

THE “IRRELEVANCE” OF CHURCH-STATE SEPARATION IN THE TWENTY-FIRST CENTURY

Steven K. Green[†]

CONTENTS

INTRODUCTION	27
I. BACKGROUND	32
II. SEPARATIONISM’S MODERN ADOPTION.....	48
III. SEPARATIONISM IN TRANSITION	50
A. <i>The Demise of Separationism</i>	55
B. <i>The Consequences of Separationism’s Demise</i>	62
CONCLUSION.....	67

INTRODUCTION

Few jurisprudential theories have had a greater transformative impact on American law and culture than the maxim of separation of church and state. Few constitutional theories have experienced such a comparable longevity, as well. Even though the Supreme Court first identified church-state separation as a principle undergirding the Religion Clauses in 1879,¹ in 1947 the modern Court made it an operative legal theorem.² That year, in *Everson v. Board of Education*, Justice Hugo Black wrote:

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. . . . In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”³

The Court’s embrace of church-state separation in *Everson* was neither novel nor a sport; indeed, historians and legal and religious scholars had been promoting the principle for decades.⁴ The nation’s leading

[†] Fred H. Paulus Professor of Law and Director, Center for Religion, Law and Democracy, Willamette University. Earlier versions of this article were presented at conferences in 2016 sponsored by Claremont Graduate University and the Religion and Law Section of the American Academy of Religion.

1. *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

2. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16–18 (1947).

3. *Id.* at 15–16 (citing *Reynolds*, 98 U.S. at 164).

4. See *An Unamerican Appointment*, 57 CHRISTIAN CENTURY 34, 38–40 (1940); *Threats to Religious Liberty*, 56 CHRISTIAN CENTURY 790, 790–91 (1939); *Vatican Appointment Draws Protestant Fire*, 57 CHRISTIAN CENTURY 66, 69 (1940).

mainline Protestant journal, *The Christian Century*, had been singing the praises of church-state separation for years prior to 1947.⁵ Litigants on both sides in the *Everson* case acknowledged the principle of church-state separation in their briefs;⁶ even the National Catholic Welfare Conferences' amicus brief conceded that the "Jeffersonian metaphor of a 'wall of separation' between Church and State has validity."⁷ As a result, the Court's adoption of separationism as a legal principle was relatively non-controversial; in fact, all nine Justices endorsed the principle, the only disagreement being over which Justice maintained the stricter position.⁸ That apparent unanimity of thought belied the deep disagreements over the concept, however; while most people agreed on the principle in the abstract, people diverged over its meaning and application. Since the Court's pronouncement in 1947, separationism has been praised⁹ and vilified.¹⁰ Still, church-state separation was the dominant paradigm for adjudicating religion clause disputes into the 1990s.¹¹ It remains popular among members of the public and retains an undeniable presence in legal adjudications of church-state controversies to this day.¹²

Despite its pedigree and legacy, the legal principle of separationism

5. *An Unamerican Appointment*, *supra* note 4; *Threats to Religious Liberty*, *supra* note 4; *Vatican Appointment Draws Protestant Fire*, *supra* note 4.

6. See Brief for Appellees at 29–30, *Everson*, 330 U.S. 1 (No. 52) (highlighting that appellant and amici curiae filed briefs which argue separation of church and state is a fundamental principle of government, a proposition with which the appellees agreed).

7. Brief for National Council of Catholic Men & the National Council of Catholic Women as Amici Curiae Supporting Appellees at 33, *Everson*, 330 U.S. 1 (No. 52).

8. LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 150–51 (2d ed. 1994).

9. See generally R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* (1950); CONRAD HENRY MOEHLMAN, *THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (1951); FRANK SWANCARA, *THE SEPARATION OF RELIGION AND GOVERNMENT* (1950); V. T. THAYER, *RELIGION IN PUBLIC EDUCATION* (1947) (advocating for continued church-state separation).

10. See generally JOSEPH H. BRADY, *CONFUSION TWICE CONFOUNDED: THE FIRST AMENDMENT AND THE SUPREME COURT* (1955); JAMES M. O'NEILL, *CATHOLICISM AND AMERICAN FREEDOM* (1952); JAMES M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949); WILFRID PARSONS, S.J., *THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES* (1948); Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3 (1949) (arguing against the currently developed church-state separation).

11. Ira C. Lupu, *The Lingering Death of Separationism*, 62 *GEO. WASH. L. REV.* 230, 243–44 (1994).

12. *FIRST AMEND. CTR., STATE OF THE FIRST AMENDMENT 2011*, at 6 tbl.Q6 (2011), https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/FAC_sofa_2011report.pdf (indicating that sixty-seven percent of Americans either strongly or mildly agree that the Constitution requires "a clear separation of church and state").

2019] “Irrelevance” of Church-State Separation 29

has fallen into disfavor among many jurists, politicians, and members of the academy. Even a casual observer would note a shift in the Court’s church-state jurisprudence since the late 1980s away from separationist holdings to more accommodationist results. Recent decisions, for example, have upheld public grants to religious nonprofits to provide family planning counseling,¹³ grants for educational materials for parochial schools,¹⁴ tuition vouchers for children attending parochial schools,¹⁵ access by religious groups to public school facilities and even students,¹⁶ the display of religious symbols on public property,¹⁷ and Christian prayers at city council meetings.¹⁸ This non-separationist trend is reflected in much of the scholarly literature on the subject over the same period of time. Books and articles by scholars including Gerard Bradley, Daniel Dreisbach, Philip Hamburger, Steven Smith, Tom Berg, and Michael McConnell have excoriated the concept and the Court’s separationist holdings, charging that the principle is ahistorical, anti-Catholic in origin, or simply hostile to religion.¹⁹ These works have reinforced an apparent enmity toward the concept from Justices Clarence Thomas and Samuel Alito, and former Justices William Rehnquist and Antonin Scalia.²⁰

Separationism’s decline is starkly evinced by the holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer* in 2017.²¹ That case involved the question of whether the state of Missouri could deny a reimbursement grant to a church for playground resurfacing when the church otherwise met the state’s nonprofit criteria for receiving the grant.²² By a surprisingly lopsided seven-to-two vote, the Court majority held that the

13. *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

14. *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

15. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

16. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001).

17. *E.g.*, *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); *Cap. Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

18. *Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

19. *See* GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 5 (1987); DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 128 (2002); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 3 (2002); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 4 (1995); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. UNIV. CHI. L. REV.* 121, 123 (2001); Michael W. McConnell, *Accommodation of Religion*, 1985 *SUP. CT. REV.* 1, 1 [hereinafter McConnell, *Accommodation*]; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 *WM & MARY L. REV.* 933, 933 (1986).

20. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring), *abrogated by* *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

21. 137 S. Ct. 2012, 2025 (2017).

22. *Id.* at 2017.

state could not discriminate against the church based on its religious identity, even though the grant would flow directly from the state coffers to a house of worship to pay for facility improvements.²³ The majority, in an opinion by Chief Justice John Roberts, brushed aside the non-establishment concerns, initially declaring that all parties agreed that the Establishment Clause did not bar the grant,²⁴ and then characterizing Missouri's "no religious aid" constitutional provision as a mere "policy preference" that failed to qualify as a compelling state interest.²⁵ The holding elicited a lengthy dissenting opinion by Justice Sonia Sotomayor (joined by Justice Ruth Bader Ginsburg) that excoriated the majority for abandoning the principle of church-state separation: "If . . . separation means anything, it means that the government cannot, or at least need not, tax its citizens and turn that money over to houses of worship."²⁶ The holding, according to Justice Sotomayor, was effectively leading the Court to "a place where separation of church and state is a constitutional slogan, not a constitutional commitment."²⁷

This Article critiques this decline of separationism as a constitutional theorem. While it expresses regret over this trend, it argues that the demise of separationism should not be surprising. Church-state separation, in most of its applications, outlived its usefulness decades ago. Though separationists, like this author, can rightfully mourn its passing, we must recognize that separationism is an anachronism and is largely irrelevant for the ordering of church-state relations in the twenty-first century.²⁸ In so stating, this Article does not join the host of critiques of separationism that have been written over the past seventy years. As noted, those numerous books and articles—too many to document—have taken a number of approaches: that separationism is ahistorical (that the Founders never intended to install a regime of church-state separationism);²⁹ that separationism is anti-religious;³⁰ that it has anti-Catholic origins;³¹

23. *Id.* at 2025.

24. *Id.* at 2019.

25. *Id.* at 2024.

26. *Trinity Lutheran Church*, 137 S. Ct. at 2041 (Sotomayor, J., dissenting).

27. *Id.*

28. See Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1116 (2002). As an aside, for ten years I served as legal director for Americans United for Separation of Church and State.

29. HAMBURGER, *supra* note 19, at 481.

30. McConnell, *Accommodation*, *supra* note 19.

31. Berg, *supra* note 19, at 130.

2019] “Irrelevance” of Church-State Separation 31

and that separationism advances a secularist agenda at the expense of religious pluralism.³² Key to all of those critiques is that separationism was wrong when the Court adopted it and was wrong as it was subsequently applied in the law.³³ I have contested those various critiques in other writings.³⁴ That said, the purpose of this Article is not to defend the ongoing relevance of separationism. Instead, its approach is both historical, in the sense of tracing separationism’s rise and fall, and normative, in arguing that separationism is no longer necessary for the correct ordering of church-state relations.

I wish to make three points: first, when the Supreme Court adopted separationism as the controlling theory for ordering church-state relations, the Justices were responding to concerns of the recent past and the immediate present. Separationism addressed those concerns while it affirmed certain democratic norms that were highly valued at the time, but those concerns and norms became less compelling over time. Second, with the rise of the welfare state after World War II, and more particularly, with the passage of non-discrimination and Great Society legislation in the 1960s, the principle of separationism was ill-equipped to deal with new societal pressures and challenges. In an era of increasing government funding of and cooperation with private entities, could the government continue to exclude eligibility of some entities solely on account of their religious character? By the early 1970s, the American ideal of separation of church and state was becoming an anachronism.³⁵ The majority of observers, including members of the Court, did not realize its

32. See HAMBURGER, *supra* note 19, at 483–86.

33. Lupu, *supra* note 11, at 234; see HAMBURGER, *supra* note 19, at 481, 483–86; Berg, *supra* note 19, at 121–22.

34. See generally STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* (2010) [hereinafter GREEN, *SECOND DISESTABLISHMENT*] (referencing the law’s application of separationism in the realm of education); Steven K. Green, *A ‘Spacious Conception’: Separationism as an Idea*, 85 OR. L. REV. 443 (2006) (arguing that it is the job of judges and lawyers to discover and apply the settled understandings of church-state separation and that as an unfolding idea, the court and law did not apply separationism wrong); Green, *supra* note 28 (arguing in favor of the courts’ holdings on separationism where religious organizations and churches were left to determine their own beliefs); Steven K. Green, *The Separation of Church and State in the United States*, OXFORD RES. ENCYC. AM. HIST. 1 (2014), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-29?print=pdf> (arguing positively in favor of the court and law’s adoption of separationism into the country).

35. Lupu, *supra* note 11, at 232–33; see also *Mitchell v. Helms*, 530 U.S. 793, 838 (2000) (O’Connor, J., concurring) (quoting *id.* at 809–10) (addressing the plurality’s shift away from separationist and its “near-absolute” adherence to the neutrality principal).

increasing irrelevance for another two decades.³⁶ Opponents of separationism were blinded by their enmity toward the principle, while supporters were desperately shoring up the walls of a decaying structure.³⁷ This Article thus parts from the conventional explanation for separationism's demise: rather than being a victim of the politically conservative Reagan Revolution, it was a casualty of the liberal Great Society.³⁸ And third, this Article maintains that with the demise of separationism, we are witnessing a new tension in church-state relations that separationism kept at bay, that being claims for regulatory exemptions from those religious players and entities that previously were excluded from the beneficiary class. This state of affairs, however, may say less about separationism's continuing legal relevance and more about the institutional role it has played in the law and culture. While the normative justifications for separationism may be wanting, it continues to serve a valuable institutional function in a culture beset by religious competition and divisiveness. So we can still mourn its passing, despite its irrelevance.

I. BACKGROUND

First some background. In the United States, separation of church and state has long been seen as a corollary of religious disestablishment.³⁹ In the nineteenth century, the Supreme Court first associated separationism with the religion clauses in an early case involving government suppression of Mormon polygamy.⁴⁰ The Court's endorsement of separationism in *Reynolds* was unusual in that the case was essentially a free exercise dispute, though the backdrop that informed the Mormon cases involved allegations that Deseret/Utah was essentially a theocracy *lacking* in church-state separation.⁴¹ Chief Justice Morrison R. Waite employed separationism to refute charges that Congress had purposefully

36. Lupu, *supra* note 11, at 237; *see also* Green, *supra* note 28, at 1112–14.

37. *See generally* Lupu, *supra* note 11 (discussing the continued relevance of separationist thought in Supreme Court jurisprudence despite the prolonged decline of the theory).

38. *See id.* at 237 (arguing that the decline of separationist thought in the Supreme Court was reflective of political trends during the Reagan-Bush years in America in the 1980–1990s, reflecting a retreat from judicial policing of the boundaries between religion and government); *see also* GREGG IVERS, LOWERING THE WALL: RELIGION AND THE SUPREME COURT IN THE 1980S, at 99 (1991) (arguing the decline of separationist thought in the Supreme Court was reflective of political trends in America in the 1980–1990s).

39. *See* Conor B. Dugan, Note, *Religious Liberty in Spain and the United States: A Comparative Study*, 78 NOTRE DAME L. REV. 1675, 1711 (2003).

40. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802) (on file with the Library of Congress)).

41. *See id.* at 161.

legislated against a religious doctrine in prohibiting polygamy.⁴² Chief Justice Waite maintained that the value of separationism underlay both religion clauses, so much so that “it may be accepted almost as an authoritative declaration of the power and scope of the amendment thus secured.”⁴³

The impulse for church-state separation went back much farther than 1879, however. Putting aside the controversy over whether the nation’s founders intended to institute a regime of church-state separation in the First Amendment, there can be no dispute that the concept was familiar to members of the founding generation.⁴⁴ The idea of a separation between civil and religious institutions had both religious and secular roots.

Considering its religious origins first, a distinction between temporal and ecclesiastical authority, with each operating in independent realms, can be traced to the eleventh century Catholic Church. As a means of freeing the Church from the control of emperors and kings, Pope Gregory VII promoted the “two swords” theorem in which clergy wielded the spiritual sword and civil magistrates possessed the temporal sword.⁴⁵ Five hundred years later Protestants, rebelling against what they perceived as the papacy’s autocratic exercise of both swords, seized on the two swords theorem, “adding new accents and applications,” in the words of scholar John Witte, Jr.⁴⁶ Both Martin Luther and John Calvin distinguished spiritual from temporal authority and called for a division of labor between the two.⁴⁷ Luther wrote of a “paper wall” that separated the “spiritual estate” from the “temporal state.”⁴⁸ “Worldly government has laws which extend no farther than to life and property and what is external upon earth,” Luther asserted.⁴⁹ Echoing Luther, John Calvin wrote in his *Institutes of the Christian Religion* that “Christ’s spiritual Kingdom and the

42. *Id.* at 166.

43. *Id.* at 164.

44. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947) (referencing a letter written by James Madison stating religion did not need the support of law, confirming that he, as a member of the founding generation, was aware of the concept of church-state separation).

45. Harold J. Berman, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 92–93 (1983); John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & ST. 15, 20 (2006).

46. Witte, Jr., *supra* note 45, at 21.

47. *Id.* at 23–24.

48. *Id.* at 23.

49. LUTHER ON LEADERSHIP: LEADERSHIP INSIGHTS FROM THE GREAT REFORMER 41 n.33 (David D. Cook, ed., 2017); *see also* HEINRICH BORNKAMM, *LUTHER’S DOCTRINE OF THE TWO KINGDOMS* 17 (1966); JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 106 (2002); John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. R. 1869, 1877 (2003).

civil jurisdiction are things completely distinct,”⁵⁰ and as such, must always be considered separately because of the great “difference and unlikeness . . . between ecclesiastical and civil power.”⁵¹ These distinct realms did not mean, however, that civil authorities in Calvin’s Geneva had no interest in ensuring that society operated according to religious precepts.⁵² Luther, too, did not object to German princes declaring Lutheranism to be the established religion of their provinces.⁵³

Protestants in the Anabaptist tradition took separationism to extremes, seeking to separate their communities from the corruptions of the world, declining to swear oaths of allegiance to civil authorities or otherwise participate in civic functions.⁵⁴ The early leader of the Mennonites, Menno Simons, used the term a “separating wall” or “wall of separation” to illustrate the degree of separateness their faith required from the world.⁵⁵ Most Protestant dissenters did not seek to isolate themselves from the corrupt world as did the Anabaptists; as a result, they did not promote notions of separationism where the two realms would never interact.⁵⁶ Thus, while many dissenters decried the “adulterous ‘union’ of church and state,” others, like Presbyterians, promoted milder forms of establishment in which the regenerate would form a national church and where civil authorities would enforce religious standards.⁵⁷ Historian Philip Hamburger maintains that the “overwhelming majority of Protestants who criticized religious establishments and the union of church and state did not understand themselves to be seeking separation.”⁵⁸ That may be true as for advocating an absolute sense of that term, but that does not mean that Protestant dissenters did not promote versions of separation that were consistent with their particular needs and theology.⁵⁹ Puritans—despite their reputation for being theocrats—promoted notions of separation between the true church and the ecclesiastical authority of the Church of England which served as a proxy for the British

50. CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 1486 (John T. McNeill ed., Ford L. Battles trans., Westminster Press 1960).

51. *Id.* at 1215.

52. Witte, Jr., *supra* note 45, at 24.

53. See THOMAS M. LINDSAY, LUTHER AND THE GERMAN REFORMATION 158 (1900).

54. Witte, Jr., *supra* note 45, at 22.

55. DREIBACH, *supra* note 19, at 73.

56. HAMBURGER, *supra* note 19, at 28 (“[A]ttacks [by dissenting Protestants] on a union or alliance left open the possibility of other, nonestablishment connections.”).

57. *Id.* at 27, 102–03.

58. *Id.* at 28.

59. See EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 66 (1967).

crown.⁶⁰ Whereas Puritans sought to purify the national Church, their Separatist (Pilgrim) brethren went a step further, advocating a regenerate church that was separated from its temporal overlords.⁶¹ Early Baptists also employed the metaphor of separationism in their critiques of religious establishments.⁶²

What this indicates is that separation was a familiar theme in the political/theological thought of many religious dissenters. While a greater number of dissenters employed separationism as a rhetorical device rather than as a creed to be practiced, the idea—whatever its particular strain—was sufficiently prevalent to draw the ire of sixteenth-century Anglican theologian and apologist Richard Hooker.⁶³ Hooker derided the concept of separationism, but grudgingly acknowledged its appeal among religious dissenters.⁶⁴ Dissenters, Hooker reproved, insisted on “a necessary separation perpetual and personal between the Church and Commonwealth.”⁶⁵ On the contrary, Hooker declared, the “episcopal form of government was the best for the Church of England, and that Church and state were two aspects of the same commonwealth”⁶⁶ Separatists and other dissenters would undermine that system ordained by God by urging that “the Church and the Commonwealth are two both distinct and separate societies . . . and the walls of separation between these two must forever be upheld.”⁶⁷ The point is that while only a minority of religious dissenters advocated actual separation between the religious and civil realms, the concept was familiar to people in both orthodox and dissenting camps.⁶⁸ Thomas Jefferson reputedly owned a copy of Hooker’s *Of the Laws of Ecclesiastical Polity*, the book potentially serving as one source for his “wall” metaphor.⁶⁹

The notion of separationism made the trans-Atlantic crossing with the early settlers of British colonial America, many of them being religious dissenters from the Church of England. Today, the most famous advocate of church-state separation during the colonial period was Roger Williams, the founder of Rhode Island in 1640. Initially identifying as a

60. *See id.*

61. *See id.* at 19–20.

62. HAMBURGER, *supra* note 19, at 348–49.

63. Witte, Jr., *supra* note 45, at 25.

64. *See* DREISBACH, *supra* note 19, at 74.

65. *Id.*

66. *Id.*

67. *Id.* at 75–76.

68. *See id.* at 73–76 (establishing the familiarity of Anglican theologian and critic of separationism, Richard Hooker, with the separatist views of the Puritans and other dissenters).

69. *See* DREISBACH, *supra* note 19, at 76.

Separatist, Williams joined the Baptists and adopted their strong theological aversion to religious establishments, perceiving that state support and endowments of religion corrupted true faith.⁷⁰ In correspondence with Puritan leader John Cotton, Williams argued for erecting a “hedge or wall of separation between the garden of the church and the wilderness of the world”⁷¹ Although Williams’s writings were not generally known throughout the colonial period, his letters were rediscovered during the revolutionary era by Baptist leader Isaac Backus who, along with fellow Baptist John Leland, widely promoted the concept.⁷² By the time of the American Revolution, a religious basis for separationism was firmly established in colonial society.⁷³

Secular writers affiliated with the Enlightenment also promoted notions of church-state separation. A chief mission of Enlightenment theorists was to free scientific and intellectual inquiry from the constraints imposed by religious dogma.⁷⁴ Many theorists advocated forms of religious disestablishment as a means of preventing coercion of conscience and curtailing entrenched clerical power.⁷⁵ One of the earlier and stronger proponents of separationism was John Locke, whose writings influenced many of the Founders, most notably Thomas Jefferson. Locke did not expressly call for disestablishment, but his *Letter on Toleration* suggested as much by declaring that “the whole jurisdiction of the [civil] magistrate is concerned only with these civil goods” and not with “the care of souls.”⁷⁶ As Locke continued: “This, then, is what I say, namely that the civil power ought not to prescribe articles of faith, or doctrines, or forms of worshipping God, by civil law.”⁷⁷ But Locke went further, tying his vision of state and church disengagement to concepts of separationism.⁷⁸ Locke regarded it “as necessary above all to distinguish between the business of civil government and that of religion, and to mark the true bounds between the church and the commonwealth.”⁷⁹ The church, Locke asserted, must be “absolutely separate and distinct from the commonwealth

70. DREIBACH, *supra* note 19, at 78; TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 154 (1998).

71. HALL, *supra* note 70, at 83.

72. EDWIN S. GUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 203, 206 (1991).

73. *Id.* at 38–43.

74. See JOHN LOCKE, A LETTER ON TOLERATION 65 (Raymond Klibansky ed., J.W. Gough trans., Clarendon Press 1968) (1689).

75. *Id.*

76. *Id.* at 67.

77. *Id.* at 69.

78. See *id.* at 85.

79. LOCKE, *supra* note 74.

and civil affairs. The boundaries on both sides are fixed and immovable.”⁸⁰ Locke’s writings on religious toleration, like his more famous works on government, influenced later Enlightenment and Whig theorists such as Voltaire and David Hume, but his greatest influence was on a generation of American Founders: Thomas Jefferson, Benjamin Franklin, John Adams, and James Madison, among others.⁸¹

Later political theorists familiar to the Founders, such as Joseph Priestly and James Burgh, expressly endorsed disestablishment. Priestly urged the repeal of the Test and Corporations Acts which denied religious dissenters many civil rights; like Locke, Priestley identified separate private and public spheres, contending that the government should only have control over the public sphere.⁸² Priestley criticized any “union of civil and ecclesiastical power” as an “unnatural mixture,” suggesting that true religious toleration could only exist under a regime of disestablishment.⁸³ Schoolmaster and Whig theorist James Burgh also maintained a significant following among leading Founders, including Thomas Jefferson, George Washington, John Adams, John Hancock, John Dickinson, and Benjamin Rush.⁸⁴ Burgh expressly advocated a variant of disestablishment: church-state separation. Society should “build an impenetrable wall of separation between things sacred and civil,” Burgh wrote.⁸⁵ “[T]he less the church and state had to do with one another, it would be the better for both.”⁸⁶ These also became the sources for Jefferson’s famous declaration that the United States Constitution had built “a wall of separation between Church and State.”⁸⁷

Both strains of separationism—religious and philosophical—were familiar to the leaders of the American Revolution when they began dismantling the colonial establishments that had been in place since the first

80. *Id.* at 85.

81. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26–30 (4th ed. 1969); see also EDWIN S. GAUSTAD, *SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON* 70–72 (1996); CHARLES B. SANFORD, *THE RELIGIOUS LIFE OF THOMAS JEFFERSON* 24–30 (1984).

82. JOSEPH PRIESTLEY, *AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY* 174–75 (2nd ed. London 1771) (1768).

83. *Id.* at 172; see also GREEN, *SECOND DISESTABLISHMENT*, *supra* note 34, at 17.

84. CARLA H. HAY, *JAMES BURGH, SPOKESMAN FOR REFORM IN HANOVERIAN ENGLAND* 42–43 (1979).

85. JAMES BURGH, *CRITO, OR ESSAYS ON VARIOUS SUBJECTS* 119 (vol. 2, London, Messrs. Dodsley 1767).

86. JAMES BURGH, *CRITO, OR ESSAYS ON VARIOUS SUBJECTS*, at xi (vol. 1, London, Messrs. Dodsley 1766).

87. DREISBACH, *supra* note 19, at 81.

settlements. In 1775, nine of the thirteen original British colonies maintained some form of a religious establishment whereby residents were taxed to support the operations of one church or another and where colonial legislatures or local officials licensed and regulated various aspects of the religious societies within their jurisdictions.⁸⁸

In the South (Virginia, Maryland, Georgia and North and South Carolina), the Church of England was established by law; all other religious societies existed as dissenters, ineligible to receive the benefits (and burdens) of being officially recognized.⁸⁹ In the years preceding the American Revolution, Virginia officials regularly subjected unlicensed Baptist lay preachers to fines, whippings, and imprisonment.⁹⁰ Such treatment led a young James Madison in 1774 to lament how “in the adjacent County not less than 5 or 6 well meaning men [were] in close [Gaol] [sic] for publishing their religious Sentiments which in the main are very orthodox. . . . [P]ray for Liberty of Conscience”⁹¹

In New England (Massachusetts, Connecticut, New Hampshire and, shortly, Vermont), the colonies maintained “multiple” establishments in which “recognized” Protestant churches could in theory receive a proportional share of the tax assessments, though the system clearly favored the dominant Congregational Church.⁹² New York maintained yet a third system whereby a majority of voters of each town (outside of Manhattan) selected which Protestant church to support financially, a system that largely benefitted Presbyterians and Dutch Reformed to the chagrin of the Anglican Church which claimed to be the officially established church.⁹³ The remaining four colonies—Pennsylvania, Delaware, New Jersey and Rhode Island—had no religious establishments but they, like all of the colonies, maintained other laws that favored Protestantism over Catholicism and Judaism (e.g., oath requirements).⁹⁴

With the onset of the Revolution and the enactment of the first state constitutions, New York and North Carolina quickly abolished their establishments while Georgia, Maryland, and South Carolina struggled to

88. GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 24–31.

89. See THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT ch.6 (1986).

90. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776–1787, at 14–15 (1977).

91. *Id.* at 15; see also Letter from James Madison to William Bradford (Jan. 24, 1774) (second alteration in original), http://press-pubs.uchicago.edu/founders/documents/amendI_religions16.html.

92. See CURRY *supra* note 89, at ch.7.

93. See *id.* at 67–68; GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 25–26.

94. See CURRY *supra* note 89, at 159.

maintain religious assessment systems in the face of growing opposition.⁹⁵ Those moribund systems all collapsed by the 1790s.⁹⁶ And finally in Virginia, James Madison and his Baptist and Presbyterian allies successfully defeated Patrick Henry’s moderate assessment proposal in 1785, with Madison securing the passage of Jefferson’s Bill for Establishing Religious Freedom the following year.⁹⁷ Only in three New England states (possibly four depending on how one counts Vermont) did religious establishments continue into the new century.⁹⁸ As a result, in a twenty-five-year span, the ratio of state religious establishments had been completely reversed, a remarkable change over such a short period of time.⁹⁹

Philip Hamburger is correct that during the various state struggles for disestablishment few people spoke of *separation* of church and state—the more commonly expressed concern was to avoid a *union* of church and state.¹⁰⁰ Unquestionably, many people who supported political disestablishment continued to believe in a reciprocal and reinforcing relationship between civil government and religion and had few issues with official or public affirmations of divine providence and Christian values.¹⁰¹ If they had taken the term literally—or had anticipated some of its modern interpretations—then many would have considered “separation” to be an inapposite concept.¹⁰² But people of the founding generation did not necessarily consider the words “separation” or “union” to be terms of art or to represent mutually exclusive concepts.¹⁰³ Separationists Jefferson and Madison often used terms interchangeably and would have resisted being restricted to any single paradigm in their efforts to expand religious liberty for individuals and religious freedom writ-large.¹⁰⁴ In addition to employing the “wall” metaphor to describe the ideal church-state relationship, Jefferson used other terms, deploring the “loathsome combination of Church and State” and decrying government “intermeddling” with religion.¹⁰⁵ Madison, too, did not restrict himself to any one

95. *Id.* at 105–06, 151, 161.

96. *See id.* at 148, 151–53, 161.

97. *See id.* at 140–46.

98. *See id.* at 184.

99. *See* BUCKLEY, *supra* note 90, at ch.5; CURRY, *supra* note 89, at ch.7; GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 31–51.

100. *See* HAMBURGER, *supra* note 19, at ch.4.

101. *See id.*

102. *See* GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 24–51.

103. *See* JAMES MADISON ON RELIGIOUS LIBERTY 93 (Robert S. Alley ed., 1985).

104. *See id.*; JEFFERSON: MAGNIFICENT POPULIST 340–41 (Martin A. Larson ed., 2d ed. 1984) (citing to excerpted letters by Thomas Jefferson).

105. *Id.*

phrase. In addition to advocating “perfect separation” and the “total separation of the Church from the State,” Madison spoke in other contexts of an “essential distinction between civil and religious functions” while criticizing “a connexion” or an “alliance or coalition between Gov[ernment] [and] Religion.”¹⁰⁶ Rather than parsing distinct meanings from these various phrases, it makes more sense to view them as reinforcing each other.¹⁰⁷

This was the philosophical and practical background for the drafters of the First Amendment. Disestablishment was necessary in 1790s America to ensure religious peace and pluralism and prevent religious factionalism.¹⁰⁸ At the national level, the no-establishment clause, in conjunction with the prohibition on religious tests for public offices, denied government authority over religious matters while they guaranteed the secular character of the federal government.¹⁰⁹ As noted, at the state level, disestablishment was the clear trend.¹¹⁰ The remaining New England establishments were inefficient and increasingly unpopular anachronisms; none of the second generation of states—Kentucky, Tennessee, Ohio, Louisiana, Indiana, and Mississippi, all admitted before disestablishment arose in New England—chose to adopt a religious establishment, even though they were free to do so.¹¹¹ Disestablishment was essentially an enterprise (and concern) of the late-eighteenth and early-nineteenth centuries, with Massachusetts eventually abolishing its system in 1833.¹¹² In many ways, separation of church and state was an enterprise of the same period where the term represented a gradual process of disengagement rather than an ongoing state of affairs.¹¹³ Jefferson made his famous reference to a “wall of separation between Church and State,” contained in a public response to a Connecticut Baptist association, in solidarity to the Baptists’ ongoing struggle against the reigning Connecticut establishment.¹¹⁴

106. JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 103, at 79, 81, 83–84 (citing to excerpted letters by James Madison).

107. *See id.* at 80–84, 89–94 (citing to excerpted letters by James Madison, read together rather than in isolation).

108. *See generally* Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869 (2002) (arguing that disestablishment as advocated by James Madison was required in order to maintain religious peace and prevent factions from developing in the new republic).

109. *See* U.S. CONST., amend. I; *see also* U.S. CONST., art. VI, cl. 3.

110. *See* CURRY, *supra* note 89, at 193; *see also* GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 31–51.

111. *See* GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at 51.

112. *Id.*

113. *Id.* at 143.

114. DANIEL L. DREISBACH & MARK DAVID HALL, THE SACRED RIGHTS OF CONSCIENCE:

2019] “Irrelevance” of Church-State Separation 41

As religious historians have long noted, the ideal of church-state separationism was not the reality in nineteenth-century American culture.¹¹⁵ Religious historian Robert Handy once called nineteenth-century America the “Protestant Establishment” because of the pervasive Protestant influences on the nation’s culture.¹¹⁶ A Protestant ethos pervaded the nation’s institutions, including its emerging public schools, and for the first half of the century judges demonstrated little hesitation about upholding morally based sumptuary laws—Sunday laws, restrictive divorce and oath requirements, and blasphemy and swearing restrictions—on grounds that they reinforced a Christian culture.¹¹⁷ David Sehat has argued that church-state separation was little more than a fig-leaf to hide a regime of religious coercion.¹¹⁸ I have written previously that the American disestablishment of the 1790s was chiefly political, that institutional and cultural disestablishment took much longer, extending throughout the nineteenth century.¹¹⁹ During that time, church-state separation was usually more of a mantra than a reality.¹²⁰

In addition to insisting that few people during the founding period advocated for church-state separation, Hamburger argues that the concept arose chiefly during the nineteenth century as a Protestant response to Catholic immigration.¹²¹ To be sure, insecure Protestants and anti-Catholic nativists used separation to justify perpetuating a Protestant cultural hegemony at the expense of Catholics.¹²² Protestants and nativists raised church-state separation as the rationale for denying Catholic schools a proportionate share of the state school funds—and used the concept to fan nativist fears of papal designs—while turning a blind eye to the

SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FUNDING 528 (2010).

115. *See generally* ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (2d ed. 1984) (discussing the influence of Protestant Christianity in the development of American civilization).

116. ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA 1880–1920, at 7–8 (John F. Wilson ed., 1991).

117. *See id.* *See generally* HANDY, *supra* note 115 (discussing the influence of Protestant Christianity in the development of American civilization).

118. *See generally* DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM (2011) (suggesting that religious ideologies continued to maintain a dominant role in the foundation of morality and law in America after ratification of the First Amendment).

119. *See* GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at ch.4 (elaborating on the idea that the political disestablishment and cultural disestablishment were two distinct movements with two distinct endpoints).

120. *Id.* at ch.7 (denoting the shift from Christian-based law to a law that was more areligious).

121. HAMBURGER, *supra* note 19, at 191.

122. *Id.*

Protestant character of the public schools.¹²³ But this narrative of a chiefly anti-Catholic basis for separationism gives short shrift to the larger historical record. Throughout the nineteenth century, people promoted separationism for a variety of reasons and in a variety of contexts. In 1829, a controversy arose over whether to discontinue the delivery of U.S. mail on Sundays, a practice that many evangelical Protestants found highly offensive.¹²⁴ They petitioned Congress for a law prohibiting such delivery, but faced opposition from freethinkers and other secularists who asserted that a repeal would effectively establish the doctrines of one religious sect and result in a union of church and state.¹²⁵ Congress agreed with the respondents, and in a report written by Representative Richard Johnson, future Vice President to President Martin Van Buren, it affirmed that “the conclusion [was] inevitable that the line cannot be too strongly drawn between church and state.”¹²⁶ Three years later, President Andrew Jackson relied on church-state separation to explain his decision not to declare a national fast day in the wake of a cholera epidemic, writing that he refused to “disturb the security which religion now enjoys in this country, in its complete separation from the political concerns of the General Government.”¹²⁷ President Jackson’s concern represented the view of many Jacksonian Democrats who disdained the moralizing of their Whig opponents and their evangelical supporters who pushed for “Christian” reform legislation.¹²⁸

Religious and legal commentators of the century also acknowledged the concept of separationism, although each writer commonly imposed his own interpretative spin on the principle. One leading observer who was directly involved in church-state controversies was Horace Mann, Secretary of the Massachusetts Board of Education from 1836 to 1848.¹²⁹ Mann became famous—and controversial—for reforming the state’s school curriculum by removing all religious exercises from the public schools except for unmediated readings from the Bible.¹³⁰ Responding to his evangelical critics, Mann embraced a paradigm of separationism,

123. See STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* 71–91 (2012) (discussing the impact of anti-papal sentiments on the development of the church-state separation doctrine).

124. GREEN, *SECOND DISESTABLISHMENT*, *supra* note 34, at 110–11.

125. *Id.* at 112–13.

126. H.R. REP. NO. 21-271, at 3 (1829); GREEN, *SECOND DISESTABLISHMENT*, *supra* note 34, at 115.

127. LAWRENCE FREDERICK KOHL, *THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA* 111 (1989).

128. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 354 (1945).

129. GREEN, *supra* note 123, at 21.

130. *Id.*

2019] “Irrelevance” of Church-State Separation 43

though he did not use that exact term. In discussing the separate authority of state and religious entities, Mann asserted that “there are some things that are within the jurisdiction of government, and other things which are not within it.”¹³¹ Analogizing to the different jurisdictions of the federal and state governments, Mann wrote, “there is a line dividing the jurisdiction” of civil governments and religion.¹³² “Rights, therefore, which are strictly religious, lie out of, and beyond the jurisdiction of civil governments.”¹³³

Offering a different view of church-state relations was Robert Baird, author of the first comprehensive history of religion in America, titled *Religion in the United States of America*, written in 1844.¹³⁴ Baird celebrated the rise of evangelicalism in antebellum America and its growing influence on the culture.¹³⁵ Because those influences benefited society, Baird insisted that the “government is not restrained from promoting religion,” provided it did not create a religious establishment.¹³⁶ States could enact legislation that favored Christianity generally and promoted public morality.¹³⁷ Still, throughout his book Baird decried any steps that would result in a “union” or “connection between the church and the state.”¹³⁸ Baird saw little inconsistency in asserting that America was essentially “a Christian nation” while affirming that he believed that “the separation of church and state is, with us, considered almost, if not universally, as a blessing.”¹³⁹ Two centuries later such contradictions may seem difficult to reconcile, but writers of Baird’s time did not view separationism as producing a secular society but one in which religion would flourish. As religious historian Philip Schaff characterized matters several decades later, religious liberty required “a friendly separation” between the two spheres; the “separation of church and state as it exists in this country is not a separation of the nation from Christianity.”¹⁴⁰ Still

131. MA. DEP’T OF ED., TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION 119 (1849).

132. *Id.*

133. *Id.*; GREEN, *supra* note 123, at 27.

134. *See generally* REV. ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA (Glasgow, Blackie & Son 1844) (detailing the origination of evangelical churches in the United States and subsequent church-state relations).

135. *See id.* at 221–26 (describing the post-Revolution effects prompting a rise in American evangelicalism).

136. *Id.* at 258.

137. *See id.* at 268–73 (detailing the presence of Christianity in the original constitutions of various states).

138. *E.g., id.* at 245.

139. BAIRD, *supra* note 134, at 272, 283.

140. PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES 10, 53 (New York, Charles Scribner’s Sons 1889) (1888).

Schaff, a German-Reformed Swiss émigré, believed that separationism represented the preferred church-state arrangement over all others: “We will only point in conclusion to the advantages of the separation of church and state over the other systems which have prevailed or still prevail in Europe. The American system secures full religious liberty.”¹⁴¹

As Schaff’s passage suggests, European observers were keenly interested in the church-state situation in the United States and often recounted the nation’s reliance on separationism. Likely the best-known foreign commentator on America’s political culture was Alexis de Tocqueville, who traveled along the eastern seaboard in the early 1830s. Compiling his notes into *Democracy in America*, de Tocqueville commented extensively about America’s religious situation.¹⁴² A nominal Catholic, de Tocqueville marveled at “the peaceful dominion of religion in their country,” which people attributed “to the separation of Church and State.”¹⁴³ He remarked that he “did not meet with a single individual, of the clergy or of the laity, who was not of the same opinion upon the subject.”¹⁴⁴ While de Tocqueville probably overstated that degree of consensus, he was not the only foreigner to comment about Americans’ widespread commitment to church-state separation, at least as an abstract principle. Hungarian statesman Louis Kossuth wrote in 1852 that while several European countries were endangered by the “direct or indirect amalgamation of Church and State, . . . of this danger, at least, the future of your country is free . . . your institutions left no power to your government to interfere with the religion of your citizens.”¹⁴⁵ Ten years later, another Frenchman, the Count Agénor de Gasparin, declared that the United States had “proclaimed and loyally carried out the glorious principle of religious liberty” while at the same time adopting “another principle, much more contested among [the French], but which I believe destined also to make the tour of the world: the principle of separation of Church and State.”¹⁴⁶ Writing around the same time, the Polish count Adam De Gurowski, made a similar observation:

141. Philip Schaff, *Statecraft and Priestcraft*, 141 N. AM. REV. 436, 442 (1885).

142. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., New York, Adlard & Saunders 1838) (1835) (discussing the American democratic experiment, particularly from a European perspective).

143. *Id.* at 289.

144. *Id.* at 290.

145. LOUIS KOSSUTH, *THE FUTURE OF NATIONS: IN WHAT CONSISTS ITS SECURITY* 32 (1852) (originally a lecture which had been republished and edited by Louis Kossuth).

146. COUNT AGÉNOR DE GASPARIN, *THE UPRISING OF A GREAT PEOPLE: THE UNITED STATES IN 1861*, at 63–64 (Mary Booth trans., New York, Charles Scribner 4th ed. 1861).

2019] “Irrelevance” of Church-State Separation

45

Religious liberty, the absolute separation of Church and State, has become realized in America far beyond the conception, and still more the execution, of a similar separation in any European Protestant country. This separation, and the political equality of all creeds, constitute one of the cardinal and salient traits of the American Community.¹⁴⁷

It should come as no surprise that European intellectuals of the mid-century heaped praise on America’s church-state arrangement; at the time, reactionary continental monarchs were supporting the rise of Catholic ultramontanist and the Church’s condemnation of republicanism.¹⁴⁸ Even so, intellectuals were not simply promoting an ideal as a counterpoise to the religious arrangements in Europe, but were documenting a pervasive attitude and condition they had observed in the United States.¹⁴⁹

Of course, church-state separation was more than a cultural or political phenomenon; it was a legal principle as well. In contrast to popular writers who acknowledged church-state separation, most legal commentators of the nineteenth century avoided employing the terminology of separationism. While the reason for this is uncertain (as there is likely no single explanation for the word choices of multiple writers), a possible explanation may rest with the commanding influence of Justice Joseph Story, author of one of the earlier and more widely read treatises, *Commentaries on the Constitution*.¹⁵⁰ Story held strong opinions about church-state matters. A nemesis of Thomas Jefferson and a defender of Massachusetts’s religious establishment to the bitter end, Story asserted that Christianity formed part of the common law.¹⁵¹ As a result, Story promoted a narrow interpretation of the Establishment Clause’s restrictions on government activity involving religion. The purpose of that clause, Story asserted, was not to prevent government favoritism or support for Christianity, but “to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment.”¹⁵² Without using the exact term, Story rejected the paradigm of separationism, insisting instead that “the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well-being

147. ADAM G. DE GUROWSKI, *AMERICA AND EUROPE* 323 (Books for the Libraries Press 1972) (1857).

148. *See id.* at 331.

149. *See id.* at ch.10 (contrasting the religion establishment and arrangements in the United States with Europe).

150. *See generally* JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston, Hilliard, Gary & Co. 1833) (discussing, among other constitutional topics, the separation of church and state).

151. GREEN, *SECOND DISESTABLISHMENT*, *supra* note 34, at 194.

152. STORY, *supra* note 150, at 701.

of the state.”¹⁵³ Although Story was only ten years old at the time of the drafting of the First Amendment, he spoke with such authority about the meaning of the Religion Clauses that he cast a long shadow over future treatise writers who generally deferred to his analysis. Later legal writers Thomas Cooley, Henry Campbell Black, and Carl Zollmann cited to Story’s *Commentaries* in their discussions about church-state relations.¹⁵⁴ None of their treatises used the terminology of separationism.¹⁵⁵ The chief exception was Christopher G. Tiedeman, law professor at the University of Missouri and author of *A Treatise on the Limitations of Police Power in the United States*.¹⁵⁶ In his work, Tiedeman argued that the goal of early disestablishment was to “separate” church and state, and he insisted that “for the first time in the history of the world” the nation had effected “a complete divorce of church and State,” though it still had more to do to end “legal discrimination, on account of religious opinions.”¹⁵⁷ Not surprisingly, Tiedeman disputed Story’s claims that the law incorporated and favored Christianity.¹⁵⁸

Nineteenth-century state judges also relied on separationism in a handful of holdings that limited the application of laws favoring Christianity, such as Sunday laws and oath requirements. In striking down the state Sunday law in 1858, the California Supreme Court called for “a complete separation between Church and State, and a perfect equality without distinction between all religious sects.”¹⁵⁹ A decade later, a controversy broke out in Cincinnati over the city school board’s decision to ban daily readings from the King James Bible.¹⁶⁰ Although most Protestants opposed the board’s action, a handful of church leaders sided

153. *Id.* at 698–99.

154. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470 (Da Capo Press 1972) (1868); HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 449 (2d ed., St. Paul, West Publishing Co. 1897) (1895); CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW 10 (AMS ed. 1969) (1917).

155. See generally COOLEY, *supra* note 154 (noting that a state cannot inquire or take notice of a person’s religious belief); BLACK, *supra* note 154 (discussing provisions securing the freedom of religious liberty, without using any separation terminology); ZOLLMANN, *supra* note 154 (using only the general terminology of “religious freedom” or “religious liberties”).

156. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES, at i (Lawbook Exchange 2001) (1886).

157. *Id.* at 157, 159.

158. *Id.* at 167–68; see also STORY, *supra* note 150, at 728.

159. *Ex parte* Newman, 9 Cal. 502, 506 (1858).

160. See J.B. STALLO ET AL., ARGUMENTS AGAINST THE USE OF THE BIBLE IN THE PUBLIC SCHOOLS: IN THE CASE OF JOHN D. MINOR ET ALS. VERSUS THE BOARD OF EDUCATION OF THE CITY OF CINCINNATI ET ALS. 3 (Cincinnati, Robert Clarke & Co. 1870); see also GREEN, *supra* note 123, at 93; *id.* at ch.3.

2019] **“Irrelevance” of Church-State Separation** 47

with the board, arguing it was required under church-state separation.¹⁶¹ Henry Ward Beecher, one of the nation’s most influential pastors, asserted that the Protestant argument “in favor of compulsory religious service in state schools is a conscience for ‘church and state’ [union].”¹⁶² However, Beecher maintained, “It is too late to adopt the church-and-state doctrine.”¹⁶³ Samuel T. Spear, editor of the nation’s leading Protestant journal, *The Independent*, made a similar argument against school Bible reading, arguing that both Catholics and Protestants “are alike taxed for the support of public schools, and both live under a government which disowns all formal connection between church and state.”¹⁶⁴ The Ohio Supreme Court ultimately upheld the board’s action in a decision which affirmed the value of separationism.¹⁶⁵ The United States, wrote Justice John Welch, had “at last solved the terrible enigma of ‘church and state.’”¹⁶⁶ Religion, he noted, “is eminently one of these interests, lying outside the true and legitimate province of government.”¹⁶⁷

Courts also applied the principle of separationism to insulate church bodies from judicial oversight of the management of their internal affairs. In 1878 the Louisiana Supreme Court relied on the principle to deny itself authority to review a Jewish synagogue’s expulsion of a member.¹⁶⁸ “The entire separation of Church and State is not the least of the evidences of the wisdom and forethought of those who made our national constitution. It was more than a happy thought—it was an inspiration.”¹⁶⁹ The “complete separation of church and state” necessitated this rule of deference, wrote another court,¹⁷⁰ while still another asserted that “[c]ivil courts in this country have no ecclesiastical jurisdiction. . . . This doctrine inevitably results from that total separation between church and state which . . . is essential to the full enjoyment of the guaranteed rights of American citizenship.”¹⁷¹ During the second half of the century, separationism

161. GREEN, *supra* note 123, at 97, 99.

162. Henry Ward Beecher, *The School Question*, in *THE BIBLE IN THE PUBLIC SCHOOLS* 14, 18 (New York, J.W. Schermerhorn & Co. 2d ed. 1870).

163. *Id.*

164. *THE CHRISTIAN WORLD, THE BIBLE IN THE SCHOOLS* 36 (New York, No. 27 Bible House 1870).

165. *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 248, 254 (1872).

166. *Id.* at 251

167. *Id.* at 253.

168. *State ex rel. Soares v. Hebrew Congregation “Dispersed of Judah,”* 31 La. Ann. 205, 206, 209 (1879).

169. *Id.* at 206.

170. *Lamb v. Cain*, 29 N.E. 13, 21 (Ind. 1891).

171. *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*,

evolved into a legal construct that promoted a gradual severing of ties between religious and governmental institutions *writ large* and helped to facilitate a “second disestablishment,” in the law and in public education.¹⁷²

The point of this historical review is that the church-state separation was a well-accepted construct during the eighteenth and nineteenth centuries, and the principle found application in a variety of contexts. It was not, as Hamburger and others have suggested, the chief invention of anti-Catholics, though nativists clearly used the concept to advance their goals.¹⁷³ The Supreme Court’s reference to church-state separation in *Reynolds* in 1879 was thus far from novel. By the time the Court embraced church-state separation in the mid-twentieth century, it was an unalterable, embedded condition of American democracy.

II. SEPARATIONISM’S MODERN ADOPTION

At the time the Supreme Court declared church-state separation jurisprudential canon in 1947, the United States was experiencing a number of church-state controversies. The nation was beset by a growing cultural division between Protestant fundamentalism and a John Dewey- inspired pragmatic secularism.¹⁷⁴ The Catholic Church was making its transition from being a largely immigrant, insular church into becoming an *American* institution; one that was gaining in confidence and demonstrating a willingness to challenge the Protestant ethos that dominated the culture.¹⁷⁵ In addition, conflicts had recently arisen over religious-based censorship of literature, movies and information regarding contraceptives, and over the proselytizing activities of Jehovah’s Witnesses.¹⁷⁶ When in 1943 a Court majority famously upheld the right of Jehovah’s Witnesses’ children to be exempt from reciting the Pledge of Allegiance, a frustrated

89 Ind. 136, 151–52 (1883).

172. See GREEN, SECOND DISESTABLISHMENT, *supra* note 34, at ch.7 (arguing that the “second disestablishment” put the theory that Christianity formed part of American common law into disrepute).

173. See HAMBURGER, *supra* note 19, at 191.

174. See generally ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM (1995) (discussing cultural divisions between Protestant fundamentalists and Dewey-inspired secularists).

175. See generally LEROND CURRY, PROTESTANT-CATHOLIC RELATIONS IN AMERICA: WORLD WAR I THROUGH VATICAN II (1972) (discussing the growth of Catholicism in the United States and the Catholic Church’s continued conflicts with American Protestants).

176. See generally CURRY, *supra* note 175; SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000); RYAN, *supra* note 174 (discussing the various religious conflicts taking place during the 1940s and 1950s).

2019] “Irrelevance” of Church-State Separation 49

Justice Felix Frankfurter cast the issue in terms of church-state separation.¹⁷⁷ “It would never have occurred to [the Founders] to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples,” Frankfurter wrote in a dissenting opinion.¹⁷⁸ To do so, he insisted, would be to violate “the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people.”¹⁷⁹ In essence, in Frankfurter’s view, to grant an exemption from a salutary law based on religious qualms would subordinate the law to religion and thus violate church-state separation.¹⁸⁰ For many intellectuals and mainline Protestants, separationism reinforced a technologically developed society that was equipped to operate in the modern world.¹⁸¹

The Court’s embrace of separationism in 1947 also reflected old suspicions about religious authoritarianism and divisiveness, though now in the context of a new perceived threat: a confident and invigorated Catholic hierarchy. Philip Hamburger and Tom Berg are partially correct that the Court’s choice of separationism reflected traditional Protestant suspicions that the Catholic Church was an autocratic institution.¹⁸² But while some of the suspicions were old, the issues were new. Were Catholic Church officials truly committed to democratic values having recently supported repressive fascist regimes in Spain and Italy? Would church leaders abandon their opposition to Catholics attending public schools or marrying non-Catholics, stances that separated Catholics from the larger culture? What did the Church’s ongoing campaign to censor “immoral” movies, books, and magazines say about its commitment to First Amendment values? Separationism also sought to address concerns that transcended the old Protestant-Catholic divide.¹⁸³ Could Protestantism maintain its status as the ethical/moral guardian of American culture with the growing influence of secularism since the 1920s? What would supply the national unity that patriotism had provided during World War II now that the war was over? And with the Justices committed to their new role as the arbiters of expressive and civil rights nationally, could the nation af-

177. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting).

178. *Id.* at 653.

179. *Id.* at 655.

180. *Id.* at 658.

181. *See id.* at 670–71.

182. *See generally* HAMBURGER, *supra* note 19; Berg, *supra* note 19 (arguing that the doctrine of separationism reflected an anti-Catholic sentiment among Protestants which had historical roots dating back to the founding of the colonies).

183. CURRY, *supra* note 175, at 42–44; Philip Gleason, *Pluralism, Democracy, and Catholicism in the Era of World War II*, 49 *REV. POL.* 208, 209 (1987).

ford potentially competing regional standards about church-state relations that reflected local religious-parochial interests? Separationism was the solution, as it promised to diffuse religious competition and divisiveness by mandating separate realms for the spiritual and the profane.¹⁸⁴

Once the dust settled over the specific holdings in *Everson* and *McCullum*—and over the absolutist rhetoric of the Justices—Americans generally rallied to the legal concept of church-state separation. Secularists, intellectuals, and Protestants of all stripes—liberals, mainline, neo-orthodox, and even evangelical/fundamentalists—embraced separationism, though often for different reasons.¹⁸⁵ Jews also embraced the concept.¹⁸⁶ Even Catholic thinkers were split over the legitimacy of church-state separation, with moderate theologian John Courtney Murray and *Commonweal* magazine seeing it as the practical model for the United States, though not as the ultimate religious arrangement.¹⁸⁷ By the mid-1950s, separationism was the accepted legal canon as well as the popular script. Senator John F. Kennedy's famous speech in Houston in September 1960 endorsing church-state separation was not that remarkable, even coming from a Catholic, as it reflected the near consensus among Americans, rank-in-file Protestants and Catholics alike.¹⁸⁸

III. SEPARATIONISM IN TRANSITION

The principle of separationism announced in *Everson* and *McCullum* had an immediate impact on constitutional law. In addition to restricting government funding of religion and the government's use of religion in coercive settings, such as in the public schools, separationism also ensured the autonomy and independence of religious institutions. In a series of church autonomy cases from the 1950s through the late-1970s, the Court relied on the separationist impulse to prohibit civil courts from adjudicating internal disputes of religious bodies.¹⁸⁹ And recently, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court

184. See STEVEN K. GREEN, *THE THIRD DISESTABLISHMENT: CHURCH, STATE, AND AMERICAN CULTURE, 1940–1975*, at 12–14 (2018).

185. *Id.*

186. *Id.*

187. *Id.*

188. See Mark S. Massa, *A Catholic for President? John F. Kennedy and the "Secular" Theology of the Houston Speech, 1960*, 39 J. CHURCH & ST. 297, 297–98 (1997).

189. See *Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church*, 344 U.S. 94, 120–21 (1952) (first citing *Ponce v. Roman Catholic Apostolic Church*, 210 U.S. 296, 322 (1908); and then citing *Watson v. Jones*, 80 U.S. 679, 729 (1872)); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Jones v. Wolf*, 443 U.S. 595, 601 (1979) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976)).

2019] “Irrelevance” of Church-State Separation 51

relied on separationist principles to protect the ability of church bodies to control the selection of clergy as against non-discrimination claims.¹⁹⁰

Despite that general consensus over the value of church-state separation, separationism came under attack beginning in the 1980s, first from conservative scholars, and then members of the Court itself. In part, this attack reflected the new conservative mood of the Reagan era. In 1982, political scientist Robert Cord published an influential book, *Separation of Church and State: Historical Fact and Current Fiction*, which disputed the historical bona fides of church-state separation.¹⁹¹ His book provided the ammunition for the first repudiation of the concept by a Supreme Court Justice, then-Justice Rehnquist.¹⁹² Other critiques followed. Catholic theologian and author Richard John Neuhaus charged that the Supreme Court’s reliance on separationism had created a “Naked Public Square,” while Yale law professor Stephen Carter asserted the concept had contributed to a “Culture of Disbelief.”¹⁹³ This trend has continued into the current century with the publication of Philip Hamburger’s *Separation of Church and State* and Daniel L. Dreisbach’s *Thomas Jefferson and the Wall of Separation of Church and State*, both books popular among legal and religious conservatives.¹⁹⁴ This growing chorus of criticism has impacted the jurisprudence of an increasingly conservative Supreme Court.¹⁹⁵

The 1980s ushered in the first wake of several non-separationist holdings. In 1983, the Court upheld tax deductions for religious school tuition, introducing the idea of “private choice” in government financial support of religion.¹⁹⁶ In 1988, the Court ruled that religious agencies could receive government grants for their charitable programs, even if

190. See 565 U.S. 171, 181 (2012).

191. See generally ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982) (discussing how secularism lacks a background in history and the framers’ intent).

192. See *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting).

193. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION* 3 (1993); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA*, at vii (1984).

194. See HAMBURGER, *supra* note 19, at 3; DREISBACH, *supra* note 19, at 7.

195. Hamburger’s book, for one, has been cited several times by members of the Court. See *Van Orden v. Perry*, 545 U.S. 677, 709 n.4 (2005) (Stevens, J., dissenting) (citing HAMBURGER, *supra* note 19); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (citing HAMBURGER, *supra* note 19, at 106 n.40), *abrogated by* *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

196. See *Mueller v. Allen*, 463 U.S. 388, 402 (1983); see also *Witters v. Wash. Dep’t. of Servs. for the Blind*, 474 U.S. 481, 491 (1986) (White, J. concurring) (citing *Mueller*, 463 U.S. at 398–99).

those programs promoted a religious perspective.¹⁹⁷ The religious neutrality of the government program became controlling, rather than the potential religious uses by grant recipients.¹⁹⁸ The most significant turning point in the Court's church-state jurisprudence, however, was its adoption of a non-discrimination rationale in the 1990s. This approach, advocated ironically by conservative lawyers (some might say cynically due to longstanding conservative opposition to civil rights enforcement), maintained that not only did the Establishment Clause not prohibit religious groups from participating in religiously neutral programs, to exclude them from doing so violated non-discrimination norms.¹⁹⁹ Applying this non-discrimination principle, chiefly through the medium of free speech, the Court in the nineties upheld Bible clubs in public secondary schools,²⁰⁰ religious groups' access to public buildings (including public schools),²⁰¹ and public funding for college journals promoting a religious perspective.²⁰² The Court also applied non-discrimination principles to mandate religious access to other public spaces, such as to allow the display of religious symbols.²⁰³ Concerns about perceived government endorsement of religion gave way to non-discrimination against religious expression.²⁰⁴ Finally in 2000 and 2002, the Justices used private choice and neutrality theories to permit supplemental assistance to religious schools and vouchers for religious school tuition.²⁰⁵ By the new century, Justice Black's "no-aid" admonition in *Everson* seemed a distant memory.²⁰⁶

Coinciding with this jurisprudential shift toward religious cooperation or accommodation, affirmations of church-state separation by the Justices all but disappeared. The last majority opinion to "endorse" the

197. *See Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

198. *Id.* at 624 (Kennedy, J. concurring).

199. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993); *see also Lamb's Chapel*, 508 U.S. at 395).

200. *See Rosenberger*, 515 U.S. at 837.

201. *Lamb's Chapel*, 508 U.S. at 401 (Kennedy, J. concurring).

202. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 246–47 (1990).

203. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989).

204. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119–20 (2001); *Cap. Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

205. *See Mitchell v. Helms*, 530 U.S. 793, 801, 810 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–42, 652–53 (2002).

206. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

concept was the 1984 decision of *Lynch v. Donnelly*, involving the constitutionality of a public display of a nativity scene.²⁰⁷ In an opinion upholding the display, Chief Justice Warren Burger wrote:

The court has sometimes described the Religion Clauses as erecting a “wall” between church and state. The concept of a “wall” of separation is a useful figure of speech probably deriving from the views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.²⁰⁸

The “total separation of the two is not possible,” Chief Justice Burger concluded.²⁰⁹ Chief Justice Burger’s affirmation of separation was hardly rousing, though it was not unexpected in a case with a non-separationist result. Possibly more revealing, since the late eighties, the opinions in those handful of decisions that reached a separationist result—*Edwards v. Aguillard*, *County of Allegheny v. ACLU*, *Lee v. Weisman*, *Santa Fe Independent School District v. Doe*, and *McCreary County v. ACLU*—avoided affirming that principle.²¹⁰ Even in dissenting opinions where Justices were at greater liberty to vent their frustrations, separationist stalwart Justices William Brennan, John Paul Stevens, and David Souter made only passing references to separationism or the “wall of separation” metaphor; no one offered a ringing defense of the principle.²¹¹

Not only had endorsements of separation all but disappeared by the late-1980s, they were being replaced by judicial criticisms of the concept. Justice Rehnquist reproved the Court’s separationist holdings throughout his tenure, with his disdain for the principle boiling over in two dissenting opinions in 1985.²¹² In the first opinion dissenting from a decision striking a state statute authorizing silent prayer and meditation in public

207. See 465 U.S. 668, 670–71 (1984).

208. *Id.* at 673 (citing *Everson*, 330 U.S. at 18).

209. *Id.* at 672.

210. See *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989); *Lee v. Weisman*, 505 U.S. 577, 586–87, 599 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000); *McCreary Cty. v. ACLU*, 545 U.S. 844, 875–76 (2005).

211. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 709 (2005) (Stevens, J., dissenting) (stating that the Establishment and Free Exercise Clauses together “erect a wall of separation between church and state”); *Mitchell v. Helms*, 530 U.S. 793, 873 (2000) (Souter, J., dissenting) (quoting *Everson*, 330 U.S. at 15–16) (penning a strongly separationist dissent that quotes Justice Black’s “wall of separation” declaration from *Everson*).

212. See *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 401 (Rehnquist, J. dissenting) (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Wallace v. Jaffree*, 472 U.S. 38, 106–07 (1985) (Rehnquist, J., dissenting).

schools, Justice Rehnquist attacked the principle at length, calling the wall metaphor “mischievous” and “all but useless as a guide to sound constitutional adjudication,” concluding that it “should be frankly and explicitly abandoned.”²¹³ In a second opinion that year, Justice Rehnquist chastised Justice Brennan’s majority opinion in *Grand Rapids School District v. Ball* for “declin[ing] to discuss the faulty ‘wall’ premise upon which [the holding] rest[s].”²¹⁴ Justice Rehnquist’s broadsides were later echoed by other judicial conservatives, with Justice Scalia likening separationism (as represented in the maligned *Lemon v. Kurtzman* test) to a ghoul from a late-night horror film that refuses to die.²¹⁵

Justice Scalia made his ghoulish analogy in 1993. The following year, leading separationist scholar Ira “Chip” Lupu wrote an article that caught the attention of the church-state community. In *The Lingerin Death of Separationism*, Lupu argued that the legal regime of separation of church and state, which had governed religion clause jurisprudence since 1947, was not only in a state of decline but was effectively existing in a terminal medical condition, being kept alive by its resiliency as a “stock phrase.”²¹⁶ Lupu maintained that the jurisprudential preservative of separationism, the three-part test enunciated in *Lemon v. Kurtzman*, was an anachronism and had been cast aside for the principle of government neutrality toward religion.²¹⁷ Interestingly, Lupu made this claim based on two rather modest holdings by the Supreme Court in the previous term: *Lamb’s Chapel v. Center Moriches Union Free School District* and *Zobrest v. Catalina Foothills School District*.²¹⁸ In *Lamb’s Chapel*, the Court had ruled, based on free speech principles, that a school district could not discriminate against a church wishing to use a school auditorium after hours under an open forum policy; in *Zobrest*, the majority of Justices had held that the Establishment Clause did not bar providing a publicly paid sign-language interpreter for a disabled student attending a

213. *Wallace*, 472 U.S. at 107 (Rehnquist, J. dissenting).

214. 473 U.S. at 400–01 (Rehnquist, J., dissenting) (discussing a majority opinion which struck down a state “shared time” instructional program conducted in parochial schools); see also DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 95 (1991).

215. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 856, 861 (1995) (Thomas, J., concurring) (Justice Clarence Thomas charged that the Court’s separationist jurisprudence was “in hopeless disarray,” in part because of “extreme notions of separation of church and state”).

216. Lupu, *supra* note 11, at 230.

217. See *id.* at 239–41; see also 403 U.S. 602, 612–13 (1971).

218. See Lupu, *supra* note 11, at 256, 260; see also *Lamb’s Chapel*, 508 U.S. 384, 396–97 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993).

2019] “Irrelevance” of Church-State Separation 55

parochial school.²¹⁹ Lupu interpreted both holdings as constituting a significant step back from the rule of no-aid separationism.²²⁰ Considering the facts of each case, neither holding involved a substantial benefit or financial boon to a religious institution or to religion generally.²²¹ Perhaps Lupu was being prophetic as the holdings (particularly *Zobrest*) served as precedent for subsequent decisions having much broader affect—*Agostini v. Felton*; *Mitchell v. Helms*; and *Zelman v. Simmons-Harris*—the troika of holdings that permitted significant forms of educational assistance to religious schools, though stopping short of allowing unrestricted monetary grants.²²²

Thus, by the 1990s, few church-state opinions openly embraced the principle of church-state separation. A principle that the Supreme Court had established and had been at the heart of an important area of constitutional jurisprudence was now openly reviled by opponents and all but abandoned by supporters.

A. *The Demise of Separationism*

As addressed, the prevailing narrative is that separationism maintained its dominance over church-state adjudication through the mid-1990s, and it would have lasted longer had it not been for the appointment of conservative judges to the federal bench by Republican presidents. While few can question the impact of Justices Rehnquist, Scalia, Thomas, Alito, and now Neil Gorsuch and Brett Kavanaugh on more recent church-state cases, that analysis represents only part of the story. Professor Lupu was correct about the demise of separationism; however, his timing was off by approximately twenty years. Separationism was already on its way to becoming an anachronism by the mid-1970s, such that many of the holdings of the 1980s forward would likely have turned out the same way with other Justices on the Court, albeit without the hostile rhetoric toward separationism found in some of the actual decisions.

Three events in the 1960s presaged the demise of church-state separation. Because of these events, by the mid-seventies, separationism was already in decline as a legal norm. Separationism was chiefly kept alive in later years by holdover Justices from the 1940s and 1950s (e.g., Jus-

219. See *Lamb's Chapel*, 508 U.S. at 396–97; *Zobrest*, U.S. 509 at 13–14.

220. Lupu, *supra* note 11, at 258–59, 263.

221. See *Lamb's Chapel*, 508 U.S. at 395, 397; *Zobrest*, 509 U.S. at 14.

222. See *Agostini v. Felton*, 521 U.S. 203, 240 (1997); *Mitchell v. Helms*, 530 U.S. 793, 835 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002); see also Lupu, *supra* note 11, at 263–64.

tices Hugo Black, William Douglas, and William Brennan) and those Justices who had received their legal education in the 1940s, 1950s, and 1960s (e.g., Justices Thurgood Marshall, John Paul Stevens, and David Souter). Wedded to the idea of church-state separation, these Justices failed to recognize that, based on the combination of intervening events, the rationales for separationism had become increasingly irrelevant.²²³

The first event was the public “rehabilitation” of the American Catholic Church, which began in the 1950s. Less than a decade earlier, Protestants and secular liberals had successfully characterized the Catholic Church as an authoritarian and anti-democratic institution. Even though this critique was based in part on exaggeration and hyperbole, as represented by Paul Blanshard’s best-selling book *American Freedom and Catholic Power*, the Church had supplied much ammunition for its opponents by supporting fascist regimes in Spain and Italy and working diligently to restrict access to birth control and to censor books, magazines, and motion pictures it regarded to be immoral.²²⁴ By the 1950s, however, the longstanding image of Catholicism as an autocratic, insular, and immigrant church was quickly changing. Thanks to the booming post-war economy and the G.I Bill, rank-and-file Catholics were entering the middle class and fleeing inner-city ethnic enclaves for the suburbs.²²⁵ For many Protestants, their Catholic co-workers and neighbors no longer looked suspiciously foreign but rather suspiciously American. The public image of the Church also improved due to a new ecumenical spirit and the popular (and widely inter-faith) appeal of the avuncular television priest Bishop Fulton Sheen whose weekly program, *Life is Worth Living*, was watched by millions of Protestants and Catholics alike.²²⁶ And finally, the Church’s long stance against Communism—a position that had alienated liberals and intellectuals from the twenties through the late-forties—now looked very pro-democratic during the Cold War of the 1950s. Senator Kennedy’s 1960 embrace of church-state separation went far to dispel suspicions about Catholic loyalties, and President Kennedy’s refusal to support a federal education bill that included benefits for religious schools solidified perceptions that Catholics could be good Americans.²²⁷

223. GREEN, *supra* note 184, at 15, 354.

224. PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 135, 209–10, 240 (1949); *see also* Una M. Cadegan, *Guardians of Democracy or Cultural Storm Troopers? American Catholics and the Control of Popular Media, 1934–1966*, 87 *CATH. HIST. REV.* 268–69 (2001).

225. *See A Bold New Age: 1945–1962*, ARCHDIOCESE MILWAUKEE (Oct. 25, 2018), <https://www.archmil.org/AboutUs/History/Bold-New-Age-1945-1962.htm>.

226. Anthony Burke Smith, *Prime-Time Catholicism in 1950s America: Fulton J. Sheen and “Life is Worth Living,”* 15 *U.S. CATH. HISTORIAN* 57, 59 (1997).

227. Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 *CALIF.*

2019] “Irrelevance” of Church-State Separation

57

Then, between 1963 and 1965, the Catholic Church held its conclave known as Vatican II.²²⁸ Most significant for American non-Catholics was the Church’s abandonment of the confessional state model, its preference for state religious establishments, and its insistence on the exclusivity of the Catholic faith.²²⁹ In accepting the legitimacy of other Christian denominations and liberal democratic systems, the Catholic Church ceased to be a threat for the majority of non-Catholic Americans. Church-state separation was no longer necessary to guard against perceived Catholic incursions on democratic America.²³⁰

The second event that helped transform popular attitudes about church-state separation were the Court’s public-school prayer and Bible reading decisions of 1962 and 1963. In the first case, *Engel v. Vitale*, the Court struck down the recitation of a non-denominational prayer in New York’s public schools.²³¹ In the second case, *School District of Abington Township v. Schempp*, the Justices struck down the common practice of Bible readings and recitation of the Lord’s Prayer.²³² Both holdings were more controversial than the Court’s church-state decisions of the late forties. Many people charged that the Court’s rejection of nonsectarian religious exercises aligned separationism with secularism.²³³ Although it took a while to materialize, the school prayer decisions broke apart the Protestant consensus over separationism, with secularists and liberal Protestants supporting the holdings, and evangelical and conservative Christians (including the Catholic Church) opposing them.²³⁴ Opponents and their political allies promoted a school prayer amendment to the U.S. Constitution, a matter that was not ultimately resolved until 1984.²³⁵ The school prayer decisions, buttressed by *Roe v. Wade* in 1973, provided the impetus for the rise of the Religious Right and the ensuing cultural wars.²³⁶ For many conservatives, church-state separation was now seen

L. REV. 260, 261 (1968).

228. John T. Pawlikowski, *Catholicism and the Public Church: Recent U.S. Developments*, 9 ANN. SOC’Y CHRISTIAN ETHICS 147, 147 (1989).

229. *Id.* at 148–49.

230. See CURRY, *supra* note 174, at 73; John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928–1960*, 87 J. AM. HIST. 97, 129 (1997).

231. 370 U.S. 421, 424–25 (1962).

232. 374 U.S. 203, 205–06 (1963).

233. Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 993 (2011).

234. *Id.* at 1016.

235. Martin Tolchin, *Amendment Drive on School Prayer Loses Senate Vote*, N.Y. TIMES (Mar. 21, 1984), <https://www.nytimes.com/1984/03/21/us/amendment-drive-on-school-prayer-loses-senate-vote.html>.

236. See *Roe v. Wade*, 410 U.S. 113, 116 (1973) (acknowledging that religious beliefs

as an anti-religious principle and antagonistic to the nation's religious traditions.²³⁷

The third event of the 1960s that laid the groundwork for the demise of separationism was the rise of federal civil rights legislation and President Lyndon B. Johnson's Great Society. At risk of oversimplification, comprehensive laws such as the 1964 Civil Rights Act prohibiting discrimination in areas of public accommodations, employment, and in government funded programs²³⁸ introduced a regime of what some have called "Rights Talk."²³⁹ Non-discrimination in access to and receipt of benefits became an important constitutional norm. These laws complemented the rights-oriented approach of the Warren Court of the same period.²⁴⁰ Coinciding with rights revolution was the expansion of federal social welfare programs under President Johnson's Great Society.²⁴¹ The watershed events were the passage of the first significant federal funding programs for education, the Higher Education Facilities Act of 1963 (HEFA) and the Elementary and Secondary Education Act of 1965 (ESEA), the latter funding supplemental programs for children in public and private schools, including parochial schools.²⁴² These laws established a presumption that religious institutions were not to be excluded from participating in important social programs simply because of their religious character.²⁴³ Though the Court would strike the *manner* in which some of those funds were administered, it never rejected the underlying premise that religious schools could be included in government public welfare programs.²⁴⁴

substantially influence one's conclusions about abortion).

237. BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* 187–88 (2007).

238. See 42 U.S.C. §§ 2000a, 2000d, 2000e (2012).

239. See, e.g., Nan D. Hunter, *Rights Talk and Patient Subjectivity: The Role of Autonomy, Equality, and Participation Norms*, 45 WAKE FOREST L. REV. 1525, 1537 (2010); see also Jeffrey R. Dudas, *In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Right America*, 39 LAW & SOC. REV. 723, 752 (2005).

240. Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1215 (2002).

241. Elizabeth Hinton, *"A War within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 100 (2015).

242. Higher Education and Facilities Act of 1963, Pub. L. No. 88-204, 77 Stat. 363; Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 203(a)(5), 79 Stat. 27, 38.

243. Richard D. Winders, *Building on the Establishment Clause: Government Conduit Financing of Construction Projects at Religiously Affiliated Schools in Johnson v. Economic Development Corp.*, 35 CREIGHTON L. REV. 1151, 1182 (2002).

244. E.g., Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968); GREEN, *supra* note 184, at 311–28; Donald E. Boles, *Church and State and the Burger Court: Recent Developments Affecting Parochial Schools*, 18 J. CHURCH & ST. 21, 38 (1976).

2019] “Irrelevance” of Church-State Separation 59

Significantly, secular liberals, mainline Protestants, and moderate Jews—constituencies that had been loyal supporters of church-state separation²⁴⁵—threw their support behind the civil rights and Great Society legislation. Between 1960 and 1963, various mainline denominations and the National Council of Churches (NCC) established offices to train volunteers and organize grassroots support for the civil rights struggle, including sending freedom riders into the South.²⁴⁶ Then, a significant turning point occurred at a 1964 meeting of progressive and mainline religious groups in Cleveland, Ohio, organized by the NCC.²⁴⁷ There, the attendees abandoned their previous opposition to including religious schools and institutions in the Great Society legislation.²⁴⁸ Key to precipitating that shift was the strategic decision of President Johnson’s Administration to recast federal aid to education as a poverty program, one that included aid to segregated schools.²⁴⁹ By the mid-sixties, religious and secular progressives were increasingly willing to compromise on separationism in order to ensure that government promoted equality and advanced the commonweal.²⁵⁰

These events of the 1960s thus laid the foundation for the accommodationist holdings of the 1980s and beyond. Importantly, those non-separationist holdings were less of a repudiation of the Court’s separationist jurisprudence than a recognition of a transition already underway. In *Board of Education v. Allen*, the Court upheld a New York law modeled after ESEA that allowed school districts to loan textbooks to parochial schools.²⁵¹ Writing for a six-Justice majority, Justice Byron White—a President Kennedy appointee—maintained that the beneficiaries of the program were children, not their schools, asserting that the Establishment Clause “does not prevent a State from extending the benefits of state laws

245. Boles, *supra* note 244, at 23–24.

246. JAMES F. FINDLAY, JR., *CHURCH PEOPLE IN THE STRUGGLE: THE NATIONAL COUNCIL OF CHURCHES AND THE BLACK FREEDOM MOVEMENT, 1950–1970*, at 31–34 (1993).

247. *Id.*

248. *Id.* at 172.

249. Michael J. Steudman, “*The Guardian Genius of Democracy*”: *The Myth of the Heroic Teacher in Lyndon B. Johnson’s Education Policy Rhetoric, 1964–1966*, 17 RHETORIC & PUB. AFF. 477, 481 (2014); Gene L. Maeroff, *After 20 Years, Educational Programs are a Solid Legacy of Great Society*, N.Y. TIMES (Sept. 30, 1985), <https://www.nytimes.com/1985/09/30/us/after-20-years-educational-programs-are-a-solid-legacy-of-great-society.html>.

250. GREEN, *supra* note 184, at 311–28; *National Council Action on Race*, 23 CHRISTIANITY & CRISIS 131, 132 (1963); Nat’l Council of Churches, *Separation and Interaction of Church and State*, 6 J. CHURCH & ST. 147, 149–50 (1964); *Religion and Race*, 80 CHRISTIAN CENTURY 133, 134 (1963).

251. 392 U.S. 236, 248 (1968).

to all citizens without regard for their religious affiliation.”²⁵² More significant than the outcome, Justice White made three crucial points: legislatures were not limited to assisting the health and welfare of children attending religious schools but could also aid in their education as well; religious schools served an important public function; and those schools’ religious and secular functions could be distinguished.²⁵³ Notably missing from Justice White’s opinion was an affirmation of the importance of church-state separation.²⁵⁴ Commenting on the changed assumptions in the Court’s *Allen* holding, the *New York Times* editorialized that the decision “deepens the already serious inroads that have been made into the vital principle of church-state separation.”²⁵⁵

Three terms later, the Court handed down two consequential holdings that have frequently been considered to be high points of church-state separation: *Lemon v. Kurtzman* and *Tilton v. Richardson*.²⁵⁶ A careful reading of those decisions reveals, however, that they were not ringing endorsements of separationism. *Lemon* involved a challenge to a state statute that provided reimbursements to nonpublic schools for teacher salaries, textbooks, and instructional materials used in secular subjects,²⁵⁷ whereas *Tilton* concerned HEFA grants to church-related colleges for the construction of academic facilities.²⁵⁸ The Court split the difference, striking the aid in *Lemon*, but upholding the grants in *Tilton* on the condition the funded buildings could not be used for religious instruction or worship.²⁵⁹ Both decisions were written by Chief Justice Warren Burger, whose opinions were equivocal at best. Chief Justice Burger noted that a

252. *Id.* at 238, 242.

253. *Id.* at 243, 247–48.

254. *See generally id.* (noticing that Justice White does not affirm the importance of separationism). *But see* Brief of American Jewish Congress et al., as Amici Curiae Supporting Appellants at 2, *Bd. of Educ.*, 392 U.S. 236 (No. 660); Brief of Protestants and Other Americans United for Separation of Church and States as Amicus Curiae Supporting Appellants at 2, *Bd. of Educ.*, 392 U.S. 236 (No. 660); *see also* Christine Linton Compston, *The Serpentine Wall: Judicial Decision-Making in Supreme Court Cases Involving Aid to Sectarian Schools*, U. N.H. SCHOLARS’ REPOSITORY 203, 203 (1986).

255. *Retreat on Church Schools*, N.Y. TIMES, June 12, 1968, at 46; *see Book Aid to Church Pupils Upheld by Supreme Court*, N.Y. TIMES, June 11, 1968, at 39; Fred M. Hechinger, *Court’s Textbook Ruling Hailed by Church School Officials, Deplored by Liberties Groups*, N.Y. TIMES, June 11, 1968, at 38; Fred M. Hechinger, *More Dispute Over Books to Parochial Schools*, N.Y. TIMES, June 16, 1968, at E13.

256. *See generally* *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971) (favoring separation of church and state).

257. *See Lemon*, 403 U.S. at 609–10. A companion case to *Lemon* was *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1970), *aff’d by Lemon*, 403 U.S. 602.

258. *See Tilton*, 403 U.S. at 674–75 (citing Higher Education and Facilities Act of 1963, Pub. L. No. 88-204, § 101, 77 Stat. 363, 364 (amended 1968)).

259. *See Lemon*, 403 U.S. at 606; *Tilton*, 403 U.S. at 689.

2019] “Irrelevance” of Church-State Separation 61

teacher in a parochial school was unlike a non-ideological textbook, such that the funding of the former raised constitutional issues not presented in funding the latter.²⁶⁰ In contrast, “religious indoctrination is not a substantial purpose or activity” of most church-related colleges, Chief Justice Burger wrote, and the construction grants were restricted for buildings where secular subjects were to be taught.²⁶¹ Although the holdings were arguably separationist, the tone of Chief Justice Burger’s opinions belied that intent.²⁶² “Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable,” Chief Justice Burger wrote.²⁶³ “[T]he line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”²⁶⁴ Separationism, therefore, was neither an absolute nor fixed principle, but one that varied depending on the circumstances.²⁶⁵

Likely the most consequential but unappreciated case of the period was *Wheeler v. Barrera*.²⁶⁶ *Wheeler* involved a challenge to how the state of Missouri administered its ESEA funds for parochial school students.²⁶⁷ The Court side-stepped the question of whether ESEA’s provisions benefitting parochial school students violated the Establishment Clause, simply ruling that the state had discretion in fashioning its program so as to avoid any constitutional conflict.²⁶⁸ Despite not addressing the constitutional question, the Court essentially held that there was no absolute bar to government aid that benefitted the educational mission of religious schools.²⁶⁹ Writing for the majority, Justice Harry Blackmun stated that when it came to administering ESEA, “the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated.”²⁷⁰ The implication of *Wheeler* was that ESEA’s requirements providing services to children attending religious schools were constitutional; the rub was in how those

260. *Lemon*, 403 U.S. at 617.

261. *Tilton*, 403 U.S. at 687–88.

262. *See generally Lemon*, 403 U.S. 602; *Tilton*, 403 U.S. 672 (noting the lack of clear separationist tone in both opinions).

263. *Lemon*, 403 U.S. at 614 (citing *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

264. *Id.*

265. *Id.*

266. *See* 417 U.S. 402, 427 (1974) (finding that an act permitting federal funding of parochial schools was not unconstitutional).

267. *Id.* at 405.

268. *See id.* at 426.

269. *See id.* at 428.

270. *Id.* at 426 (emphasis removed).

services were administered.²⁷¹ The Justices clearly appreciated the implications of the holding, and two of the Justices stated as much. Concurring in the judgment, Justice White, the Court's leading proponent of religious school funding, expressed delight at the holding.²⁷² "I would have thought that any such arrangement would be impermissible under the Court's recent cases construing the Establishment Clause," Justice White wrote.²⁷³ "I am pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools."²⁷⁴ He invited the majority to "say so expressly" what it was clearly implying.²⁷⁵ On the other side, Justice Douglas found the implications of the decision highly troubling. "The emanations from the Court's opinion are . . . at war with our prior decisions," he wrote.²⁷⁶ The *Wheeler* decision essentially constitutionalized aid programs that assisted nonreligious aspects of religious schools.²⁷⁷ There would be no going back; it was the turning point in church-state separation. By the mid-1970s the Court's church-state jurisprudence had already entered the post-separationist era, a transition that had been facilitated by the rise of the welfare state under the Great Society.²⁷⁸

B. *The Consequences of Separationism's Demise*

So briefly, what are the implications of the demise of separationism for the future of religious freedom in the twenty-first century? The decline of separationism has brought about two seemingly opposite but reinforcing phenomena. The first has been the acceptance of a cooperationist or accommodationist model of church-state relations, one that includes government funding of religious entities.²⁷⁹ As noted, the 1988 *Bowen v. Kendrick* decision, allowing religious nonprofit agencies to receive federal funding for family planning programs, laid the foundation for greater government cooperation with religious-based non-profits, including greater public funding of those institutions.²⁸⁰ President Bill Clinton's

271. See 417 U.S. at 428.

272. See *id.* at 429 (White, J., concurring).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Wheeler*, 417 U.S. at 431 (Douglas, J., dissenting).

277. See *id.* at 428.

278. See *id.* (finding that an act permitting federal funding of parochial schools was not unconstitutional).

279. See Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1269–70.

280. 487 U.S. 589, 622 (1988).

“Charitable Choice” component to his 1996 Welfare Reform initiative, and President George W. Bush’s more expansive Faith Based Initiative, are stark examples of this change.²⁸¹ They evince the strength of the neutrality and nondiscrimination norms on church-state jurisprudence.²⁸² Though these programs remain controversial when they involve allegations of proselytizing or religious-based hiring in publicly financed programs, they have greatly expanded the role of religious institutions in advancing the public good.²⁸³ Other indicia of this cooperationist model to church-state relations have been the Court’s approval of vouchers and other forms of public aid to religious schools and the rise of religiously based arbitration.²⁸⁴

This brings us back to the holding in *Trinity Lutheran Church*, a decision that was both consequential and indeterminate at the same time. For the first time in its history, the Court upheld a direct cash grant for improving the facilities of a house of worship.²⁸⁵ Anyone reading Chief Justice Roberts’s opinion in isolation would never have imagined that a threshold had been crossed or that it represented a repudiation of the Court’s earlier church-state jurisprudence—that only seventy years earlier the Justices had unanimously agreed that direct aid that benefits a religious entity is unconstitutional.²⁸⁶ Chief Justice Roberts brazenly asserted there was no Establishment Clause issue presented through a grant to a house of worship, as if a mere denial could make the issue disappear.²⁸⁷ Chief Justice Roberts resorted to a slight of hand by asserting that “[t]he parties agree[d] that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the [grant program],” in that Missouri had relied only on its state constitution for denying the grant, not on the federal Establishment Clause.²⁸⁸ Chief Justice Roberts’s claim would have been more persuasive if he had qualified his statement in the sense that the grant could not be used to fund religious worship or instruction or could not otherwise be diverted for a distinct religious purpose.²⁸⁹ Chief Justice Roberts’s open-ended assertion left the impression that non-

281. See Personal Responsibility and Work Reconciliation Act, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161–63 (1996) (codified at 42 U.S.C. § 604a (2012)); Exec. Order No. 13,279, 3 C.F.R. 258–62 (2003), reprinted in 5 U.S.C. § 601 (2012).

282. See 42 U.S.C. § 604a; 3 C.F.R. 258–62.

283. See 42 U.S.C. § 604a; 3 C.F.R. 258–62.

284. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

285. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017, 2025 (2017).

286. Compare *id.*, with *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

287. See *Trinity Lutheran Church*, 132 S. Ct. at 2019.

288. *Id.*

289. See *id.*

establishment concerns would not arise under any scenario.²⁹⁰ Chief Justice Roberts's claim would also have been more convincing had he argued that the Court's jurisprudence had changed, such that this aid was now constitutional. But Chief Justice Roberts's audacious statement seemed cut from the pages of *1984* in a world where history no longer matters and people have no previous memory.²⁹¹ Justice Sotomayor's meticulous and exasperated dissent that the "decision discounts centuries of history" and amounts to a "judicial brush aside" of the Court's own jurisprudence was in direct response to Chief Justice Roberts's back-hand dismissal of the Establishment Clause concerns.²⁹²

What Chief Justice Roberts did not say is as important as what he did say; so, too, was the absence of a concurring opinion for either of the two moderate Justices—Justices Stephen Breyer and Elena Kagan—who joined in the majority.²⁹³ Clearly, Chief Justice Roberts saw little reason to reply to Justice Sotomayor's charge that the majority was abandoning the principle of church-state separation, and any response may have alienated Justices Breyer and Kagan. Most likely, Chief Justice Roberts dropped the footnote stating, "We do not address religious uses of funding or other forms of discrimination" not only to secure Justices Breyer and Kagan's votes but also as an oblique response to Sotomayor's assertion that the majority had abandoned its own jurisprudence.²⁹⁴ But the fact that neither Justices Breyer nor Kagan filed a concurring opinion on Justice Sotomayor's point speaks volumes about the resiliency of church-state separation as a constitutional principle. Considering the fervency of Justice Sotomayor's dissent, one would have expected at least one or the other to have written a short concurrence that said "no, Sonia, we still believe in separation of church and state." Their silence was thus surprising, particularly considering that Justice Kagan had recently authored dissenting opinions in two cases where she strongly defended Establishment Clause values.²⁹⁵

All of that said, was Chief Justice Roberts's conclusion nevertheless correct? Are the constitutional values at stake in denying Trinity Lutheran Church a grant to pay for playground resurfacing any greater than approving a grant to Notre Dame University for construction costs for a new

290. *Id.*

291. *See generally* GEORGE ORWELL, 1984 (Penguin Books 2008) (1949).

292. *Trinity Lutheran Church*, 132 S. Ct. at 2041 (Sotomayor, J., dissenting).

293. *See id.* at 2016.

294. *Id.* at 2024 n.3.

295. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 148 (2011) (Kagan, J., dissenting).

2019] “Irrelevance” of Church-State Separation 65

academic building (or football stadium)? With the increasing number of government grant programs that are available to nonprofits, with the general acceptance of the government’s use of private actors to accomplish salutatory public policy outcomes, and with the expansion of social services by faith-based entities and houses of worship, the rationales of separationism seem outdated if not misinformed.²⁹⁶ “Faith-based partnerships” and cooperative ventures between governmental and religious entities, while not new, are increasingly crucial for addressing social welfare needs. A paradigm of *separation* does not reflect these realities. In addition, two of the primary rationales supporting the “no aid” rule also seem outdated. The traditional objection to government funding of religion was that it infringed on the conscience rights of those who disagreed with those religious uses—in essence, it constituted coercion to force someone to pay for another’s religion.²⁹⁷ While this was a well-founded concern in colonial and early America where a magistrate or tithingman would distraint a religious dissenter’s cattle or crops to pay a religious assessment, the idea of such economic coercion of conscience today is attenuated. Direct assessments of *A* to pay for *B*’s religion no longer occur.²⁹⁸ Taxpayers today are compelled to support a host of policies to which they hold ideological disagreements.²⁹⁹ As members of the Court suggested recently in *Hein v. Freedom from Religion Foundation* and *Arizona Christian School Tuition Organization v. Winn*, the idea that a personalized injury arises through the expenditure of tax receipts to a religious entity is largely a legal fiction.³⁰⁰ The second rationale for the no-aid rule has been to prevent government favoritism in awarding grants and to avoid potentially corresponding competition among religious applicants.³⁰¹ Although these concerns remain salient, they are not restricted to nor are more pronounced when the grantees are religious entities rather than secular ones. Government favoritism of religious applicants over their secular counterparts or of particular denominational groups in awarding financial benefits, like government favoring the expression of one denomination or religion, remains a concern, but that concern can usually be addressed by enforcing equality principles. Separationism has

296. Lupu, *supra* note 11, at 231–32.

297. In the words of Thomas Jefferson: “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical” Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 18, 1779), <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

298. See *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

299. See *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 138; *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 599 (2007).

300. See *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 138; *Hein*, 551 U.S. at 599.

301. See *Flast*, 392 U.S. at 103.

never been the most effective device for preventing government favoritism of religion.³⁰²

The second consequence of the decline of separationism and the shift to a cooperationist/inclusive model is somewhat at tension with the first. The more that religious bodies are able to participate in government funded or sponsored programs, the more those bodies are finding themselves subject to government regulation. To be sure, government funding was never a prerequisite for imposing regulations on religiously-affiliated institutions.³⁰³ The Equal Employment Opportunities Act and the Fair Labor Standards Act have long applied to certain operations of religious institutions.³⁰⁴ But with the greater participation of religion in the public realm, we are witnessing increased conflicts between regulatory agencies and religious institutions and actors.³⁰⁵ Quite clearly, when the government funds particular programs and outcomes, it may impose restrictions not only on how those funds are being spent, but also on related operations of the grantees, such as prohibiting certain forms of discrimination in employment.³⁰⁶ Coinciding with this jurisprudential shift away from a separationist model, the nation has generally witnessed an expansion of nondiscrimination legislation.³⁰⁷ Gay rights and marriage equality, of course, have been at the forefront of this expansion.³⁰⁸ Because religious institutions and actors are not per se exempt from being public accommodations, they are experiencing the increasing weight of government regulation. This of course is the focal point of the most heated church-state debates of today: whether religious actors and institutions should be exempted from complying with nondiscrimination laws or regulations requiring compliance with birth control benefits in health insurance. The

302. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014) (Souter, J. concurring) (citing *Lee v. Weisman*, 505 U.S. 577, 617 (1992)).

303. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 305 (1985) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

304. See Equal Employment Opportunities Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060; see also *Tony & Susan Alamo Found.*, 471 U.S. at 306.

305. See, e.g., *Tony & Susan Alamo Found.*, 471 U.S. at 293 (citing 29 U.S.C. §§ 206(b), 207(a), 211(c), 215(a)(2), (5) (2012)).

306. See 42 U.S.C. § 2000d (2012) (prohibiting denial of benefits on the grounds of race, color, or national origin).

307. See, e.g., Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 52 HARV. J. LEGIS. 459, 496–97 (2016); Shalyn L. Caulley, Note, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. Rev. 909, 928.

308. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (concluding that same-sex couples may also exercise the right to marry because it is a fundamental right under the Constitution).

Hobby Lobby case in 2014, the *Zubik* and *Little Sisters of the Poor* cases in 2016, and the *Masterpiece Cakeshop* case of 2018 are all part of this present controversy.³⁰⁹ In all instances, the claimants sought accommodation of their religious conscience claims through exemptions from the laws. In “Blue States” that have adopted comprehensive nondiscrimination laws to protect members of the LGBTQ community, related controversies have arisen concerning pharmacists wishing not to dispense morning-after pills, photographers refusing to take wedding photographs for gay and lesbian couples, and florists refusing to prepare floral displays for gay weddings.³¹⁰ These controversies represent the new ground-zero in church-state law and are not likely to be resolved any time soon. To a degree, the separationist model kept some of these conflicts at bay by shielding the internal operations of religious entities from government oversight or regulation. At the same time, separationism held that some religious entities and functions were ineligible to receive government financial assistance, which also triggered regulation. With separationism’s demise, these conflicts will only intensify.

CONCLUSION

The claim made by the title to this article—that separation of church and state is irrelevant in the twenty-first century—is somewhat overstated. Concerns about governmental financial support for the religious functions of a religious entity remain salient: the government should not involve itself in supporting religious indoctrination.³¹¹ And certainly, the government ordering of tenets of faith or the internal operations of religious entities are matters that separationism kept at bay. But the statement holds an element of truth: the core issues that informed separationism—no-aid to religion, in particular—are no longer as relevant as they once were. But that shift in jurisprudence had less to do with a change in the ideological make-up among members of the Supreme Court and more to do with expansion of public welfare and non-discrimination programs the Great Society initiated. Already by the mid-1970s, separationism was on the way to becoming an anachronism. The presumption that separationism is a necessary prerequisite for religious freedom in the United States

309. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016); *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 15-105, 2016 U.S. LEXIS 2268, at *1–2 (Mar. 29, 2016); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

310. See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1116 (9th Cir. 2009); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2017).

311. *Agostini v. Felton*, 521 U.S. 203, 230 (1997).

appears no longer to be true, even though it once was.