

Findings

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A Wall of Separation?

The Evolution of the Separation of Church and State

By Jamie McEachern



Pennsylvania high school student named Melissa Donovan led a Bible club known as FISH. Members of the group were up early—7:15 a.m.—in

order to meet together before school because the administration refused to allow them to meet during the school's activity period, which took place after homeroom. Donovan sued the school district, and a federal district court held that the school would be violating the Establishment Clause of the Constitution if it allowed the Bible club to meet during the activities period. However, the Third Circuit Court of Appeals disagreed, holding that the Bible club was equally entitled to meet during the activities period just as other non-curriculum clubs did. The Third Circuit dismissed the district court's reasoning that a potential Establishment Clause violation would outweigh FISH's right to equal access.¹

This is just one example of the current struggle between religious freedom and the "separation of church and state" doctrine. The judicial system has taken the Establishment Clause to the extreme, thus effectively eliminating many rights under the Free Exercise Clause. The irony is that, through an attempt to make sure that no religion is endorsed by the government, the courts have essentially created a new state religion—secularism—that is readily affirmed by many of the decisions our courts make today.

This paper will outline how, through judicial interpretation, the relationship between the spheres of religion and government has evolved and how those wishing to protect religious freedoms find themselves now fighting this new religion of secularism.

Original Intent

It is important to understand the original intent of the 90 men who enacted the First Amendment in order to understand how it applies to situations today. As President Woodrow Wilson once stated, "A nation which does not remember what it was yesterday, does not know what it is today, nor what it is trying to do. We are trying to do a futile thing if we do not know where we came from or what we have been about."²

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The idea of "separation of church and state" has been deeply entrenched in the minds of many Americans over the last 50 years although the phrase exists nowhere in the Constitution. In fact, it was originally used in a letter written by Thomas Jefferson to members of the Danbury Baptist Association in 1802 in response to their concern over the inclusion of the Free Exercise Clause in the First Amendment, which had been adopted eleven years earlier. The Baptists were concerned that inclusion of this clause presupposed that the right to free exercise of religion was *not* an inalienable right.³

Jefferson addressed these fears:

Believing with you that religion is a matter which lies solely between 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 opinion, I contemplate with sovereign reverence that 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 the Church and State.*⁴

The "wall of separation" that Jefferson referred to was originally a phrase used by Roger Williams, a prominent Baptist pastor.⁵ Williams' words referred to God protecting His people from the "wilderness of the world." The words were used in a context clearly meant to protect the church from interference by the government. This "wall of separation" phrase, now used as a misrepresentation of the Establishment and Free Exercise Clauses, was originally designed to be a one-direction limit on the power of the federal government to influence religion.

The Danbury Baptists' letter to Jefferson also sought to put to rest any rumors that a national denomination was to be established.⁶ Past oppression by other denominations had been an issue for the Baptists before the adoption of the Constitution, and they naturally had a fear of a church established by the national government.⁷ However, the First Amendment was meant to apply only to federal government action, and Jefferson subscribed to this understanding, as evidenced by various statements he made regarding First Amendment purpose and intent. In his Second Inaugural Address, he stated:

In matters of religion, I have considered that its free exercise is placed under the Constitution independent of the powers of the General [i.e., federal] Government. I have therefore undertaken, on no occasion, to proscribe the religious exercises suited to it; but have left them, as the Constitution

found them, under the discretion and discipline of State or Church authorities acknowledged by the several religious societies.⁸

Jefferson believed that the federal government had an obligation under the Tenth Amendment to allow the states to regulate issues not assumed by the federal government.⁹ Today, rather than serving as a barrier to control of the states, the First Amendment has been twisted into a bridge that allows the federal government to cross over into matters intended to be regulated by the state.¹⁰

Certainly one might assume that Jefferson was an avid supporter of keeping religion and government separate even on the state level. However, Jefferson's opinion was quite the contrary. While a member of the House of Burgesses in Virginia, he played an integral part in the passage of an act that established a "day of fasting, humiliation, and Prayer."¹¹

Jefferson understood the First Amendment to be a barrier to the federal government's enactment of any law establishing or prohibiting the free exercise of religion. He further understood that the Tenth Amendment allowed for the states to enact any law that they wished regarding religion, because it was an area of regulation reserved for the states.

Moreover, the United States was established by men who believed in the Divine Creator and Lawgiver. As the Founders struggled to create our Constitution, Benjamin Franklin addressed George Washington, president of the Constitutional Convention, saying, "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men."¹² He further stated that without God's aid, the nation would be "divided by our partial local interests; our projects will be confounded, and we ourselves shall be a reproach and by word down to future ages."¹³

John Jay, the first Supreme Court Chief Justice and one of the writers of *The Federalist Papers*, believed that Christianity should play a role in public affairs. He said, "Providence has given to our people the choice of their rulers, and it is the duty as well as the privilege and interest of our Christian nation to select and prefer Christians for their rulers."¹⁴

These Founders and others clearly intended for religion, particularly Christianity, to influence not only the founding of the new nation, but the way in which the nation should be governed in the future.

Court rulings from the time of the nation's early beginnings also provide a glimpse of the driving intentions behind the ideas the Founders put forth in the Constitution and Bill of Rights. In *Church of the Holy Trinity v. U.S.* (1892), the Supreme Court held that the application of an anti-immigration law to a pastor that the church had hired from England was "absurd."¹⁵ It held that, when looking at the intent of the statute and the spirit under which it was created, it would be inappropriate to use it as a restriction on Christianity, saying, "No purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people... This is a *Christian nation*."¹⁶ (emphasis added)

The court also set out to show the nation's Christian foundations upon which it based its decision, even citing back to the first charter of Virginia, which King James I granted by giving the purpose, "in propagating of Christian Religion to such People as yet live in darkness..."¹⁷ Clearly, this early Court, like the Founding Fathers, understood and sought to retain the Christian principles upon which the nation was founded. This decision and numerous others written during the 19th century serve as concrete examples of original intent.¹⁸

Founders' Meaning of "Religion"

As President, Thomas Jefferson was committed to the cause of the First Amendment, which was, in his words, to prevent the "establishment of a particular form of Christianity."¹⁹ Today, many Americans believe that the "religion" referred to in the First Amendment means one's value system or belief in a higher being, including most, if not all, of the religions recognized around the world; however, that was not the intention of the Amendment writers or early Congresses. Examination of the Founders' First Amendment proposals and drafts show that the drafters originally used words such as "religious society," "religious sect," and "particular denomination" synonymously with the word "religion" as it was used in the final wording.²⁰ While it may be argued that these were merely terms used in drafts that were ultimately rejected, evidence exists demonstrating that the term "religion" was to be defined similarly to the language used in the other drafts. It is recorded from the U.S. House of Representatives Judiciary Committee in 1854 that "at the time of the adoption of the Constitution and the amendments, the universal sentiment was that *Christianity*

should be encouraged, not any one sect... In this age there can be no substitute for Christianity..."²¹ (emphasis added)

Evidence of misinterpretation of the Founders' intent and original definition of religion by separation proponents is readily available upon review of the cases in our court system today. The Ninth Circuit Court of Appeals held on June 26, 2002 in *Newdow v. U.S. Congress*, that voluntary recitation of the Pledge of Allegiance, led by teachers, violates the supposed constitutional "separation of church and state."²² In its *amicus curiae* brief, Americans United for the Separation of Church and State argued, "Children are bound to perceive the phrase as affirming a belief in the existence of God and national subordination to God, and as expressing commitment to a nation defined by religious devotion."²³ Americans United Legal Director Ayesha Khan stated that adding the phrase "Under God" to the Pledge in 1954 "turned a patriotic ritual into a religious testimonial."²⁴ The Ninth Circuit Court has taken this view, ignoring the original meaning of "religion" according to the First Amendment drafters as well as the national dependence on God and the Christian faith expressed by the Founders.

Evolution of the First Amendment

In the last 50 years, the Supreme Court has turned the Constitution on its head, establishing what often resembles an oligarchy intent on suppressing religious freedom. To put it in the words of pastor and author John Piper, "The First Amendment has been so twisted in the service of secular antagonists as to make it the warrant of harassment against Christians."²⁵ The Supreme Court has further allowed the doctrine of separation of church and state, under the guise of the Establishment Clause, to swallow up rights promised to the American people through the Free Exercise clause.

In 1947, the Court first used the "separation of church and state" phrase, as it is known today, in *Everson v. Board of Education*.²⁶ The Court in that case determined that the Fourteenth Amendment incorporated the First Amendment, making it applicable to the states rather than just the federal government. The Fourteenth Amendment was intended only to provide civil rights to the emancipated slaves in all states.²⁷ The Supreme Court in *Everson*, however, did not consider this intent when it used the Fourteenth Amendment to apply the First Amendment to all states in addition to the federal government.²⁸ In writing for the majority, Justice Black

stated that the “[separation] wall must be kept high and impregnable.”²⁹ Justice Rutledge required an even larger gap between the government and religious spheres, writing that “the Constitution requires not comprehensive identification of state with religion, but complete separation.”³⁰ These two viewpoints triggered a drastic shift in the meaning of the First Amendment and an evolution in the meaning of “separation of church and state.” *Everson* was instrumental in forming the view of the First Amendment that exists today.

It did not take the Supreme Court long to fully immerse itself in the separation doctrine established by the *Everson* decision and to begin the gradual demise of the Free Exercise Clause. In 1948, the Court heard the case of *McCullum v. Board of Education*, in which a public school district allowed voluntary “release time” religious instruction classes that required parental permission. The Court followed *Everson* and found that the Constitution of the United States prohibited the “commingling of sectarian with secular instruction in public schools.”³¹ Separation proponents were given a victory in which the Court effectively took the right of free exercise of religion and placed in its own hands the school district’s instructional discretion.³²

In 1962, prayer was removed from public schools by the Court’s decision in *Engel v. Vitale*.³³ The prayer in question in this case was voluntary and non-denominational, simply referring to “God.” This prayer was indicative of the type of prayer that the Founding Fathers would likely approve of—it neither established a specific religious sect promoted by the government, nor denied anyone the right to freely exercise his or her religion. Nevertheless, the Court invoked the separation doctrine and declared that the prayer was unconstitutional. The Court also surprisingly concluded that the prayer in question was “relatively insignificant” compared to the way in which the government had encroached upon religion 200 years earlier.³⁴ The Court, in establishing this new policy, which was not based on one single precedent, basically concluded that its knowledge of the Constitution and the First Amendment was superior to that of the Founders who wrote and ratified these documents.³⁵

After this decision, a litany of cases was decided based on the reasoning in *Everson*. The Court held to be unconstitutional praying aloud in schools,³⁶ public display of the Ten Commandments in certain forms,³⁷ and introduction of bills in

the legislature when the author may have religious motives,³⁸ among other things.

The Current Doctrine

So what has the judiciary left us to use in deciding what conduct is permissible under the Establishment Clause and Free Exercise Clause as they stand today? The current stance on interpreting the First Amendment is somewhat murky. The Court formulated a test in 1971 in *Lemon v. Kurtzman* that has been widely used, but often criticized since its inception.³⁹ According to the “*Lemon*” test, government interaction with religion is permissible and constitutional only if: (1) its purpose is secular, (2) it does not promote, inhibit, or endorse religion, and (3) it does not foster excessive entanglement with religion.⁴⁰ Basically, any activity in which the government may be involved must have some secular references in order to pass Constitutional muster.⁴¹ This test has been used widely by the Court, with varying results, which has made it difficult to predict what is considered constitutional under the Establishment Clause. This unpredictability has made it difficult for citizens to publicly express their religious beliefs free from fear of a lawsuit, in essence creating a “chilling effect” on free speech. It has also placed a significant burden on those interested in protecting religious freedoms because of the potential costs associated with litigating these issues. Consequently, many religious freedoms have been infringed upon simply because of the fear of legal repercussions or because financial resources have been exhausted. The unpredictable nature of the Court’s current precedent has also left room for the Justices who are sitting on the bench at any given time to insert their own value judgments without providing a solid basis in legal theory. The *Lemon* test weighs heavily on subjective opinions and has yet to be clarified by the Supreme Court, thus lower federal courts have also fallen prey to judicial inconsistency. Without a clear understanding or definition of what the real test is, courts will continue to have difficulty in understanding how to decide religious freedom issues.⁴²

With the growing number of religious activities determined to be unconstitutional in public places comes the ever-shrinking rights under the Free Exercise Clause. The special protection afforded religion under the Free Exercise Clause has been diminished so that, according to the court in *Employment Division v. Smith*, laws that are neutral and generally applicable are still constitutional regardless of how they

impact religion.⁴³ *Smith*, which dealt with the sacramental use of an illegal controlled substance, also stood for the proposition that as long as the intent of the law was not to prohibit free exercise of religion, then the First Amendment was inapplicable. Because of *Smith* and subsequent decisions, a Free Exercise Clause claim is no longer enough to stand alone in a lawsuit. It must be linked to a free speech or equal protection claim in order for it to have a likely chance of success.⁴⁴ This is not what the Founding Fathers intended when they enacted the First Amendment over 200 years ago.

Effect on Current Issues

There are many issues relating to our religious freedoms that are still in the forefront of legal disputes today. It is possible for the Establishment Clause and the Free Exercise Clause to coexist, as intended by those who wrote them. As the 1878 case of *Reynolds v. United States* stated, it was never the intention of the Founding Fathers for government to interfere with traditional religious practices, but only to regulate those practices that went against the moral good and/or violated the order of peace in the states.⁴⁵

In his book *Positive Neutrality*, Stephen Monsma describes the ideal church and state function, explaining that religious groups have a right to teach and develop the core beliefs of the group and participate in the policy making process of the republic. On the other hand, religious groups also have the obligation to refrain from attempting to take over functions reserved for the government sphere or trying to remove the legitimacy of the government.

Monsma further describes how decisions the government makes should be ones that coordinate, protect, encourage, and empower all of the various spheres of society. The goal should be the promotion of justice, public interest, and the common good. The State is also to refrain from transgressing the sovereignty of the other spheres and to be neutral in all of its dealings with them.⁴⁶

So how does this ideal church and state function relate to the issues facing our nation today such as education funding? It simply says that in dispersing funds to schools, the government should do so to all groups, regardless of their religious inclination, in order to avoid being partial to any one group. Educational choice should be unhindered by the consideration of whether or not the school is religious or secular, private or public.

It also says that when school prayer is at issue, the students should be allowed to engage in voluntary, unmandated, and undistruptive prayer in the classroom without the interference of school officials. Guidelines issued by the Department of Education follow this principle by requiring public schools wishing to maintain their federal funding to offer proof that they are not prohibiting students from praying outside the classroom or teachers from holding religious meetings among themselves.⁴⁷ The guidelines further allow students to read their Bibles, say meal-time grace, or pray and meet with fellow students during their recess or lunch hour, as long as such conduct does not occur during their own instructional time.⁴⁸

Another correct application of the First Amendment would result in allowing religious groups to meet in public, municipal facilities without fear of being turned away. It would also allow posting of the Ten Commandments, a historical document from which we have derived many of our statutes and moral norms, to be displayed in public forums such as schools and courthouses.

While the suggestions for resolving these issues may seem to some a clear intrusion by religion into the government sphere, it is important to remember the Judeo-Christian foundations of the nation and the importance of the Free Exercise Clause in prohibiting the government from stamping out the right to religious freedom. In fact, when it restrains the opportunities and rights of a religious person, the government is showing favor to secularism. In its effort to refrain from promoting a particular religion, the government has failed. It regularly promotes “no religion” as the religion of the State. Judicial activism over the past fifty years has gone a long way towards effectively creating a secularist society.

The future direction that the government will take in its application of the First Amendment in regard to religious freedom issues remains to be seen. What is clear, however, is that we cannot continue to stand idly by and watch our nation distance itself from the religious roots upon which it was founded. Unfortu-

nately, our memory of what was required to ensure our freedoms has faded and we no longer understand our duty to defend the rights that the Founders envisioned for us. However, a conscious effort to educate our legislatures and judiciary, to become a constant voice for religious freedom rights and to return to the foundations of the First Amendment and the intent of its writers may help to make our nation a stronger, more equal society in which religious freedoms intended by the Founders are returned to the people.

Jamie McEachern worked with the N.C. Family Policy Council as a legal intern from the Alliance Defense Fund's Blackstone Fellowship during the summer of 2003.

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Endnotes

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