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SECULAR STATE, RELIGIOUS PEOPLE—  
THE AMERICAN MODEL

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## **Secular State, Religious People—The American Model**

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### Introduction

Almost everywhere in the world where people are at war, religion plays a role, usually a negative one. In this country, religion contributes to a growing and disturbing polarization. Still, though not perfect in its record of religious tolerance, America has been remarkable in its success at avoiding faith-flavored wars and, overall, at granting freedom to a wide variety of religious expressions and practices over the past two centuries and a little more. That is a notable achievement in human history. In this paper, I want to contend that this achievement is traceable in large measure to that remarkable little document, the Constitution of the United States of America. The Constitution is one of the world's great monuments to religious tolerance. Paradoxically, it has very little to say about religion. That is part of its genius. But before we look at the Constitution, we need a little background.

### The Colonial Period

In 1628, in one of the most famous episodes in American religious and political history, John Winthrop, first governor of the Massachusetts Bay Colony, declared to the passengers on board the ship *Arabella* that God Almighty had dispatched them to New England to establish “a city upon a hill” for all humankind to behold and emulate. It would be a New Israel, a Christian Commonwealth, whose citizens would be in covenant with Almighty God and under the regulation of scripture.

These four hundred or so devout Puritans had come to the New World in search of religious freedom—for themselves. Massachusetts Bay was not a tolerant place. Only the one true religion could be taught and practiced. Dissenters were banished—or executed. Numerous offenses against the religiously based law were harshly punished. Church attendance was required, and all residents, church members or not, were taxed to support the churches and their clergy.

### Roger Williams

One of the earliest settlers, arriving in 1631, was Roger Williams, a Baptist and a religious fanatic. Williams scoffed at the notion that New England was a New Israel and that a Christian Commonwealth was possible. Since true Christians would always be few in number—he would

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be one of them—he thought it blasphemous for a political entity to undertake the enforcement of religious belief and practice. And he said so. When citizens of the colony were ordered to take an oath of loyalty to the governor that included the phrase, “so help me, God,” he complained that it would cause unregenerate men to take the name of God in vain.<sup>1</sup>

By 1835, the Puritan leaders were fed up with Williams and ordered him to return to England. Not one to take orders easily, he took a shorter trip and founded Providence and, with others, the colony of Rhode Island. There, he proclaimed, citizens would have complete freedom of conscience, which he called “soul liberty,” in matters of religion. In consequence, Rhode Island attracted a number of Baptists and other dissenters and was apparently a rather obstreperous place.

Believing that his religion alone was true, Williams vehemently criticized the beliefs of many of his providential fellows, particularly Quakers, but he stood by his principles and insisted they had the right to be wrong.

In 1644, Williams wrote *The Bloody Tenent of Persecution*, in which he called for the separation of church and state. “Enforced uniformity,” he wrote, “confounds civil and religious liberty [and] denies the principles of Christianity and civility....”<sup>2</sup> He also insisted that no man should be required to worship or maintain a worship against his will, and that to do so was to force a guilt of hypocrisy.<sup>3</sup>

He considered government to be “merely human and civil,” with no appropriate religious function, and noted that good governments existed in “nations, cities, kingdoms....which never heard of the true God, nor his only son.” Indeed, he thought that efforts by the state to involve itself in religion were likely to corrupt both government and religion. Therefore [in another

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<sup>1</sup> Edmund S. Morgan, *Roger Williams: The Church and the State* (New York: Harcourt, Brace and World, 1967), 31-32.

<sup>2</sup> Roger Williams, *The Bloody Tenent of Persecution, for cause of Conscience, Discussed in A Conference between Truth and Peace* (1644), edited by Richard Groves (Macon, Georgia: Mercer University Press, 2001), P. 4.

<sup>3</sup> *Ibid.*, p. 187.

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writing], he called for "a wall or hedge of separation" between "the wilderness of the world" and "the garden of the church."<sup>4</sup>

With Rhode Island and, to a lesser degree, Pennsylvania as the major exceptions, the colonies were not notable for religious freedom or tolerance. During much of the colonial period, citizens were taxed to provide government support either to a single denomination (usually the Church of England/Episcopal) or to several of the larger bodies, with Congregationalism the standard frontrunner. In some, dissenters could be exempted from paying the tax, but getting the exemption was not automatic, and those who got it were resented by those who had to pick up a larger share. This was especially true for Baptists as they grew more numerous. Catholics, if permitted at all, were forbidden to hold public services in almost all the colonies. In some colonies, disfavored groups were forbidden to evangelize, attendance at the established church was required, expressions of disrespect toward ministers were often forbidden, and blasphemy could be punished by death. In Virginia, denial of the Trinity could lead to a three-year jail sentence.<sup>5</sup> These measures, incidentally, did little to encourage piety in colonial America. By the time of the Revolution, only 10 to 15 percent of the population were church members, and foreign visitors noted an overwhelming indifference to religion.

### Thomas Jefferson and James Madison

The Founding Fathers who played the greatest role in shaping the American understanding of the appropriate relationship between church and state were Thomas Jefferson and James Madison. With the aid of like-minded colleagues, these two close friends managed to get their path-breaking views incorporated first into the laws of Virginia and ultimately into the Constitution of the United States.

Both Madison and Jefferson, like many of the Founding Fathers, were heavily influenced by English political theory of the 17th century, specifically the Whigs and their chief theorist, John

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<sup>4</sup> Often cited. See, for example, [http://www.firstamendmentcenter.org/rel\\_liberty/faqs.aspx?id=13982&](http://www.firstamendmentcenter.org/rel_liberty/faqs.aspx?id=13982&)

<sup>5</sup> Robert Boston, *Why the Religious Right is Wrong about Separation of Church and State*. (Buffalo, NY: Prometheus Books, 1993), pp. 54-55, citing Allan Nevins and Henry Steele Commager, *A Pocket History of the United States* (New York: Simon & Schuster, 1981), p. 19.

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Locke, who has been called “America’s philosopher.” Locke asserted that all humans have natural rights to life, liberty, and property. Since these rights are not granted by government, government cannot take them away—they are “unalienable.” Fundamental among these liberties is freedom of conscience. While God may expect obedience to [his] will, no human entity can coerce or enforce that obedience. To be meaningful, it must be entirely voluntary. Government exists because naturally free people enter into a “social contract”—here the Fathers drew also on the French philosopher Rousseau—in which they agree to accept certain regulations as a means of fostering communal existence and protecting these natural, unalienable rights. Because one of these rights is freedom of conscience, of which freedom of religion is a prime example, government should have no role in regulating religion, and churches, as voluntary associations, should operate entirely without government support.

Locke and his fellows, and the young Americans after them, looked back on the destruction religious wars had caused since the Protestant Reformation and concluded that the surest way to achieve the domestic peace necessary for free and orderly economic activity was to separate the religious and civil realms. Indeed, the stated purpose of Locke’s *Letter Concerning Toleration* was “to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.”<sup>6</sup>

Nearer the time of the Revolution, in 1767, James Burgh, a Scottish dissenting minister and political writer whose work was well known to Jefferson and Madison as well, wrote *Political Disquisitions*, which has been called the “key book of the Revolutionary generation.” Burgh argued that “Those with different religious views are both equally fit for being employed in the service of our country” and contended that it was essential to “build an impenetrable wall of separation between things sacred and civil.”<sup>7</sup>

With their religious convictions and civil duties kept in separate realms, good citizens may believe what they will as long as they do not violate the peace. Locke observed that, “If a Roman Catholic believes that to be really the body of Christ, which another man calls bread, he does no

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<sup>6</sup> John Locke, *A Letter Concerning Toleration*, 1689, <http://www.constitution.org/jl/tolerati.htm>

<sup>7</sup> James Burgh, *Crito, or Essays on Various Subjects*, 2 vols. (London, 1766. 1767), II: 68, as quoted in Isaac Kramnick, *Republicanism and Bourgeois Radicalism* (Ithica, NY: Cornell University Press), p. 232.

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injury thereby to his neighbors."<sup>8</sup> Jefferson would later echo these thoughts [in his *Notes on the State of Virginia*] by writing that "the legitimate powers of government extend to such acts only as are injuries to others. But it does me no injury for my neighbor to say There are twenty gods, or no God. It neither breaks my leg, nor picks my pocket."<sup>9</sup>

With these as their convictions, Madison and Jefferson set about to end the establishment of the Anglican Church in Virginia. In 1779, in response to a bill to provide tax support to a variety of religious groups, Jefferson submitted his Bill for Establishing Religious Freedom to the Virginia legislature. As is often noted, he regarded it as one of his three finest accomplishments, along with primary authorship of the Declaration of Independence and the founding of the University of Virginia. It seems fair, then, to regard it as a definitive statement of his views on the matter. In the bill, Jefferson contended that,

- The government should not compel people to support a religion in which they do not believe, and that to do so "is sinful and tyrannical."
- There should be no religious test for holding public office.
- The magistrate should not enter into the field of religious opinion, but should interfere only when religions violate the public peace.
- Religious establishment bribes (and thereby runs the risk of corrupting) religion when it offers it rewards from the public coffers.<sup>10</sup>

Neither bill passed, but the fight was renewed in 1784, with Patrick Henry contending for multiple establishment and James Madison against. The decision was put off until 1785.

In the interim, Madison composed and circulated anonymously the singularly important document, *Memorial and Remonstrance against Religious Assessments*.<sup>11</sup> "It is proper to take

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<sup>8</sup> Ibid.

<sup>9</sup> Thomas Jefferson, *Notes on the State of Virginia*, p. 285. Electronic Text Center, University of Virginia Library. <http://etext.lib.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&division=div1>

<sup>10</sup> [http://www.religioustolerance.org/virg\\_bil.htm](http://www.religioustolerance.org/virg_bil.htm)

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alarm at the first experiment on our liberties,” he wrote, for “Who does not see that the same authority which can establish Christianity in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects....that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.”

Madison was not concerned solely with oppression. Government support of religion, he insisted, would lead inevitably to the corruption and weakening of religion itself. Fifteen centuries of governmental entanglement with Christianity had made clear that neither institution benefited from the relationship. He noted that ecclesiastical establishments “have [in some instances] been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people....A just government ... will be best supported by ... neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”

In a further flourish on the theme of taking alarm at “the first experiment on our liberties,” Madison characterized the General Assessments bill not only as unwise and unjust, but as “a signal of persecution” because “It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.” This freedom of conscience also extended to unbelievers. Madison insisted that, “While we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny any equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.”

Sensing the tide was moving with him, Madison reintroduced Jefferson’s 1779 Bill for Religious Freedom and, in January 1786, it passed by a vote of 60 to 27.

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<sup>11</sup> James Madison, *Memorial and Remonstrance against Religious Assessments*, 1785.  
[http://religiousfreedom.lib.virginia.edu/sacred/madison\\_m&r\\_1785.html](http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html)

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In an attempt to give some kind of official recognition to Christianity, some assemblymen tried to insert an acknowledgment of “Jesus Christ, the holy author of our religion.” Though Jefferson himself was in Paris at the time, he followed the progress of the debate closely in correspondence with Madison and, in his autobiography, he took retrospective pleasure in the fact that “the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, the infidel of every denomination.”<sup>12</sup>

### The Constitution

Virginia’s resolution of the issue was neither unique nor universal. At the time of the framing of the Constitution, other states had also rejected all establishment of religion. No state any longer had a European-style establishment of a single denomination, but several retained a form of establishment in which multiple denominations received government support. When they gathered in Philadelphia in 1787, however, the Framers of the Constitution set out to prove that a nation and, by implication, states, could exist and flourish without an established religion or religious tests.

In keeping with their determination to separate religion and government, they wrote a constitution that was entirely secular. It begins by identifying the source of its legitimacy: “We the people of the United States ...do ordain and establish this Constitution for the United States of America.” Unlike the Declaration of Independence, it does not mention God or a Supreme Being or Divine Providence, though it implicitly acknowledges Christian culture by identifying its date as “the Year of our Lord one thousand seven hundred and eighty seven” and by noting that Sundays are not to be counted among the 10 days during which the President can veto legislation (Article I, Section 7).

The lone reference to religion in the “Original Constitution,” before the Bill of Rights, is in Article VI: “No religious test shall ever be required as a qualification to any office or public trust under the United States.” At the time, the constitutions of nearly all the thirteen states included

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<sup>12</sup> *Thomas Jefferson’s Autobiography*, under the date of January 6, 1821. *The Life and Selected Writings of Thomas Jefferson*, edited by Adrienne Koch and William Peden, Random House New York, NY (1993) pp 45-46. Found at <http://members.tripod.com/~candst/ref4.htm>

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religious tests, generally requiring that public officials be Protestant Christians, and sometimes that they acknowledge the divine inspiration of Scripture and profess belief in the Trinity. Article VI was a significant departure from existing practice, but it was adopted easily, and apparently without much debate.

That the Constitution was godless and opened the door for non-Christians to serve in government did not go unnoticed. Indeed, it was bitterly attacked for its failure to honor God and to give Christianity a favored place. To abandon the ideal of a Christian Commonwealth was to invite God's wrath or, at best, the withdrawal of his favor. A group of Massachusetts and New Hampshire ministers complained to George Washington that no "explicit acknowledgment of THE TRUE ONLY GOD AND JESUS CHRIST who he sent" had been "inserted somewhere in the Magna Carta of our country." In newspapers, pamphlets, sermons, letters, and arguments in the ratification debates, troubled citizens complained that "pagans, deists ("abominable wretches"), and Mahometans [who ridicule the doctrine of the Trinity] might obtain offices among us." "A Turk, a Jew, [a papist], and what is worse than all, a Universalist, may be President of the United States." A Quaker president could "deprive us of the means of defence" And since the Constitution stupidly gives command of the whole militia to the president, "should [the president] hereafter be a Jew, our dear posterity may be ordered to rebuild Jerusalem." <sup>13</sup>

For their part, the few Jews in America expressed gratitude, thanking George Washington for his part in creating a government that "enfranchised us with all the privileges and immunities of free citizens, and initiated us into the grand mass of legislative mechanism."<sup>14</sup> Constitutional scholar William Lee Miller has written that, "in the framing of Article VI, . . . the new nation was electing to be nonreligious in its civil life."<sup>15</sup>

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<sup>13</sup> Quoted in Martin Borden, "Christ and the Constitution," *Church and State*, Vol. 10, 1987, p. 10.

<sup>14</sup> <http://www.jewishvirtuallibrary.org/jsource/loc/washington.html>. The Jewish community that sent the letter was the Hebrew Congregation of Savannah, Georgia, May 6, 1789.

<sup>15</sup> James E. Wood, Jr., "No Religious Test: Good Medicine for the Body Politic," *Church and State*, Vol. 10., 1987, p. 14, adapted from an editorial in *Journal of Church and State*, Vol. 29, Spring 1987, pp. 199, 206-208, citing William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: A. A. Knopf, 1986).

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It was reported that, asked why the Constitution fails to mention God, Alexander Hamilton—I imagine him sounding something like Louis Rukeyser—said, “We forgot.”<sup>16</sup> But the omission of God was neither an oversight nor, in the minds of the Framers, a slight. That gathering of grave young men contained some remarkable thinkers and fine writers. Had they wanted to establish a Christian nation, they could have stated the matter quite plainly.

The Founding Fathers were cosmopolitan intellectuals devoted to the rationalism of the Enlightenment, but they were not, for the most part, humanistic atheists or opposed to religion. On the contrary, they regarded morality as indispensable to a healthy state and religion as a primary foundation of morality, as well as of charity and concern for one’s fellows. But the state itself should be secular. John Adams spoke for most of them when he said that “governments thus founded on the natural authority of the people alone—[“We the people”]—without a pretense of miracle or mystery... are a great point gain in favor of the rights of mankind.” As for Article VI, Madison, in the *Federalist Papers* [51 and 56], cited the “no religious test” clause as one of the glories of the new constitution. “The door of the federal government, is open to merit of every description, whether native or adopted, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.” And James Iredell [of North Carolina] a future justice of the Supreme Court, asked, “[How] is it possible to exclude any set of men” without thus laying “the foundation on which persecution has been raised in every part of the world.”<sup>17</sup>

Madison, the “Father of the Constitution,” at first saw no need for amendments securing particular liberties, but Jefferson and others soon convinced him of the value of spelling out certain rights. Given his convictions, it is hardly surprising that, when he began to draw up the list of amendments that would come to be known as the Bill of Rights, he chose religion to be the first freedom. After careful deliberation, the First Amendment was formulated to proclaim that “Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof; . . . .”

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<sup>16</sup> Gordon S. Wood, “Evangelical America and Early Mormonism,” *New York History*, 61 (October 1980), pp. 359f. Cited in Mark A. Noll, Nathan O. Hatch, George M. Marsden, *The Search for Christian America* (Westchester, Illinois: Crossway Books, 1983), p. 107.

<sup>17</sup> Madison and Iredell, quoted in Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: W. W. Norton and Company, 1997), pp. 38f.

### Attempts to Breach the Wall

In recent years, there has been a concerted effort on the part of many Christians, particularly those we commonly refer to as the Religious Right—mostly White Evangelical Christians involved in political activity on the right side of the spectrum—to claim that America was founded as a Christian Nation, that separation of church and state is a gross misreading of the Constitution and the intentions of the Founders, and that the First Amendment prohibition of a religious establishment refers solely to the governmental founding and support of a national church.

Pat Robertson, Ralph Reed, James Dobson, David Barton and a host of others regularly claim that the Constitution was written to establish, promote, and perpetuate a Christian order, and that secular humanists and other liberals, aided by activist courts, have subverted it, trying to turn America into a secular state. As a corollary, they call on Christians to retake governance and return the nation to its intended nature as a Christian Commonwealth. (There are harder and softer versions of this view, but I believe the general characterization is fair.)

I trust it is already clear that the Framers did not intend to found a Christian Commonwealth, that indeed they were explicitly rejecting that concept, and emphatically did intend to separate church and state. But there is more evidence. In 1797, less than 10 years after ratification, while John Adams was president, the young nation clearly affirmed its secular status with respect to foreign policy when it signed a treaty with Tripoli, a Muslim region of North Africa. Article 11 of the treaty states, "As the Government of the United States is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the law, religion or tranquility of Musselmen [Muslims]... it is declared by the parties that no pretext arising from religious opinion shall ever produce an interruption of harmony existing between the two countries."<sup>18</sup>

Interestingly, had the Framers intended to found a Christian nation, today's religious conservatives would likely have been appalled at its nature. Only a few accepted the teachings of orthodox Christianity, and they often put an Enlightenment spin on them. Washington's religion

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<sup>18</sup> Treaty of Peace and Friendship between the United States and the Bey and Subjects of Tripoli of Barbary, 1797.  
[http://www.stephenjaygould.org/ctrl/treaty\\_tripoli.html](http://www.stephenjaygould.org/ctrl/treaty_tripoli.html).

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seems mainly to have been a social performance and his beliefs more deistic than Episcopalian. Jefferson, a great admirer of Jesus, regarded the deity of Christ, the resurrection, the Trinity, miracles, and the authority of Scripture as "deliria of crazy imaginations."<sup>19</sup> John Adams spoke of the incarnation and deity of Christ as "this awful blasphemy."<sup>20</sup> Franklin regarded Jesus as primarily a moral teacher, a good model for perfectible human nature.<sup>21</sup> The historian Gordon Wood has observed that "it is one of the striking facts of American history that the American Revolution was led by men who were not very religious. At the best the founding fathers only passively believed in organized Christianity and at worst they scorned and ridiculed it."<sup>22</sup> So long as religion supported political harmony, few of them were all that concerned with what a person believed. Historian Daniel Boorstin put it well: "They had found in God what they most admired in men."<sup>23</sup>

The second claim made by those unhappy with the notion of a secular state is that the First Amendment prohibits only the founding of a national church and not other things they would like to see government do.

Charles Pinckney, who had proposed and furnished the language for Article VI, proposed language stating, "the Legislature of the United States shall pass no law on the subject of religion."<sup>24</sup> Numerous other proposals, particularly those arising in the House and including Madison's own first draft, contained wording about not infringing on the equal rights of conscience. I wish they had retained that wording, but they didn't. Fortunately, we have

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<sup>19</sup> Quoted in Noll et al, p. 73, citing Charles Mabee, "Thomas Jefferson's Anti-Clerical Bible," *The Historical Magazine of the Protestant Episcopal Church*, 48 (December 1979), 473-481.

<sup>20</sup> Noll, et al., p. 75, citing letters from Adams to Jefferson, citing Henry F. May, *The Enlightenment in America* (New York: Oxford, 1976), pp. 335, 280.

<sup>21</sup> Noll et al, p. 73, citing Franklin's *Autobiography*.

<sup>22</sup> Gordon S. Wood, "Evangelical America and Early Mormonism," *New York History*, 61 (October 1980), 359f. quoted in Noll et al., p. 107.

<sup>23</sup> Daniel J. Boorstin, *The Lost World of Thomas Jefferson* (New York: Henry Holt, 1948), quoted in Noll et al., p. 74.

<sup>24</sup> William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Alfred A. Knopf, 1985), p. 110, cited in Boston, *Why the Religious Right is Wrong*, p. 61.

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considerable evidence as to how they and their successors regarded that amendment, and it is clear they intended more than simply to bar a national church.

That this was Jefferson's intent is made clear in a letter to the Danbury (Connecticut) Baptist Association in 1802, the second year of his presidency. Connecticut still had a form of establishment. The Baptists didn't like it and wrote to the President to ask that he use his influence to discourage it. Though Jefferson could do little about the Connecticut law, he did take the opportunity to put his convictions on record. In his sympathetic response, he said, "I contemplate with solemn 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."

Today, supporters of strict separation of the two institutional orders point to Jefferson's famous metaphor as the shining example of the "original intent" of the founders. Those who think the Framers would have been appalled at the extent to which religious content has been excluded from state-related institutions tend to dismiss the Danbury letter as nothing more than an incidental document of which entirely too much has been made. The late Chief Justice William Rehnquist, for example, characterized Jefferson's comment as "a short note of courtesy" that should not be taken too seriously.

But far from dashing off a perfunctory mollifying letter to a disgruntled group of sectarians, President Jefferson regarded his response to their appeal as a signal opportunity to reiterate his longstanding convictions. So concerned was he to strike just the right tone that he asked Attorney General Levi Lincoln to review it. In his note to Lincoln, he observed that he liked to use such letters as a means "of sowing useful truths and principles among the people, which might germinate and become rooted among their political tenets." More specifically, he said that the Danbury letter "furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors did."<sup>25</sup> In the original draft of the letter, which you can read on the Web, Jefferson explained why he did not want to proclaim fast days. "Congress thus inhibited from acts respecting religion, and the executive authorized only

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<sup>25</sup> <http://members.tripod.com/~candst/tnppage/levi.htm>

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to execute their acts, I have refrained from prescribing even occasional performances of devotion." <sup>26</sup>

Jefferson did not imagine his letter would please everyone. "I know," he said, that "it will give great offence to the New England clergy [who benefited from establishment]; but the advocate of religious freedom is to expect neither peace nor forgiveness from them."<sup>27</sup> Attorney General Lincoln excised from the original draft Jefferson's comments about fasting and thanksgiving proclamations—it would have likely have cost Jefferson much-needed votes in New England—but the wall of separation stood, as Jefferson intended.

A more systematic thinker than Jefferson, Madison hewed an even straighter line. In 1811, he vetoed a bill passed by Congress, giving a charter to an Episcopal Church within the District of Columbia, because it referred to the church's engagement in dispensing charity and educating people in a poor neighborhood. Madison claimed it violated the First Amendment and "would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civic duty." The bill, authorizing a faith-based initiative, would blur and indeed erase "the essential distinction between civil and religious function."<sup>28</sup> He vetoed another bill that would have given government-owned land to a Baptist church in Mississippi, insisting that it violated the First Amendment and would set "a precedent for the appropriation of funds of the United States for the use in support of religious societies."<sup>29</sup>

During the War of 1812, he gave in to pressure to proclaim a national day of prayer and fasting for those "so disposed" to ask for God's assistance in the war. Later, however, he wrote a document ["Detached Memoranda"] listing five reasons why he had been wrong to do so. (In

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<sup>26</sup> <http://www.loc.gov/loc/lcib/9806/danpost.html>. Quoting from Andrew Lipscomb and Albert Bergh, *The Writings of Thomas Jefferson*, Vol. 10, p. 305:

Following various links at this site will lead to the letter from the Danbury Baptists, Jefferson's original draft, the draft he sent, a photocopy of the letter itself, and a discussion of the matter.

<sup>27</sup> <http://members.tripod.com/~candst/tnppage/levi.htm>

<sup>28</sup> (James Madison, "Veto Message to Congress," February 21, 1811; from Jack N. Rakove, ed., *James Madison: Writings*, New York: Library of America, p. 683. [http://www.stephenjaygould.org/ctrl/madison\\_veto.html](http://www.stephenjaygould.org/ctrl/madison_veto.html)

<sup>29</sup> *Writings of James Madison*, 8:132-133; *The Papers of James Madison: Presidential Series*, 3:176-177. <http://www.sunnetworks.net/~ggarman/madison.html>

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1832, Andrew Jackson refused to proclaim a fast day during a cholera epidemic because he thought it unconstitutional.)<sup>30</sup>

Similarly, Madison initially condoned tax support of congressional chaplains, then later rejected this as “a palpable violation of ... Constitutional principles.” Their payment from the national treasury, he contended, violated the First Amendment and was an affront “to members whose creeds and consciences forbid a participation in the majority.”<sup>31</sup> As for military chaplains, Madison believed they served a worthwhile purpose, but thought they should be supported by their respective denominations rather than from the public coffers.<sup>32</sup> He even argued that ministers should not be identified as such in the census because he thought singling them out might constitute unlawful governmental interference in religion. The government is proscribed, he argued, from “ascertaining who and who are not ministers of the Gospel”<sup>33</sup> None of these actions, all of which Madison saw as violating the First Amendment, had anything to do with establishing a national church.

Shortly after leaving the presidency, Madison observed in a letter to a friend that the civil government performed ably without interference from the church and that “the number, the industry and the morality of the priesthood, and the devotion of the people have been manifestly increased by the total separation of the church from the state.”<sup>34</sup>

Madison fully recognized, of course, that he and the Framers had forged a new arrangement. He called it a “decisive test.”<sup>35</sup> He also thought America would pass that test.

In the following decades, various attempts were made to breach the wall of separation and gain some official recognition and status for Christianity. Again and again, they failed. In their

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<sup>30</sup> Excerpts from Detached Memoranda, <http://members.tripod.com/~candst/detach.htm>

<sup>31</sup> <http://members.tripod.com/~candst/tnppage/qmadison.htm>

<sup>32</sup> <http://members.tripod.com/~candst/madnational.htm>

<sup>33</sup> Debates and Proceedings of the Congress of the United States (Washington 1834) I, 1106-1108 Joseph Gales Sr., in Anson Phelps Stokes, *Church and State in the United States* Vol. I (New York: Harper & Brothers, 1950), pp. 346-347, as found at <http://members.tripod.com/~candst/ref1.htm>

<sup>34</sup> Letter to Robert Walsh, 1819, <http://historymatters.gmu.edu/d/5666>

<sup>35</sup> [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions68.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions68.html)

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excellent little book, *The Godless Constitution*, to which I acknowledge a debt, Isaac Kramnick and Laurence Moore discuss two of these in detail—the effort to stop Sunday Mail and repeated efforts to pass a Christian Amendment. I will touch on these just briefly.

### Sunday Mail

In 1809, after a postmaster in Pennsylvania was expelled from the Presbyterian Church in which he was an elder for keeping the post office open on Sunday so people coming to church from outlying areas could get their mail, the Postmaster General got Congress to pass a law permitting post offices to open and mail to move on Sunday.

Over the next twenty years, leading figures argued heatedly over the issue. Defenders of Sunday mail argued that commerce and even the safety of the nation depended on it. Opponents, who comprised progressives as well as conservatives, argued that Congress did not have “the constitutional power to authorize the violation of the Sabbath” and that such violation would destroy the piety and morality necessary to uphold the Republic. Thousands of people signed petitions on both sides of the argument.

In January 1829, the Senate issued a “Report on the Subject of Mails on the Sabbath.” Kramnick and Moore rightly call it a “landmark statement of commitment to a secular national government.”

Congress, the report said, is “a civil institution, wholly destitute of religious authority.” Legislators have no power to “define God or point out to the citizen one religious duty” or “to coerce the religious homage of anything,” including the Sabbath.

“The line cannot be too strongly drawn between church and state,” the report said, and prohibiting Sunday mail is “legislating upon a religious subject and therefore unconstitutional.”

Large numbers of the report were distributed to constituents, pamphlet editions were sold, and its chief author, Richard M. Johnson, was praised as having produced a “supplement to our Bill of Rights.” In 1836, he was elected vice president of the United States.<sup>36</sup>

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<sup>36</sup> Kramnick and Moore, *The Godless Constitution*, ch. 7, pp. 131-143.

### The Christian Amendment<sup>37</sup>

As they had since the ratification debates, many Christians continued to lament the dissociation between religion and government, particularly so in times of crisis.

During perhaps the greatest of all national crises, the Civil War, a group of prominent churchmen calling themselves the National Reform Association began pushing for a Constitutional amendment that would amount to rewriting the preamble “acknowledging Almighty God as the source of all authority and power in civil government, The Lord Jesus Christ as the Governor among the Nations, and His revealed will as of supreme authority, in order to constitute a Christian government....etc.”

A delegation of prominent members of the association visited President Lincoln in 1864 and asked him to support it in Congress. Lincoln said he needed to study the matter further, but he never got around to it.

Congress ignored it in 1864 and again in 1869. Major, but losing, efforts to insert Christ into the Constitution were made in 1894 and 1910, and in 1947 and 1954, the National Association of Evangelicals campaigned for such a measure. They have all failed, so far.

As Kramnick and Moore point out, it is a gross distortion of history to contend that the Constitution was designed to produce a Christian nation and that secularists have worked to erode that sacred character. The pressure has come from the other direction. Still, there is little question that the dominant cultural ethos of the nation strongly reflected that of its Protestant Christian majority. Sunday laws and blasphemy statutes either went unchallenged or, if challenged, were upheld by the courts. Likewise, education in the public schools had a Protestant Christian flavor, with prayer and Bible reading common in many schools and learning materials themselves infused with Christian teaching.

As significant immigration, beginning in the 1830s and 1840s and surging enormously after the Civil War and on into the 20th century, changed the ethnic and cultural makeup of the nation, and as new religious groups such as the Mormons, Seventh-Day Adventists, and Christian

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<sup>37</sup> Ibid., pp. 143-149.

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Scientists arose, this tacit Protestant hegemony inevitably created friction and, occasionally, violence. When, for example, Roman Catholics complained about the use of the King James Bible and the Protestant version of the Lord's Prayer in school devotional exercises, since both differed somewhat from their preferred versions and since the Roman Catholic church did not encourage the reading of scripture without clerical guidance, they were subjected to ridicule and, occasionally, to physical abuse.

Jews raised similar complaints against the schools and also against being forced by Sunday laws to close their businesses two days a week if they observed the Sabbath.

Sunday laws proved quite durable, but by the end of the nineteenth century, several states began to declare school devotional exercises unconstitutional, typically declaring that the purpose of public schools is secular education, and that forcing unwilling students, usually Catholics, to participate in Protestant exercises, subjects them to a stigma and puts them at a disadvantage in the school.

When Catholics organized private schools to protect their religious beliefs, the states uniformly decreed that parochial schools should not receive public funds.<sup>38</sup> It is important to acknowledge that the Ku Klux Klan and other nativist organizations used the concept of church-state separation more from a dislike of Catholics than out of reverence for the Constitution. That does not invalidate the principle.

Despite a progressive tendency toward separation of church and state, the individual states continued to vary considerably in their practices and policies. It was not until 1940, in the case known as *Cantwell v. Connecticut*, that the federal government, through the Supreme Court, formally declared the First Amendment stipulations regarding religion to be binding on the states.

Over the next 25 years, the Supreme Court gave Jefferson's famous metaphor of the "wall of separation between church and state" a sharper meaning that it had ever had since Jefferson coined it. In another 1940 case, *Minersville School District v. Gobitis*, the court ruled that

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<sup>38</sup> For an excellent discussion of this process and the argumentation used to reaffirm a separationist stance, see Noah Feldman, *Divided by God*, (New York: Farrar, Strauss and Giroux, 2005), Chapter 2, pp. 57-110.

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schools did not have to excuse Jehovah's Witness children from reciting the Pledge of Allegiance, which violated their convictions. Feeling this decision had given them license to do so, irate citizens subjected Witnesses to widespread persecution that included humiliating children and expelling them from school, burning down a house of worship, running Witness families out of town, and at least one case of castration. Fortunately, just three years after this affront to First Amendment guarantees of freedom of conscience, the Court, whose composition and sentiment had changed somewhat, accepted a similar case, involving the refusal of Jehovah's Witness children to participate in flag-saluting exercises in West Virginia schools. This time, the court reversed its decision in *Gobitis* and upheld the right of citizens to abstain from any such practices that offended the teachings of their religion or the dictates of their conscience. That decision has been repeatedly sustained.

The cases involving Jehovah's Witnesses undergirded what has come to be called the "Free Exercise clause" of the First Amendment. In 1947, the Court heard a case that laid a firm foundation for its future decisions on the amendment's "Establishment clause." The case, *Everson v. the Board of Education of Ewing Township, New Jersey*, involved a challenge to a policy that reimbursed parents for the cost of transporting their children to parochial schools on public buses.

Writing for the majority, Justice Hugo Black said, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another....No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>39</sup> Black capped off this summary by asserting that, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between Church and State."

Despite some subsequent inconsistencies, these cases enabled the Supreme Court to develop what constitutional scholars refer to as a "bright-line test" on matters "respecting an

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<sup>39</sup> Hugo Black: "a union of government and religion tends to destroy government and degrade religion." Quoted by Barry Lynn, Introduction, to Boston, *Why the Religious Right is Wrong*, p. 17.

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establishment of religion.” Basically, after the 1947 Everson decision, if religion, a religious practice, or a religious institution received any support or sponsorship from a public institution, the Court was likely to decide that the First Amendment had been violated. By far the most famous—or infamous—practices to fail the Court’s bright-line separatist test were prayer and Bible reading in the public schools, which were deemed unacceptable in 1962 and 1963. Writing for the Court in the 1963 case, *Abington v. Schempp*, Justice Tom Clark asserted that, to be valid, any enactment by a government body must have “a secular legislative purpose and a primary effect that neither advances nor inhibits religion.” Thenceforth, those two “tests” would be regularly applied in establishment cases.

In 1971, in a case called *Lemon v. Kurtzman*, a third test was added. To be acceptable, a statute or mandated practice must not “foster excessive entanglement with religion.” Subsequently, the three-pronged “Lemon Test” became the standard measure of establishment. If a law or practice violated any one of the three standards, it was deemed to be unconstitutional. In addition, the Court routinely applied what it called the “compelling state interest” test, by which it meant that, unless the state can show that something truly important is at stake, it should not restrict or penalize free exercise of one’s religion. A 1990 case, *Employment Division v. Smith*, abandoned the “compelling state interest” test, but in 1993 Congress passed the Religious Freedom Restoration Act, whose sole effective purpose was to require courts, including the Supreme Court, to restore this test to its former place in their deliberations. That Act, however, was later declared unconstitutional.

Since 1971, the Court has manifested considerable inconsistency in its decisions regarding religion, with some going one way and some another, and a number by five-to-four decisions. It is something of a mess. As Constitutional scholar A.E. Dick Howard has observed, “The casual reader of opinions that draw such seemingly fine distinctions may be forgiven if he thinks that he has stumbled into the forest of Hansel and Gretel, the birds having eaten all the crumbs that mark the way out.”<sup>40</sup>

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<sup>40</sup> A. E. Dick Howard, “The Wall of Separation: The Supreme Court as Uncertain Stonemasons,” in James E. Wood, Jr., ed., *Religion and the State: Essays in Honor of Leo Pfeffer* (Waco: Baylor University Press, 1985), p. 96. In making these points, Howard cites *Meek v. Pittinger*, 421 U.S. 349 (1975) as well as the other cases mentioned above.

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It is troubling when major questions of constitutionality are decided by 5–4 margins, and when citizens understand that the “supreme law” can change quite suddenly with the appointment of only one or two new justices.

### Current Challenges to Separation

Obviously, despite the clarity with which Thomas Jefferson, James Madison, and I see things, many Americans are not convinced, as recent events make clear.

In 1989, Daniel Weisman, a Jewish citizen in Roger Williams’ Rhode Island, objected to his daughter’s being asked to accede to prayers “in Jesus’ name” at public school, and thus government-sponsored public events. When he brought a lawsuit to challenge the constitutionality of such prayers, he received obscene phone calls, hate mail, bomb threats, many of them anti-Semitic.

In September 2005, Michael Newdow succeeded for the second time in getting a federal court to declare that the words, “Under God,” in the Pledge of Allegiance violates the right of school children to be "free from a coercive requirement to affirm God." I suspect that, as in the first case, Newdow has received a deluge of negative responses, but he seems unmoved. “I’m passionate about treating people equally,” he told the *San Francisco Chronicle*. "Imagine [you are Jewish and] you send your kids to school every day, and the teachers made them stand up and say, 'We're one nation under Jesus.' Imagine you are Christian, and they say, 'We're one nation under Mohammad.' " [T]hat's exactly what goes on against atheists."<sup>41</sup> In the first case, the Supreme Court declined to hear Newdow’s appeal, on the grounds that, because his daughter no longer lived with him, he was unqualified to bring the case. This time, he is serving as the lawyer for two families who do have legal standing. I expect that the Supreme Court, if the case reaches it, will rule against Newdow. To be sure, the country faces more pressing problems, but Newdow makes an important point. The Republic for which the flag stands is, according to the men who brought it into being, not “under God” and Congress had no right to declare that it is.

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<sup>41</sup> Kelly St. John, San Francisco Chronicle Staff Writer  
Thursday, September 15, 2005  
<http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/09/15/PLEDGE.TMP>

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School prayer—another favorite cause of the Christian Right—is favored by an overwhelming majority of Americans, yet it seems to me to violate the desirable boundaries between church and state and to be something we ought, in the name of freedom of religion, to oppose. (That does not exclude private prayer by individuals at lunch or before a math test, or such student-organized efforts as “Meet Me at the Pole” gatherings that students voluntarily attend.) Not that either school prayer or its absence is all that important in itself. Based on my own experience with it in Mrs. Howard's second grade and in high school assemblies, I doubt school prayer is a powerful weapon for the inculcation of piety, though it may well have a positive symbolic benefit for those whose beliefs are expressed in the prayers that might be said. I also doubt that its absence from schools is responsible for crime, drug abuse, or venereal disease, or that its restoration would lead to a dramatic decline in such problems. But boundary disputes are typically fought over acreage that seems in itself to be insignificant.

Several months ago, Professor David Newman of the University of Texas at Odessa challenged a decision by the Odessa school board to adopt a Bible curriculum that is unmistakably fundamentalist Christian in its orientation and that advocates the erroneous notion that America was founded as a Christian nation. Advocates of the curriculum claim it has been adopted by school districts in approximately 35 states.<sup>42</sup>

Many Christians and perhaps some Jews have been troubled by the Supreme Court's decisions that the Ten Commandments should not be displayed in public schools or in other public settings, at least not in a singular fashion that implies government approval of their content. But those decisions are appropriate. Some American school children and their parents do have other gods before the God of Israel; some Americans make and worship graven images; some, including most Christians, do not observe the Sabbath. Should the state try to push any such explicitly religious belief or practice on those who do not share them? The Framers of the Constitution decided they should not. It was a wise decision. (Beyond that, stealing, murder, and perjury are the only commandments upheld in our laws. Bearing false witness is forbidden in

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<sup>42</sup> For a description of this controversy and a thorough critique of the curriculum by SMU Professor Mark Chancey, see <http://www.tfn.org/religiousfreedom/biblecurriculum/execsummary/>

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court, but not on grocery store newsstands. Honoring father and mother is a fine idea, but not required. And if we outlawed coveting, capitalism would collapse. Be careful what you pray for.)

As for national days of prayer, we had one in the week following Hurricane Katrina, in September 2005. It is not yet clear what impact that had on FEMA. Churches had already prayed without government sanction and there was clearly a suspicion that the president was trying to divert attention from his administration's admitted failures. Religion was not enhanced.

Many people seek and cast their votes in favor of laws that will criminalize or at least stigmatize homosexuals, often because they believe homosexuals violate scriptural prohibitions, even though their sexual orientation and behavior pose no threat to domestic tranquility or the general welfare. I don't know what Jefferson thought about homosexuality. It appears he would have forgiven adultery. I suspect he could have adapted. And even if he found it objectionable, he would not have argued for legal restriction on religious grounds.

### Conclusions

As we think and talk about examples such as these and other matters pertaining to religious tolerance, we must take care not to underestimate the value of this historic wall of separation and allow it to be dismantled—or bulldozed. It has proven to be the greatest guarantor of religious freedom and tolerance ever devised by human minds. As Justice Sandra Day O'Connor wrote in her concurring opinion in the 2005 Kentucky Ten Commandments case (*McCreary County v. ACLU of Kentucky*),

At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Americans attend their places of worship more often than do other citizens of other developed nations and describe religion as playing an especially important role in their lives. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

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America has been remarkably favored—blessed, if you prefer—by a wise constitutional policy of nonpreferential protection for the free and responsible exercise of religion. For the good of the entire community of Americans, religious and secular alike, we should protect that policy against encroachments from whatever quarter.

Each generation must retrace the line of separation between the rights of religion and the rights of civil authority. We understand that it matters a great deal when there are flagrant violations of this boundary. We must remind ourselves again and again that the best way to prevent such flagrant violations is to watch diligently for apparently minor ones, to "take alarm at the first experiment upon our liberties," as Madison put it, to look out not only for the interests of our own parochial group, but for the interests of the entire community, a process that often involves standing up for the rights of minorities, even though we may find them disagreeable.

Further, religious individuals and groups ought also to respect and honor the valuable principle of pluralism, the essence of which is not that all values are up for grabs and that no value position is to be preferred over another, but that our society is one in which "any number can play," and that a multiplicity of views contributes not to chaos, but to a rich and diverse republic. (It has also contributed mightily to a free-market environment in religion that helps account for the amazing vitality of American religious bodies, vitality unmatched by any other comparably modern society.) As James Madison observed more than 200 years ago, "In a free government the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects."

Hinduism, Judaism, Buddhism, Christianity, Islam, traditional religions of this and other countries, and other traditions with which I am less well acquainted all have much to contribute to moral wisdom and admirable social ideals and behavior. Most of them will find fault with aspects of contemporary modern society, and as they try to shape public policy, they cannot be expected to leave their religious convictions behind when they enter the political arena. But their contribution should come as a result of competition in the free marketplace of ideas, not on the basis of a claim to divine warrant. Beliefs dependent solely upon revelation thought to be divine and peculiar to specific religious communities are simply not a viable basis for either the domestic or foreign policy of a multicultural democracy in a pluralistic world.

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The pluralism of which I speak, the pluralism that has served this country so well, that pluralism whose core is—let me repeat—not the dogma that no value is to be preferred over another, but the conviction that civility and the public peace are important, that respect for minorities and their opinions is a crucial element of a democratic society, and that, however persuaded I am of the rightness of my position, I may still, after all, be wrong.<sup>43</sup>

Americans cannot, of course, require other nations to adopt the principle of church-state separation. I see no problem, however, in our being willing to acknowledge the remarkable success and demonstrable advantages of this model and to invite others to inspect it, leaving it to them to assess its merits and act as they see fit. It is indeed a commendable arrangement.

You may want to thank God for it. But you don't have to.

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<sup>43</sup> Portions of his conclusion are adapted from William Martin, *These Were God's People: The Rise of the Religious Right in America* (New York: Broadway Books, 1996), pp. 371-385.