THE BOISI CENTER PAPERS ON RELIGION IN THE UNITED STATES

Separation of Church and State

Religious belief and practice remain vibrant in the United States despite—or more likely, because of—the separation of church and state. This paper provides an account of the history and current controversies over religious disestablishment. It explains how the constitutional structure of the American government affects religious freedom; and in surveying some of the most important Supreme Court cases dealing with religion, it provides an overview of the status of religious freedom in the United States.

INTRODUCTION

Religious belief among Americans today is as vigorous, dynamic and widespread as it ever has been. Immigration constantly brings new and different religious traditions and practices to the United States, even as the Christian traditions to which most Americans adhere continue to adapt to the needs of an ever-changing population. Approximately ninety percent of Americans profess a belief in God, and religion remains a pervasive influence on American culture, politics and public policy.

Yet the United States is among the few nations in the world that eschew an established state religion—indeed it was the first to do so, in 1791. As a result, the government is prohibited from supporting or endorsing any religion, or promoting one at the expense of another. Among other things, this means it cannot appoint religious leaders, compel worship or prayer, provide official interpretations of sacred scriptures, or define creedal statements of faith. Although this arrangement is widely known in the United States as the "separation of church and state," owing to the predominance of Christian churches, it also applies to mosques, synagogues, and indeed all religious institutions of any sort. Scholars often use the term "disestablishment" to specify the legal aspect of the concept, but by whatever name it is a core principle and defining feature of American political life.

Although many Americans find these facts unremarkable because they are so familiar, foreign observers—especially those from nations with official religions—often ask keen questions about the American form of church-state separation: If most Americans are Christians, why would they not support the establi
inculcate that belief in students and other citizens

as a matter of public policy? And how is it possible that religious belief has flourished without the protection and support of the state? This paper will address these and other questions through a focus on the legal issues involved in religious disestablishment specifically, and religious freedom in general. For a more thorough examination of institutional religious pluralism in the United States, and of the diversity of religious practices in this country, please see the accompanying Boisi Center Papers on these topics.

This paper is divided into two major sections. The first examines the religious, philosophical and political origins of disestablishment in this country, and explains the legal and constitutional provisions that codify the principle. Special care is taken to explain how the structure of the United States government—its federal system and separation of powers—plays an important role in matters of religious freedom. In the United States the judiciary holds the exclusive authority to interpret the Constitution (including its provisions for religious freedom) and to nullify any laws that violate that interpretation. Constitutional interpretations have changed over time (albeit slowly), and will continue to change as new members of the judiciary apply the law to new contexts. The second major section of this paper illustrates the complexity (and sometimes incoherence) of the American church-state arrangement through an historical overview of the most important judicial decisions in (di)3(4ar1t)2423.1(S1.4(

The Founding Moment

On July 4, 1776 representatives of thirteen British colonies in North America published the Declaration of Independence, an open letter to the world stating their reasons for breaking the American ties of allegiance to King George V. Its opening paragraphs, written primarily by Thomas Jefferson, contain the stirring language that has inspired oppressed peoples for more than two centuries:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration argued that human rights were given by God, but that they must be protected by a government whose powers are derived from the consent of the governed, not from royal lineage or divine sanction. In like fashion—with an appeal to the heavens but grounded in the authority of citizens themselves—the Declaration stated its conclusion:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States... And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Although they do not offer a detailed theory of church and state, much less codify it into law, these passages do imply a certain view of the relationship between religion and government. According to this view, God is to be acknowledged as the creator of humankind and source of

association; protections against self-incrimination and unlawful search and seizure; guarantees of

church and state were both ordained by God, but to serve separate ends; they should thus remain distinct but still "close and compact" with one another. Based on this theological conception of church and state, the Puritans instituted a form of religious establishment that would maintain institutional separation while still allowing church and state to assist one another in their pursuits.

Notably, the Puritans enforced an institutional separation that was in many ways more strict than the one currently employed in the United States. They prohibited religious leaders from holding political office, censuring political officials or serving on juries, just as they forbade political officials from serving religious functions, holding religious office, or censuring religious leaders. Like it is today, marriage was regulated by civil, not religious, law. But the Puritans also allowed more interaction between church and state—they were more "accommodating," in current parlance—than present law would permit. Government officials collected special tithes and taxes to support the religious activities of Congregational churches; state funds were used to build and improve religious buildings; and churches served as the central meeting place and social service organization in the local community.

The Puritan model of close and compact relations between the church and state—or more precisely, churches and state, since by the time of the Revolution, Massachusetts and Connecticut allowed residents to specify which Protestant church their taxes would support—provided an example of the establishment of a specific religious denomination. Civic republicans, however, argued for a more diffuse form of religious establishment, one that would recognize and encourage the nation's Christian heritage while tolerating religious diversity of even non-Christians.

Civic Republicanism

In broad terms, civic republicanism is a set of beliefs linking the practice of virtue with the presence of freedom and the common good of society. Republicanism has an ancient genealogy, beginning in the classical Greek city-states, and forking and branching through the Middle Ages, Renaissance, and Enlightenment, through to the present day. Civic republicans in the American founding period believed that free governments—meaning those based upon the consent of the governed rather than the divine or patriarchal right of a monarch—are quite vulnerable to corruption and cannot depend upon force or fear to make their citizens act in ways that benefit society. Rather, free governments require citizens who are otherwise inclined to act for the common good; virtue is the word used to describe this inclination, and religious belief is the most common and effective source of virtue. Therefore, from the civic republican perspective, religion was essential to the maintenance of a free country.

This theme was often stated by two of the most influential Founding Fathers, John Adams and George Washington. John Adams drafted the Massachusetts state constitution that allowed multiple religious establishments and served as a diplomat to France and England in the early years of American independence before becoming its second president. Washington commanded the American armies that won the Revolutionary War, chaired the Continental Congress that wrote the Declaration of Independence, and later served as the nation's first president. His most famous

speech, delivered just before he left office in 1796, put the matter succinctly: “Of all the dispositions and habits which lead to political prosperity,” he said, “religion and morality are indispensable supports.” He couched his message as warning: “Let us with caution indulge the supposition that morality can be maintained without religion. . . . Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.” Washington, like many other

garner support for establishing its church. Evangelicals such as Roger Williams, who championed the separation of church and state as the founder of Rhode Island, had been present in the earliest years of the American colonies. But it was not until the Great Awakening—a series of large religious revivals held in the colonies from roughly 1720 to 1780—that evangelicals came into cultural and political prominence. By the middle of the nineteenth century, evangelicals would dominate American religious and cultural life; had they held commensurate political influence during the founding period, they might have been tempted to seek the establishment of some form of evangelical Christianity. This possibility is quite remote, however, given how deeply rooted the theological commitment to separation of church and state had already become.

Liberal Enlightenment Philosophy

futility of coercing human opinion, and that the protection of conscience was essential for maintaining civil peace. A prominent and powerful supporter of religious disestablishment, both in the federal government and in his home state of Virginia, Jefferson supported church-state separation primarily out of a concern for protecting the individual's right of conscience. For him, "building a wall of separation between Church and State" was to be undertaken on "behalf of the rights of conscience." Jefferson considered religion to be a private matter, outside the realm of government authority.

The writings of Jefferson's fellow Virginian James Madison also show the influence of Enlightenment thought. His *Memorial and Remonstrance against Religious Assessments*, written in 1785, famously defended separation of church and state. Madison began by describing the right of conscience in words that resonate with Locke:

seek to give the broadest protection possible to the free exercise of religion are keen to ensure that the government not *disfavor* (discriminate against) religious believers of any sort; they often encourage the state to specially accommodate religious believers whenever possible. This "accommodationist" position is rejected by those who are especially adamant that the government not *favor* one or more religions, meaning they support an expansive interpretation of the Establishment Clause. Sometimes these opponents of accommodationism argue that the state must be neutral in its posture toward religion, favoring neither religion nor nonreligion as such, nor one religion over other religions; this position is known as "neutrality" in this context. Other opponents of accommodationism, however, are known as "separationists" because they seek to separate religion from the state as much as possible, even if this means favoring nonreligion over religion.

It has been widely noted that the Supreme Court's interpretation of the Establishment Clause has shifted dramatically in the last half-century from a strict separationist position in the 1960s and 1970s to an accommodationist stance in the last two decades; free exercise jurisprudence has taken a more complex and meandering path since the 1970s. The remainder of this major section is given to an extended discussion of these legal

For the next thirty years free exercise cases often focused upon subtle definitions of what constituted a "substantial burden" on a person's religious practice, or what makes a state's interest "compelling" enough to warrant universal application. In 1972 (in *Wisconsin v. Yoder*), for example, the Court ruled that the Old Order Amish—a Christian denomination that seeks to separate itself from mainstream culture out of a religious desire to live simply and peaceably—in Wisconsin be granted a partial exemption from compulsory schooling laws that required attendance to the age of 16. Amish parents in these communities generally removed their children from public school at age 13 out of a belief that further education was unnecessary for the Amish way of life and would expose children to worldly temptations. Despite the state's argument that universal education is essential to the maintenance of a democracy, the Court ruled that the extra three years of education constituted a substantial burden on the Amish's religious way of life, and that, conversely, the state did not have a compelling interest to require those extra three years in the face of the burdens it imposed upon the Amish.

Interestingly, a lower court ruling on a related educational issue in 1987 took an opposite approach. In the state of Tennessee a family of Christian fundamentalists objected to the books their children used in the local public school, claiming that they inculcated false notions of gender equality, religious toleration and other principles contrary to their beliefs. They asked the school to allow their childrenC.4(i)-162(l)-32.9(o)2 c20 Tat 5

As a result of the *Smith* case, religious minorities lost an important protection against abuse by the majority; they would henceforth need to seek redress in the legislatures, where by definition they lack the obvious support of the majority of

be granted conscientious objector status in any war.

The principle of neutrality that the Court outlined in 1990 remains the controlling precedent for free exercise cases today. This approach requires

can the government pay for religious education?) to the religious activities in which students engage (e.g., prayer, Bible study groups, evangelizing) to the curriculum students are taught (e.g., can creationism or intelligent design theories be taught in science classes?).

On numerous occasions in the last hundred years, the Supreme Court has considered the government's proper relation to religious

working in their official capacity, and the Establishment Clause prohibits the state from

courthouses—public places of high visibility and unfettered access. In the 1980s a number of these public holiday displays were challenged in the courts as unconstitutional establishments of religion; three such cases were argued before the U.S. Supreme Court, which rendered landmark decisions that continue to serve as the final word on these issues. The common thread in each case was a close scrutiny of the context in which the display was placed and a concern for whether the particular arrangement would leave a "reasonable observer" to believe that the government was endorsing a particular religion. In these instances, a nativity scene depicting Jesus Christ's birth was allowed when symbols of the secular celebration of Christmas (e.g. Santa Claus' mythical reindeer) were also included in the display, but disallowed when it stood alone in a courthouse stairwell; and a Jewish menorah was allowed when it was displayed alongside a Christmas tree and a sign promoting liberty.

The second controversial kind of religious displays are those objects or symbols (e.g. a cross) erected by private citizens or groups in public places known as public forums. In the broadest sense, "public property" means the interior or exterior of any property owned by federal, state or local governments; this includes public schools, city halls, courthouses, and capitol buildings, as well as parks, streets, sidewalks, town squares, plazas, and other public spaces. But the Supreme Court has recognized some of these places—those that have been devoted, by long tradition or government fiat, to public assembly and debate—as "public forums" where the state's right to limit expressive activity is sharply circumscribed. When a place is considered a public forum, the courts are less likely to consider a religious display on the site to be an establishment or endorsement of religion. Such was the case when the white supremacist organization known as the Ku Klux Klan (KKK) sought to construct an unattended cross on the plaza around the Ohio state house in Columbus, knownt t TD;14.s fnu(kn)23.3((n)-22.8(ow)14.8(

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