourage religious uniformity was to jeopardize religious sincerity. To limit religious exercise was to stymie religious development. To enlist the church's ministry was to impugn the state's integrity. Religion was thus best left to the private sphere and sanctuary; church and state were best left separated from each other.

Adams agreed that too little religious freedom was a recipe for hypocrisy and impiety. But too much religious freedom, he argued, was an invitation to depravity and license. Too firm a religious establishment would certainly breed coercion and corruption. But too little a religious establishment would convert private prejudices into constitutional prerogatives. Somewhere between these extremes a society must strike its balance.

II. Adams' Model in Action

For the first century and a half of the republic, it was Adams' style of argument about religious liberty more than Jefferson's that dominated the nation--even, ironically, in nineteenth-century Virginia.¹⁵ Before 1940, principal governance of the American experiment lay with the states, not with the federal government. The First Amendment applied, by its terms, only to "Congress."¹⁶ Its provisions were rarely invoked and only lightly enforced by the federal courts. Most questions of religious liberty

¹⁵ See 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* 41-64 (James Hutson, ed., 2000); id., "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," 3 *Journal of Southern History* 445-80 (1995).

¹⁶ U.S. Const., Am. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

were left to the states to resolve, each in accordance with its own state constitution.¹⁷

The dominant pattern was that states sought to balance the general freedom of all private religions with the general patronage of one common public religion--increasingly relying on the frontier as a release valve for the tensions between this private religious freedom and public religious patronage.

On the one hand, state and local governments granted basic freedoms of conscience, exercise, and equality to most religious groups and religious practices, at least those that conformed with common culture and average temperament. Most religious individuals were granted rights to assemble, speak, publish, parent, educate, travel, and the like on the basis of their religious beliefs. Most religious groups were generally afforded the rights to incorporate, to hold property, to receive private donations, to enforce religious laws, and to maintain buildings, schools, and charities for their voluntary members.

Many states, however, still dealt discriminately with religious minorities, particularly those of high religious temperature or low cultural conformity. The New England states, for example, continued to resist the missionizing efforts of Catholics, Baptists, and Methodists, routinely delaying delivery of their corporate charters, tax exemptions, and educational licenses. New York, New Jersey and Pennsylvania were similarly churlish with Unitarians, Adventists, and Christian Scientists, often turning a blind eye to private abuses against them. Virginia and the Carolinas tended to be hard on conservative Episcopalians and upstart Evangelicals alike. Many of the southern states were notorious in their resistance to Catholic churches, schools, missions, and literature. Few legislatures and courts, outside of the main cities on the Eastern seaboard, showed much respect for the religious rights of the few Jews or Muslims about, let alone the religious rights of Native Americans or enslaved African Americans.

¹⁷ For sources and fuller discussion of what follows in this section, see John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* 87-116 (2000).

On the other hand, state and local governments patronized a "public" religion that was generally Christian, if not Protestant, in character. A "mass of organic utterances," as the Supreme Court later put it, attest to the typical features of this system.¹⁸

State and local governments endorsed religious symbols and ceremonies. "In God We Trust" and similar confessions appeared on governmental seals and stationery. The Ten Commandments and favorite Bible verses were inscribed on the walls of court houses, public schools, and other public buildings. Crucifixes were erected in state parks and on state house grounds. Flags flew at half mast on Good Friday. Christmas, Easter, and other holy days were official holidays. Sundays remained official days of rest. Government-sponsored chaplains were appointed to the state legislatures, military groups, and state prisons, asylums, and hospitals. Prayers were offered at the commencement of each session of many state legislatures and at city council meetings. Thanksgiving Day prayers were offered by governors, mayors, and local officials. Election day sermons were offered, especially in rural and town churches, throughout the nineteenth century.

State and local governments also afforded various forms of aid to religious groups. Subsidies were given to Christian missionaries on the frontier. States and municipalities occasionally underwrote the costs of Bibles and liturgical books for poorer churches and donated land and services to them. Property grants and tax subsidies were furnished to Christian schools and charities. Special criminal laws protected the property, clergy, and worship services of the churches. Tax exemptions were accorded to the real and personal properties of many churches, clerics, and charities. Tax revenues supported the acquisition of religious art and statuary for state museums and other public buildings.

State and local governments predicated some of their laws and policies on biblical teachings. Many of the first public schools and state universities had mandatory courses in the Bible and religion and

¹⁸ Church of the Holy Trinity v. United States, 143 U.S. 457, 478 (1892).

compulsory attendance in daily chapel and Sunday worship services. Employees in state prisons, reformatories, orphanages, and asylums were required to know and to teach basic Christian beliefs and values. Polygamy, prostitution, pornography, and other sexual offenses against Christian morals and mores were prohibited. Blasphemy and sacrilege were still prosecuted. Gambling, lotteries, fortune-telling, and other activities that depended on fate or magic were forbidden. In many jurisdictions, these and other laws were predicated on explicitly religious grounds. It was a commonplace of nineteenth-century American legal thought that "Christianity is a part of the common law."¹⁹

This prevalent pattern of balancing the freedom of all private religions with the patronage of one public religion worked well enough for the more religiously homogeneous times and towns of the early republic. The established public religion confirmed and celebrated each community's civic unity and confessional identity. It also set natural limits to both political action and individual freedom--limits that were enforced more by communal reprobation than by constitutional litigation.

One of the saving assumptions of this system was the presence of the frontier, and the right to emigrate thereto. Religious minorities who could not abide a community's religious restrictions or accept its religious patronage were not expected to stay long to fight the local establishment as their European counterparts had done. They moved--sometimes at gunpoint--to establish their own communities on the frontier, often on the heels of missionaries and schoolmasters who had preceded them. Mormons moved from New York to Ohio, to Missouri, to Illinois, before finally settling in Utah and in neighboring states. Catholics moved to California, the Dakotas,

¹⁹ The phrase was coined by Sir Matthew Hale in *Taylor's Case*, 1 Vent. 293, 86 English Reports 189 (K.B. 1676), and is repeated in several American tracts and cases. See, e.g., 2 *The Works of James Wilson* 671 (R.G. McCloskey ed., 1967); *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198 (1844). For analysis and other sources, see Stuart Banner, "When Christianity was Part of the Common Law," 16 *Law and History Review* 27 (1998); Daniel L. Dreisbach, "In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution," 48 *Baylor Law Review* 927 (1996).

Illinois, Louisiana, Montana, Nevada, and New Mexico. Baptists and Methodists poured into the southern states from Georgia and Tennessee to Mississippi and Missouri. Free spirits escaped to the mountainous frontiers of Wyoming, Montana, Washington, and Oregon.²⁰

The right and the duty to emigrate was a basic assumption of the early American experiment in religious liberty. Many first-generation Americans had left their European faiths and territories to gain their freedom. Accordingly, they embraced the right to leave--to exit their faith, to abandon their blood and soil, to reestablish their lives, beliefs, and identities afresh--as a cardinal axiom of religious freedom. Escape to the frontier provided the release valve for the common nineteenth-century pattern of balancing freedom for all private religions with patronage of one public religion.

As the American populace became more pluralized and the American frontier more populated, however, this system became harder to maintain. The Second Great Awakening of 1810-1860 introduced to the American scene a host of newly minted faiths--Adventists, Christian Scientists, Disciples, Holiness Churches, Jehovah's Witnesses, Mormons, Pentecostals, Unitarians, and Universalists. The Second Great Awakening also fueled what Edwin S. Gaustad has aptly called "the reconquest"²¹ of the original Eastern seaboard states by Evangelical Baptists and Methodists as well as by Roman Catholics. The American Civil War (1861-1865) permanently divided Lutherans, Presbyterians, and other denominations into northern and southern branches. The Thirteenth, Fourteenth and Fifteenth Amendments (1865-1870) not only outlawed slavery but also liberated a host of long-cloaked African beliefs and rituals, some in pure African forms, many inculturated with various Christian traditions. After the 1860s, the great waves of European emigration brought new concentrations and forms of Catholicism and Protestantism from Ireland, Germany, and Great Britain, joined by a number of Catholic emigrants from Mexico. After the 1880s,

²⁰ For detailed religious demography, see Edwin S. Gaustad, et al., *New Historical Atlas of Religion in America* (2001).

²¹ *Ibid.*

fresh waves of emigrants from Eastern Europe and Russia brought new forms and concentrations of Catholicism, Judaism, and Orthodox Christianity. At the same time, a growing number of emigrants from across the Pacific introduced Buddhism, Confucianism, Hinduism, and other Eastern religions to the Western states.

These movements of new inspiration, immigration, and invention radically recast the American religious map in the course of the nineteenth century--with the traditional Calvinist and Anglican strongholds of the early republic giving way especially to precocious new forms of Evangelical Baptists and Methodists, and scores of new religious groups.

This radical reconfiguration of the American religious map in the later nineteenth century eventually challenged state constitutional patterns of religious liberty. In particular, state policies of patronizing a preferred form of public religion became increasingly difficult to maintain with the growing plurality of the populace and the growing political strength of groups who opposed such policies. Many Evangelical churches, both Baptist and Methodist, insisted that states adhere more firmly to principles of disestablishment and separatism; in a number of states, they gained the political power to revise the constitutions accordingly. Religious minorities in many communities--whether Protestant, Catholic, Orthodox, Jewish, Adventist, or Mormon--also began to ally themselves in opposition to this system, particularly the patronage of a common Protestantism within the public schools. Some of these minority religious communities refused to conform or to assimilate. Others refused to live or leave quietly. Still others began to crusade actively against the system.

When neither assimilation nor accommodation policies proved effective, state and local legislatures began to clamp down on these dissenters. At the turn of the twentieth century and increasingly thereafter, local officials began routinely to deny Roman Catholics their school charters, Jehovah's Witnesses their preaching permits, Eastern Orthodox their canonical freedoms, Jews and Adventists their

Sabbath-day accommodations, non-Christian pacifists their conscientious objection status. As state courts and legislatures turned an increasingly blind eye to their plight, religious dissenters began to turn to the federal courts for relief.

III. Jefferson's Model in Action

The United States Supreme Court responded forcefully to their plight of the dissenters--first by applying the First Amendment to the states, then by applying Jefferson's model to the First Amendment. Both moves brought fundamental change to the American experiment.

In the landmark cases of *Cantwell v. Connecticut* (1940)²² and *Everson v. Board of Education* (1947)²³, the Court read the First Amendment religion clauses into the due process clause of the Fourteenth Amendment. On its face, the Court said, the First Amendment binds the federal government: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As a general statement of religious liberty, the First Amendment also binds state governments. For religious liberty is part of the corpus of fundamental liberties in the Fourteenth Amendment guarantee that "no state shall deprive any person of ... liberty ... without due process of law."²⁴ By so incorporating the First Amendment into the Fourteenth, the Court accomplished what sixteen failed amendments to the Constitution could not accomplish--to create a national law on religious liberty, governed by the federal courts, and enforceable against state and local governments.

In its early application of the free exercise clause, the Court simply adjusted the American experiment by protecting the rights of newly emergent religious groups against recalcitrant local officials. Jehovah's Witnesses, the Court held repeatedly, could

²² 310 U.S. 296 (1940).

²³ 330 U.S. 1 (1947).

²⁴ U.S. Const., Am. XIV, sec. 1.

not be denied licenses to preach, parade, or pamphleteer just because they were unpopular.²⁵ Public school students could not be compelled to salute the flag or recite the pledge if they were conscientiously opposed.²⁶ Other parties, with scruples of conscience, could not be forced to swear oaths before receiving citizenship status, property tax exemptions, state bureaucratic positions, social welfare benefits, or standing in courts.²⁷ Such free exercise remedies can be read as an effort to make the traditional state establishments of a public religion more "mild and equitable" for the many new private religions on the American scene.

In its early application of the establishment clause, however, the Court radically reconfigured the American experiment, by outlawing state establishments of public religion altogether. State patronage of a public religion, the Court held, was not only a threat to an individual's free exercise rights. It was also a violation of the government's non-establishment duties. It was Thomas Jefferson who had first seen the virtues of combining a strong free exercise clause with a strong disestablishment clause. It was Thomas Jefferson who had hit upon the formula for enforcing both clauses with equal vigor--by consigning religion to the private sphere and sanctuary, and by separating church from state. Jefferson's views henceforth would be the law of the nation. In the words of Justice Black in *Everson*:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from

²⁵ The main cases are *Cantwell*, 310 U.S. at 296; *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Murdock v. Pennsylvania* 319 U.S. 141 (1943); *Follet v. McCormick*, 321 U.S. 574 (1944); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

²⁶ The main case is *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

²⁷ The main cases are *In re Summers*, 325 U.S. 561 (1945); *Girouard v. United States*, 328 U.S. 61 (1946); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958).

church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever 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, 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."²⁸

Everson was an open invitation to litigation. A long tradition of state and local policies that patronized a public religion was now open to challenge. The new application of the First Amendment religion clauses to the states encouraged such extensive litigation. The *Everson* Court's adoption of the Jeffersonian model of religious liberty demanded it. Hundreds of establishment clause cases poured into the lower federal courts after the 1940s.

The Supreme Court applied its newly minted Jeffersonian logic primarily in cases challenging the traditional state patronage of religious education, devoting nearly three quarters of its establishment clause cases to this issue. On the one hand, the Court removed religion from the public school. Public schools could not offer prayers or moments of silence, could not read Scripture or religious texts, could not house Bibles or prayer books, could not teach theology or creationism, could not display Decalogues or crèches, could not use the services or facilities of

²⁸ *Everson* 330 U.S. at 15-16.

religious bodies.²⁹ On the other hand, the Court removed religious schools from state support. 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.³⁰

In *Lemon v. Kurtzman* (1971), the Court distilled the Jeffersonian logic of its early cases into a general test to be used in all establishment clause cases.³¹ Henceforth every law challenged under the establishment clause would pass constitutional muster only if it could satisfy three criteria. The law must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) foster no excessive entanglement between church and state. Incidental religious "effects" or modest "entanglements" of church and state could be tolerated, but defiance of any of these criteria would be constitutionally fatal.

This constitutional reification of Jeffersonian logic rendered the establishment clause a formidable obstacle to many traditional forms of state patronage of public religion. Particularly the lower courts used this test to outlaw all manner of government subsidies for religious charities, social services, and mission works, government use of religious services, facilities, and publications, government protections of Sundays and Holy Days, government enforcement of blasphemy and sacrilege laws, government participation in religious rituals and religious displays. It must be emphasized that it often did not take law suits to effectuate these reforms. Particularly local governments, sensitive to the political and fiscal costs of constitutional

²⁹ The main cases are *McCullum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

³⁰ The main cases are *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittinger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985). See *infra* note 32 for cases overturning several of these precedents.

³¹ *Lemon*, 403 U.S. at 602.

litigation, often voluntarily ended their prayers, removed their Decalogues, and closed their coffers to religion long before any case was filed against them. The Jeffersonian logic of the establishment clause seemed to demand this.

IV. Toward the Freedom of Public Religion

While many officials and citizens have remained faithful to this Jeffersonian logic, the Supreme Court of late has been quietly defying it and reversed some of its harshest separationist precedents.³² The Court has not yet crafted a coherent new logic, let alone consistent new test, to resolve these disputes and has been properly pilloried for some of its blundering opinions. But these cases hold signposts of a new way to define and defend the legal place of public religion.

Tradition has become one strong vector in some of the Court's recent First Amendment cases. The Court had used arguments from tradition a few times before, as part of broader rationales for upholding religious tax exemptions and Sabbath Day laws. But in *Marsh v. Chambers* (1983), the argument from tradition became the exclusive basis for upholding a state legislature's practice of funding a chaplain and opening its sessions with his prayers. Writing for the Court, Chief Justice Burger defended such practices as a noble survival of the traditional public role of religion in American life and law: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion [but] simply a tolerable acknowledgement of beliefs widely held among the people of this country.... '[W]e are a religious

³² *Mitchell v. Helms*, 530 U.S. 793, 808 (2001), overruling *Meek v. Pittenger*, 421 U.S. 329 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 235 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985).

people whose institutions presuppose a Supreme Being'." ³³

Arguments from tradition, while by themselves rarely convincing, can sometimes bolster a broader rationale for upholding traditional features of a public religion and a religious public. Tradition can sometimes serve effectively as something of a null hypothesis--to be overcome by strong constitutional arguments rather than discarded by simple invocations of principle. As Justice Holmes once put it: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." ³⁴ Innocuous long-standing practices, therefore, such as religious tax exemptions, military chaplains, prison prayer books, and public displays of Decalogues and of other religious symbols might well be justified.

There are limits and dangers to arguments from tradition, which the Court itself betrayed the following year. In *Lynch v. Donnelly* (1984) the Court upheld a municipality's traditional practice of maintaining a manger scene (a crèche) on a public park as part of a large holiday display in a downtown shopping area. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," Chief Justice Burger wrote, repeating his *Marsh* argument and now giving an ample list of illustrations. ³⁵

There is another reason to uphold this display, however, Burger continued. Crèches, while of undoubted religious significance to Christians, are merely "passive" parts of "purely secular displays extant at Christmas." They "engender a friendly community spirit of good will," that "brings people into the central city and serves commercial interests and benefits merchants." ³⁶ The prayers that are occasionally offered at the crèche, Justice O'Connor wrote in concurrence, merely "solemnize public

³³ *Marsh v. Chambers*, 463 U.S. 783 (1983), quoting, in part, *Zorach v. Clauson*, 343 U.S. 306 (1952).

³⁴ *Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922).

³⁵ *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

³⁶ *Ibid.*, 685.

occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society."³⁷ Governmental participation in and support of such "ceremonial deism," the Court concluded, cannot be assessed by "mechanical logic" or "absolutist tests" of establishment. "It is far too late in the day to impose a crabbed reading of the [Disestablishment] Clause on the country."³⁸

A crabbed reading of establishment would have been better than such a crass rendering of religion. For the Court to suggest that crèches are mere advertisements, prayers mere ceremony, and piety mere nostalgia is to create an empty "American Shinto"³⁹--a public religion that is perhaps purged enough of its confessional identity to pass constitutional muster, but too bleached and too bland to be religiously efficacious, let alone civilly effective.

Arguments from tradition, while helpful, are thus inherently limited in their ability to define and defend the public place of religion today. Such arguments perforce assume a traditional definition of what a public religion is--namely, a common system of beliefs, values, and practices drawn eclectically from the multiple denominations within a community. In the religiously homogeneous environment of John Adams' day, a public religion of the common denominator and common denomination still had the doctrinal rigor, liturgical specificity, and moral suasion to be effective. In the religiously heterogeneous environment of our day--with more than 1,000 incorporated denominations on the books--no such effective common religion can be readily devised or defended.

More recent cases suggest a budding new way of defining and defending the legal place of public religion. The Court has numerous times upheld government policies that support the public access and activities of religious individuals and groups--so long as these religious parties act voluntarily, and so long as non-religious parties also benefit from the

³⁷ Ibid., 693 (O'Connor, J. concurring).

³⁸ Ibid., 687.

³⁹ The phrase is from John T. Noonan, Jr., *The Lustre of our Country: The American Experience of Religious Freedom* 230-31 (1998).

same government support. Under this logic, Christian clergy were just as entitled to run for state political office as non-religious candidates.⁴⁰ Church-affiliated pregnancy counseling centers could be funded as part of a broader federal family counseling program.⁴¹ Religious student groups could have equal access to state university and public school classrooms that were open to non-religious student groups.⁴² Religious school students were just as entitled to avail themselves of general scholarships, remedial, and disability services as public school students.⁴³ Religious groups were given equal access to public facilities or civic education programs that were already opened to other civic groups.⁴⁴ Religious parties were just as entitled as non-religious parties to display their symbols in public forums.⁴⁵ Religious student newspapers were just as entitled to public university funding as those of non-religious student groups.⁴⁶ Religious schools were just as entitled as other private schools to participate in a state-sponsored educational improvement or school voucher or educational program.⁴⁷

These holdings were defended on wide-ranging constitutional grounds--as a proper accommodation of religion under the disestablishment clause, as a necessary protection of religion under the free speech or free exercise clauses, as a simple application of the equal protection clause, among other arguments.

One theme common to many of these cases, however, is that public religion must be as free as private religion. Not because the religious groups in these cases are really non-religious. Not because their public activities are really non-sectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these

⁴⁰ *McDaniel v. Paty*, 435 U.S. 618 (1978).

⁴¹ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

⁴² *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

⁴³ *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

⁴⁴ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001).

⁴⁵ *Capitol Square Review and Advisory Board*, 515 U.S. 753 (1995).

⁴⁶ *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

⁴⁷ *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 122 S.Ct. 24690 (2002).

public groups and activities deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond, and against the mainstream. They provide leaven and leverage for the polity to improve.

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

A third theme common to these cases is that a public religion cannot be a common religion. If the religious gerrymandering of *Lynch v. Donnelly* and its progeny had not already made this clear, these more recent cases underscore the point. Today, our public religion must be a collection of particular religions, not the combination of religious particulars. It must be a process of open religious discourse, not a product of ecumenical distillation. All religious voices, visions, and values must be heard and deliberated in the public square. All public religious services and activities, unless criminal or tortious, must be given a chance to come forth and compete, in all their denominational particularity.

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

A fourth teaching of these cases is that freedom of public religion also requires freedom from public religion. Government must strike a balance between coercion and freedom. The state cannot coerce citizens to participate in religious ceremonies and subsidies that they find odious.⁴⁸ But the state cannot prevent citizens from participation in public ceremonies and programs just because they are religious. It is one thing to outlaw Christian prayers and broadcasted Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private religious speech in these same public schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who choose to educate their children in religious schools. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike. It is one thing to outlaw governmental prescriptions of prayers, ceremonies, and symbols in public forums, quite another thing to outlaw governmental accommodations of private prayers, ceremonies, and symbols in these same public forums.

⁴⁸ Lee v. Weisman, 505 U.S. 577 (1991); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

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 CBN. Turn away the missionary at your door. Close your 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 behind the judge. 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.