Introduction

JEFFERSON'S words seem to have shaped the nation. Beginning with his draft of the Declaration of Independence, Jefferson's taut phrases have given concentrated and elevated expression to some of the nation's most profound ideals.

Few of Jefferson's phrases appear to have had more significance for the law and life of the United States than those in which he expressed his hope for a separation of church and state. In 1802, in a letter to the Danbury Baptist Association, he quoted the First Amendment and interpreted it in rather different words: "I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[1] Two centuries later, Jefferson's phrase, "separation between church and state," provides the label with which vast numbers of Americans refer to their religious freedom. In the minds of many, his words have even displaced those of the U.S. Constitution, which, by contrast, seem neither so apt nor so clear. Thus,

[1] Thomas Jefferson, Letter to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802), in Daniel L. Dreisbach, "Sowing Useful Truths and Principles: The Danbury Baptists, Thomas Jefferson, and the 'Wall of Separation,'" *Journal of Church and State*, 39: 468 (1997). Although, of course, not the first to publish this and related documents, Dreisbach provides by far most accurate transcript of them. To Dreisbach's work James H. Hutson adds an infrared photograph that reveals the deleted words in Jefferson's letter. Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *William & Mary Quarterly*, 56 (no. 4): 779 (3d ser., October 1999).

refracted through Jefferson's letter, the religious liberty guaranteed by the Constitution often appears to be a separation of church and state.[2]

Notwithstanding the authority of Jefferson and those who have followed him, it may be useful to reconsider whether the First Amendment actually guaranteed a separation of church and state and, further, how Jefferson and other Americans came to assume that it did so. Certainly, there is reason to wonder why the religion clauses of the First Amendment differ from the words with which these clauses are most commonly interpreted. According to the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Yet Jefferson and numerous other Americans, including many judges and scholars, have understood this phrase, especially its establishment clause, in terms of the "separation between church and state"—indeed, a "wall" of separation.

The difference between the Constitution's phrase and Jefferson's is significant because Jefferson's has tended to mean much more. Of course, the phrase "separation between church and state" has had a range of meanings. At the very least, it alludes to a differentiation or distinction between church and state. More substantively, it is often used to denote a freedom from laws instituting, supporting, or otherwise establishing religion. Yet the phrase "separation between church and

[2] Daniel Dreisbach writes: "Occasionally a metaphor is thought to encapsulate so thoroughly an idea or concept that it passes into the vocabulary as the standard expression of that idea. Such is the case with the graphic phrase 'wall of separation between Church and State,' which in the twentieth century has profoundly influenced discourse and policy on church-state relations. Jefferson's 'wall' is accepted by many Americans as a pithy description of the constitutionally-prescribed church-state arrangement. More important, the federal judiciary has found the metaphor irresistible, elevating it to [an] authoritative gloss on the First Amendment religion provisions." Dreisbach, "Sowing Useful Truths and Principles," 456. Among those quoted by Dreisbach is R. Freeman Butts, who writes that Jefferson's words about separation "are not simply a metaphor of one private citizen's language, they reflect accurately the intent of those most responsible for the First Amendment; and they came to reflect the majority will of the American people. The words 'separation of church and state' are an accurate and convenient shorthand meaning of the First Amendment itself; they represent a well-defined historical principle from the pen of one who in many official statements and actions helped to frame the authentic American tradition of political and religious liberty." Butts, *The American Tradition in Religion and Education*, 93 (Boston: Beacon Press, 1950), quoted by Dreisbach, "Sowing Useful Truths and Principles," 456. Dreisbach, ibid., also quotes Edwin S. Gaustad as saying that "this powerful metaphor, once employed, became even more familiar to the American public than did the constitutional language itself." Gaustad, "Religion," in *Thomas Jefferson: A Reference Biography*, 282, ed. Merrill D. Peterson (New York: Scribner, 1986).

state" has also pointed to something more dramatic—a distance, segregation, or absence of contact between church and state. Rather than simply forbid civil laws respecting an establishment of religion, it has more ambitiously tended to prohibit contact between religious and civil institutions. Thus the phrase "separation between church and state" has lent itself to a notion very different from disestablishment. Recognizing the disparity between separation and disestablishment, this book attempts to understand how Americans came to interpret the First Amendment in terms of separation of church and state, and through this inquiry it traces how Americans eventually transformed their religious liberty.

The Standard History

The standard history of separation has some of the qualities of a myth. Certainly, it makes its hero seem larger than life, it celebrates his deeds (or, at least, his words), and it serves a valuable explanatory role. The conventional account of separation emphasizes the heroic role of Jefferson by suggesting that he employed a previously obscure phrase to illuminate the First Amendment's establishment clause. Apparently drawing upon ideas first enunciated by an earlier giant, Roger Williams, Jefferson in 1802 gave currency and constitutional significance to the phrase about separation, which was later employed in 1875 by President Grant, in 1878 by Chief Justice Waite, and in 1947 by Justice Black, whose opinion that year in *Everson v. Board of Education of Ewing* made Jefferson's separation the foundation of subsequent establishment clause jurisprudence. In this spare, bold account of the utterances of great men, Jefferson's influence exerts itself in leaps and bounds across the centuries. An ancient phrase to which Jefferson gave new life, his statement about separation seems both venerable and original, both authoritative and a creative act of genius.

According to the proponents of this conventional account, Jefferson's phrase has not only been immensely influential but also appropriately so—his views being the profoundly thoughtful conclusions of a philosopher-president who devoted himself to the cause of religious liberty. Although at least one scholar has questioned whether Jefferson gave much thought to what he wrote to the Danbury Baptist Association, others have insisted that he wrote with care, and most commenta-

tors have joined a resounding chorus of praise for the farsighted, even prophetic vision of religious liberty bequeathed to Americans by the most intellectual of their presidents.[3]

It is odd, however, that this standard history of separation is so remarkably free of detail. Little is said of the genealogy of the phrase during the generations—even centuries—between the pronouncements of the great men, and nothing is said of the contexts in which they used it. To be sure, there are numerous scholarly and popular histories of American religious freedom—histories that could be considered accounts of a generic separation of church and state. Yet these accounts hardly discuss the history of the phrase "separation of church and state" and therefore are rarely informative about the specific idea or ideas to which that phrase may have referred. As a result, the meaning of "separation of church and state" remains obscure.

Fortunately, some important work has been done on the specific phrase and idea of separation. Perry Miller, Edmund S. Morgan, and various other scholars have explored Roger Williams's notion of separation of church and state.[4] Writing on a later period, Daniel L. Dreisbach observes that the phrase about a wall of separation between church and state may have been known to Jefferson, not from Roger Williams, but from an eighteenth-century writer, James Burgh, whom Jefferson much admired.[5] In two particularly suggestive pieces, Thomas E. Buckley examines the political successes of religious dissenters, especially Baptists,

[3] For the most perspicacious query concerning Jefferson's letter, see Edward S. Corwin, "The Supreme Court as National School Board," in *A Constitution of Powers in a Secular State*, 106 (Charlottesville, Va.: Michie Co., 1951).

[4] Perry Miller, ed., *The Complete Writings of Roger Williams*, 7: 6 (New York: Russell & Russell, 1963); Edmund S. Morgan, *Roger Williams: The Church and the State* (New York: Norton, 1967); W. Clark Gilpin, *The Millenarian Piety of Roger Williams* (Chicago: University of Chicago, 1979); David Little, "Roger Williams and the Separation of Church and State," in *Religion and the State: Essays in Honor of Leo Pfeffer*, ed. James E. Wood, Jr. (Waco: Baylor University Press, 1985); William Lee Miller, *The First Liberty: Religion and the American Republic*, 182–183 (New York: Paragon, 1988); Glenn W. LaFantasie, ed., *The Correspondence of Roger Williams*, 2: 23 (Providence: Rhode Island Historical Society, 1988); Hugh Spurgin, *Roger Williams and Puritan Radicalism in the English Separatist Tradition* (Lewiston: E. Edwin Mellen Press, 1989); Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* (Grand Rapids: William B. Eerdmans, 1991); Timothy L. Hall, "Roger Williams and the Foundations of Religious Liberty," *Boston Univ. Law Review*, 71: 455, 482 (1991); Dreisbach, "Sowing Useful Truths and Principles," 483; Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty*, 72–98 (Urbana: University of Illinois, 1998).

[5] Dreisbach, "Sowing Useful Truths and Principles," 455.

in late eighteenth-century Virginia. Buckley concludes that Virginia's 1786 Act for Establishing Religious Freedom, which was drafted by Thomas Jefferson, "did not disentangle religion from politics or sever relations between church and state. Nor did Virginians understand Jefferson's statute to require that separation." On the contrary, the act (together with the subsequent sale of establishment glebe lands) ensured Baptists and other evangelicals an equal religious liberty and thereby allowed evangelicals to cooperate in pursuit of their legislative agenda, with which they hoped "to impose their religious values and culture upon American society." Buckley also examines the early nineteenth-century debate in Virginia concerning that state's power to incorporate religious societies—a controversy in which many Virginians argued that incorporation risked the creation of a religious establishment. It was a dispute in which the term "separation" was not ordinarily employed, but it reveals, as Buckley points out, that a standard of liberty in some ways similar to separation had onerous consequences for religious minorities seeking to enjoy religious freedom.[6]

Yet none of these accounts directly examines the broad history of separation of church and state as a constitutional standard in America, let alone its relationship to the religious liberty guaranteed by the First Amendment. Indeed, the work most directly pertinent to this inquiry consists only of very brief historical observations. For example, according to Mark DeWolfe Howe, whereas the First Amendment was understood in the eighteenth century to protect religion and churches from the state, Jefferson sought to protect the state from the demands of churches.[7] This contrast is suggestive, but it overlooks a third possibility, that Jefferson desired not only to preserve government but also, more fundamentally, to protect individuals from churches so that Americans might be

[6] Thomas E. Buckley, "Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786–1801," *William & Mary Quarterly*, 45: 68–69 (1988); Thomas E. Buckley, "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," *Journal of Southern History*, 61 (no. 3): 445 (August 1995).

[7] Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, 19 (Chicago: University of Chicago Press, 1965). Although roughly accurate, even this remark obscures almost as much as it illuminates. For example, in 1777, an antiestablishment pamphlet published in Virginia stated that "[t]he very establishment corrupts the Church: And such a Church will consequently corrupt the State." "A Freeman of Virginia," *The Freeman's Remonstrance against an Ecclesiastical Establishment: Being Some Remarks on a Late Pamphlet, Entitled The Necessity of an Established Church in Any State*, 8 (Williamsburg: 1777).

free and uninfluenced in thought and politics. Edward S. Corwin, in a lone remark, intimates that Jefferson's phrase about separation "was not improbably motivated by an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an 'infidel' and 'atheist.'"[8] Corwin, however, does not pursue this hint that Jefferson aimed his words about separation at politics as much as religious liberty. Most recently, in a manner similar to Corwin, James H. Hutson proposes that "Jefferson's principal motive in writing the Danbury Baptist letter was to mount a political counter-attack against his Federalist enemies." Yet Hutson undermines some of the possibilities his brief observation might seem to imply, arguing that Jefferson wrote his letter as part of a "strategy of conciliation" and that Jefferson's separation was "consistent" with the religious liberty of "his fellow founders." From Jefferson's 1802 letter, Hutson then jumps forward 150 years to conclude that "the wall of separation is still an acceptable metaphor, if it is understood as a wall of the kind that existed during the cold war."[9] Thus the scholarship—particularly this nonmythical variety—contains valuable hints about the concept of separation between church and state but provides no sustained examination of its history.

The Tenacity of Separation

The concept of religious liberty employed by Jefferson has been tenacious. So strongly has it become part of American understandings of religious liberty that even the twentieth-century commentators who question the idea of separation often have difficulty dislodging it from their own thought.

The doubts about separation have been long-standing. Only five years after the Supreme Court's adoption of Jefferson's phrase in 1947 in *Everson*, Justice William O. Douglas, in *Zorach v. Clauson*, declared his adherence to the idea of separation but expressed concern about the length to which its implications could be taken. He opined that the First Amendment reflected the "philosophy" of separation and that "the

[8] Corwin, "The Supreme Court as National School Board," 106.

[9] James H. Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," 776, 780, 789; James H. Hutson, *Religion and the Founding of the American Republic*, 94 (Washington, D.C.: Library of Congress, 1998).

separation must be complete and unequivocal" but added that the First Amendment did "not say that in every and all respects there shall be a separation of Church and State." If it had said this, "the state and religion would be aliens to each other": on the one hand, "[c]hurches could not be required to pay even property taxes"; on the other, "[m]unicipalities would not be permitted to render police or fire protection to religious groups."[10] Similarly, although Justice Warren Burger in 1971 enforced the principle of separation with vigor in *Lemon v. Kurtzman*, he also equivocated: "The line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[11] Indeed, in 1984, in *Lynch v. Donnelly*, Burger acknowledged that "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."[12] Most emphatically, in 1985 Justice William H. Rehnquist, in a dissent, argued that separation is a standard that lacks historical support and has "proved all but useless as a guide to sound constitutional adjudication."[13] Some academics agree. For example, Sidney E. Mead suggests that "Jefferson's words have been the source of much confusion and conflict because they have helped to perpetuate thinking about the situation in the United States with the traditional concepts of 'church' and 'state' which are really not applicable to the experienced order of Americans." He also observes that "the reference to a 'wall' conjures up the image of something quite tangible and solid, which was built once and for all in the beginning."[14] Adding to these scholarly doubts, some popular authors

[10] Zorach v. Clauson, 343 U.S. 306, 312 (1952). Nonetheless, according to Justice Douglas, "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that church and State should be separated." Ibid.

[11] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[12] Lynch v. Donnolly, 465 U.S. 668, 673 (1984).

[13] Wallace v. Jaffree, 472 U.S. 38, 107 (1985). See also Brief of Appellant, George C. Wallace, in Wallace et al. v. Jaffree et al. and Smith et al. v. Jaffree et al., 36–37 (October Term, 1983, U.S. Supr. Ct.).

[14] Mead, "Neither Church nor State: Reflections on James Madison's 'Line of Separation,'" in James E. Wood, Jr., *Readings on Church and State*, 41–42 (Waco: J. M. Dawson Institute of Church-State Relations, Baylor University, 1989). See also Wilfrid Parsons, *The First Freedom: Considerations on Church and State in the United States* (New York: Declan X. McMullen Co., Ca. 1948); James M. O'Neill, *Religion and Education under the Constitution* (New York: Harper, 1949); Edward S. Corwin, "The Supreme Court as National School Board," 98; Joseph Brady, *Confusion Twice Confounded* (South Orange: Seton Hall University Press, 1954); Charles Rice, *The Supreme Court and Public Prayer: The Need for Restraint* (New York:

bluntly challenge separation as a myth.[15] Generalizing about the developments of the past few decades, Ira C. Lupu notes that "separationism is on the wane" and that there is a "strong trend away from the separationist ethos . . . that prevailed . . . after the end of the Second World War."[16]

Yet even those who have questioned whether the First Amendment really required separation of church and state have had difficulty escaping this concept. For example, as already seen, although Justices Douglas and Burger doubted there could be a thorough separation of church and state, they nonetheless analyzed the religion clauses of the First Amendment in terms of "separation"—Burger attempting to soften the conventional phrase by substituting a "line of separation," which he borrowed from one of Madison's letters.[17] More typically, the commentators who question separation do not even attempt to dislodge the phrase "separation of church and state." For example, in interpreting the First Amendment, Mark DeWolfe Howe merely contrasts two versions of separation, that of Roger Williams and that of Jefferson, arguing that Williams and Jefferson each was ahead of his time, and that Williams's "figure of speech luminously reflects the political theory of the eighteenth century"—indeed, that the First Amendment was then "generally understood to be more the expression of Roger Williams's philosophy than

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Fordham University Press, 1964); Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, 176 (Chicago: University of Chicago Press, 1965); Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought since the Revolutionary Era*, 246, 252, 322 (Philadelphia: Fortress Press, 1972); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982); Norman DeJong, with Jack Van Der Slik, *Separation of Church and State* (Jordan Station, Ontario: Paideia Press, 1985); Gerard V. Bradley, *Church-State Relationships in America* (New York: Greenwood Press, 1987); Steven D. Smith, "Separation and the 'Secular': Reconstructing the Disestablishment Decision," *Texas Law Review*, 67: 955 (1989); Michael W. McConnell, "Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence," *DePaul Law Review*, 42: 191 (1992); Thomas Berg, *The State and Religion in a Nutshell* (St. Paul: West Group, 1998).

[15] John W. Whitehead, *The Separation Illusion: A Lawyer Examines the First Amendment* (Milford, Mich.: Mott Media, 1977); David Barton, *The Myth of Separation: What Is the Constitutional Relationship between Church and State? A Revealing Look at What the Founders and Early Courts Really Said* (Aledo, Tex.: Wallbuilder Press, 1992).

[16] Lupu, "The Lingering Death of Separationism," *George Washington Law Review*, 62: 230, 256, 267 (1994).

[17] Lemon v. Kurtzman, 403 U.S. at 614. Madison's 1832 letter is also quoted approvingly by Sidney E. Mead, "Neither Church nor State: Reflections on James Madison's 'Line of Separation,'" in Wood, *Readings on Church and State*, 41.

of Jefferson's."[18] As will be seen, it is misleading to understand either eighteenth-century religious liberty or the First Amendment in terms of separation of church and state, whether the separation be that of Williams or that of Jefferson. Yet Howe prefers to describe different types of separation than to discuss the phrases and concepts actually used by eighteenth-century advocates of religious liberty. Another historian, E. R. Norman, protests that "[t]he separation of church and state in the federal constitution of the United States was not originally intended to disconnect Christianity and public life; it was a device to prevent the supremacy of one sect over another."[19] Unselfconsciously using a phrase not in the Constitution, this historian has to struggle to make clear that the Constitution's religious liberty was not that apparently implied by his own words. These commentators who attempt to wiggle free from the clear implications of Jefferson's phrase make no effort to shake off the phrase itself and thereby reveal how much it has become part of American culture and constitutional thought. Although some have rejected the phrase as ahistorical, most judges, lawyers, academics, journalists, and other Americans—even those who reject its implications—repeatedly talk about religious liberty and especially that of the First Amendment in terms of a "separation of church and state."

Separation and the Constitutional Religious Freedom

To understand the idea of separation of church and state and how it became part of American constitutional law, this book examines two questions, the first being whether separation was the religious liberty protected by the First Amendment. According to the myth, the idea of separation of church and state was widely accepted by the time of the nation's establishment and was the freedom desired by religious dissenters and protected by the Constitution. Yet the idea of separation of church and state was very different from the religious liberty desired by the religious dissenters whose demands shaped the First Amendment, and it had its own quite distinct path of development. The dissenters were the adherents of minority denominations that refused to conform

[18] Howe, *The Garden and the Wilderness*, 18–19.

[19] Norman, *The Conscience of the State in North America*, 4 (London: Cambridge University Press, 1968).

to the churches established by law. These established churches (Episcopal in the southern states and Congregationalist in most New England states) were established through state laws that, most notably, gave government salaries to ministers on account of their religion. Whereas the religious liberty demanded by most dissenters was a freedom from the laws that created these establishments, the separation of church and state was an old, anticlerical, and, increasingly, antiecclesiastical conception of the relationship between church and state. As might be expected, therefore, separation was not something desired by most religious dissenters or guaranteed by the First Amendment. Indeed, it was quite distinct from the religious liberty protected in any clause of an American constitution, whether that of the federal government or that of any state.

A second, no less significant question is how the U.S. Constitution's religious liberty came to be perceived as a separation of church and state. If separation was an idea radically different from what dissenters and other early Americans considered their religious liberty, how did it come to be revered as their founding conception of this freedom? To ascertain this is to understand some of the ways in which constitutions, for better or for worse, can evolve.

The explanation of how separation became the U.S. Constitution's religious liberty has much to do with majority perceptions. Jefferson suggested that the U.S. Constitution guaranteed separation, but the idea of separation did not become popular until the mid-nineteenth century, when opponents of Catholicism—many of them nativists—depicted it as a principle of government evident in most American constitutions, even if it was not guaranteed by these documents. Allied with the nativists were theological liberals, especially anti-Christian "secularists," who worried that separation had not been fully assured by any American constitution, and who therefore demanded a federal constitutional amendment. These secularists organized a political movement, including a presidential campaign, on behalf of this alteration to the U.S. Constitution. Only when their movement for an amendment failed did they abandon their argument that the U.S. Constitution had not already guaranteed separation. With little hesitation they switched tack and argued that American constitutions had historically guaranteed separation. Similarly, nativist Protestants, who had also hoped for amendments to the U.S. Constitution, turned away from the disappointments of the amendment process and increasingly argued that separation had been guaranteed in American constitutions and especially in the U.S. Bill of Rights. In these and other ways, Protestants, nonbelievers, and numerous other Americans came to understand the religious liberty protected by American constitutions as a separation of church and state.

Related to these two inquiries about the distinct development of separation and about its subsequent association with the First Amendment's religious liberty is an incidental inquiry concerning Jefferson's reputation for a thoughtful analysis of separation and for influencing constitutional law on the subject. Ever since the *Everson* case in 1947, innumerable judges, lawyers, and other Americans have assumed that the constitutional separation of church and state was one of Jefferson's great contributions to American liberty. Accordingly, it would be valuable to learn whether Jefferson wrote about separation in a manner that deserves constitutional weight and whether his words were as influential before 1947 as is commonly supposed. There is much reason to believe that modern suppositions about the wisdom and influence of Jefferson's words regarding separation have developed largely as part of a twentieth-century myth—an account that has become popular precisely because it has seemed to provide constitutional authority for separation.

Contrasting Implications

Americans took their religious liberty in a new direction when they reconceived their constitutional freedom from an establishment as a separation between church and state. The significance of the shift is apparent from the contrasting practical implications of these two ideals. Neither has been self-defining, but those who in the late eighteenth century sought constitutional guarantees against establishments and those who later sought a separation of church and state revealed much about what they understood to be the implications of their different conceptions of religious liberty.

In late eighteenth-century America the dissenters from the established churches sought limitations on civil government and did so in arguments that conformed to recognizable patterns.[20] The states with

[20] Philip A. Hamburger, "Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights," *Supreme Court Review*, 295, 336–345 (1992).

establishments had once passed laws imposing penalties on dissenters but now more typically enacted only privileges for their established denominations—notably, salaries for the established clergy. Against these establishments of religion most dissenters sought not only a freedom from penalties (whether in terms of the "freedom of worship" or the "free exercise of religion") but also guarantees against the unequal distribution of government salaries and other benefits on account of differences in religious beliefs. Some dissenters even demanded assurances that there would not be any civil law taking "cognizance" of religion. As a result, the American constitutions that were drafted to accommodate the antiestablishment demands of dissenters guaranteed religious liberty in terms of these limitations on government—specifically, limits on discrimination by civil laws and on the subject matter of civil laws.

In contrast, separation has often seemed to imply rather different conclusions. First, it has implied limits upon government far beyond, and even contrary to, what dissenters demanded. The dissenters or religious minorities whose views were reflected in the First Amendment assumed that legislation should not discriminate among religions and even that it should not take cognizance of religion. Yet separation has often been taken to imply that even if legislation does not take cognizance of religion, such legislation is suspect if it has a religious purpose or if it substantially benefits religion—particularly when the religion is that of a "church" or group. For example, on the ground of such religious purposes or benefits, legislators and judges since the mid-nineteenth century have often questioned the constitutionality of Sunday closing laws and school-aid statutes, even if the statutes do not take cognizance of religion.[21] Moreover, whereas the First Amendment, following the demands of most religious dissenters, seems to have placed limits only on civil legislation, the concept of separation of church and *state* has long appeared, in addition, to impose limits on what government can do even beyond legislation—for example, in executive acts (such as thanksgiving proclamations) and in nonlegislative acts of the legislature (such as the

[21] For the most prominent recent expression of such concerns, note the first two parts of the standard proposed in Lemon v. Kurtzman, 403 U.S. 602 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" Id. at 612–613 (citations omitted).

appointment of chaplains). Thus, in various ways, separation has historically gone much further in implying limits on government than did the liberty sought by dissenters and protected by the First Amendment.

Second, unlike the liberty sought by dissenters, separation of *church* and state has often implied limitations not only upon government but also directly upon religions. As already observed, separation is often understood to suggest that churches cannot receive government benefits, even if the benefits are distributed on the basis of entirely secular qualifications. In addition, for almost two centuries separation has seemed to imply that clergymen and religious organizations ought not attempt to influence voters or governments, and thus separation has implied that these individuals and groups ought not fully exercise the rights of political speech and association held by other Americans. Indeed, for at least 150 years separation has frequently been understood to imply doubts about the legitimacy of otherwise secular laws enacted with vigorous or partisan support based on religious views, especially if from religious organizations. Thus separation has suggested limits on religion and religious groups—constraints not sought by dissenters.

Both of these developments—limiting government and limiting churches—have been magnified by a third, more general, implication of separation that if church and state are to be separate, they should not have too much contact. For example, it is said that these institutions should avoid close relations or any substantial involvement in each other's activities. In the parlance of its advocates, separation bars "entanglements" between church and state.[22]

On account of all three of these lines of reasoning, the First Amendment has often been understood to limit religious freedom in ways never imagined by the late eighteenth-century dissenters who demanded constitutional guarantees of religious liberty. For example, the dissenters who campaigned for constitutional barriers to any government establishment of religion had no desire more generally to prevent contact between religion and government. Yet separation has seemed to forbid contact. Moreover, these dissenters and their allies sought to prohibit laws establishing religion, and in making such demands, they

[22] Again, compare *Lemon*, 403 U.S. 602. Of course, other standards or ideals of religious liberty can also suggest the three implications recited here, but none has done so more consistently than the separation of church and state.

did not attempt directly to limit religion. Yet the conception of the First Amendment in terms of separation directly constrains church as much as state. Not least, the dissenters sought the First Amendment and other constitutional provisions to prevent government from discriminating on account of religious differences. Yet these guarantees have increasingly been interpreted on the basis of an idea that typically has seemed more applicable to members of churches than to persons who merely have an individual religiosity. This last point—that separation discriminates among religions—is evident in the expectations that government should deny secularly defined benefits to religious groups and that clergymen should not speak about politics on behalf of their churches. As these examples illustrate, the principle of separation limits religious groups and individuals within them more severely than other types of religion, thus transforming the constitutional guarantees against discrimination on grounds of religious differences into provisions that necessitate it. To some Americans, the various implications of separation may seem reassuringly familiar and not necessarily invidious. Nonetheless, in all of the ways outlined here, separation has had a severe effect, particularly upon individuals whose religious beliefs lead them to worship and otherwise act as part of a religious group. The federal and state constitutional provisions designed to protect religious liberty have, ironically, come to be understood in terms of an idea that substantially reduces this freedom.

Separation and Society

In order to trace how American religious liberty came to be conceived as a separation between church and state, this book must examine how the idea of separation flourished among broader cultural and social developments, including ideals of individual independence, fears of Catholicism, and various types of specialization. Although often omitted from the history of religious liberty, these more general tendencies can suggest much about the growing popularity of separation.

Separation often attracted Protestants who felt individualistic fears of religious groups. Many nineteenth- and twentieth-century Americans worried about the power of government. In addition, however, numerous Protestants felt anxiety about nongovernmental groups and hierarchies, particularly churches and their clergies. From the perspective of these Protestants, the claims of authority made by churches—even if merely claims of moral rather than legal authority—could be oppressive and dangerous to the freedom of individuals. Accordingly, in the nineteenth and twentieth centuries separation often appealed to Americans who thought of themselves as mentally independent—particularly to those who conceived of themselves as independent of their churches. Of course, in America's ever more secular society, separation also attracted expanding numbers of nonreligious persons.[23] More generally and pervasively, however, it appealed to those whose liberal theology or whose sense of distance from communal, clerical religion led them to think of themselves as intellectually independent of any ecclesiastical dictates.

This distrust of church authority increasingly permeated American Protestantism and its often nativist critique of the Catholic Church. Fearful of Catholic immigrants, many native-born Protestants emphasized the Protestant character of their American identity. In particular, they adopted heightened expectations of intellectual independence. Believing that this individual independence was essential for both genuine religion and American citizenship, they demanded that Catholics adhere to hyper-individualistic ideals of mental freedom. In this spirit, nativist Protestants worried that the pope's claims of ecclesiastical authority would stultify the minds of Catholics, rendering them unfit to vote and giving the Church an influence that would allow it to threaten freedom through the institutions of republican government. Against these and related dangers, growing numbers of Protestant Americans demanded a separation of church and state. Thus nativist demands for mental independence and for a separation between church and state took aim at Catholics for their failure to adopt supposedly Protestant and American

[23] It is often assumed that separation of church and state became popular as a secular principle. Yet this conclusion—when stated this simply—is misleading. There was no single secularism in England or America during the period covered by this book. Indeed, "secularism" was a term popularized for polemical purposes in the mid-nineteenth century precisely in order to minimize the differences among quite divergent tendencies, many of which were candidly religious. See Chapter 11, note 20. Although some secularizing developments (such as social specialization and antiecclesiastical suspicions) drew Americans toward a separation of church and state, other secularizing developments did not so clearly have such an effect. Accordingly, it seems useful to focus on separation's relatively concrete historical circumstances rather than generalizations about secularism.

beliefs.[24] In such ways, religious liberty itself—even an unusually individualistic conception of it—was often employed to demand conformity.

The separation of church and state had particular appeal in an age of specialization. Separation often attracted individuals who—whether in fact or in their minds—divided their lives into distinct activities and sought to maintain their freedom within each such activity by restricting the demands of the others. Jefferson, his allies, and many subsequent Americans attempted, on occasion, to limit religion to a private, personal, or nonpolitical realm so that it would not intrude too much (whether by force of law or only by force of argument) on various other aspects of their lives. To such Americans, the moral claims of an entirely voluntary, disestablished church could seem threatening. Accordingly, increasing numbers of Americans attempted to escape these constraining demands of churches by welcoming various separations between organized religion and other facets of their lives, particularly a separation between church and state.

Ironically, however, religion was not so easily confined. The very parties and groups that in the nineteenth century most vigorously condemned church participation in politics simultaneously encouraged a much more direct and individualized pursuit of religious yearnings in this secular arena and, in this way, rechanneled profoundly religious passions and aspirations from Christian churches to egalitarian politics. Their efforts, however, probably were only part of a broader displacement of aspirations—a transference of religiosity to various specialized, secular activities—that may have been almost inevitable with the fragmentation of society and the decline of localized "social worship." In their increasingly fractured and secular circumstances, Americans who found their desires for purity and transcendence unsatisfied in the communal worship of traditional religion often pursued these goals in more specialized endeavors but most commonly in politics. Thus the separation of church and state may have been part of a specialization of religion, politics, and much of the rest of life that simultaneously contributed to the secularization of most activities and left many Americans to

[24] Of course, as John Higham and others have pointed out, anti-Catholicism can be distinguished from nativism. Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925*, 5 (1955; New York: Atheneum, 1977). Nonetheless, much anti-Catholicism was distinctly nativist.

pursue in their specialized, secular endeavors the sort of yearnings they once more typically satisfied in their religious groups.[25]

These cultural and social contexts—ranging from fears of group authority to the displacement of yearnings—suggest that the evolution of American religious liberty into a separation of church and state cannot be understood simply as the product of great men, whether Roger Williams, Thomas Jefferson, or Hugo Black. Nor can it be understood merely as an institutional development, whether in the documents of the U.S. Constitution or in the opinions of the U.S. Supreme Court. Instead, the redefinition of American religious liberty as a separation of church and state needs to be considered within the context of America's broader ideas, culture, and society. Amid these wider circumstances, including changing popular perceptions and fears, Americans gradually transformed their understanding of religious liberty. Increasingly, Americans conceived their freedom to require an independence from churches, and they feared the demands of one church in particular. To limit such threats, Americans called for a separation of church and state, and eventually the U.S. Supreme Court gave their new conception of religious liberty the force of law.

[25] R. Laurence Moore, "The End of Religious Establishments and the Beginning of Religious Politics: Church and State in the United States," in *Belief in History: Innovative Approaches to European and American Religion*, 237, ed. Thomas Kelsman (Notre Dame, Ind.: University of Notre Dame Press, 1991).