

# RELIGION

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## The American Tradition in Church and State: Its Meaning and Significance in Historical Perspective

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Much attention is being given this year, and rightly so, to the Bicentennial of the Constitution of the United States. Two hundred years ago, fifty-five delegates from twelve of the thirteen original states (Rhode Island abstained from participating) met in Philadelphia, 25 May-17 September 1787, and drafted a document that would become the Constitution of the United States. In a real sense, the Constitutional Convention of 1787 represented the founding of the nation and the establishment of its republican form of government. Ratification of the Constitution by the required three-fourths of the states came within nine months, with all states finally ratifying the Constitution by May 1790. The foundation of the constitution is to be found in the Bill of Rights, the cornerstone of which is the First Amendment. And the heart of the First Amendment has to do with church and state.

The American tradition in church and state, the non-establishment of religion and the free exercise of religion, represented on behalf of the founding fathers a bold experiment unparalleled in human history. The fact is that not until the twentieth century were these American guarantees of the First Amendment constitutionally and unequivocally enunciated anywhere else in the world. The uniqueness of the American tradition in church and state is of profound importance in understanding both the nation's political and religious history.

Religious liberty, which significantly is the cornerstone of the First Amendment in America's Bill of Rights, was fundamental in the development of American civilization. For Americans the principle of complete religious liberty, to quote from a famous case before the New York Supreme Court, "has always been regarded by the American people as the very heart of its national life."<sup>1</sup> More than three-quarters of a century ago, David Dudley Field, one of America's greatest jurists of the nineteenth century, declared that the separation of church and state in America was the "greatest achievement ever made in the cause of human progress." "If we had nothing else to boast of," Field wrote, "we could lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private concern, into which other men have no right to intrude."<sup>2</sup> Indeed, the American tradition in church and state is, as Leo Pfeffer has expressed it, "America's contribution to civilization."<sup>3</sup> Or as Peter Drucker has written, "The relationship between religion, the state, and society, is perhaps the most

fundamental—certainly it is the most distinctive—feature of American political as well as American religious life."<sup>4</sup>

### I. RELIGIOUS PLURALISM IN COLONIAL AMERICA

From the beginning, religious diversity characterized the colonies. French and Spanish explorations brought the Roman Catholic faith to the New World in the sixteenth century. In the seventeenth century, English colonists were planted in the New World. Unlike the French and Spanish, English colonial authorities did not impose a pattern of religious uniformity in any of the colonies other than in Virginia. A deliberate policy of toleration on the part of the British authorities inevitably encouraged religious diversity throughout the English colonies, since it offered to religious dissenters of England and the continent a greater measure of freedom in the New World than they had known in their homelands.

Although the policy of toleration by the British authorities was by no means always reflected in the actions of the colonists themselves, as in the case of those in Massachusetts Bay, it did contribute enormously to the religious diversity of the colonies. Commercial interests required that the widest appeal possible be made to English as well as to non-English colonists if the economic advantages of colonization were to be completely realized. These economic interests are evident in the grants that were made to Lord Baltimore and William Penn, but nowhere is this motivation as a contributing factor to religious pluralism perhaps more evident than in an communication from the Lord of Trade in London to the Council of Virginia: "A free exercise of religion . . . is essential to enriching and improving a trading nation; it should be ever held sacred in His Majesty's colonies. We must, therefore, recommend it to your care that nothing be done which can in the least affect that great point."<sup>5</sup>

Although religious diversity was not something sought by the settlers in the New World, the absence of religious uniformity characterized colonial America from the beginning. During the seventeenth century, colonists included members of the national churches of England, Scotland, Germany, Holland, and Sweden. New religious movements, such as the Puritans in Massachusetts, the Baptists in Rhode Island, and the Quakers in Pennsylvania contributed significantly to the religious diversity of colonial America. Beyond the mere fact of multiplicity of religious groups was the prominent presence among the colonists of religious dissenters and schismatics from the religious establishments of Europe. As Edwin Scott Gaustad has written, "Schismatics came from Switzerland and France, from Austria and Germany, from Britain and the Netherlands, Huguenots fled to Saint Augustine and to Charleston, Moravians to North Carolina and Pennsylvania, Mennonites and Quakers to the Middle Colonies, Lutherans to Savannah, and

Pilgrims to Plymouth. Schism was, quite early, an American way of life."<sup>6</sup>

By and large, religious immigrants to the New World belonged mainly to religious groups or shared religious beliefs that were discriminated against in the Old World: Puritans, Baptists, Calvinists, Irish Catholics, Mennonites, Jews, Dunkers, Moravians, Pietists (Puritanic Lutherans), and Scotch-Irish Presbyterians. One description of religious pluralism in the colonies at the end of the seventeenth century is as follows: "A traveler in 1700 making his way from Boston to the Carolinas would encounter Congregationalists of varying intensity, Baptists of several varieties, Presbyterians, Quakers, and several other forms of Puritan radicalism; Dutch, German, and French Reformed; Swedish, Finnish, and German Lutherans; Mennonites and radical pietists, Anglicans, Roman Catholics; here and there a Jewish congregation, a few Rosicrucians; and, of course, a vast number of the unchurched—some of them powerfully alienated from any form of institutional religion."<sup>7</sup>

Within the colonies, religious pluralism was rampant. In Rhode Island, where religious liberty was first made a part of organic law, it was said that "hardly any two Rhode Islanders shared the same beliefs."<sup>8</sup> By 1644, the governor of New Amsterdam reported that eighteen different languages could be heard on the island of Manhattan and the surrounding area. The religious diversity of New York was vividly described in a 1687 report by Governor Dongan: "New York has first a chaplain . . . of the Church of England; secondly, a Dutch Calvinist; thirdly, a French Calvinist; fourthly, a Dutch Lutheran. Here be not many of the Church of England; few Roman Catholics; abundance of Quaker preachers, men, and women especially; Singing Quakers; Ranting Quakers; Sabbatarians; Anti-Sabbatarians; some Ana-baptists; some Jews; in short, all sorts of opinion there are some, and the most part none at all."<sup>9</sup> By the eighteenth century, Pennsylvania was not only a denominational stronghold for Quakers, but also for Presbyterians, Episcopalians, Baptists, the German Reformed Church, and the Lutherans.

The colonists came from many lands and differing cultural and religious backgrounds. An analysis of the census of 1790 indicates that the population at that time was composed of national stocks with English barely 60 percent of the population, with the remainder of the colonists divided as follows: German 8.6 percent, Scotch 8.1 percent, "Ulster Irish"—5.9 percent, "Free State Irish"—3.6 percent, Dutch—3.1 percent, French—2.3 percent, Spanish—.8 percent, Swedish—.7 percent, and unassigned—6.8 percent. **Not only did religious pluralism prevail throughout the colonies, but the vast majority of the population in each of the colonies was unchurched, described as "the largest proportion of unchurched in Christendom."**<sup>10</sup> Only 5.5 percent of the population were members of churches or synagogues. Understandably, there was no pattern of uniformity among the colonies regarding a religious establishment. While some form of religious establishment in the New World largely followed the pattern of the Old, at least in nine of the thirteen colonies, four of the colonies—Rhode Island, Pennsylvania, New Jersey, and Delaware—did not have established churches and provided no public support for ministers. Perhaps even more significant is the fact that no single church was established in more than five of the thirteen colonies. In Massachusetts, Connecticut, and New Hampshire, the Congregational Church was established by law; while in Maryland, Virginia, North Carolina, South Carolina, Georgia, and New York City and three neighboring counties, the Anglican Church was established.

## II. CHURCH-STATE RELATIONS IN COLONIAL AMERICA

Admittedly, the religious pluralism of colonial America was not without open religious conflicts and oft-repeated acts of intolerance and obvious discrimination toward religious dissenters. Although some of the persecutions of colonial America are generally well known, including the banishments from Massachusetts of Roger Williams and Anne Hutchinson, all too often these more well-known acts are not seen as reflecting a widespread practice in colonial America, by both the political and religious establishment,

namely the denial of the right of religious dissent. While the right of religious dissent would later become an essential and pervasive trait of the American character, colonial America was both pro-establishment and anti-dissent, pro-Protestant and anti-Catholic and anti-Jewish.

For the Puritans of New England, separation of church and state was inconceivable, since as theocrats they expressly sought "to make the Lord God our governor."<sup>11</sup> In Massachusetts, laws were enacted to ensure religious conformity, since toleration of religious dissent could only lead to anarchy. Jesuits were prohibited from entering the colony and should they do so it would be only at the risk of their lives. When John Clarke, Obadiah Holmes, and other Baptists insisted on holding a religious service in Lynn, Massachusetts, they were arrested and fined. For some years, efforts persisted in Massachusetts to remove the Baptists, but they proved to be unsuccessful.

**With the founding of Rhode Island as "the first secular state of modern times,"<sup>12</sup> its very existence was challenged by Massachusetts and its inhabitants were regarded as "scum."<sup>13</sup>** Upon the arrival of the Quakers in New England in 1656, they were met with imprisonment, whippings, and expulsion. Anti-Quaker legislation was passed by the United Colonies of New Haven, Connecticut, Massachusetts, and Plymouth.<sup>14</sup> Four Quakers were hung in Massachusetts upon their return after being expelled. In New England, Quakers were forbidden to hold their own services and fined for missing Sunday worship of the religious establishment.

Elsewhere in the colonies, conditions were not appreciably different. In Virginia, from the time of the first General Assembly in 1619, establishment of the Anglican Church was officially promulgated. All ministers were to be appointed by the governor and all religious activity was to conform to that of the Church of England. Preaching in unlicensed houses and without Episcopal ordination was a crime. Only Episcopal clergy could conduct marriages. Numerous Baptist preachers were jailed in Virginia for committing such crimes.<sup>15</sup>

In Maryland, the Assembly enacted in 1649 the celebrated Act Concerning Religion, which provided, on the one hand, for the "free exercise" of religion to both Catholics and Protestants, but, on the other hand, imposed strict penalties, possibly death, to those who "exceeded the limits of Christian orthodoxy" and "decreed death and confiscation of goods for any who blasphemed the Trinity or denied it."<sup>16</sup> By the beginning of the eighteenth century, however, the Church of England was officially established in Maryland, maintained by a tax imposed on all the inhabitants. Catholics were subsequently disfranchised, excluded from public office, prohibited from acting as attorneys, denied the right of Catholic worship except in private homes, and restricted from making converts except from among persons or children of Catholic parents.

In North Carolina, establishment of the Anglican Church, although its members constituted only a small minority of the state's religious adherents, was maintained both by law and social pressure. As one North Carolina planter expressed it, while there are many roads to heaven, "no gentleman would choose any but the Episcopal."<sup>17</sup> Finally, in 1696 a law guaranteed "all Christians," except Catholics, "full liberty of conscience."<sup>18</sup> As elsewhere, Quakers were excluded from the political life, although they constituted a significant following among the population. Similarly, in South Carolina, the Anglican Church was officially established with a tax-supported clergy and allocation was regularly made to the Church out of the public treasury. Here, also, the colony made it known that Catholics were not welcome.

In a recent study, *The first Freedoms: Church and State in America to the Passage of the First Amendment*, as Thomas J. Curry observed, "In every American colony . . . specific test laws . . . ensured the exclusion of Catholics from public life."<sup>19</sup> Jews, also, were discriminated against in all the colonies, even in Rhode Island, where they and the Catholics were denied the right to vote and to hold public office. "Every colonial government demanded religious tests for office, and many of them levied religious taxes."<sup>20</sup>

In many of the colonies, even established churches from Europe

faced persecution and legal acts of discrimination against them. Puritans in New England banished and persecuted Anglicans, Baptists, and Quakers, among others, while Anglicans hounded the Puritans and the Baptists who came to Virginia. Jews were banished from Manhattan and Huguenots from Florida. As already indicated, Roman Catholics met resistance almost everywhere they settled, except, for a time, in Maryland where they constituted a majority. Catholics were not represented in Connecticut until the latter part of the 1820s. Acts of toleration were passed, but excepted "irregular ministers and exhorters," dissenters, and certain sectarians. In a landmark church-state case in 1947, the United States Supreme Court appropriately characterized religion in colonial America as follows:

**Practices of the old world were transplanted to and began to thrive in the soil of the new America.** The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which, whether believers or nonbelievers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain Protestant sects; men and women of varied faiths who happened to be a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.<sup>21</sup>

Although religious pluralism was not something desired by the American colonists, nor was this religious pluralism generally met by toleration in the colonies, the absence of religious uniformity contributed immeasurably to the guarantees of religious freedom in the founding of the American Republic. It was, in fact, this diversity or "multiplicity," as James Madison was later to express it, that was the best guarantee against the tyranny of a majority, whether that majority be characterized as secular or religious. For this reason, Madison wrote in *The Federalist*, the new country should secure civil and religious rights since both belong to the coin of freedom, guaranteeing "the multiplicity of interests" on the one side and "the multiplicity of sects" on the other.<sup>22</sup> In the absence of any uniform religious establishment and in the presence of religious liberty as a matter of organic law in the formation of the early Republic, religious diversity was assured.

The very motto on the seal of the United States, *E Pluribus Unum* ("from the many, one"), testifies not to bigness but to multiplicity. Selected in 1776 by Benjamin Franklin, John Adams, and Thomas Jefferson, this motto has become both a descriptive and a normative expression of America as a pluralistic society. This multiplicity of interests is a clue to understanding both the *character* of religion and the *freedom* of religion in American history. Perhaps in no area of American life has this multiplicity of interests been more manifest than in the area of religion.

### III. RELIGION AND THE STATE IN THE FOUNDING OF THE NEW REPUBLIC

At the time of the nation's founding, an establishment of religion was both practically and ideologically an impossibility if the ideal of *E Pluribus Unum* were to be realized. At the same time, religious freedom was eloquently championed by religious and political leaders alike. For both theological and political reasons, it was argued, religion should be free of the state and government should be denied the right of jurisdiction over religion, a view that came to be widely shared by the Founding Fathers. As Madison wrote, "The religion . . . of every man, must be left to the conviction and conscience of every man. . . . We maintain, therefore, that in matters of religion no man's right is [to be] abridged by the institution of civil society; and that religion is wholly exempt

from its cognizance."<sup>23</sup> or as one renowned minister, Isaac Backus, expressed it: "The free exercises of private judgment, and the unalienable rights of conscience, are of too high a rank and dignity to be submitted to the decrees of councils, or the imperfect laws of fallible legislators."<sup>24</sup>

**Diversity of religious opinion was now widely recognized not only as the natural and inevitable consequence of religious freedom, but also as beneficial to religion.** Thomas Jefferson wrote, "Difference of opinion is advantageous in religion. The several sects perform the office of a *ensor morum* over each other."<sup>25</sup> With the founding of the new Republic, America's religious pluralism was both undeniable and irrevocable and this provided considerable reassurance to the new nation's advocates of religious liberty.

Quite remarkably, during the Revolutionary era radical changes took place in church-state relations from the prevailing patterns of the colonial period. As a matter of fact, it has been noted that "every colony-turned-state altered the Church-State arrangements it had inherited from colonial times."<sup>26</sup>

With Independence there was a move on the part of religious dissenters to bring an end to religious establishment throughout the states and the privileges which it assumed. No better example of this sudden and sweeping change in church-state relations may be found than in the case of Virginia, which, with more than half of its population identified with dissenting bodies, dramatized the struggle for religious liberty and church-state separation throughout the states. Within a decade after the Declaration of Independence, Virginia passed, by an overwhelming majority, Thomas Jefferson's "Act for Establishing Religious Freedom." This act disestablished the Anglican Church, established the equality of all religions before the law, prohibited any religious tests for public office, denied government any jurisdiction over religious matters, and categorically rejected any right of assessment on the part of government for the support of any one religion or all religions.

While disestablishment did not take place in all the states until some decades later, **disestablishment and provisions for guarantees of the free exercise of religion clearly prevailed in a majority of the states by the time of the Constitutional Convention of 1787.** Establishment in New England, which was religiously far more homogeneous, except for Rhode Island, was not terminated until the early part of the nineteenth century—Connecticut in 1818, New Hampshire in 1819, and Massachusetts in 1833—and, even then, not without considerable struggle. As has been amply shown, the separation of church and state and the struggle for guarantees of religious liberty in America came primarily as a result of the concerted efforts of religious dissenters—Baptist, Deists, Methodists, Presbyterians, Quakers, and Unitarians, among others.<sup>27</sup> Delegates to the Constitutional Convention of 1787 were well aware of the persecution of dissenters and nonconformists earlier in the colonies and in England. With the vast majority of the population without any church affiliation, it was to be expected that the unchurched, too, could be counted on to favor a secular state without religious tests for office.

There was now growing recognition that **a person's religious opinions were not in any way to be related to the exercise of one's civil liberties.** As Jefferson stated it in "An Act for Establishing Religious Freedom" in Virginia, "All men shall be free to profess, and by argument to maintain, their opinion[s] in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil liberties."<sup>28</sup> This Virginia document became the primary source of other state statutes, the First Amendment, and the prevailing view of religion at the time of the nation's founding. As Leonard Levy noted in his recent study on religion and the Constitution, "The significance of the statute is not just that it broadened freedom of worship or of opinion in matters of religion, but that it separated church and state in the context of protecting religious liberty."<sup>29</sup> As a result of these developments, scarce consideration was even given to the subject of religion at the Constitutional Convention at Philadelphia from May to September in 1787.

When reviewing the constitutional provisions concerning the American tradition in church and state, there is a tendency to focus

almost exclusively on the religion clauses of the First Amendment. To do so, however, is to obscure the historical and substantive significance of Clause 3 of Article VI: "No religious test shall ever be required as a qualification to any office or public trust under the authority of the United States." The proposal was introduced by Charles C. Pinckney, a South Carolina delegate, who told the Convention that it was a "provision the world will expect from you in the establishment of a System founded on Republican Principles and in an age so liberal and enlightened as the present."<sup>30</sup> As a member of Congress under the Articles of Confederation, Pinckney had earlier bemoaned, "How many thousands of subjects of Great Britain at this moment labor under civil disabilities merely on account of their religious persuasions!"<sup>31</sup> The prohibition of any religious test for public office passed unanimously and "without much debate," as reported later by Luther Martin, a Maryland delegate to the Convention.<sup>32</sup>

The only reference to religion in the original Constitution, Article VI is written in the form of an unequivocal denial of any place to be given to religious considerations in determining qualifications for public office. The prohibition, of course, applied at this time only to federal office, not state or local. The adoption of this proposal, in effect, precluded the possibility of any church-state union or the establishment of a state church in the absence of any religious test for public office. The clause "went far," in the words of Anson Phelps Stokes, "in thwarting any state church."<sup>33</sup> While religious tests for public office may exist without any formal religious establishment, as witness several of the states during the early years of the American republic, the denial of any religious test for office would be inevitably and inexorably in conflict with an establishment of religion. As Supreme Court Justice Joseph Story (1812-1845) wrote in his *Commentaries on the Constitution of the United States*, "This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off for ever every pretence of any alliance between church and state in the national government."<sup>34</sup>

Although the ban on religious tests met with some opposition, primarily from certain religionists, it was widely applauded throughout the states. Oliver Ellsworth, a Connecticut delegate to the Constitutional Convention and later chief justice of the United State Supreme Court (1796-1800), declared that Article VI was not "unfavorable to religion," but was adopted to affirm religious liberty as a natural right, a view widely shared by the Founding Fathers. "The business of civil government," he wrote, "is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare. Civil government has no business to meddle with the private opinions of the people."<sup>35</sup> James Madison echoed the same opinion when he wrote later that the Constitution was not to create "a shadow of right in the general government to intermeddle with religion."<sup>36</sup> This viewpoint was also shared by many prominent religious leaders of the period. Isaac Backus, a Massachusetts delegate to the Convention and a leading Baptist minister, wrote, "The exclusion of any hereditary, lordly power, and of any religious test, I view as our greatest securities in this Constitution." "Nothing is more evident," Backus declared, "both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals; and therefore no man or men can impose any religious test, without invading the essential prerogatives of our Lord Jesus Christ. . . . the imposing of religious tests hath been the greatest tyranny in the world."<sup>37</sup>

The adoption of the ban on religious tests by the Constitutional Convention of 1787 was historically without precedent. For centuries, some form of religious belief, at least in a Supreme Being, or some formal religious affiliation, had been a well-established requisite for holding public office throughout the world. Even John Locke, of all political philosophers perhaps the one who most influenced Thomas Jefferson and the American Founding Fathers, particularly James Madison, in his *Letter Concerning Toleration* denied the right of public office to atheists and Catholics. "Those are not at all to be tolerated," Locke wrote, "who deny the being of God."<sup>38</sup> In writing of the historical significance of the Convention's action

barring any religious test for office, Justice Story in his *Commentaries*, offered the following description of the situation that prevailed in England at that time and his justification for the adoption of this constitutional prohibition:

Let it be remembered . . . the laws of England merely tolerated Protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the Test and Corporation Acts excluded them from public and corporate offices, both of trust and profit; . . . that the object of the Test and Corporation Acts was to exclude them from office, in common with Turks, Jews, heretics, papists and other sectaries; that to deny the Trinity, however conscientiously believed, was a public offense, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind. . . .<sup>39</sup>

The prohibition of any religious test for public office came not only out of a religious pluralism that was rampant at the time of the nation's founding, but also out of the concept of the new Republic as a secular state. The very exclusion of any religious test for office was itself a profound acknowledgment of the secular character of the new Republic, to use Miller's phrase, "to be nonreligious in its civil life."

One curious form of religious discrimination emerged after independence. Aided by a wave of anticlericalism from prerevolutionary France, steps were taken by the states to bar members of the clergy from holding public office, particularly as members of state legislatures. By the time of the adoption of the Constitution, with its exclusion of any religious test for office, a majority of the original states had constitutional provisions prohibiting members of the clergy from serving in state legislatures (Maryland, Virginia, North Carolina, and Georgia) and, in some cases, from holding any political or public office (New York, Delaware, and South Carolina). With the ratification of the federal Constitution, including Article VI of "no religious test" for public office, discrimination against the clergy's holding federal office was expressly prohibited.

During the nineteenth century, the disabilities against the clergy were gradually removed by the states, except Maryland and Tennessee, which continued to bar members of the clergy from serving in their legislatures until the 1970s. Finally, in a case out of Tennessee, the last of the state laws barring clergy from state office was unanimously declared unconstitutional by the United States Supreme Court in *McDaniel v. Paty* (1978).<sup>40</sup>

A landmark case bearing on religious tests for state office came in *Torcaso v. Watkins* (1961).<sup>41</sup> In *Torcaso*, the Supreme Court unanimously held unconstitutional a Maryland law requiring "a declaration of belief in the existence of God" for state office. The significance of *Torcaso* is that the Court categorically denied religious tests for office at any level of government and any preferential treatment of theistic over nontheistic faiths, or religion over against nonreligion as a qualification for public office.

From dissenters, especially Baptists, Presbyterians, Methodists, Unitarians, Deists, and Quakers, among others, came the demand in the form of a Bill of Rights to guarantee the separation of church and state and to provide some explicit assurance of the free exercise of religion. Consequently, any establishment of religion, at least on a national level, was expressly prohibited by Congress on 25 September 1789 by the adoption of the First Amendment and official acknowledgment was thereby made as to the secular and pluralistic character of the new nation. Ratification of the First Amendment in 1791, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," constitutionally confirmed both the secular and the pluralistic character of the new Republic.

The ratification of the First Amendment, however, did not mark an end to state laws of religious discrimination and intolerance, since the religion clauses of the First Amendment originally applied only to the federal government and federal elections. In spite of this constitutional achievement that provides an indissoluble link in America between the secular state (no establishment of

religion) and religious liberty, namely the equality of all religions before the law, the nineteenth century is replete with examples of widespread bigotry and intolerance, particularly toward Catholics and Jews as well as toward new religions born in America.

In some states, as in Delaware and Pennsylvania, public office was limited to Christians (Catholics or Protestants), while in New Jersey and North Carolina public office was limited just to Protestants. Only gradually was religious pluralism legally guaranteed in the states, and only after the ratification of the Fourteenth Amendment in 1868, followed by a lengthy history of "incorporation" (i.e., specifically "incorporating" the religion clauses of the First Amendment into the Fourteenth Amendment and, thus, applying the religion clauses of the federal Constitution to the States). As Gaustad has aptly observed of nineteenth-century America, "Religious non-conformity found its path to public acceptance paved with legal obstacles and illegal harassment."<sup>42</sup>

Nonetheless, most of the state constitutions came specifically to forbid religious tests as a qualification for office and, almost without exception, even more explicitly than the federal constitution to guarantee religious liberty and to deny aid, in any form, to any religious group. In time, the states led the way in removing sectarian influences from the public schools and in denying public funds to parochial schools. Except for a statute passed in Massachusetts in 1826 requiring Bible reading, no statutory authorization for Bible reading in the public schools appeared, until 1913, when Pennsylvania passed the first law requiring Bible reading in the public schools.<sup>43</sup> "Few verdicts of history," Murray A. Gordon has noted, "are clearer than the purposeful determination of the states to bar the church from public schools and the church schools from public funds."<sup>44</sup> A new high watermark of the separation of church and state was reached during the last several decades of the nineteenth century.

#### IV. THE MEANING AND SIGNIFICANCE OF THE AMERICAN TRADITION IN CHURCH AND STATE

The First Amendment rests upon the concept of a secular state and upon the recognition of America as a pluralistic society in which "the free exercise" of religion is assured to all equally under the law. The secular state is not born out of hostility toward religion, for hostility toward religion is irreconcilable with the very nature of the secular state. From a constitutional point of view, America is a secular state, a free society, in which neither religion nor irreligion enjoys any official status, one in which the attitude of government toward religion is one of "benevolent neutrality."<sup>45</sup> As Franklin H. Littell has perceptively written, "The whole image of America as a 'Christian nation' . . . is a lie which must be struck down."<sup>46</sup> Those who are wary of the concept of the secular state, as the condition of the Establishment Clause of the First Amendment, would do well to note that the concept of the Christian state is as hazardous for true religion as for civil liberty. As the free church is incontrovertibly in conflict with the totalitarian church, so the free state is inevitably incompatible with the totalitarian state.

As the separation of church and state is regarded as the guarantee of religious liberty, so the secular state is the legal basis of the pluralistic society. The issue of religious liberty, which inevitably involves liberty of conscience and thereby all civil liberties, is crucial to understanding and maintaining American democracy as a free society. Indeed, the correlative of religious liberty is nothing less than the right of dissent, for as former Supreme Chief Court Justice Charles Evans Hughes stated it some decades ago, "When we lose the right to be different, we lose the right to be free."<sup>47</sup> A pluralistic society is one in which minority rights are constitutionally guaranteed, and the *free exercise of religion*—freedom of religion and freedom *from* religion—is assured.

**While the theological basis of the secular state may be found in the sovereignty of God, the theological basis of the pluralistic society may be found in the sacredness of persons. . . .**

The goal of the religion clauses of the First Amendment is religious freedom—the independence of religion from the control and jurisdiction of the state and the state from the control and jurisdiction of religion. This goal is not, however, an end in itself, but rather the First Amendment represents a constitutional means

of assuring both the freedom of the church and the freedom of the state, and the independence of both. The separation principle as embodied in the First Amendment is not a negative or sterile concept, to be likened more to the image of a Berlin Wall than to the democratic society. Many argue today that the state must recognize the rights of the Christian majority to integrate Christian rites and symbols into public policy, public life, and public institutions. To do so, however, is to ignore the concept of America as a secular state and the religious pluralism of America, not to mention the more than eighty million Americans who are not identified with any religious tradition. To understand the American tradition in church and state is to discern the concern for religious liberty through the free church and the free state. Writing more than a century ago (1848), Alexis de Tocqueville observed the interdependence of the free church, the free state, and the separation of church and state.

On my arrival in the United States the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country. My desire to discover the causes of this phenomenon increased from day to day. In order to satisfy it I questioned the members of all the different sects; I sought especially the society of the clergy, who are the depositories of the different creeds and are especially interested in their duration. As a member of the Roman Catholic Church, I was more particularly brought into contact with several of its priests, with whom I became intimately acquainted. To each of these men I expressed my astonishment and explained my doubts. I found that they differed upon matters of detail alone, and that they all attributed the peaceful dominion of religion in their country mainly to the separation of church and state.<sup>48</sup>

Like all phrases applied to dynamic principles in history, the phrase "separation of church and state" is not entirely satisfying. The phrase has meant, and does mean, far more than the sum total of its parts. While, to be sure, religious liberty is not something which the state can confer upon the church, but which ultimately can only be exercised by the church, the goal of the separation principle, as enunciated in the First Amendment, is nothing less than the constitutional guarantee of full religious liberty, both freedom of religion and freedom from religion. Church-state separation provides for the mutual independence of both the church and the state, in which the state is free of control by the church and the church is free of control by the state. Church-state separation has not meant, at least historically, the separation of religion and politics or the right of the churches to be involved in the body politic. **The Establishment Clause does mean the institutional separation of the direct and official functioning of the church from the direct and official functioning of the state.** There can be little question, from a historical point of view, but that religious liberty finds its truest expression where the state is not legally dependent upon the church in the exercise of its authority, and the church is not dependent upon the state for its sanction and support.

To suggest that the goal of church-state separation may be achieved so long as no one church enjoys special privileges and all denominations are treated impartially, is to fail to understand both the meaning and the significance of America as a secular state and to recognize the magnitude and variety of America's pluralism. Of even more relevance to the Bicentennial of the Constitution is that an equality of all communities of faith in matters of state sanction and support is not compatible with either the Establishment Clause or the Free Exercise Clause of the First Amendment and the interpretations given them by the United States Supreme Court. An establishment of religion in general is contrary to the concept of the secular state and the character of a pluralistic society.

The American tradition in church and state is profoundly important to both authentic religion and a free society and this tradition has historically demonstrated that it is best for the church and best for the state and secures the freedom of both.

## Footnotes

1. *Miami Military Institute v. Leff*, 129 Misc. 481, 220, N.Y.S. 799, 810.
2. David Dudley Field, "American Progress," *Jurisprudence* (New York: Martin B. Brown, 1893), 6.
3. See Leo Pfeffer, "Freedom and Separation: America's Contribution to Civilization," *Journal of Church and State* 2 (November 1960):100-11.
4. Quoted in William Lee Miller, "Religion and the American Way of Life," *Religion and the Free Society* (New York: The Fund for the Republic, 1958), 18.
5. Quoted in Anson Phelps Stokes, *Church and State in the United States*, 3 vols. (New York: Harper and Brothers, 1950), 1:255.
6. Edwin Scott Gaustad, *Dissent in American Religion* (Chicago: University of Chicago Press, 1973), 8-9.
7. Sydney E. Ahlstrom, *A Religions History of the American People* (New Haven: Yale University Press, 1972), 4.
8. Samuel Eliot Morrison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), 68.
9. William Warren Sweet, *Religion in Colonial America* (New York: Charles Scribner's Sons, 1942), 323.
10. *Ibid.*, 334.
11. See Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 4-8.
12. Carl Bridenbough, *Fat Mutton and Liberty of Conscience in Rhode Island, 1636-1690* (Providence: Brown University Press, 1974), 5.
13. See Thomas Hutchinson, ed., *Collection of Original Papers Relative to the History of the Colony of Massachusetts Bay*, 2 vols. (Boston, 1865; reprinted ed. New York: Bert Franklin, 1967) 1:267.
14. See Rufus Jones, et al. *The Quakers in the American Colonies* (London: The Macmillan Co., 1923), 26-29.
15. See Lewis Peyton Little, *Imprisoned Preachers and Religious Liberty in Virginia* (Lynchburg: J.R. Bell and Co., 1938) and Sandra Rennie, "Virginia's Baptist Persecution, 1765-1778," *Journal of Religious History* 12 (June 1982):48-61.
16. Curry, *The First Freedoms*, 39; see also Thomas O'Brien Hanley, "Church and State in the Maryland Ordinance of 1639," *Church History* 26 (1957):325-41.
17. Curry, *The First Freedoms*, 55.
18. See Gloria Beth Baker, "Dissenters in Colonial North Carolina" (Ph.D. dissertation, University of North Carolina at Chapel Hill, 1970), 89-90.
19. Curry, *The First Freedoms*, 80.
20. *Ibid.*, 133.
21. *Everson v. Board of Education*, 330 U.S. 1 (1947).
22. See Sweet, *Religion in Colonial America*, 339.
23. Joseph T. Blau, ed., *Cornerstones of Religious Freedom in America* (New York: Harper and Row, 1964):84-85.
24. Alvah Hovey, *A Memoir of the Life and Times of the Reverend Isaac Backus* (Boston: Gould and Lincoln, 1858), 205-6; see also Edward F. Humphrey, *Nationalism and Religion in America, 1774-1789* (Boston: Chipman Law Publishing Co., 1924), 331-32.
25. See Thomas Jefferson, "An Act for Establishing Religious Freedom," Blau, *Cornerstone of Religious Freedom in America*, 78.
26. Curry, *The First Freedoms*, 134.
27. See Stokes, *Church and State in the United States*, 1:358-446.
28. Blau, *Cornerstone of Religious Freedom in America*, 78.
29. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Co., 1986), 60.
30. Leo Pfeffer, "Religious Test for Public Office," *New Catholic Encyclopedia*, 17 vols. (Nashville: Thomas Nelson, 1967), 12:333.
31. Stokes, *Church and State in the United States*, 1:351.
32. Max Farrand, *The Records of the Federal Constitution of 1787*, 4 vols. (New Haven: Yale University Press, 1937), 3:227.
33. Stokes, *Church and State in the United States*, 1:527; see also Leo Pfeffer, *Church, State, and Freedom*, rev. ed. (Boston: Beacon Press, 1967), 110.
34. Joseph Story, *Commentaries on the Constitution of the United States* (1833); see Philip B. Kurland and Ralph Lerner, eds. *The Founders' Constitution*, 5 vols. (Chicago: University Press, 1987), 4:646.
35. Kurland and Lerner, *The Founders' Constitution*, 4:639-40.
36. Pfeffer, *Church, State, and Freedom*, 122.
37. Stokes, *Church and State in the United States*, 1:309, 310.
38. See John Locke, *Letter Concerning Toleration* (1689). Locke also never directly advocated the disestablishment of the Church of England.
39. Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution*, 5th ed; 2 vols. (Boston: Little, Brown, and Co., 1905), see 1878-79.
40. *McDaniel v. Paty*, 435 U.S. 618 (1978). Quoting James Madison, Chief Justice Warren Burger declared that Tennessee was guilty of "'punishing a religious profession with the privation of a civil right.'"
41. *Torcaso v. Watkins*, 367 U.S. 488 (1961).
42. Edwin Scott Gaustad, *Religious Issues in American History* (New York: Harper and Row, 1968), 246.
43. See Robert F. Drinan, S.J., *Religion, the Courts, and Public Policy* (New York: McGraw-Hill Book Co., 1963), 9ff.
44. Murray A. Gordon, "The Unconstitutionality of Public Aid to Parochial Schools," *The Wall Between Church and State*, ed. Dallin H. Oaks (Chicago, University of Chicago Press, 1963), 79.
45. A phrase first used by the U.S. Supreme Court in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970).
46. Franklin H. Littell, *From State Church to Pluralism: A Protestant Interpretation of Religion in American History* (Garden City, New York: Doubleday and Co., 1962), xx.
47. See Stokes, *Church and State in the United States*, 2:462.
48. Alexis de Toeqeuille, *Democracy in America*, 2 vols. (New York: A.A. Knopf, 1945), 1:308.

James E. Wood, Jr., presented the KSR Lecture in this bicentennial of the Constitution. We share with our readers part of his major address of April 7. It is shortened here to conserve space. Wood is Professor of Church and State at Baylor University and editor of the *Journal of Church & State*.



Scene from a workshop in 1986

## 1987 Conferences Announced

The theme for the conferences this year is "A Theology of Caring," with leadership by Dr. Carl Bangs of St. Paul's.

Three are scheduled:

September 25	Salina
September 26	Topeka
October 17	Hutchinson

Continuing education credit by Washburn School of Nursing is offered to nurses and by KSR to social workers and clergy.

Information and registration forms will be in the mail late in July.

Last year's conferences were attended by 224 people from the caring professions. The program is coordinated by a central committee of Stephen Fletcher, Yates Center, Dr. Alice Young, Topeka, Lloyd Munger, Topeka, Richard Clark, Hutchinson, Kerry Ninemire, Salina and Dr. Lynn Taylor, Lawrence.

## Essay Winners Celebrate Constitution

The 1987 theme for the essay competition was "Religion and the Constitution." The state winners were awarded their prizes at the KSR banquet in April. We present quotations from the top three essays.

**Helen Svoboda** of Chapman won first prize with her "Free Will and The Freedom of Religion." We excerpt from her second page:

"It is interesting to look back into the lives of the men who built this country and who wrote the Constitution. They believed, 'A worthy faith was not a thing to be blindly accepted, but was, instead, something to be reasoned about by each and every individual believer.' Thomas Paine, in his book *Common Sense*, writes, 'For myself I fully and conscientiously believe, that it is the will of the Almighty, that there should be diversity of religious opinions among us.' James Madison interpreted the First Amendment in 1785 in the following statement: 'The religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate. This right is, in its nature, an unalienable right.' *Notes on Virginia*, penned in 1781 by Thomas Jefferson, states, 'But it does me no injury for my neighbor to say there are 20 gods or no God. It neither picks my pocket nor breaks my leg.'"

Second place winner was **Christopher Wegener** of White Cloud whose title was "A Separate Freedom." He concludes with:

"Our founding fathers were wise enough to see that a democracy could not survive unless Church and State were separated. Their experience had made this all too clear. Much blood has been shed in the name of religion as the Church struggled for control of various territories. The concept of freedom of religion is a very simple one. However, the exact interpretation of this right has been tested over and over. The testing of this freedom shall leave scars on our country for many decades to come."

Third place went to **Corinne Bontrager** of Kendall. Her summary stated:

"After the founding fathers created the Constitution, it became much easier for the young nation to stabilize. The stabilization stemmed from the fact that the justice in the Constitution had a scriptural basis. Another stabilizer is the fact that early Americans believed in the scriptural principals of justice and applied them to their lives and also to their government. Americans need to learn to fully accept the principles of justice that are outlined in the Constitution because, as John Adams said, 'Our Constitution was made only for a moral, religious people. It is wholly inadequate to the government of any other.'"

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### Board Announces '88 Essay Topic

The theme for the high school essay competition for next year is "Religion & Technology." Essays will be due next March. County winning papers will be forwarded to Lawrence for the final judging according to Pat Spillman, Chairman. High school English teachers, school officers and Kansas clergy will be distributing information on the competition in the fall semester.

### Smith Hall Has Twenty Years

Irma I. Smith Hall, religion headquarters on Mt. Oread, is 20 years old this year. Built by private subscription, it was dedicated October 8, 1967. It was named in honor of Irma I. Smith of St. John, Kansas.

### Video Program Available

"Something From Our Hands," the 12-minute video tape presentation of the KSR programs, is being circulated from our office. Persons interested may write in or may call.



KSR Banquet April 7, 1987 held in Adams Alumni Center, Lawrence

Kansas School of Religion  
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Lawrence, KS 66045  
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1096

# Traverse Log

Religion is a spiritual wild card in an old shuffle of human patterns.

Time was when "main line" local clergy addressing their loyal constituencies for an hour a week focused theology and protocol into the heart of their groups. No longer. The options are increasing; the emphases are shifting. No spiritual or intellectual movement will dominate American culture again (William Lee Miller).

In our tinker toy age now, religion for many has become a matter of showmanship and style. Maybe this has washed up as free exercise of religion but it is not so in my corner. "Main line" TV shows break solid theology from glitzy showmanship.

Jeffrey Hadden observed "I have been to Lynchburg and Virginia Beach and have seen the future . . . (National Religious Broadcasters) is an enormous catalyst on functional . . . grounds—they don't talk about theology." The migratory shift in emphasis from nurture to entertainment is a two handkerchief melodrama of human patterns.

Like the ancient prophets, some clergy in various faiths still call their communities to reassess their relationship to the Almighty, and to their potential for the betterment of society. This is different from the electronic hoopla just to seduce an overwhelmed viewing audience. The misleading aspect in this Tower of Babble is the danger of confusing religious faith with its idolatrous rival, a correct (often political) ideology.

In a day when society is hurting and needing help, religion should offer more than "correct" style, stiff-arming those who do not fit: homosexuals, communists, sex educators and eavesdroppers.

The solution for the pains and strains of people lies in the direction of communicating reconciliation: tolerance, acceptance and understanding. Surely the solution is not in the way of slick programming and recrimination.

Senator Sam Ervin (who would probably flip if he knew he was a religious reference) furnished a fitting conclusion: "Religious faith is not a storm cellar to which men and women can flee for refuge from the storms of life. It is, instead, an inner spiritual strength that enables them to face those storms with hope and serenity. Religious faith has the miraculous power to lift ordinary human beings to greatness in seasons of stress."

Let's focus on that!



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