2004

Against Separation

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IN 1802, in a letter to the Danbury Baptist Association, Thomas Jefferson wrote that the First Amendment had the effect of "building a wall of separation between Church & State." As it happens, when Congress drafted the First Amendment in 1789, Jefferson was enjoying Paris. Nonetheless, his words about separation are often taken as an authoritative interpretation of the First Amendment's establishment clause. Indeed, in the 1947 *Everson v. Board of Education* decision, the Supreme Court quoted Jefferson's pronouncement to justify its conclusion that the First Amendment guarantees a separation of church and state. Not only the justices but also vast numbers of other Americans have come to understand their religious freedom in terms of Jefferson's phrase. As a result, Jefferson's words often seem more

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This essay is adapted from the author's book Separation of Church and State *(Harvard University Press, 2002).*

familiar than the words of the First Amendment itself.

At stake is the character of religious freedom in the United States. In particular, there is a danger that lingering separationist notions will continue to affect the interpretation of the First Amendment's establishment clause. This clause provides, among other things, that "Congress shall make no law respecting an establishment of religion." These words say nothing about separation of church and state, and therefore notwithstanding the claims made on behalf of separation, there is reason to believe it is not the religious freedom guaranteed by the Constitution.

The absence of historical authority

It is difficult to imagine an allegedly eighteenth-century constitutional doctrine that has as little eighteenth-century foundation as separation of church and state. The standard claim on behalf of separation is that it was the religious liberty demanded by eighteenth-century religious dissenters and then adopted in the First Amendment. Certainly, were separation the principle of religious liberty adopted in the First Amendment, one would expect to find that it had been much discussed by these dissenters. Few advocates of religious liberty in the United States have been as voluble and importunate as the dissenters who clamored against state establishments in the late eighteenth century. If separation were the concept of religious liberty that the framers of the First Amendment took for granted or otherwise employed, one would expect to find that it had been repeatedly demanded by dissenters in the numerous petitions, pamphlets, newspaper articles, sermons, and even poems in which these advocates of religious liberty sought a freedom from state establishments. Yet it is difficult to find late eighteenth-century American demands for "separation of church and state" or any clear equivalent.

To be sure, eighteenth-century Americans often alluded to particular types of differences and disconnections between church and state, and in retrospect these allusions are sometimes imagined to have been references to a separation. For example, throughout the period, both dissenters and establishment clergy distinguished between church

and state as different institutions with different goals and powers. Yet they did not thereby suggest that these institutions should be separated in the sense of being kept apart or segregated. Indeed, many Englishmen and Americans assumed the distinction between church and state implied the necessity of an alliance between these institutions. Religious dissenters and their allies often condemned a "union of church and state," but in rejecting this extreme, they did not embrace the other. Instead, they usually took care to reject only the "adulterous" or "illicit connection" formed by an establishment of religion. In this way, dissenters almost always avoided any suggestion that they wanted a more general separation of church and state.

Thus it should be no surprise that the debates on the adoption of the First Amendment reveal no requests for a "separation of church and state." The phrase simply was not used in these debates, and the idea was not advocated. Although this is not the place to recite the full history of the First Amendment's religion clauses, one basic observation is inescapable: In light of the failure of dissenters to seek a separation of church and state and the failure of the framers to mention separation, the historical claims that the amendment adopted this principle are, at best, improbable.

In fact, American dissenters made demands for religious liberty very different from separation. Although the evangelical dissenters who dominated the campaign against state establishments relied upon numerous arguments and principles, they tended to demand constitutional protections of two types: First, they sought equal rights, without respect to religious differences. Second, and much more broadly, some of them insisted that the laws should take no cognizance of religion.

It was in the context of these anti-establishment demands that Congress adopted the words of the First Amendment. In particular, the establishment clause was an ameliorated version of the second kind of demand. Whereas the first type, which merely required equality among religions, did not accomplish enough, the second, which precluded all laws concerning religion, came to seem too severe. It would have made the First Amendment an ob-

stacle to laws that protected religious liberty or that otherwise concerned religion without establishing it—for example, church property laws and legislative exemptions. Accordingly, the First Amendment was drafted to prohibit laws respecting not religion, but an establishment of religion. In other words, it was written to permit laws concerning religion as long as they did not concern an establishment of it. This was a far cry from separation of church and state.

Lack of support for separatism

It is no coincidence that American dissenters demanded a religious liberty very different from separation of church and state, for they did not want separation. Their distaste for separation may come as a surprise, but it is important to recall, because it explains why separatism is without historical authority.

Many American dissenters in the late eighteenth century would have been familiar with the idea of separation between church and state, but they knew it as an establishment accusation rather than an anti-establishment demand. It was a notion that establishment ministers had long used to mischaracterize the claims of religious dissenters. In particular, during an era in which morals were widely understood to depend upon religion, the suggestion that dissenters sought to separate either church from state or religion from government implied they hoped to separate government from the foundations of morality. As it happens, dissenters did not demand a separation of church and state. Yet establishment ministers found it advantageous to hint that dissenters sought this because it made the dissenters' demands for religious liberty seem disreputable.

Already in the late sixteenth century, Richard Hooker attributed separation to dissenters. In his voluminous *Of the Laws of Ecclesiastical Polity*, this learned Anglican apologist had suggested that the arguments of English dissenters against the government-appointed Anglican prelacy did not make sense, "unless they against us should hold that the *Church* and the *Commonwealth* are two both distinct and separate societies, of which two the one

comprehendeth always persons not belonging to the other." In Hooker's view, dissenters seemed to be arguing from the principle that walls existed between church and commonwealth, and that "the walles of separation between these two must for ever be upheld." Dissenters had not actually demanded "walles of separation" between church and commonwealth, as Hooker practically admitted. But he surely was pleased to believe that dissenters built their arguments on this foundation, for then he could easily demolish it.

Almost no dissenters, whether in sixteenth-century England or eighteenth-century America, took such a position. On the contrary, like establishment ministers, they tended to assume that some connections between church and state were unavoidable and even valuable. They typically opposed any civil establishment of religion, and they therefore rejected some of the institutional connections between church and state. But they had no desire to prevent all connections. In particular, they tended to share with establishment ministers a hope for a civil society in which religious societies were supportive of civil law and in which civil law protected the rights of religious societies. For example, most dissenters assumed that they assisted government by encouraging morality, by praying for government, and by upholding the sanctity of oaths. By the same token, they needed government to provide legal protection for their church property, to give legal effect to marriages conducted by their clergy, and to protect the freedom of their preachers in expounding faith and morality to the people, including with respect to politics. Dissenters also expected government to protect the religion of the people in more active ways, such as by passing laws prohibiting Sunday labor or even requiring observance of the Sabbath. American dissenters therefore had every reason to share with establishment ministers the sense that a separation of church and state was disreputable.

It should thus come as no surprise that the dissenters did not demand "separation of church and state," and that this phrase does not appear in the Constitution. Nor is it plausible that (as is sometimes suggested as a fallback

position) separation is an understated but underlying principle of the First Amendment. Separation was simply not what religious dissenters or their advocates wanted.

Nativist prejudice

How, then, did separation come to be considered a constitutional principle? The phrase "separation of church and state" became popular as part of American constitutional law largely through the effect of fear and animosity that can justly be considered prejudice. Though often praised as the desire of eighteenth-century minorities, separation has, in fact, a later and very different genealogy. It entered American constitutional law through the importunate demands of various nineteenth- and twentieth-century majorities, which embraced separation in response to their anxieties about ecclesiastical authority, especially that which they associated with the Catholic church.

Of course, just because separation was used by prejudiced groups in the past does not mean its current supporters—or even all of its past advocates—have been prejudiced. Nonetheless, the early history of separation is revealing and should not be minimized. Some advocates of separation may attempt to discount the bigotry or downplay the importance of the more prejudiced supporters of separation in establishing this idea in American constitutional law. Yet while the good faith of the current advocates of separation should not be questioned, the obvious prejudice of many of their predecessors begs attention. In particular, this prejudice needs to be recognized and examined for what it reveals about separation.

The phrase "separation between church and state" first entered popular American political debates during the election of 1800 and its aftermath. As previously noted, the phrase is ordinarily attributed to Jefferson, but he was following a path already laid out by his fellow Republicans. Federalist clergymen had preached that Jefferson was an infidel and therefore unworthy to be president, and Republican propagandists responded by arguing that clergymen should keep religion and politics separate. Blending both anti-establishment and anticlerical sentiments, these

Republicans used a version of the idea of separation to condemn Federalist ministers for speaking about politics. Jefferson himself feared the New England Federalist clergy, their establishments, and above all, their claims of ecclesiastical authority. In 1802, after becoming president, he answered a letter from the Danbury Baptist Association by echoing the electioneering rhetoric: "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 Church & State." Although today venerated as a statement of religious liberty, Jefferson's letter was also a profoundly anticlerical, political condemnation of the New England clergy for exercising their First Amendment rights of speech and press. The implications of the phrase "separation of church and state" were not lost on Jefferson's contemporaries, and the words did not become popular outside of some Republican and, later, Jacksonian political circles.

In the 1840s, however, anti-Catholic Americans elevated separation to an American ideal, thereby beginning a century-long process by which popular prejudice would lead to the adoption of separation as a constitutional "right." In particular, many American Protestants who were proud of being native-born citizens formed nativist organizations and political parties that campaigned against Catholic immigration and Catholic influence in American politics. Nativists and other anti-Catholic Protestants objected to a wide range of connections between the state and the Catholic church. For example, they condemned Catholic preaching on politics, coordinated Catholic voting, the appointment of Catholic teachers and officeholders, and the use of public funds for Catholic schools (even if distributed to schools in general on the basis of entirely secular qualifications). Although these practices did not amount to an establishment of religion as traditionally understood, they seemed to violate the separation of church and state, which the nativists elevated as a republican and "American" constitutional ideal in opposition to the hierarchical and for-

eign practices of the Catholic church. Indeed, separation seemed the primary defense available to the United States in the coming conflict that many Protestants anticipated between Americanism and Catholicism, and to which they often attributed eschatological significance.

Of course, in far greater numbers than Catholics, Protestants also introduced religion into politics and government. They preached on politics, voted on religious grounds, and demanded that public school funds be used in support of their own religion. Unlike Catholics, who were a minority, Protestants were numerous enough to expect almost exclusive control over politics and education. In fact, Protestants exercised a profound dominance over public educational institutions.

Yet when nativists and other Protestants insisted upon separation of church and state, they had no sense of any inconsistency, for they were demanding separation of church from state rather than a separation of religion or Christianity from government. Catholicism was a church, and its beliefs seemed to be imposed on individuals by a deceptive and imperious hierarchy. In contrast, Christianity—especially Protestant Christianity—was understood to be a religion freely chosen by individuals, as evident from their diverse denominations. Accordingly, for many Protestants well into the twentieth century, there seemed a necessity of separating church and state, but there seemed no need to separate Christianity or religion from the state.

In addition to popularizing "separation of church and state," nativists cultivated the ugly tactic of wrapping discriminatory ideals in the American flag. Insisting that their point of view was the only "American" perspective, they condemned their opponents as un-American. In particular, they pressured their fellow Americans to acknowledge that separation of church and state was the nation's religious liberty. In this way, nativists created an oppressive culture of "Americanism," in which they demanded a heightened sense of identity with their vision of American ideals, including separation of church and state.

Prominent among the nativist advocates of separation was the Ku Klux Klan. This was the second Klan, founded

in 1915, which reached the peak of its influence during the first half of the 1920s. The myriad nativist organizations that advocated separation in opposition to the Catholic church went under names such as the American Protective Association, the Guardians of Liberty, the True Americans, and the League of Protestant Women. In the twentieth century, however, none was as popular and powerful as the Ku Klux Klan. The Klan appealed to anti-Catholic animosities with the attractively American ideal of separation, which it celebrated in its recruiting materials, its pamphlets, its Oath of Allegiance, and its Creed. The Klan was only one of many nativist groups that inculcated separation, but more than any other in the twentieth century, it seared the principle of separation into the minds of Americans.

Liberal fears and animosities

Separation appealed not only to nativists and others with nativist sympathies but also, more generally, to all who adopted a theologically liberal posture in opposition to the Catholic church.

In attacking Catholicism, many nativists drew upon theologically liberal ideals, according to which, perhaps more than legal constraints, mental influence threatened religious liberty. With such ideals as freedom from mental oppression, nativists in both the nineteenth and twentieth centuries (including the men and women of the Klan) condemned the Catholic church for claiming an ecclesiastical authority that seemed to threaten the intellectual independence of individuals. Against this church authority, which seemed to make Catholic voters and elected officials mere tools of the church and thus a threat to republican government, nativists demanded a separation of church and state.

These nativists were soon joined by many other Protestants. Although Protestants were themselves much divided over theological liberalism, they found unity in adopting a theologically liberal stance against Catholicism. From this perspective, many Protestants welcomed and adopted nativist demands for a separation of church and state.

Some Protestants—some of those who were theologi-

cally liberal—expanded the notion of separation. They took this perspective further than most nativists and other Protestants in fearing not only the Catholic church but also orthodox Protestant denominations. On this basis, these liberals eventually developed a much broader understanding of separation—a separation from government of any church and, indeed, any distinct religion.

Prominent among the theological liberals who developed this broader version of separation were those who distinguished themselves as anti-Christian secularists. These individuals included both theists and atheists, not to mention assorted Spiritualists and other heterodox thinkers. Beginning in the 1870s, many of them called themselves "Liberals" to emphasize that they acted on theologically liberal ideals—albeit they applied such ideas more expansively than the Protestant "liberals" who remained within Christianity.

Forming themselves into the National Liberal League, the Liberals devoted themselves to a separation of church and state that was systematically anti-ecclesiastical rather than merely anti-Catholic. They aimed in particular to rid American government—both state and federal—of all traces of Christianity. Although their bitter anti-Christian sentiments and their defense of persons prosecuted under the Comstock Laws deprived them of any chance of political success, their vision of a thoroughly anti-ecclesiastical separation of church and state—a thorough separation of any distinct religion from government—was profoundly influential. In particular, later atheist organizations adopted this secularist heritage and carried it forward into the twentieth century, and some small but vocal religious minorities—such as Jews and Seventh Day Adventists—and growing numbers of Protestants and political liberals gradually adopted its anti-ecclesiastical vision of separation.

By the first half of the twentieth century, a broad array of Protestants and non-Protestants assumed separation was the true "American" religious liberty. Many were merely anti-Catholic; others were more broadly suspicious of all organized Christianity. The advocates of separation included Protestants, Jews, atheists, nativists, those who de-

spised nativism, and all sorts of theological and political liberals. What united them was the particular fear of Catholicism or, at least more generally, a theologically liberal distrust of ecclesiastical authority. The very diversity of Americans supporting separation seemed to confirm that it was a shared American ideal.

In this atmosphere, judges increasingly opined that separation was the religious liberty protected by federal and state constitutions. Americans had repeatedly been told that separation was the American religious liberty, and that it was un-American to think otherwise. Even many Americans who were not themselves nativists or theologically liberal therefore took these nativist-derived assumptions for granted.

Judges were not immune to such expectations about separation, which reached through much of American society and all the way up to the Supreme Court. Amid this culture of "Americanism," the Supreme Court in 1947 held that the First Amendment's establishment clause guaranteed the separation of church and state. For several decades thereafter, the Court interpreted the First Amendment in terms of "separation of church and state." It soon acknowledged the unrealistic character of the metaphor but nonetheless attempted to apply it. In 1971, in *Lemon v. Kurtzman*, the justices tried to make separation of church and state practicable by adopting a series of more specific tests that they derived from separation. In the 1980s and 1990s, however, the justices gradually backed away from separation's implications. Although the Court did not expressly repudiate its earlier endorsement of separation, it gradually retreated from this ideal, leaving Americans in considerable confusion as to what the establishment clause requires.

Discrimination

Some caution is advisable before reaching any conclusion about the discriminatory character of a doctrine adopted by the U.S. Supreme Court. With respect to separation, however, such a conclusion seems inescapable. In particular, the notion of separation between church and state

appears to discriminate against churches—that is, against religious groups and other distinct religions.

Even without an examination of the history, it is possible to discern in "separation of church and state" substantial reason to worry that this phrase lends itself to discrimination. This may seem odd to Americans who identify their religious freedom with separation, and their positive feelings about separation are not obviously unreasonable in light of the long history of celebrating separation as an American ideal. Nonetheless, the potential for penalty and discrimination is evident from the very words "separation of church and state."

Unlike the establishment clause, the phrase about separation places burdens directly on religion. The First Amendment forbids Congress from making certain laws, such as those respecting an establishment of religion or prohibiting the free exercise of religion. In contrast, separation focuses not only on the state but also the church, thus shifting the burden of the First Amendment directly to constrain religion as well as government.

Fortunately, the Supreme Court has not enforced separation in this way. Nonetheless, popular conceptions of separation as a constitutional principle—conceptions the Supreme Court has legitimized—have had a profoundly chilling effect upon churches. Wary about being condemned for violating this supposedly constitutional principle, they have hesitated to bring their religion to bear on politics, and in this way, separation has discouraged them in their freedom of speech and press and in their exercise of their right to petition and persuade government.

The phrase "separation of church and state" even discriminates among different types of religion. In particular, the word "church" tends to distinguish religious groups from religious individuals and distinct religions from an individual religiosity. During the last half of the twentieth century, separation has often seemed to extend to a separation of all religion from government. Yet even when conceived of in this very expansive manner, separation has typically been understood as a separation of distinct religions from government, thus permitting political leaders and public schools to

indulge in a diffuse individual spirituality as long as they avoid any distinct type of religion. Separation in this way privileges individuals and individual religiosity and discriminates with different degrees of intensity against a continuum of religious groups (ranging from such religions as are merely distinct to such institutional churches as emphasize conformity to their creeds and hierarchies). Put simply, separation transforms the establishment clause into a means of favoring Americans who are satisfied with a homogenized individual spirituality while penalizing Americans to the degree they maintain the distinctiveness of their religions.

This discrimination may make sense as a matter of legislative policy if one feels little concern about a generalized spirituality but fears religions and their organizations. For example, one might fear that religious groups, their creeds, and their hierarchical structures of authority pose a threat to free, democratic government. One might also fear that they encourage conformity and thus stifle the intellectual freedom necessary for uncompromised individual belief. More generally, the discrimination may also make sense if one fears religious challenges to modernity, especially to modern beliefs in the progressive character of truth—challenges that might be expected to come from traditional, organized religious groups. The discrimination particularly makes sense if one distrusts Catholicism, which has long been the model from which Europeans and Americans have generalized their fears of religious groups, their conceptions of individualism, and their aspirations for progress and modernity.

Yet these fears provide a poor foundation for constitutional analysis. The First Amendment in various ways limits government discrimination on the basis of religion, whether in imposing penalties or granting privileges. Although the amendment does not bar all distinctions based on religion, nothing in the amendment justifies interpreting it in terms of a principle that requires government to discriminate on the basis of religion. By requiring discrimination on the basis of religion—indeed, on the basis of religious differences—separation transforms the First Amendment into a threat to religious liberty.

Ending separationism

The legal implications are sobering. At the very least, what has been observed here about the character and history of separation shifts the burden of persuasion. Over the past century and a half, separation has become an object of reverence, and it has thus enjoyed a presumption of constitutional and moral authority. The evidence, however, shows that separation lacks authority in the U.S. Constitution, that it discriminates among religions, and that it thereby perpetuates the effect of prejudice. Separation therefore seems suspect. Far from there being a presumption in favor of separation, there should now be a presumption against it. The proponents of separation should bear the burden of showing why it deserves any respect, let alone why it should be enforced as if the Constitution required it.

If advocates of separation cannot meet this burden, then it is necessary to reach stronger conclusions. Most concretely, after so many decades in which the principle of separation has distorted the Supreme Court's interpretation of the First Amendment, the Court should repudiate separation. In rejecting separation, the Court should also repudiate all types of separationism—particularly the doctrines that restate and thus preserve aspects of separation. The aptly-named *Lemon* test—which rephrases separation in terms of purpose, effect, and entanglement—has already been squeezed dry, and the Court should now expressly and completely discard it. The Court should also repudiate any pursuit of separation in terms of "substantive neutrality" and government's role as "neutral." Although suggestive of nondiscrimination, these ideas perpetuate separation's discrimination against churches or distinct religions by depriving them and their adherents of ordinary rights and relations to government that do not constitute an establishment.

The justices' rejection of separation matters not merely in the courts but also outside their doors. In 1947, the Supreme Court adopted "separation of church and state" as a constitutional ideal, and because the justices lent their authority and that of the Constitution to it, many Americans outside the Court have been able to use the principle all the more effectively to condemn and dis-

credit persons who, in reality, are merely exercising their First Amendment freedoms. For example, the notion of separation as a constitutional right is regularly used to decry politicians who speak about their religion and to denounce religious leaders who participate in politics. In this way, even though separation has decreasing support on the bench, it continues to be an instrument of opprobrium and cultural delegitimation. Of course, most politicians and religious leaders will have reasons to adopt their own, informal versions of separation, but too often they never reach this complex prudential decision because they are led to believe that they are violating a constitutional principle. For the profoundly chilling effect of separation outside the courts, the Supreme Court bears some responsibility, and having given its authority to separation, the Court should now confess its error.

Incidentally, the experience of Americans with the phrase "separation of church and state" suggests one of the risks of what is often celebrated as a "living constitution." In hinting that the only other choice is a dead constitution, the notion of a living constitution denies the possibility of a valuable alternative and thus diverts attention away from its own limitations. As illustrated by separation, it is doubtful whether a constitution can adequately protect the liberty of minorities while judges feel free to understand rights in terms of evolving majority ideals. Claiming to speak for the majority of Americans and for the ideals of Americanism, the advocates of separation created a culture in which religious freedom was understood in terms of separation. Like so much of the country, the justices of the Supreme Court perceived separation as a liberal, American ideal enshrined in the First Amendment, and on these assumptions, they imposed it as a matter of constitutional law. The justices thereby rendered the First Amendment responsive to shifting majority or "American" conceptions of freedom (or at least elite conceptions of these), and in this high-minded way, they gave prejudice the force of law and introduced perils of a sort American constitutions were designed to resist.

Although this is not the place to parse the First Amend-

ment, one might note that the Constitution itself has something to say about religion. For the last half-century, the justices have repeatedly seen in the establishment clause various words and phrases that are not there. Rather than hasten to apply these other words in place of the Constitution's, thus inviting the dangers of separation and other ideals that threaten the Constitution's religious liberty, the justices could do worse than to linger, at least briefly, on the First Amendment. It begins: "Congress shall make no law respecting an establishment of religion." These words were not accidental, and they provide a more secure foundation for freedom than the meretricious catchwords and slogans that so often preoccupy the justices of the Supreme Court.