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# Dissent and Disestablishment: The Church/State Settlement of the New American Republic

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province,[714] a jurisdictional restraint that dates to America's disestablishment.

Indeed, the entire array of disestablishmentarian ideas appears in the modern cases, albeit more secular sounding to suit modern sensibilities. Consider, for example, Justice Stevens' majority opinion in *Wallace v. Jaffree*,[715] acknowledging that voluntaryism entails a judgment about which faiths are worthy of respect:

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .[716]

Similarly, in *Engel v. Vitale*[717] the Court observed that once a church is more responsive to the aims of the state than its own calling, the religion loses the respect of a free-minded people:

> [The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[718]

If religious Americans, especially religious conservatives, have not always been faithful to the church-state settlement that came out of the period of state-by-state disestablishment, American liberals have also lacked fidelity. The ready example of liberalism taking an illiberal turn and attempting to drive the religious voice out of the public

714. *See, e.g.*, *Bryce*, 289 F.3d at 656 ("[C]ourts reason that, unlike *Smith*, [494 U.S. 872 (1990)] the ministerial exception addresses the rights of the church, not the rights of individuals."); *Catholic Univ. of Am.*, 83 F.3d at 462.

715. 472 U.S. 38 (1985) (overturning a state law requiring a moment of silence in public schools for student prayer or meditation).

716. *Id.* at 52–53.

717. 370 U.S. 421 (1962) (striking down teacher-led prayer in public schools).

718. *Id.* at 431 (footnote omitted).

square concerns equal access to public fora for speech of religious content or viewpoint. The machinery of civil government should no more be used to suppress the religious voice than to promote it. Yet public officials in high numbers still persist in arguing that the Establishment Clause requires that religious speech (especially worship and proselytizing) be treated differently,[719] and that religious groups be discriminated against in public fora in municipal buildings[720] and public schools.[721] The sophistry of local officials is that there is a "conflict" or "tension" between the Establishment Clause, on the one hand, and the Free Speech and Free Exercise Clauses, on the other hand. Compliance with the no-establishment principle, they argue, provides the "compelling governmental interest" that legitimates the government's discrimination against religious speech.[722]

To the Supreme Court's credit, the religious claimants win all these equal access cases.[723] The High Court, however, has had to keep taking up these cases because of resistance in some of the

719. Distinctions between religious speech, on the one hand, and religious worship, on the other hand, have been known to be unconstitutional since *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 nn.9, 11 (1981).

720. *See, e.g.*, DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (holding that the village could not exclude National Day of Prayer meeting from public forum limited to civic purposes).

721. *See, e.g.*, Child Evangelism Fellowship v. Stafford Township Sch. Dist., No. 03-1101, 2004 U.S. App. LEXIS 21473 (3d Cir. Oct. 15, 2004) (holding that public school teachers did have to distribute to students information on an after-school religious club because teachers handed out similar information on after-school secular clubs and that the Establishment Clause did not excuse such a refusal); Child Evangelism Fellowship v. Montgomery County Pub. Schs., 373 F.3d 589 (4th Cir. 2004) (same); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004) (same).

722. Those arguing a "collision" between the clauses distort the fundamental nature of the Establishment Clause, which is not an individual right but a structural restraint on the government's power. *See supra* text accompanying notes 6–10.

723. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school could not deny an elementary school Bible club the right to meet on the same terms as other clubs); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that a state university could not deny student religious newspaper the right to funding on the same terms as other student secular newspapers); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school could not deny a church the right to show films during the evening in school building on the same terms as other community organizations); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act in face of Establishment Clause challenge); *Widmar*, 454 U.S. 263 (holding that a state university could not deny a student religious organization access to facilities for meetings on the same basis as other secular student organizations).

federal circuits to following the Court's case law.[724] The Court needs to say, once and for all, that it is not possible for the Establishment Clause to be in "conflict" with liberty,[725] and thus the clause can never be read to supply the "compelling interest" needed to override free speech or free exercise rights. Moreover, one has to wonder: did religious freedom prevail in these equal access cases only because the religious claimants argued foremost the Free Speech Clause? Certainly arguing free speech helped the religious claimants appear less like special pleaders to liberal eyes. And liberals, most of them anyway, will defend speech with which they do not agree, even speech that is religious proselytizing. However, the basis for equal access in these cases is more foundational: the institutional separation of church and state was never intended to silence the church. Rather, separation was to limit the power of the state and thereby afford more breathing room for the church to be the church.[726]

Second, some insist that a religious exemption in regulatory and tax legislation is unconstitutional.[727] They would have religious groups be treated like any other voluntary association. But the very reason for causing religious organizations to be jurisdictionally "separated" from government is to reduce conflicts between the two and thereby to protect church autonomy. The word "exemption" is merely the legislative rubric for accomplishing that deeper purpose. Religious exemptions from regulatory or tax burdens do not violate the Establishment Clause—they reinforce the desired distance between church and state.[728] Some voices argue to the contrary,

724. See, for example, the Supreme Court's scolding of a divided panel of the Second Circuit in *Good News Club*, 533 U.S. at 109 n.3 ("We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn.").

725. *See supra* notes 8–10.

726. *See supra* text accompanying note 705.

727. *See, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 557 (1998) ("I emphasize that I am not urging the abandonment of exemptions on the basis of a normative argument, but rather for the pragmatic reason that they can no longer be justified with the theoretical resources available in late 20th century legal culture.").

728. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding an exemption in Title VII of 1964 Civil Rights Act for religious organizations staffing on a religious basis); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding a property tax exemption for religious organizations); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a release time program for students to attend religious classes off public school grounds);

decrying cases such as *Corporation of the Presiding Bishop v. Amos*[729] and *Walz v. Tax Commission*,[730] and aggressively overreading the plurality opinion in *Texas Monthly, Inc. v. Bullock*.[731] However, a

Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, inter alia, military service exemptions for clergy and theology students); *see* Gillette v. United States, 401 U.S. 437, 450–60 (1971) (holding that a religious exemption from military draft for those who oppose all war does not violate Establishment Clause).

729. 483 U.S. 327 (1987) (upholding as not violative of Establishment Clause a statute exempting religious organizations from civil rights law that prohibited employment discrimination on the basis of religion).

730. 397 U.S. 664 (1970) (upholding as not violative of Establishment Clause a statute exempting religious organizations from property taxes).

731. 489 U.S. 1 (1989) (plurality opinion). In *Texas Monthly*, a three-justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating religious faith as violative of the "secular purpose" requirement of the Establishment Clause. *Id.* at 17. Justice White wrote separately because he believed that the law was a content-based discrimination violative of the Free Press Clause. *Id.* at 26 (White, J., concurring). Justice Blackmun also wrote separately, joined by Justice O'Connor, holding narrowly that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause." *Id.* at 28 (Blackmun, J., concurring).

Portions of the three-justice plurality suggest the unconstitutionality of religious exemptions from regulatory and tax burdens unless the scope of the exemption is broadened to include a number of nonreligious groups that provide similar charitable or beneficent services. *See id.* at 11–12. I do not think this states the law. First, the rationale of a three-justice plurality is not controlling. Plurality opinions of the Supreme Court are not binding on lower federal and state courts except on the narrow question decided. Indeed, just one year later a majority of the Court in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), invited the unsuccessful litigants to seek religion-specific exemptions from general regulatory laws by going to the legislature. It would be disingenuous to commend legislative exemptions as an avenue of relief for religious claimants if such exemptions, once secured from a legislature, were unconstitutional.

Second, the three-justice plurality went out of its way to say that the opinion was not contrary to two important cases generally upholding religious exemptions: *Amos* and *Zorach*. *Texas Monthly*, 489 U.S. at 18 n.8. The plurality even opined that it would be constitutional if the U.S. Air Force adopted a religious exemption from the military's rule on the wearing of official head gear, albeit, such a rule is not required by the Free Exercise Clause. *Id.* at n.8.

Third, at one point the three-justice plurality suggested that the problem with the tax exemption before it was that it was too narrow. The sales tax exemption favored sacred writings and "writings promulgating the teaching of the faith," as opposed to all religious writings. *Id.* at 5, 16 n.6. A religious exemption can be unconstitutionally narrow by favoring some religious beliefs or practices over others. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 702–05 (1994) (striking down a law, inter alia, because it sought to relieve a burden from a single religious sect); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (see the Court's explanation of *Estate of Thornton* in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 145 n.11 (1987)). If confined to this principle of law, the result in *Texas Monthly* is consistent with the Court's case law elsewhere.

Fourth, at times the three-justice plurality characterized the sales tax as a benefit or subsidy for the purchasers of these materials. *Texas Monthly*, 489 U.S. at 14–15. This is wrong; it is an exemption from a tax burden. But if the tax law before the Court could have been

government does not establish a religion by leaving it alone. The fact that religion is left undisturbed when other organizations are burdened by new regulations or taxes is a mere consequence of the desired separation of these two authorities, church and state.

Third, illiberal liberalism is urging an erosion of the public-private distinction embodied in the "state action" doctrine.[732] The aim is to impose on religious organizations receiving government assistance the duty to be secular in the same sense that government must be secular. They argue, for example, that a government-funded, faith-based provider of social services should be forced to secularize its operations. This is not liberty of association. This is not classical liberalism. This puts religious organizations to a cruel choice: either forfeit their right to compete on an equal basis for public funding to do social service work or recant the religious beliefs that form their essential character.[733] No other group, regardless of its ideology, is asked to self-destruct in this way.

Under current law, religious organizations are not "state actors" subject to constitutional duties merely because they successfully compete for government grants as part of a neutral program of education or social-service funding.[734] To bulldoze through the public-private distinction and treat faith-based social-service organizations receiving government assistance, as well as K–12 religious schools enrolling publicly aided students, as having the same constitutional duties as the government would crush the

properly characterized as a benefit, then the Court would be correct to strike it down as a financial benefit that favors religion over nonreligion.

732. *See, e.g.*, MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (advancing author's own conception of democratic values as constitutional norms, and then suggesting this designer democracy trumps historic First and Fourteenth Amendment rights).

733. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 23–27 (1997) (explaining how church autonomy is served by neutrality in government funding of social service providers, including religious providers); Carl H. Esbeck, *Statement Before the United States House of Representatives Concerning Charitable Choice and the Community Solutions Act, reprinted in* 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 572–76 (2002) (defending the basis for protecting the religious staffing rights of faith-based social service providers).

734. *See* Blum v. Yaretsky, 457 U.S. 991, 1002–12 (1982) (holding that pervasive regulation and receipt of government funding at private nursing homes do not make nursing home decisions state action); Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (holding that private school heavily funded by state is not state actor); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (stating that mere acquiescence by the law in private actions of warehouse does not convert the acts by the warehouse into those of the state).

institution's religious autonomy. That is not separation of church and state. That is not the church-state settlement of the early American republic. This debate is most prominent in relation to religious staffing rights of social service providers and President Bush's faith-based initiative.

What is needed by liberals and religious conservatives alike is fidelity to the American church-state settlement. It is in the long-term interest of both. It is a win-win situation. One of the aims of this modest paper is to help them to understand that this is so.

## V. CONCLUSION

We have seen that the problem of religious freedom is usefully subdivided by considering two relationships: the relationship between nation-state and individual adherents and that between nation-state and organized religion. In the West, since the fourth century, the second relationship presumes a dual-authority pattern, one of coexisting governmental and religious institutions, the former with authority over the civil and the latter having its province over the spiritual. For seventeen centuries now these two centers of authority have at times competed and at times cooperated. While the exact boundaries between the two remain conflicted, it is understood that although the respective jurisdictions overlap at many points, nevertheless there are subject matters over which the state has sovereign power and subject matters over which the church has exclusive authority. The First Amendment, with its doctrine of church autonomy, is a recognition of the latter, namely, that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.

It is not surprising that American jurisprudence, very much in the stream of Western civilization, came to tacitly absorb this dual-authority pattern. The American colonialists brought with them a variety of European models of church-state relations, almost all of which entailed a state church. Over time, however, dissenters remonstrated for greater religious freedom, first for free exercise of conscience and then for disestablishment. The foregoing occurred as society was moving away from authoritarian and toward republican government. Meanwhile religious monopoly in America was convulsed as interest in religion expanded during the First Great Awakening (1720s–50s). These events worked together to make

religious establishments vulnerable. In the Middle Colonies the establishments faded before the War of Independence. In the Southern states the Anglican establishments were set aside during the War or within the decade thereafter. Another three decades passed before the Congregational establishment came down in New England. Thus the American disestablishment occurred over a fifty- to sixty-year period, from 1774 to the early 1830s. It introduced a church-state settlement into the new republic that departed sharply from anything known in Europe.

The American disestablishment was entirely a state-law affair. Thus disestablishment was not a consequence of the War of Independence. Moreover, disestablishment neither culminated with the adoption of the Establishment Clause in the First Amendment of 1791, nor was disestablishment hastened along by it. That is, contrary to widely held belief, the Establishment Clause did no serious work whatsoever in the furtherance of disestablishment. The reason is simple enough: in the early republic it was known and appreciated that the Establishment Clause acted to bar the federal government from interfering with how the states dealt with the prickly matter of religion.

At the state level, where the work of disestablishment did take place, the vast number of those pushing for it were not doing so out of rationalism or secularism. Rather, they were religious people who sought disestablishment for (as they saw it) biblical reasons. They were allied in this effort by certain well-placed statesmen, most notably James Madison. Together, they decried state establishments as having the effect of corrupting religion, the clergy, and the church. Second, they saw state involvement in religious creed and forms of observance as unnecessarily dividing the body politic. They believed that such inherently religious questions were never properly within the state's role. By circumscribing the state's power and thereby deregulating religion, the alliance sought a more limited state, one without jurisdiction over church doctrine, forms of observance, selection of clergy, and internal governance. The settlement presumed a unifying compact, of course, but at a more modest level of consensus, namely agreement on the moral principles by which the civil polity is to make political decisions.

Those against religious establishment were for religious voluntaryism. The disestablishment of the Anglican church in the South and the disestablishment of Congregationalism in New

England came in the midst of the Second Great Awakening (1783–1830s). In a sense this second wave of revival finished the work started by the first, namely, changing how Americans thought about religion. Religion became more personal and emotional, less authoritarian, more decentralized, and more focused on guidance in daily living and less on abstract doctrine. A top-down rule by a professional class of ecclesiastics was at odds with the growing American ethos of liberty and individualism and a leveling of social classes.

By 1833, religious voluntaryism had triumphed over the last remaining establishment in Massachusetts. The opposition did not go away, of course. It continued to assert whenever possible the use of government to endorse the dominant Protestant faith. This was more successful in communities of fairly homogeneous Protestantism than it was in major cities, which were busy absorbing immigrants of diverse faiths. So it must be conceded that the practice of voluntaryism occasionally lagged behind the principle. Nevertheless, for over a century the matter of keeping church and state in their proper spheres was the near exclusive province of the states.

In the 1940s and 1950s the United States Supreme Court was at the vanguard of the rights revolution. Clause by clause the provisions of the federal Bill of Rights were "selectively incorporated" through the Fourteenth Amendment and made binding on the states. When in 1947 the Establishment Clause was incorporated and made applicable to state and local governments in *Everson*, the Supreme Court faced something of a paradox. Unlike other clauses in the Bill of Rights that have been incorporated, the Establishment Clause was not about individual rights but about structure.[735] That meant the clause restrained the national government from interfering with how the states dealt with the sensitive matter of religion. If Connecticut, for example, wanted a state church, Congress had no authority to stop it. Incorporating the Establishment Clause destroyed the clause's work as a restraint on federal power over states. That left a clause emptied of much of its original purpose, a vessel needing to be filled with new meaning about government-church relations at the state and local level. For that meaning the Supreme Court drew upon the period of America's state-by-state disestablishment and the early republic's church-state settlement.

735. *See, e.g.*, authorities cited in notes 3 and 6, *supra*.

This was a novation, simultaneously aggressive and bold. It was aggressive because the Court expanded federal judicial power to the work of policing state and local government when and where it touched religion—which happens often and nearly everywhere. The new and expanded task of the federal judiciary was to restrain the exercise of civil power in matters inherently religious, whether that power was being utilized to help or hinder religion. Inherently religious questions and disputes were reserved to the sphere of organized religion, a body of law now called church autonomy. While bold, it was a legal development Americans have, since *Everson*, lived with now for almost sixty years. We have simply gotten used to it. To be sure there are voices on the right that still call for placing the springs of government behind their faith. And there are voices on the left seeking to work the levers of government to deny equal access to religious expression in public fora and to oppressively regulate (and thus secularize) religious schools and social-service ministries. We should spurn these efforts and continue to remind all who will listen of the promise of voluntaryism: a free church and a limited state has proven best for religion and best for civil government.