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BY

KATIE JORGENSEN

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Introduction

Church-state relations have been a topic of political dispute since America's founding. Many people, from scholars to politicians to ordinary citizens, have argued for differing stances on the proper relationship between religion and politics in American life. By examining the disestablishment debate in Virginia and the First Amendment we can better understand the trains of thought in the modern debate regarding the proper relationship between church and state. Although it is challenging to determine their optimum relationship, as there are many possible stances, it is an important debate that affects American life. Many scholars and court cases have tried to determine the best church-state relationship, and although there are many different views, ultimately we can conclude that the separation of church and state, and the disestablishment of the church have been beneficial for religion in America.

The Virginian disestablishment debate influenced our nation's history because it had lasting consequences on the First Amendment, and also on American's relationship with religion. Thomas Jefferson, Patrick Henry, and James Madison responded to one another's arguments in the late 18th century; and the Virginia legislature passed a *Statute for Religious Freedom*. The statute ensured that no one would be hindered or benefited politically based on their religious affiliation or non-affiliation. The First Amendment owes much of its origin to the Virginia statute; both of the religion clauses in the First Amendment have their roots in the language and ideas in the Virginia Statute. The free exercise clause and the no establishment clause can overlap and contradict, but together ensure both the separation of church and state, and American religious liberty.

In the 20th century there was a heightened emphasis on determining the appropriate relationship between church and state; legal commentators, scholars, Supreme Court justices, and many more people weighed in on this debate. The separation of church and state generated a multiplicity of interpretations, each explicating the perceived proper church-state relationship. I have created a typology consisting of five types drawn from my examination of several scholars, to clarify possible positions regarding church-state relations. The five types vary greatly from quasi-establishmentarianism, at one end of the continuum, to secularism, at the other extreme, with variations in between. It is challenging to decide which type is correct because Americans are so strikingly different in their stances towards religion and its relationship to the public sphere.

In the last century, the Supreme Court has attempted to define and maintain the relationship of church and state in accord with the Constitution. It has, however, proved challenging when dealing with different interpretations of the First Amendment to determine whether or not a statute is encouraging establishment or promoting free exercise. Consequentially, the Court has produced many different, and arguably contradictory, responses to significant cases. Entanglements between the state and the church are complicated and tend to leave both in a puzzling and confusing relationship. I look at several significant court cases that attempt to navigate this relationship.

America has a unique church-state model which has led to confusion, ambiguity and contradiction in the relationship of the religious and political realm. Despite the complexities in church-state relations, the best type of relationship between the church and the state is separationism. This is evidenced by the Court's major decisions, which tend towards the separationist type. America's emphasis on religious freedom, through separationism, has

encouraged religious pluralism, which in turn created a free market for religious groups. This has ultimately increased American religious vitality.

Disestablishment: the Virginian Debate

During America's foundational period some of the greatest political intellectuals in our nation's history participated in an important debate concerning religion's place in the new country. This exchange of ideas took place in the 1780s, and although there were similar discussions in other states around this time, Virginia's proved the most consequential. The disestablishment debate in Virginia brought some of the most prominent political leaders into conversation with one another, and the outcome led to nationwide consequences of historic proportions with the formation of the Bill of Rights.

Thomas Jefferson, Patrick Henry, and James Madison responded to one another's proposals and actions in the Virginia disestablishment conflict. Thomas Jefferson wrote several political pieces regarding religious freedom, including the *Statute of Virginia for Religious Freedom*; these articulated his support for disestablishment and his rebuttals to those who would question him. Patrick Henry responded to Jefferson in his *Bill Establishing a Provision for Teachers of the Christian Religion*, which asserted the necessity of established religious teachers. James Madison, an ally of Jefferson, also advocated disestablishing the church and was the primary proponent pushing Jefferson's statute through the Virginian legislature. Although disestablishment in Virginia had other supporters and opponents it was ultimately Jefferson and Madison who triumphed over Henry. This debate had significant consequences for the United States.

Jefferson's Statute for Religious Freedom

Thomas Jefferson is considered one of American's founding fathers; he drafted the Declaration of Independence, and was the third president of the United States. He served as governor of Virginia for two years, 1779-1781. Jefferson was the primary advocate for prohibiting an established church both in Virginia and nationwide. In his *Notes on the State of Virginia,* Jefferson recounts the injustices created by established religion in Virginia prior to his time. The Anglicans settled Virginia first and were intolerant of Presbyterians and Quakers. "The poor Quakers were flying from persecution in England. They cast their eyes on these new countries as asylums of civil and religious freedom; but they found them free only for the reigning sect"[1] he wrote. In the late 1600s the Virginia assembly passed a law that made it illegal for parents to refuse to have their children baptized, and the assembly had also prohibited the "unlawful assembling of Quakers."[2] The Quakers faced religious injustice and intolerance at the hands of the established church and the state.

Jefferson drafted the *Statute for Religious Freedom* to end religious intolerance and ensure religious equality in Virginia. The statute enumerates established religion's crimes against free will and reason. Ultimately, the assembly resolved to prohibit the establishment of religion and ensure religious freedom:

> We, the General Assembly of Virginia, do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions, in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[3]

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[1] Thomas Jefferson. *Notes on the State of Virginia.* ed. William Peden. (Chapel Hill: The University of North Carolina Press, 1955) 157-161.
[2] Ibid., 157.
[3] Thomas Jefferson. *Political Writings,* ed. Joyce Appleby and Terence Ball. (New York: Cambridge University Press, 1999), 391.

Jefferson first drafted this in 1777 during the Revolutionary War, but the *Statute* was not brought into the legislature and passed until 1786. According to the statute, the state, on the behalf of religion, cannot infringe either upon the reason or the will of humankind. The legislation written by Jefferson also states explicitly that the state cannot infringe upon one's ability to exercise freedom of religion. People are free to profess whichever religion they choose and their civil capacities cannot be diminished owing to religious belief or unbelief. The civil capacities include the holding of public office, the right to vote, and the ability to hold property. As a man of the Enlightenment, Jefferson asserts that reason must be free from coercion, and thus religion must not be established or else it attempts to coerce of the mind.

Jefferson anticipates his critics and their responses saying, "But every state, says an inquisitor, has established some religion. No two, say I, have established the same."[4] He asserts that although each state has chosen to establish a Christian denomination, no two states have chosen the same one, or there are variations within each sect. This bill illustrates Jefferson's distaste for religious conflict and quarrels, especially in the public realm. It must have been evident then, as it certainly is now, that religious quarrels happen often, and thus Jefferson thought that by prohibiting established churches the quarrels would move out of the public sector. This is evidence of the later terminological development of a "private sector" which is removed and distinct from the "public sector;" however, these are not terms that Jefferson himself used.

Jefferson thought that disestablishing religion enabled reason and justice to prevail. He based his justification for this argument on the freedom of mind, which was given to humankind by God. In the *Virginia Statute for Religious Freedom* Jefferson asserts that "the Almighty God has created the mind free," and that the rights asserted in the statute "are of the

[4] Thomas Jefferson, *Political Writings*, 395.

natural rights of mankind, and that if any act shall be hereafter passed to repeal the present resolution or to narrow its operation, such act will be an infringement of natural right."[5] Some might want to argue that Jefferson was completely hostile to organized religion but I would contend that he disliked the quarrels caused by organized religion and thus would have it disestablished so that these quarrels would not consume the public realm. He did not advocate measures which were harmful to organized religion beyond disestablishment, and his discussion of religious injustice and quarreling from his *Notes* indicates Jefferson's frustrations with religious squabbling. The Jeffersonian ideas in the *Virginia Statute* were significant not only in ensuring religious toleration in Virginia, but also in other states and eventually America as a whole.

Henry's Rebuttal: the Establishment Argument

Patrick Henry was a prominent political figure during the foundational period in American history. He is best known for his "Give me liberty, or give me death" speech. Later in his life, Henry was an outspoken critic of the Constitution because he felt it did not truly protect the rights of the citizens and the states, and he was instrumental in the adoption of parts of the Bill of Rights. Henry also argued for the establishment of religion for the betterment of society. Sources for Henry are limited, especially on the topic of disestablishment; however, the available primary sources are vital to the Virginian debate.

In his *Provision for Teachers of the Christian Religion*, Henry asserts that there is a great social need for provisioned professional teachers, that is, teachers who are provided a governmental stipend for teaching Christian morals.

> The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may

[5] Ibid., 33, 35.

> be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge.[6]

For instruction and societal betterment, Henry argues that Christian teachers ought to be well-learned and compensated for their endeavors so that they can devote their full effort, time, and lives to the instruction of their pupils. These teachers are to go out and instruct those who by way of circumstances cannot attain moral knowledge.

Henry anticipated the question of whether or not his proposed bill would infringe upon the liberty of citizens. The bill states, "it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians."[7] Henry apparently advocated the removal of hierarchical status among the Christian denominations. It is likely that he is referring to preeminence of religious groups in the view of the state; however, it is possible Henry is referring to religious hierarchy altogether. He thought it would not impinge on freedom of liberty and conscience to establish teachers of Christianity, because no branch of Christianity would be favored over another. Henry advocated for teachers from multiple denominations.

As historian Mark A. Noll explains in *America's God*, it was a common view that liberty and virtue were closely connected; it was thought that "without [virtue] republican polity could not succeed."[8] It is likely, insofar as we can read from his bill that Henry also thought that liberty necessitated a virtuous citizenry and he was not convinced that citizens

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[6] Patrick Henry. "A Bill Establishing a Provision for Teachers of the Christian Religion," in *Religion and the Constitution*, Michael W. McConnell, John H. Garvey, Thomas C. Berg, (New York: Aspen Law & Business, 2002), 60-61.
[7] Patrick Henry. "A Bill Establishing a Provision for Teachers of the Christian Religion," 60-61.
[8] Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002), 90.

could obtain virtue without religious aid. Henry asserted that religion was important for the moral compass it provided, which ultimately preserves societal peace.

Madison: His Response and His Work

James Madison served as the fourth president of the United States, is considered the father of the Constitution and was, along with Jefferson, a founding father of the United States. James Madison disliked established religion and what he believed were its limitations on the freedom of reason, and thus he sought religious freedom and the prohibition of establishment. His *Article on Religion* stems from Madison's time in the Virginia legislature. He also responded to Patrick Henry's bill in 1785 in his *Memorial and Remonstrance*. Madison is responsible for pushing Jefferson's *Statute for Religious Freedom* through the legislature in order to enact the prohibition of established religion.

While serving in the Virginia Legislature, Madison composed and aided in passing the *Article on Religion*. In this article, Madison asserted that reason and conviction alone direct religion, and therefore it cannot be subjected to force and violence.

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all who practice Christian forbearance, love, and charity, towards each other.[9]

Madison argues that all men are equally entitled to freedom in regards to religion and religious practice. It is important to note that here Madison is still speaking in Christian-only terms; Madison argued against the establishment of a particular denomination of

[9] James Madison. *The Papers of James Madison*. eds. William T. Hutchinson and William M. E. Rachal. (Chicago: University of Chicago Press 1962) 1, 175.

Christianity. I think that Madison seems to be saying the different versions of Christianity owe it to one another, because of their Christian principles, to practice freely their particular beliefs. This could be related to Jefferson's argument for disestablishment and removing religious quarrels from the public sector. Jefferson, as previously noted, felt that religious bickering had no place within the public realm, and he hoped that by prohibiting the establishment of churches, it would move this religious squabbling to the private realm. Madison, quite possibly, was echoing this assertion from his ally Jefferson, but in a different manner. As part of his defense of the bill, Madison asserts that Christian principles necessitate this religious tolerance from and towards different factions of Christians.

In *Memorial and Remonstrance*, Madison responds directly to Patrick Henry's proposed *Provision for Teachers of the Christian Religion*. In 1784 Henry proposed his bill, and Madison presented his remonstrance to the assembly in 1785. Madison asserts that "We remonstrate against the said Bill… because the bill violates that equality which ought to be the basis of every law."[10] Establishing teachers for the Christian religion did not, Madison contended, coincide with a law based on liberty and equality.

In addition to his argument that religions owe one another freedom to exercise their beliefs, Madison also argues that "the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[11] For Madison, it seems that since there is a natural right for the free exercise of religion, and for freedom of reason to prevail we must not subject it to coercion. It is clear that Madison, like Jefferson, was greatly influenced by

[10] James Madison, "Memorial and Remonstrance," in *Religious Issues in American History*. ed. Edwin Scott Gaustad. (New York: Harper & Row, Publishers, 1969), 74.
[11] Ibid.

Enlightenment principles, throughout his thought there is a great emphasis on the freedom of reason. Madison held human reason in high enough esteem that he believed that reason was fully capable of discerning religious truth from falsehood without governmental aid.

Madison worked to make sure the bill was enacted while Jefferson was in France as American minister, a position he held between 1784 and 1789. Thus Jefferson, although he may have been aware of Henry's bill and Madison's response, could do very little to affect the situation legislatively. It was Madison who did all of the legwork to push Jefferson's *Statute* through the Virginia Legislature in 1786.

A Comparison of Predictions

Thomas Jefferson, Patrick Henry, and James Madison had significantly different ideas of how either establishing or disestablishing the church would affect America. Henry listed the primary benefits of established Christian teachers in his proposed bill, and argued that establishment was best for America. Madison, on the other hand, asserted that by allowing the establishment of the church, America would put the foundational principles of liberty and philanthropy at stake, and thus the state must be separated from religion. Jefferson proposes possible ways to enact disestablishment. He contended that separating church and state would be a process of building a wall of separation between the two in order to remove religion from the public sphere. Jefferson also emphasized the benefits of a religion-free educational institution in his vision for the University of Virginia. Each politician had a stake in whether or not America became disestablished.

Henry argued that establishment could work and without it, America's future was bleak.

His *Provision for Teachers of the Christian Religion* indirectly predicts benefits for society upon establishing religious education. First, they will correct the erroneous morals of men. Second, these teachers will enable men to restrain their vices rather than being ruled by them. Christian education, through correct morals and restrained vices, leads to the establishment and maintenance of societal peace. Without these teachers, the corruption of men's morals will continue because there will be no one in place to correct them. The actions of men will be ruled by their vices because the restraint of vices has not been illumined for them. The lack of correct morals and restraint of vices will ultimately lead to a society that is chaotic and in great turmoil ridden with tension. In Henry's view, America's future depends upon the establishment of religious teachers for the benefit of society.

As previously noted, Jefferson's motivation was to remove the disputes caused by religion from the public realm and quarantine them in the private sector. Henry's proposal indirectly solves this problem as well. In Henry's defense of the bill's purported impact on liberty he proposes the equal footing for the different sects, and religious instruction by a variety of denominations. Henry proposes "abolishing all distinction of pre-eminence amongst the different societies or communities of Christians."[12] Apparently, Henry thought the elimination of the governmental preference among the many different denominations would remove the religious disputes from the public sector, if not end religious disputes altogether.

In contrast, Madison opposed any form of religious establishment. If America were to have an established church, Madison suggests we ought to erect a "Beacon on our Coast…warning [the magnanimous sufferer] to seek some other haven whose liberty and philanthropy…may offer a more certain repose from his troubles."[13] The "liberty and

[12] Henry, *Provision for Teachers of the Christian Religion,* 61.
[13] Madison, *Memorial and Remonstrance,* 67.

philanthropy" of America are at stake; if the prohibition on the establishment of churches does not pass, then America is not the land of the free and is not a haven for those seeking repose from their troubles. The troubles he is referring to is likely religious persecution as many colonists came to America seeking religious refuge and freedom. If the establishment of the church is prohibited, then America's liberty and philanthropy have been protected. Madison strongly supports disestablishment, and he thought that the best hope for America's future, in regards to religion, depended on disestablishment. Liberty and philanthropy are foundational values in Madison's view, and if church were to become established, America would risk putting these values at stake.

Jefferson offers a model for making disestablishment work in actuality rather than in theory alone. In his letter to the Danbury Baptist Association from 1802, Jefferson presents his ideas regarding the "Wall of Separation." He asserts that the legislature can "make no law respecting the establishment of religion, or prohibiting the free exercise thereof," and thus the result would be "building a wall of separation between church and state."[14] No laws can allow the establishment of religion; however, at the same time, no laws can prohibit the free practice of religion. This matter seems to be quite simple for Jefferson; church and state are completely separate entities, and thus a wall must be erected to maintain the distinction between them.

Jefferson sees clear limitations between the realms of American life that religion and legislation can affect. Jefferson asserts that "religion is a matter which lies solely between man and his God… [and] the legislative powers of government reach actions only." Jefferson uses the language of "opinions" and "actions." Actions are within the realm of influence for the legislature; they can enact and enforce laws which regulate the actions of men. Opinions are not under the jurisdiction of state legislatures, but rather are subject to the free exercise of reason.

[14] Thomas Jefferson, *Political Writings*, 397.

The Jeffersonian ideas proposed in the Danbury letter suggest that religion does not have social ramifications or dimensions, and thus religion should be a private matter.

Jefferson comments on the place of religion in education in his 1822 letter to Dr. Thomas Cooper regarding the opening of the University of Virginia. Jefferson tells Dr. Cooper that "There is no Professorship of Divinity,"[15] and rather than the university being a religiously founded institution, Jefferson thought it would be better for the university to be a religiously free institution. Jefferson hoped that "by bringing [members of] the sects together…we shall soften their asperities, liberalize and neutralize their prejudices," and through the interchange of ideologies, opinions, philosophies and beliefs, the general religion would become one of peace, reason, and morality.[16]

These two letters generate two possible readings. First, a wall separating church and state compared to a level plane in the public sphere on which varying ideas can converge, are two very different and practically paradoxical concepts, and thus Jefferson's ideas are wildly inconsistent. Second, this is not inconsistent at all, but rather fully consistent with Jefferson's desire to remove religious squabbling from the public realm. Jefferson did not explicate in depth how he envisioned the separation of church and state taking place. It is possible that Jefferson advocated a wall of separation for the public realm, which he takes as the political public realm and government. The university is not a public realm, it is an educational realm, and thus the university provides a place for religious ideas to converge and seek out the truth. Perhaps Jefferson realized that despite the removal of religious discussion from the public

[15] Jefferson, *Political Writings*, 406.
[16] Ibid., 407.

realm, there would still be the need for an outlet of religious discussion and debate; the university provides a non-legislative place for religious ideas to converge with equal footing. In the public realm, Jefferson proposes the wall of separation distinguishing church and state, and in other arenas of American life Jefferson proposes a level playing field upon which ideas can equally converge.

Henry, Madison, and Jefferson had very different visions for the place of religion in America, how to enact that vision, and how this would affect society. Henry asserted the benefits of establishment which would ultimately lead to societal peace, and claimed that without the establishment of religion, America was destined to a desolate future. Madison disagreed and asserted that in order to protect the principles of liberty and philanthropy America had to prohibit religious establishment. Jefferson offered ideas for the actualization of disestablishment. He contended that a "Wall of Separation" should be erected to maintain a boundary between church and state. However, in institutions of education, Jefferson thought the exchange of ideas would lead to a general religion emphasizing reason, morality and peace. Jefferson's ideas are possibly inconsistent because he switches from the idea of a wall to an equal plane allowing for the interchange of ideas, or this difference in ideas may reflect differences in venues for religious discussion. Each politician prescribed a different proper church-state relationship. As my examination of ongoing discussions about proper church-state relationships will show, the outcome of their debate had significant consequences for the United States. Their differing concerns, moreover, have not disappeared.

From Disestablishment in Virginia to the First Amendment: Historical and Contemporary Perspectives on Religious Liberty

The language and ideas of the *Virginia Statute* shaped the First Amendment, which leads to parallels between the two documents. There are underlying tensions between the "free exercise" and "establishment" clauses of the First Amendment bequeathed to the First Amendment from the *Virginia Statute*. These underlying tensions between the religion clauses can lead to a confusing line between church-state relations, and contradictions in the court rulings produced under each clause. It is necessary to understand the Virginia Bill to better understand the First Amendment and its interpretation.

Historical Perspectives

After the enactment of the *Virginia Statute for Religious Freedom* "Virginians set out to build a wall of separation between church and state," a task which Thomas E. Buckley, an American religious historian, contends "proved [to be] much more complex than either its architect or chief mason had anticipated."[17] In Virginia it proved challenging to understand and implement the separation of church and state. The imagery of a "wall of separation" did not clearly and specifically explain how it should be executed and enforced. The statute was intended to guarantee religious freedom, yet it did not separate civil government from religious concerns. Buckley explains that although the state officially refused to pay the salaries of preachers, and would not fund the building of churches, the state could still "legislate virtue." The same lawmakers who enacted the *Statute for Religious Freedom* also approved other acts that penalized those who worked on the Christian Sabbath.[18] The state thus muddied the line of separation by enforcing Christian doctrine, which only added to the confusion in trying to legislatively separate church and state, and to determine the proper relationship between them.

[17] Thomas E. Buckley, "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," *The Journal of Southern History* 61 (1995): 448.
[18] Ibid., 448.

The *Statute* also did not remove the churches from the political realm. According to Buckley, the Baptists had considerable skill at interest-group politics and pushed a "reluctant" Virginia General Assembly to seize the private property of another denomination.[19] The colonial Church of England became the Protestant Episcopal Church after the separation from England; the Episcopalians had enjoyed both establishment and laws protecting their ownership of land in Revolutionary Virginia. Even after disestablishment, the Baptists were outraged over the alleged privileges afforded to the Episcopalians, which fueled their political zest to overturn several rulings including church property laws.[20] Religious figures and groups gained renown for themselves as major forces in Virginia's political climate.[21] Even today, when religious groups and people become forces in the political realm, people question whether it is a violation of church and state boundaries. As previously noted, the state continued to use governmental power to enforce Christian morality. Conversely, churches used their power and influence to affect legislative decision-making, especially in issues pertaining to public morality, religious freedom, and the application of the Virginia statute. This involvement only further added to the intricacies and confusions of the church-state relationship. Despite the legislation separating church and state, these developments made it unclear how this should be actualized, and implementation proved much more challenging than had been expected. It is unclear whether this confusion of relationship and spheres of influence was due to the statute or the lack of the enforcement of the statute.

Even though the *Virginia Statute* was challenging to implement, the statute encouraged religious liberty in other states and it guided the formation of the religion clauses of the First

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[19] Ibid., 449.
[20] Buckley, "After Disestablishment Thomas Jefferson's Wall of Separation in Antebellum Virginia," 449.
[21] Ibid., 450.

Amendment some years later.[22] There was great debate concerning the Constitution's lack of stated liberties, and the Anti-Federalists did not want it ratified, so to salvage the Constitution's ratification the Federalists agreed to create a bill of essential rights or liberties. The Constitution was ratified in 1788, and it was followed by the Bill of Rights which was ratified in 1791. In it, the First Amendment guaranteed freedom of speech, free press and the rights of the people to peaceably assemble; however, for our purposes we will focus only on the religion clauses. In regards to religion, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[23] The two clauses contained in this brief statement are commonly separated and referred to as the "establishment" clause and the "free exercise" clause.

To commemorate the statute's bicentennial, Martin E. Marty examined the statute and its effects on America. Marty contends that there are significant similarities between the Virginia Statute and the First Amendment. Although the authorship of the First Amendment is contested we do know that it was not written by Thomas Jefferson. He may not have been the author, but his ideas are reflected in the First Amendment because both the "establishment" and "free exercise" clauses are parallel to the Virginia Statute, which Jefferson did write.[24] Marty contends that the "'frequenting' clause and its corollary 'support' feature" from the Virginia Statute, parallel the "establishment" clause.[25] Both documents prohibit coerced assent to specific religious beliefs. The second part of the Virginia Statute asserts that no one will be

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[22] Ibid., 446.
[23] U.S. Constitution, amendment 1.
[24] Thomas Jefferson, *Political Writings*, 391. "We, the General Assembly of Virginia, do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions, in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."
[25] Martin E. Marty, "The Virginia Statute Two Hundred Years Later," *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, (New York: Cambridge University Press, 1988), 7.

forced to maintain any religious opinion and that religious opinion, or lack thereof, will not diminish or enlarge civil capacities. This part of the statute correlates to the "free exercise" clause by protecting those who want to exercise their religious beliefs, as well as protecting those who choose not to hold certain religious opinions. Marty's interpretation of the amendment, like Jefferson's argument, contends that opinions and beliefs, "by nature and natural law and natural rights, belonged to religious freedom…. [The First Amendment] brought the force of these verbal pretensions into the congressional realm."[26] One of Jefferson's motivations in writing the statute was his conviction that the opinions and beliefs should not be subject to coercion by legislation, and that this fact was self-evident when looking at natural law and natural rights. The effect of the First Amendment was to bring "naturally evident" religious freedom into the congressional sphere. By drawing these parallels between the Virginia Statute and the First Amendment, Marty asserts that the "Virginia Statute is alive and well."[27] Both the "establishment" and the "free exercise" clauses have their roots in the Virginia Statute.

Free Exercise and No Establishment: Complementary or Contradictory?

The conflict of religious liberty has persisted to the present day, and intensified in the late 20th century. According to Constitutional law scholar A.E. Dick Howard's reading of the First Amendment, the goal of the "establishment" and "free exercise" clauses is ultimately to ensure religious liberty. Howard defines religious liberty as the freedom to worship as one chooses and freedom from "exactions to support a religious establishment."[28] The "no establishment" clause states that "Congress shall make no law respecting an establishment of

[26] Martin E. Marty, "The Virginia Statute Two Hundred Years Later," 10-11.
[27] Ibid., 11.
[28] A.E. Dick Howard, "Up Against the Wall: The Uneasy Separation of Church and State," in *Church, State, and Politics*, (Washington D. C.: The Roscoe Pound-American Trial Lawyers Foundation, 1981), 24.

religion;"[29] this prohibits the possibility of a nationally established church. The "free exercise" clause states that "Congress shall make no law…prohibiting the free exercise thereof;"[30] people are free to practice their religion and Congress cannot impinge on this freedom. Both components were thought to be necessary to obtain religious liberty, and according to Howard, neither Jefferson nor Madison thought the battle for religious liberty would be complete until both rights were secured.[31] However, this common goal of religious liberty did not subdue the tension between these two parts of the First Amendment. In some instances and court cases, the "establishment" clause and the "free exercise" clauses come into conflict. Under the umbrella of the First Amendment and the two religion clauses lie several principles which can lean towards either the "establishment" clause or the "free exercise" clause. These principles come up through Supreme Court rulings and have become guiding principles for Court decisions, and these principles are categorized by their content as legal commentator Eugene Volokh lays out in *The First Amendment and Related Statutes: Problems, Cases, and Policy Arguments*.

According to Volokh, some principles fall completely under either the "establishment" clause or the "free exercise" clause, but some principles overlap the two clauses significantly, and both the "non-discrimination" principle and the "no religious decisions" principle are instances of this overlap.[32] The non-discrimination principle prohibits governmental discrimination "against religious practices…among religions…and against nonreligious people."[33] This principle falls under the "free exercise" clause because people cannot be discriminated against on account of their religious practices or for being nonreligious. The non-

[29] U.S. Constitution, amendment 1.
[30] Ibid.
[31] Martin E. Marty, "The Virginia Statute Two Hundred Years Later," 7.
[32]Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments.* 2nd ed. New York: Foundation Press, (2005): 697.
[33] Ibid.

discrimination principle also falls under the "establishment" clause because the government cannot discriminate among religions because such discrimination would show favoritism and partiality for one religion over another.

The no religious decisions principle also falls under both the "establishment" and "free exercise" clauses. This principle states that the "government may not decide whether a religious doctrine makes sense, is internally consistent, is true…is central to a particular religion, or is consistent with the orthodox tenets of a group's faith."[34] The no religious decisions principle correlates to the "free exercise" clause because to the government is prohibited from condoning or critiquing any religion, and therefore the government is unable to coerce belief in the doctrines of any religion. This principle falls under the "establishment" clause as well because the government declaring a particular religious doctrine as "correct" would show government partiality towards one religion, particularly when most religions claim to be the one true religion. This partiality could lead to claims of bias and establishment.

Constitutional law scholar A.E. Dick Howard explains how the overlap of the clauses can lead to conflict by using the example of providing chaplains and places of worship for inmates and soldiers without access to "civilian opportunities for public communal worship."[35] According to Howard, Supreme Court Justice Brennan said this practice "though questionable under the establishment clause, might be permissible in the interest of free exercise."[36] Under the free exercise clause it is allowable to provide chaplains to those prohibited, for whatever reason, from attending public communal worship. However, this practice is exceedingly questionable under the establishment clause because the state would be paying chaplains with tax-raised funds. This could mean that people are being coerced and burdened to support a

[34] Eugene Volokh, *The First Amendment and Related Statutes,* 697-698.
[35] Howard, "Up Against the Wall: The Uneasy Separation of Church and State," 24.
[36] Ibid.

belief they do not hold. This example illuminates one of the ways in which the "free exercise" and "establishment" clauses can overlap and conflict with one another putting legislative action in confusing territory.

Thomas Robbins, a scholar in the sociology of religion, proposes a somewhat different analysis. He asserts that a "rough distinction can be made between two kinds of issues or conflicts involving the relationship between church and state in the United States today."[37] The first type of conflict Robbins terms "Church Autonomy Conflicts" in which a "branch of federal, state, or local government proposes to impose some regulatory constraint on a religious group, a group member or an institution connected in some manner to a religious group or organization."[38] In this type of conflict, the government imposes some sort of legislative restriction upon a religious group; the actual conflict arises when those opposing the regulatory measure contend that the governmental action impedes the free exercise of religion. In *People v. Woody* the Supreme Court of California reversed the conviction of several Native Americans for illegal possession of peyote on the grounds of free exercise. Peyote is used in Native American ritual and medicinal practices; it is also illegal. Under the free exercise clause, the Native American Church has been able to practice freely and use peyote in their practices.[39] This exemplifies the "Church Autonomy Conflict" because the Native American Church was unable to exercise freely their religious beliefs and practices as they had before legislation making peyote illegal.

Robbins calls the second type of church-state tensions "State Neutrality Conflicts." These conflicts involve "either a proposed form of assistance which the state will provide to a

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[37] Thomas Robbins, "Church-State Tension in the United States," in *Church-state Relations: Tensions and Transitions* (New Brunswick: Transaction Books, 1987), 67.
[38] Ibid.
[39] Robert S. Michaelson, "Civil Rights, Indian Rites," in *Church-state Relations: Tensions and Transitions* (New Brunswick: Transaction Books, 1987), 128.

religious group or the alleged expression of religious faith by a public administration."[40] The state or public administration can neither provide assistance to a religious group nor express a religious faith, allegedly or actually, because it shows that the state is partial to a certain religion. Cases involving prayer in schools or religious displays in public places both fall into the category of State Neutrality Conflicts. This type of conflict highlights the establishment clause, which according to Robbins is "generally viewed as prohibiting state sponsorship of religion or public favoritism among competing religions."[41] The conflicts tend to assert that the religious neutrality of the state is being undercut.[42] If the state were to publicly sponsor a religion or show favoritism towards a religion, it implicitly establishes a religion.

These categories offered by Robbins are not faultless and, as he admits, there can be a great deal of overlap between the two types. Robbins explains that there are regulations and legislative decisions that are both "Church Autonomy Conflicts" and "State Neutrality Conflicts" because the decision breaches both the "free exercise" clause and the "establishment" clause:

> Governmental regulations burdening churches are often attacked not only on the grounds that they infringe on church autonomy and thus negate free exercise, but also on the grounds that they discriminate against certain religions and thereby sacrifice the state's religious neutrality and contravene the Establishment clause.[43]

Robbins uses governmental regulations upon churches to illumine the overlap of his typologies. Free exercise is compromised when the government forces regulations upon churches. These same regulations can be critiqued on the grounds that they violate the state's neutrality and discriminate against a religion. It could be argued that those churches not affected by the

[40] Robbins, "Church-State Tension in the United States," 68.
[41] Robbins, "Church-State Tension in the United States," 68.
[42] Ibid., 68.
[43] Ibid., 69.

governmental regulations are implicitly established.[44] Different issues can fall under both religion clauses of the First Amendment, which leads to conflict between the two. This conflict may be legislative as in a court case, or it may take place in the ideological or philosophical realm in which the exchange and interplay of the varying ideas of scholars, politicians and others who choose to participate in this discussion can take place. The interrelatedness of the First Amendment's religion clauses leads to a variety of issues, ideas and interpretations of the proper relationship between church and state. The diversity and tensions within the variety interpretations is significant; however, this discussion will not examine these differences.

It is important to note that "although the First Amendment speaks directly only to Congress, the Supreme Court has long since held that the bill of rights is *incorporated* into the due process clause of the Fourteenth Amendment, and is thereby binding on the actions of the states."[45] The due process clause of the Fourteenth Amendment maintains that states cannot "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[46] Therefore, if the Bill of Rights is incorporated in the due process clause of the First Amendment it is no longer only binding on the actions of the Court but also on the actions of the states.[47]

The First Amendment and *Virginia Statue for Religious Freedom* are both important documents to examine when discussing church-state relations and issues. The First Amendment owes its origins to the Virginia Statute. The two clauses, the "free exercise" clause and "establishment" clause both parallel parts of the statute. These two primary sources are heavily

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[44] Ibid., 68.
[45] Robbins, "Church-State Relations in the United States," 67.
[46] U.S. Constitution, amendment 14, section 1.
[47] The bill of rights is applicable to the states because the Court considers it to be incorporated into the Fourteenth Amendment. The Oxford English Dictionary defines "incorporated" as "being combined or united with and to be included as part of the whole."

consulted, and widely contested, in America's ongoing quest to attain and define religious liberty. Both of these documents are referenced, studied, analyzed, critiqued and drawn upon in arguments and decisions that attempt to determine the proper relationship between church and state.

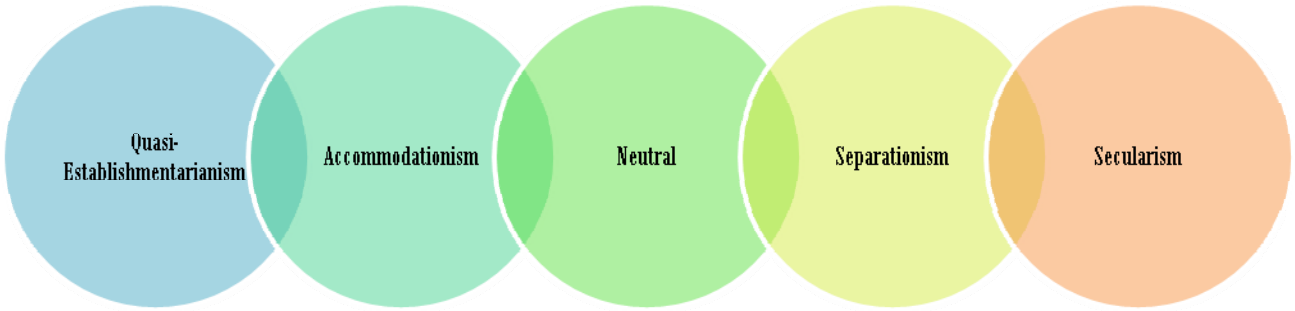
For our purposes, this examination of the First Amendment and the Virginia Statute aids our exploration of the major stances regarding the right relationship between church and state in American political ideology today. We must also look to both the Virginia Statute and the First Amendment in order to better understand rulings of the Supreme Court and the explanations they offer in regards to their decision making. There have been many court cases involving the First Amendment in which the justices have looked to the Virginia Statute and the Bill of Rights when making their decisions. The rulings of many cases have been used to develop the underlying principles of the First Amendment. Court cases have also served as attempts by the Court to understand what the original intentions of Madison and Jefferson were in the Virginia Statute in order to make a decision under the First Amendment.

The Arguments Today: Current Perspectives on Church-State Relations

Today, there are many opinions about the proper relationship between church and state. To aid in deciphering these stances I am introducing a typology with five types, from Quasi-Establishmentarianism to Secularism and other variations in between, that have come together through a synthesis of my research. 1) Quasi-Establishmentarianism supports a significantly closer relationship between church and state than any other type; this view asserts that the government has a covenantal relationship with God to ensure that the religious decisions take precedence over the democratic majority's decision. 2) Accommodationism can be seen as a "benevolent neutrality": while the government maintains the separation of church and state, and

avoids excessive involvement, the state can show benevolence to religion. 3) Neutrality is the ideal for many but proves to be an elusive standard, leading to the criticism that true neutrality is impossible. 4) Separationism stems from the Jeffersonian metaphor of the "wall of separation" and asserts the need for a governmental stance that neither inhibits nor aids religion and religious practice. 5) Secularism is the complete privatization of religious belief and removal of such beliefs from the public realm; this type emphasizes human reason as a means of decision making in the public political sphere. Since there are many strikingly different ideas regarding the proper relationship of church and state it is exceedingly hard to determine which type is correct for the American religious-political landscape.

The Continuum of Church-State Relations



Quasi-Establishmentarianism

Although very few people will claim to support true establishment or theocracy anymore, those whose views reflect the modern version of these old views or have evolved from these views can be deemed quasi-establishmentarians. Legal scholar Carl H. Esbeck asserts that this group "argues for a closer, organic relationship between church and state wherein the government has a proper role in preserving the unity and integrity of the Christian

faith."[48] It is, however, entirely conceivable that there are quasi-establishmentarians from many religions, and this Christian view is not alone. As Esbeck notes, there will be government support and regulation of religion under this view. This view assumes the government has the ability to determine, establish and enforce religious truth.

The quasi-establishmentarians envision the state siding with and fostering a single "true religion." The adherents of this view, whom Esbeck calls theocentrics, charge "the state with certain covenantal obligations to God. For them this covenant supersedes the social contract in a democracy to follow the will of the majority."[49] Quasi-establishmentarians reject the democratic will of the majority in order to achieve what they see as the government's obligations to God. Some, more radical, quasi-establishmentarians want to replace secular law with Biblical law.

Patrick Henry serves as our historical example of a quasi-establishmentarian; Henry supported the establishment of a non-denominational Christianity for the purpose of moral instruction. He argued that teaching Christian morals was necessary to correct the erroneous morals of men, constrain their vices, and maintain societal peace.

Henry emphasizes teaching Christian morality, which has been echoed in recent years by those who support religion and religious teaching in schools. In scholar Willard Sperry's discussion of church-state separation in America, he discusses the positives and negative consequences caused by this separation. Sperry contends that it has been detrimental to remove religion from the educational sector. He says, "it is in the field of education that we have suffered most…education is secular…it is the state which is replacing the church…we have

[48] Carl H. Esbeck, "Religion and a Neutral State: Imperative or Impossibility?" in *Religion in American Life*, (New York: The H.W. Wilson Company, 1987), 152.
[49] Esbeck, "Religion and the Neutral State: Imperative or Impossibility?" 153.

changed our procedure for determining what kind of beings human beings shall be."[50] Sperry highlights one of the fundamental concerns in church-state relations, namely, how schools shape morals and encourage certain visions of what it means to be human. Sperry and others contend that without religious moral instruction in schooling, we raise generations without a religious moral compass to the detriment of society.

Televangelist Pat Robertson is a prime example of a quasi-establishmentarian. In 1997 Robertson spoke at the Christian Coalition's "Road to Victory" Conference. Apparently, he proposed "a detailed 'game plan' for delivering the White House."[51] At the conference Robertson claimed that the nation faced the threat of annihilation by God and that electing a president who would implement the organization's agenda was the only way to save America from God's wrath.[52] Robertson supported the proposed Religious Freedom Amendment in 1998. This amendment contended that the courts had gone too far in church-state separation rulings and advocated the reversal of years of rulings; in effect, this would enable the state to mandate public funding for religious schools and would allow prayer in public schools. Robertson supports a Christian religious majority in Congress and a handpicked candidate for the White House in order to achieve the goals of the Christian Coalition; these actions and implications would constitute establishment.

Accommodation

The accommodationists step away from establishment, rejecting the coerced adherence of citizens to specific religious doctrines and the overregulation of religion by government. Accommodationists allow for some governmental aid and involvement with religion. Thus, the

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[50] Howard Sperry, *Religion in America*, (Boston: Beacon Press, 1963), 59.
[51] Rob Boston and Joseph Conn, "Boss Pat: Comparing The Christian Coalition To The Tammany Hall Political Machine, Pat Robertson Shares With Top Lieutenants His Game Plan For Taking The White House And Ruling America," *Church & State* 196 (1997), 4.
[52] Ibid., 5.

government could provide some aid to a religion or to religious adherents, as long as it is to religious groups equally. The government could also be involved with religion, but the amount and extent of involvement is severely more limited under accommodation than under quasi-establishment. Many have termed this type a "benevolent neutrality" because the government retains its neutrality, but this neutrality can be used to the benefit of religious groups.

Former Supreme Court Chief Justice Warren Burger was an advocate for this "benevolent neutrality." In *Walz v. Tax Commission,* Burger "argued for 'play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[53] *Walz v. Tax Commission* upheld a state tax exemption for property used "'exclusively for religious, educational or charitable purposes.'"[54] In the opinion of the Court, Burger notes that the tax exemption indirectly confers an economic benefit upon churches. However, he emphasizes the universality of this benefit; the state had "'granted exemption to all houses of religious worship within a broad class of property own by nonprofit, quasi-public corporations,'" other examples within this class are hospitals, libraries, and playgrounds.[55] Burger suggests that a benevolent neutrality would permit religious adherents to practice freely without either government support or hindrance.

American evangelical theologian, Francis A. Schaeffer contends that Judeo-Christian concepts are foundational for American government. He cites a speech by John Witherspoon, Presbyterian minister and the only pastor to sign the Declaration of Independence, Witherspoon said, "'he is the best friend of American liberty who is most sincere and active in promoting

[53] Howard, "Up Against the Wall: The Uneasy Separation of Church and State," 26.
[54] Sullivan and Gunther, *First Amendment Law, 578.*
[55] Ibid.

pure and undefiled religion.'"[56] Schaeffer argues that liberty goes hand-in-hand with religion. According to Schaeffer, the idea of inalienable rights stems from the belief that there is "Someone there who gave the inalienable rights;" these inalienable rights could not come from the government because the state the rights would not be inalienable if the state decided to revoke them. Schaeffer thinks that America is founded on Christian principles and the present separation of church and state would be appalling to our forefathers.

> Today the separation of church and state in America is used to silence the church. When Christians speak out on issues, the hue and cry from the humanist state and media is that Christians, and all religions, are prohibited from speaking since there is a separation of church and state.[57]

Schaeffer opposes the privatization of religious beliefs, and supports religion and religious influence in the public realm. He argues that Americans must take back their foundational religious roots because this is a country based on Christian Protestantism. Schaeffer contends that although Christian Protestantism may not legally be established, it is a cultural establishment that cannot and should not be denied. Schaeffer, as an accommodationist, is not arguing for a legal establishment of the church, however, he does advocate the recognition of religion as a major facet of American life.

Neutral

Out of all of the types regarding the proper relationship between church and state neutrality seems to be the most appealing to many scholars. This type recommends that the state be neither a proponent nor an adversary to religious interests, but instead should maintain a stance of neutrality. In *Everson v. Board of Education* Justice Black appealed to the standard

[56] Francis A. Schaeffer, "Foundations for Faith and Freedom," in *America, Return to God!* Reprinted from *A Christian Manifesto* (Wheaton: Good News Publishers, 1981), 10.
[57] Schaeffer, "Foundations for Faith and Freedom," 11.

of neutrality "when he said that the First Amendment 'requires the state to be a neutral in its relations with groups of religious believers and non-believers.'"[58] Then, in *Committee for Public Education v. Nyquist,* Justice Powell, delivering the opinion of the Court stated, "the state must maintain an attitude of neutrality, neither advancing nor inhibiting religion."[59] However, neutrality is an elusive standard, and its application to concrete facts has proved challenging.[60]

Esbeck discusses the myth-of-neutrality argument which contends that utter state neutrality on issues regarding religious practice and belief is impossible. Proponents of the myth-of-neutrality view assert that there is and will always be a leaning or inclination, of some sort, one way or the other, and thus true neutrality is impossible. In Esbeck's assessment of the myth-of-neutrality he deems this myth partially correct and partially wrong; Esbeck asserts that "the state cannot be neutral on moral issues, but it can and should be neutral on questions central to religions' faith."[61] On behalf of religious liberty, the state must avoid involvement with issues of "religious worship, propagation and teaching which together comprise the very heart of one's belief concerning the nature and destiny of humankind."[62] However, at the same time, the state cannot "retreat from the regulation of certain conduct which is arguably immoral and still claim its neutrality concerning the rightness of the conduct."[63] Esbeck both affirms and discredits the myth-of-neutrality by showing that state neutrality regarding religious beliefs and doctrines is not only feasible but required for religious liberty, and that the state cannot remain neutral concerning immoral conduct in religious practice. True neutrality is impossible because

[58] Howard, "Up Against the Wall: The Uneasy Separation of Church and State," 25.
[59] Howard, "Up Against the Wall: The Uneasy Separation of Church and State," 25.
[60] Ibid,.
[61] Carl H. Esbeck, "Religion and a Neutral State: Imperative or Impossibility?" 148.
[62] Ibid., 147-148.
[63] Ibid., 148.

individual's opinions are always shaped by something, and thus neutrality, although ideal, is not a true option.

Separationist

As discussed earlier, the language of a "wall of separation" between church and state is taken from Jefferson's letter to the Danbury Baptist association in 1802. Separationists advocate decisions that propagate the separation of church and state, while also being neither benevolent nor hostile to religion. Madison, along with Jefferson, was a major proponent of separationism. As previously discussed, both Madison and Jefferson laid the groundwork for church-state separation in Virginia and nationwide, and the language of the Virginia statute is echoed in the religion clauses of the First Amendment. We will later examine Supreme Court cases with separationist rulings; through these different rulings separationism emerges as the Court's ideal type.

Separationists tend to be hesitant about allowing the state to support a particular religion and they are also opposed to state regulation of religious practices.[64] This stems from the Jeffersonian idea of building a "wall of separation." Separationism desires that the state neither exercises its power over the church, nor that the state favor one religion or religious practice. "The separationist view is that the state should neither positively support nor negatively constrain religious practices as a general rule."[65] There is a dual prohibition on the state: it should not interfere with religious beliefs and practices either in espousal or opposition to the practices.

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[64] Thomas Robbins, "Church-State Tension in the United States," in *Church-state Relations: Tensions and Transitions* (New Brunswick: Transaction Books, 1987), 70.
[65] Robbins, "Church-State Tension in the United States," 70.

Secularist

The final type is secularism, which advocates an increase in the privatization of religious beliefs and a shift in political ideology that highlights the superiority of reason. Secularists may harbor "a conviction that the theistic religion is largely irrelevant, even dysfunctional in matters of public discourse;" however, the religious beliefs ought to be tolerated as long as those beliefs do not bear any weight in deciding public policy and matters of the state.[66] Secularism is far more hostile to religion than any other type we have discussed. If accommodation is a "benevolent neutrality" between the church and state, then secularism is a "hostile neutrality."

American author Susan Jacoby is the foremost representative of modern secularism. In her book *Freethinkers: A History of American Secularism*, she argues that secular values ought to be at the center of the public sphere, and urges for the restoration of secular ideas to a "proper place in our nation's historical memory and vision for the future."[67] Although Jacoby uses the term secularist throughout her work, she notes that the term "secularist" did not arise until the second half of the nineteenth century. Secularism is a "concept of public good based on human reason and rights rather than divine authority."[68] This type emphasizes distinguishing the secular functions of government from the domain of religion.

Jacoby asserts that for a nation founded on the separation of church and state it is paradoxical that religion should occupy such a prominent role in the American political sphere. "It is one of the greatest unresolved paradoxes of American history that religion has come to

[66] Esbeck, "Religion and a Neutral State: Imperative or Impossibility?" 152.
[67] Susan Jacoby, *Freethinkers: A History of American Secularism*, (New York: Metropolitan Books, 2004), 11.
[68] Ibid., 2. Jacoby also cites the Oxford English Dictionary definition of secularism which is "the doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all consideration draw from the belief in God or in a future state."

occupy such an important place in the communal psyche and public life of a nation founded on the separation of church and state."[69]

Jacoby criticizes the American religious situation; she contends that as a nation "The message is clear: we may be a multicultural people, but we're all respectable as long as we worship God in some way. The one minority left outside the shelter of America's ecumenical umbrella is the congregation of the unchurched."[70] Jacoby harshly criticizes the ignorance of the American religious landscape and the blatant disregard for the religiously unaffiliated. However, Jacoby also asserts that in the American political landscape, "a secularist's specific metaphysical beliefs are politically irrelevant, because insistence on the distinction between private faith and the conduct of the public affairs is precisely what distinguishes secularists from the religiously correct."[71] For secularists, whether or not they are affiliate with a particular religious ideology is unimportant; the emphasis is on the superiority of reason in the political realm. Jacoby advocates free thought and contends that "the combination of *free* and *thought* embodies every ideal that secularists still hold out to a nation founded not on dreams of justice in heaven but on the best human hopes for a more just earth."[72] Secularists advocate free thought and reason in the public realm and the hostile privatization of religious beliefs.

Evaluating the Types

It is clear that there are different stances concerning the relationship between the church and the state. The difficulty in understanding, determining, and implementing the "proper"

[69] Ibid., 3-4.
[70] Jacoby, *Freethinkers,* 6.
[71] Ibid., 7.
[72] Ibid., 365.

relationship is evident, since many people hold different views and even within each type individuals disagree as to how it would work in actuality in the public sphere.

The quasi-establishmentarian type would create far too many ties between religion and the state. Also, this type assumes that the state is capable of recognizing and enforcing religious truth, which is by far too weighty of a decision for the state. Ignoring the will of the majority to base decisions on the state's covenantal agreement with a Supreme Being completely undermines the fundamental principles of democracy. Quasi-establishmentarianism is not a viable option for the optimum church-state relationship.

Accommodationism notes the need for separation; however, this type also holds that the state should make decisions that aid religion and religious practice. Accommodation could also lead to excessive ties between the church and the state. The "benevolent neutrality" would prefer that the state's legislation and court's decisions assist religion. It is likely that accommodationists prefer one religion over another, and thus would prefer that these benevolent decisions and legislation be on behalf of a particular religion. It would be challenging for the state to be equally benevolent to all religions; therefore, accommodationists may sacrifice one or more religions to show benevolence toward another.

Secularism emphasizes the need for separation of church and state, and argues for the complete removal of religious beliefs from the public realm. Secularists want the utter privatization of religious beliefs. The "hostile neutrality" bases decisions on the emphasis of human reason in the public sphere, and supports decisions that remove religious ideas and practices from the state. This type would prefer to be hostile and detrimental to religion, rather than support or accommodate it.

Since the “myth of neutrality” negates true neutrality being a legitimate stance on church and state relations; the separationist position has emerged as the truly “neutral” between accommodationist and secularist. Accommodationist is the “benevolent neutrality” while secularist is the “hostile neutrality” and separationism better achieves the goals of neutrality. Separationism supports the separation of church and state and makes decisions that coincide with this separation; however, in relation to religious groups it is not adversarial or accommodating. In decision-making, whether in the legislature or the courts, the state bases its decisions on maintaining separation of church and state. The emphasis on decisions and legislation is not on whether the state should be benevolent or hostile toward the church, but rather the emphasis is on how to best maintain the separation of these institutions.

Religious Liberty and the Supreme Court: the Cases, the Tensions and the Resolutions

As was noted earlier, religious disputes happen often, and Jefferson thought that by prohibiting the establishment of religion, quarrels would be moved out of the public sector. However, attempts at building and maintaining a wall of separation and removing church-state connections have inevitably created a different set of challenges. Entanglements between religion and the state are complicated and leave both in confusing and contradictory stances. Supreme Court cases have played a major role not only in the ongoing process of separating church and state, but also in the process of maintaining separation and establishing the perceived proper relation between the two. *Everson v. Board of Education* (1947) was the Court’s first major attempt at deciphering and understanding the religion clauses of the First Amendment, and *Everson* has been a point of reference for Justices since. *Lemon v. Kurtzman* (1971) produced the Lemon test, which has been used to deem whether or not laws are constitutionally sound. The case *Board of Education of Kiryas Joel School District v. Grumet*

(1994) is significant because it is a major recent case involving separation and establishment issues. In *Engel v. Vitale* (1962) the opinion of the Court offers an intriguing explanation of the necessity of church-state separation. As you will notice, the Court cases are not in chronological order. Rather than focusing on the evolution of ideas generated from Supreme Court rulings, this discussion will focus on the relationship of the Court to the complications of church and state. The logic of the Court's arguments does not exactly follow the chronology of its decisions. I have chosen the cases that seem to be the most significant, or have had the most significant and lasting impact on Supreme Court decision making. They are chronological until the final case, *Engel v. Vitale* which relates to the later discussion of disestablishment's impact on religion in America.

Everson v. Board of Education (1947)

Everson v. Board of Education from 1947 is one of the foundational cases in regards to the Supreme Court's relationship with the First Amendment. *Everson* was one of the Court's first significant efforts to interpret the religion clauses of the First Amendment.[73] In their effort to interpret the First Amendment, "All nine justices drew on history, and all placed great weight upon the labors of Thomas Jefferson and James Madison in behalf of religious liberty in the Virginia of the 1770s and 1780s."[74] It has remained a landmark case and is often referenced by both the Supreme Court justices as well as the community of scholars discussing religion's place in the public sphere.

Everson v. Board of Education challenged a New Jersey statute that authorized school districts to make rules and contracts to transport children to and from school. This statute included transportation to and from schools other than public schools, excluding schools that

[73] Terry Eastland, ed. *Religious Liberty in the Supreme Court: The Cases That Define the Debate Over Church and State* (Lanham: Ethics and Public Policy Center, 1993), 59.
[74] Ibid., 60.

operated for profit. Consequentially, a school board adopted a resolution that authorized reimbursement to parents for money spent on transporting their children to parochial school on public buses. Subsequently, a local taxpayer challenged the authorization of reimbursement payments going to parents of Roman Catholic parochial school students.[75] The contention was that the state was violating the First Amendment by "forcing inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith."[76] The plaintiff, Everson, contested that the New Jersey statute and subsequent school board decisions to reimburse parents of parochial school children constituted an establishment of religion.[77]

The justices reviewed the historical context of the First Amendment in their decision. In his delivery of the Court's opinion, Justice Black outlined the prohibitions included under the First Amendment as well as its other implications. The Court upheld public funding of the transportation of pupils to and from both public and parochial schools.[78] Justice Black stated that, on the one hand, New Jersey cannot remain consistent with the establishment clause of the First Amendment and contribute tax-raised funds to the support of an "institution which teaches the tenets and faith of any church."[79] On the other hand, however, New Jersey also cannot hinder its citizens in the free exercise of their own religion. "Consequently, it cannot exclude Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith*, or *lack of it*, from receiving the benefits of public welfare legislation."[80] Under the free exercise clause of the First Amendment

[75] Kathleen M. Sullivan and Gerald Gunther, *First Amendment Law* (New York: Foundation. Press, 2003), 568
[76] Sullivan and Gunther, *First Amendment Law*, 568.
[77] Ibid., 569.
[78] Eastland, *Religious Liberty in the Supreme Court*, 59.
[79] Sullivan and Gunther, *First Amendment Law*, 569.
[80] Ibid.

the Supreme Court upheld New Jersey's statute of public funding for parents for the transportation of schoolchildren to both public and parochial schools.

"The Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[81] The Court asserted that the state is required to be neutral in its liaisons with groups of religious and non-religious believers. As if the Court did not consider the implications of neutrality to be self-evident, Justice Black goes on to explicate this neutrality as requiring the state to neither handicap nor show partiality towards religious groups. The state is not required to be adversarial towards religions, nor is it to favor them. Here we see the Court condemning both a benevolent neutrality as well as a hostile neutrality.

Justice Black delivered the final opinion of the Court, saying, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[82] The Court ruled that New Jersey had not infringed upon the First Amendment and upheld the law reimbursing parents for bus fares for children attending parochial schools as part of a general program in which the state paid the bus fares for schoolchildren. Under the free exercise clause parents could choose where to send their children to schools, and the state should not inhibit this free exercise of religion by denying parents of parochial school children the same benefits, namely public bus fare reimbursement, given to parents of public school children.

Two dissenting positions were offered in conjunction with the opinion of the Court. Justices Jackson and Frankfurter offered the first dissenting opinion. They concluded that the

[81] Ibid., 570.
[82] Sullivan and Gunther, *First Amendment Law*, 570.

"undertones of the opinion [of the Court], advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[83] These justices came to the opposite conclusion as the majority and opposed New Jersey's statute allowing tax funds to be used to reimburse families who spent money on bus fares for their children to attend parochial schools.

The second dissenting opinion was offered by Justices Rutledge, Frankfurter, Jackson and Burton. These justices identified two ongoing and repetitive attempts to "abridge, in the name of education, the complete division of religion and civil authority which our forefathers made."[84] The first is the attempt to incorporate religious observances and education into public schools, the second is the attempt to obtain governmental funds to provide aid and support of private religious schools. The Constitution prohibited both of these bridges between religion and civil authority according to these justices, and they argued that these avenues should not be opened by the court. The context of *Everson* does not attempt to incorporate religious observances and education into public schools; these Justices, however, holding a strongly separationist opinion, highlighted methods used by religious groups to bridge the church-state gap. The Justices wanted to maintain a strictly separationist stance in governing church-state relations. This opinion was not hostile to religion so it is not a secularist opinion, rather, the position argued for the separation of the institutions.

Everson v. Board of Education was and still is a landmark case, not only in the Court's decision making, but also in discussions of church-state relations. *Everson* solidified the incorporation of the due process clause of the Fourteenth Amendment to make the legislation of the First Amendment binding on the states. If there was a doubt as to whether or not the Court

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[83] Ibid.
[84] Sullivan and Gunther, *First Amendment Law*, 570.

would apply the establishment prohibition to the states, *Everson* removed it.[85] As discussed earlier, at times, the establishment clause can conflict with the free exercise clause. At least in this case something prohibited by the establishment clause was deemed to be permitted by the free exercise clause, which shows the possible contradiction in rulings under each clause. In the Court's first major attempt to interpret the First Amendment, rather than denying aid, in any form, to religious causes, the Court upheld aid to families educating children in parochial schools. The Court maintained that state-raised money could be redistributed to parents as part of a larger program. This ruling further confuses the line of church and state separation. Although the Court condemned a benevolent neutrality, the decision in *Everson* aligns with accommodationism. While maintaining the separation of church and state the Court made a decision in line with free exercise to support families with children attending parochial schools. *Everson* is an example of favoring free exercise and borders on accommodating religion. This case adds to the confusion of church-state relations because in the opinion of the Court Justice Black stated that the Court could not permit a breach in the wall of separation, and yet the Court decided to accommodate religious adherents. The first dissenting opinion observes this contradiction between the ruling and the opinion of the Court. *Everson* also highlights the confusion of both determining the proper church-state relationship and regulating that relationship.

Lemon v. Kurtzman (1971)

Lemon v. Kurtzman is an important case in the history of First Amendment Supreme Court decision making. Despite its importance scholars rarely discuss the contents of this case and focus instead, on the decision and explanation of the Court. Through this case the Supreme Court made a distinction between church-affiliated colleges and universities, and church-

[85] Eastland, *Religious Liberty in the Supreme Court*, 59.

related elementary and secondary schools. In *Tilton v. Richardson,*[86] which was decided the same day as *Lemon,* the Court upheld federal grants to church-affiliated colleges and universities for the construction of buildings "used for secular purposes."[87] In *Lemon v. Kurtzman*, however, the Supreme Court "struck down state laws of Pennsylvania and Rhode Island that supported instructors engaged in teaching secular subjects in church-related elementary and secondary schools."[88] The Court could not allow a state law that funded religious instruction in primary and secondary schools; however, the Court deemed it permissible to federally fund church-affiliated colleges and universities in the construction of secularly used buildings.

The major significance of *Lemon v. Kurtzman* is that for the first time the Court announced a test for the establishment clause to determine whether a disputed governmental action passes Constitutional "muster."[89] *Lemon* summarized past decisions and enunciated three criteria for the "Lemon" test:

- The statute must have a secular legislative purpose.
- Its principle or primary effect must be one that neither advances nor inhibits religion.
- The statute must not foster "an excessive entanglement with religion."[90]

[86] Sullivan and Gunther, *First Amendment Law,* 577-578. *Tilton v. Richardson* upheld federal construction grants to church-related institutes of higher education. Governmental aid was permissible if the funds were used for construction of facilities devoted exclusively to secular educational purposes. Chief Justice Burger, in the opinion of the Court, distinguished between church-related institutions of higher education and parochial secondary and elementary schools. "'[Since] religious indoctrination is not a substantial purpose [of] these church-related colleges, [there] is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that governmental aid will in fact serve to support religious activities. Correspondingly the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.'"
[87] Eastland, *Religious Liberty in the Supreme Court,* 213.
[88] Ibid.
[89] Ibid.
[90] Sullivan and Gunther, *First Amendment Law*, 535.

The Lemon test proved to be more challenging to utilize than the Court had initially anticipated. Using the Lemon test in subsequent cases involving state aid to church-affiliated schools, the Court handed down a "series of decisions that seemed contradictory."[91]

The Lemon test has been severely criticized by Supreme Court justices and the Court has grown skeptical of its utility. The first common criticism is that the "purpose" requirement of the test, if taken literally, invalidates all deliberate governmental accommodation of religion, even though this accommodation is at times required under the free exercise clause.[92] This is another point at which the free exercise and establishment clauses of the First Amendment can overlap and contradict. The second common criticism is that the legislative "purpose" is in any case difficult to determine when all we can examine is the text of the document itself.[93] The third criticism of the Lemon test is that "the 'entanglement' prong contradicts the previous two—*some* administrative 'entanglement' is essential to ensure that government aid does not excessively promote religious purposes."[94] This final criticism asserts that there must be some administrative entanglement with legislation to guarantee that the governmental aid is not disproportionately promoting religious purposes.

Lemon v. Kurtzman generates confusion when the Court is attempting to ascertain the specific purpose of a document. It is also unclear as to what "excessive" entanglement would be. Throughout the eighties, the Court grew increasingly skeptical about the efficacy of the Lemon test. The Court refused to apply the Lemon test in *Marsh v. Chambers* in 1983.[95]

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[91] Eastland, *Religious Liberty in the Supreme Court*, 213.
[92] Sullivan and Gunther, *First Amendment Law*, 535.
[93] Ibid.
[94] Ibid.
[95] Eastland, *Religious Liberty in the Supreme Court*, 213-214. In *Marsh v. Chambers* the Court upheld "'the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State.'…This was the first case since Lemon in 1971 that did not apply the three-pronged test. Instead, the majority looked at the specific features of the challenged practices in light of a long history of acceptance of legislative and other official prayers." Sullivan and Gunther, *First Amendment Law*, 556-557.

Although faced with these criticisms, and despite Marsh, the Supreme Court has not formally renounced the Lemon test. Nonetheless, the Court has relied upon the Lemon test less and less in recent decades and has increasingly employed different sets of "analytical devices for distinguishing establishments."[96] The test that resulted from *Lemon v. Kurtzman* may not be as widely used anymore; however, it seems that there are several other "tests" to help determine whether a statute infringes upon the religion clauses of the First Amendment. Volokh outlines several principles under the First Amendment—the no religious decisions principle and the antidiscrimination principle were already discussed—that aid in determining the constitutionality and proper governmental response to a disputed legislation. The Court decision in *Lemon* is a separationist decision because it looks to maintain the separation while providing criteria for determining the constitutionality of a proposed statute.

Board of Education of Kiryas Joel Village School District v. Grumet (1994)

In New York there is an area that was overwhelmingly occupied by people who practiced Satmar Hasidim, which is a strict form of Judaism. Most of the children of this community attended religious schools, however, in order to receive the benefits of federal and state funds for special education, schoolchildren of the Satmar Hasidim with special needs went to public schools in the surrounding area. The special needs of the children ranged from deafness, mental retardation to physical, mental and emotional disorders.[97] They were unable to receive public special education in religious schools, according to the Court decision in *Aguilar v. Felton* in 1985.[98] The children experienced panic, fear and trauma as a result of leaving their

[96] Sullivan and Gunther, *First Amendment Law*, 535.
[97] David H. Souter, "Board of Education of Kiryas Joel Village School District v Louis Grumet et al," in *Journal of Church and State* 3 (1994).
[98] Sullivan and Gunther, *First Amendment Law*, 603. In *Aguilar v. Felton* (1985) the Court prohibited programs in which public school teachers offered supplementary classes, such as remedial math and reading, in parochial schools. *First Amendment Law,* 583

quasi-cloistered community and being with people whose ways were strikingly different.[99] Thus, "the community sought to create its own village public school district in order to avoid the need for its special-needs children to attend county public schools."[100] The New York legislature and Governor agreed and the New York legislature drew boundaries for a school district in accordance with the Kiryas Joel village.

The legislation to create a public school district around the village of Kiryas Joel was challenged as an unconstitutional establishment of religion and, thus, a violation of both national and state constitutions. The state delegated its discretionary authority over public schools to a group defined by its common religion; the legislature delegated civic authority on the basis of religious belief rather than on neutral principles. According to the opinion of the Court, this legislation "brings about an impermissible 'fusion' of governmental and religious functions."[101]

Judge Souter delivered the opinion of the Court. After explaining the historical context of the case he went on to summarize the appellate court's decision. The New York Court of Appeals ruled that the statute failed all three prongs of the test from *Lemon v. Kurtzman*, and thus violated both the national and state constitutions.[102] The Appellate Division determined the primary effect of the legislation in question was advancing religion, because "both the district's public school population and its school board would be exclusively Hasidic, the statute created a 'symbolic union of church and state.'"[103] The majority asserted that the statute's primary effect was an impermissible advancement of religious belief. Judge Hancock, of the appellate

[99] Souter, "Board of Education of Kiryas Joel Village School District v Grumet."
[100] Sullivan and Gunther, *First Amendment Law*, 603.
[101] Souter, "Board of Education of Kiryas Joel Village School District v Grumet."
[102] Ibid.
[103] Ibid.

court, found the effect to be purposeful, which in turn, violated both the first and second prongs of the Lemon test.

The statute's "fusion" of government and religion violated the third prong of the Lemon test. The Court made a distinction between a government's intentional delegation of power based on religion and a government's delegation of power to an individual, or individuals whose religious identities are "incidental to their receipt of civic authority."[104] In this instance, the government delegated power to the Board of Education of the Kiryas Joel School District based on religion, rather than on neutral principles. This created an excessive entanglement of religion and government.

Justice Souter stated, "Because this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment."[105] The decision to create the school district was entirely based upon the religious affiliation of the Satmar children and families. The Court opinion cites a fundamental source of constitutional concern in this instance: that the delegated powers of the state may fail to be used to exercise governmental authority in religiously neutral ways. The Court also asserts that the principle "at the heart of the Establishment Clause," is that the government should not show preference toward "one religion or another, or religion to irreligion."[106]

The Supreme Court concurred with the New York Court of Appeals and held that funding a school district designed to coincide with neighborhood boundaries of a religious groups was an unconstitutional aid to religion. Justice O'Connor, in her concurring statement, emphasized "the particularity of the accommodation here: 'Accommodations may [justify]

[104] Ibid.
[105] Souter, "Board of Education of Kiryas Joel Village School District v. Grumet."
[106] Ibid.

treating those who share [a deeply held] belief differently; but they do not justify discriminations based on sect.'"[107] The Court prevented governments from using the religious affiliation of a group of people as a central consideration in reaching decisions. The discussion of accommodationist decisions and language clarifies that accommodationists justify treating those with a shared common belief differently; however, the Court cannot justify discriminations based on religious beliefs. This type of action would violate the state's neutrality.

Board of Education of Kiryas Joel Village School District v. Grumet is a recent case under the First Amendment's establishment clause that highlights the confusing interactions and relations between church and state. Despite the criticism from Supreme Court Justices regarding the Lemon test, it was used by the New York Court of Appeals and the ruling was upheld by the United States Supreme Court. The Supreme Court Justices have criticized the Lemon test, and yet, the Court will not do away with the test altogether and it sustains decisions made by an appellate court's use of the Lemon test. There is still an endorsement for the use of the Lemon test, which signifies the test's ongoing force in jurisprudence. Sometimes when the state attempts to accommodate various religious beliefs and practices it oversteps the boundaries and infringes upon the no establishment clause of the First Amendment. However, sometimes in the attempt to resist excessive entanglement the court infringes upon the free exercise clause. This case serves as another example of how entanglements between government and religion are confusing and can leave both institutions in contradictory states. There is a line between the church and the state, but this line is not clearly defined and this can lead to confusions in the correct action by the state in relation to religious groups. In this case, the state wanted to accommodate a religious group, however, the state overstepped the

[107] Sullivan and Gunther, *First Amendment Law*, 604.

boundary and based the decision solely on the religious beliefs of constituents. The contradiction stems from the no establishment clause and the free exercise clause, while the state thought the decision coincided with free exercise it was struck down as a violation of the no establishment clause. Despite this confusion in relationship and the contradiction between the religion clauses, the Court ruled on the side of separationism.

Engel v. Vitale (1962)

In one of the most controversial cases in Supreme Court history, the Court prohibited state-sponsored prayer in public schools. The New York State Board of Regents composed a brief non-denominational prayer which they recommended for everyday use in New York public schools. The Regent's prayer is as follows, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[108] When the Board of Education of New Hyde Park, New York, instructed the school principals to have the prayer recited daily, several parents challenged this practice[109] because they claimed it was contrary to both their and their children's religions, beliefs and religious practices.[110] Officials justified the prayer as part of the moral and spiritual training of schoolchildren.[111]

The state court upheld the practice so long as participation in the recitation of the prayer was voluntary. In 1962 the Supreme Court disagreed and ruled that a state cannot sponsor prayer in its public schools. Justice Black delivered the opinion of the Court.

> We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean than in this country it is no part of the business of government to compose official prayers for any group of the

[108] Eastland, *Religious Liberty in the Supreme Court*, 125.
[109] Ibid.
[110] Sullivan and Gunther, *First Amendment Law*, 538.
[111] Eastland, *Religious Liberty in the Supreme Court, 125.*

> American people to recite as part of a religious program carried on by government.[112]

Not only did the Court strike down the legislation encouraging the public use of this non-denominational prayer, the Court also criticized the government officials who wrote in attempts of influencing or instructing religious and moral education. The government should not endeavor to draft a document or practice that would constitute religious instruction.

Although the Court comments on the complications resulting from the overlap of the two clauses of the First Amendment, the most significant result was the Court's stance on religion in the public sphere and the church's relationship with the government. The Court asserted that disestablishment was based on the idea that the union of government and religion tends to destroy government and degrade religion.[113] Here the Supreme Court suggests that the separation of church and state is beneficial for the church. In a concurrent opinion offered by Justice William O. Douglas, he stated that "The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[114]

Although some may contend that the rulings and opinions offered in *Engel v. Vitale* are significantly dated and hold no weight in current discussion of church-state relations, these rulings in the arena of prayer in public schools have withstood the test of time. "Down through the years there have been various proposals to amend the Constitution so as to allow public school prayer and other devotional exercises. None has succeeded. Nor has the Court overruled

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[112] Ibid., 128.
[113] Volokh, *The First Amendment and Related Statutes*, 768.
[114] Eastland, *Religious Liberty in the Supreme Court*, 134.

these cases."[115] People have attempted to overturn the decision in *Engel v. Vitale* and the Court have overruled these attempts and maintained the decision. Therefore, the opinion of the Court is that religion benefits from the separation of church and state endures.

This case, especially, puts religion and government in a contradictory and confusing relationship. The Court contends that it is necessary to separate church and state; however, it is, at least in part, for reasons unrelated to the necessity of religious liberty and tolerance. The Court describes separation as benefiting both institutions. *Engel v. Vitale* is one of the most controversial decisions in the Court's history, and it is also one of the best decisions in the Court's history. This decision promotes the separation of church and state, and provides alternative reasoning for this separation. The need for separation is not only due to the First Amendment's preservation of liberties, but also because this separation is beneficial for both the church and the state.

While these cases show the confusions caused by church-state entanglements, it is apparent that the Court generally rules on the side of separation. In the context of real life situations, separationism is the strongest type because it promotes disestablishment and free exercise and it neither inhibits nor supports religious practice. Separationism in practice better achieves the goals of theoretical neutrality which is impossible in practice.

Disestablishment's Effects on American Religion: Beneficial or Detrimental?

As the Court suggested in *Engel v. Vitale*, perhaps the separation of church and state is not only beneficial for the state but for religion as well. Some scholars argue that through the disestablishment of state churches and the prohibition of an established national church, America has created a free market economy for religion and religious organizations. These

[115] Ibid., 126.

same scholars argue that the increase in religious pluralism has strengthened the vitality of religion in America. Through the separation of church and state, and the separationist type America enabled religious pluralism to flourish which in turn strengthened American religious vitality.

During America's early years as a nation the politically powerful prohibited a nationally established church and guaranteed the free exercise of religion. This is substantially different from any other nation around the world. Other nations with prohibited establishment have had different outcomes than the U.S.; however, since no establishment has been a foundational principle in American history. It has been implemented from the beginning and this has resulted in the uniquely American situation. Both Jefferson's and Madison's ideas, and language, can be found throughout the Constitution and the Bill of Rights. While there may have been other disestablishment debates and guarantees of religious freedom in other states, those involved in the Virginian debate directly shaped the national documents ensuring religious liberty.

America has a unique history of church-state relations. Law professor Carl H. Esbeck explains that the nation's founding fathers chose "the uniquely American proposition" which was "to embrace the unitary idea of voluntaryism and disestablishment."[116] America prohibited establishment and guaranteed free exercise, this decision made religious fervency and pluralism more commodious both to the faith of the religious minority and also to that of the at one time established majority.[117]

[116] Carl H. Esbeck, "Governance and the Religion Question: Voluntaryism, Disestablishment, and America's Church-State Proposition," 316.
[117] Ibid., 311.

The principle of voluntarism, as defined by Esbeck, contends that "religious belief is best arrived at voluntarily, without the active assistance of government, and this is equally so for everyone." [118] Along this strain of thought, individual church membership and financial contributions would also be voluntary. Esbeck argues that voluntarism "reinvigorated organized religion in the early national period" and that a church grew, or not, "based on persuasion and its appeal to the people."[119]

Another benefit of voluntarism, besides reinvigorating religion, is the protection of religious vitality and meaning. As the Supreme Court stated in *Engel v. Vitale* government officials should not be composing prayers because it is degrading to religion. Esbeck states, "state-recited prayers can, with repetition, be harmful…to the majority of faiths," when government officials compose prayers and render them nondenominational, "this waters down the theological content of the prayers and lessens their spiritual efficacy."[120] The strength of American religion is dependent on the content of faith and on the vivacity of religious organizations.

Not only is the theological content of religion watered down when government implements religious practice, but the church is also harmed by legislation forcing attendance at a particular church. Forced attendance at worship services would "produce an insincere and false faith."[121] The church that increases in attendance because of governmental mandates would not only see an increase in fallacious faith, but also would experience resentment from many groups. Esbeck argues that "to establish a church is not only to officially suppress all

[118]Ibid.
[119] Esbeck, "Governance and the Religion Question," 311.
[120] Ibid., 309.
[121] Ibid., 307.

other religious bodies, but establishment also brings intense resentment against, and eventual decline of, the official church."[122] State regulation on the church dilutes religious vitality.

William V. D'Antonio and Dean R. Hoge asserted that "After more than two hundred years we now know that the First Amendment has had a positive, not a negative effect on religious institutions in the United States." [123] They argue that churches and synagogues did not weaken after disestablishment, but rather they grew and flourished, and various religious groups became stronger and more competitive. [124] Admittedly, some denominations are certainly much weaker today than in the past; however, Roger Finke and Rodney Stark explain this in their examination of the "churching of America" as a result of religious capitalism.[125] They assert that "the churching of America was accomplished by aggressive churches committed to vivid otherworldliness."[126] Finke and Stark explain that religious organizations can thrive insofar as they have a theology that comforts souls and motivates the sacrifice of time and finance.[127]

Finke and Stark examined the writings of Francis Grund who argued that establishment is harmful to religious adherents because it encourages the indolence of the clergy.

> "'A person provided for cannot, by the rules of common sense, be supposed to work as hard as one who has to exert himself for a living….Not only have Americans a greater number of clergyman than, in proportion to the population, can be found either on the Continent or in England; but they have not one idler amongst them; all of them being obliged to exert themselves for the spiritual

[122] Ibid., 308.
[123] William V. D'Antonio and Dean R. Hoge, "The American Experience of Religious Disestablishment and Pluralism," *Social Compass*, 53 (2006), 348.
[124] Ibid., 348.
[125] Roger Finke and Rodney Stark, *The Churching of America 1776-1990: Winners and Losers in our Religious Economy*, (New Brunswick: Rutgers University Press, 1992), 17. Finke and Stark note that the idea of religious capitalism may be uncomfortable for some audience members. "Some readers may shudder at the use of a 'market' terminology in discussions of religion. But we see nothing inappropriate in acknowledging that where religious affiliation is a matter of choice, religious organizations must compete for members and that the 'invisible hand' of the marketplace is as unforgiving of ineffective religious firms as it is of their commercial counterparts."
[126] Ibid., 1.
[127] Ibid., 5

> welfare of their respective congregations. The Americans, therefore, enjoy a threefold advantage: they have more preachers; they have more active preachers, and they have cheaper preachers than can be found in any part of Europe.'"[128]

The clergy who are provided for under establishment will not work as hard as those whose livelihood is utterly dependent on the financial benevolence of the laity. American clergy are more numerous, more active and significantly cheaper. Prohibited establishment forces not only the clergy to be at their best, but also the religious organization to offer programs and services that meet the needs and desires of their followers. A facet of religious vitality is an engaged clergy.

Religious economies parallel commercial economies. Both consist of a market composed of current and potential customers paired with a set of organizations seeking to serve the market. "The relative success of religious bodies will depend on their polity, their clergy, their religious doctrines, and their evangelization techniques."[129] Finke and Stark explain that the degree of regulation is a major consideration when analyzing religious economies; they explicate, "in keeping with supply and demand principles, to the degree that a religious economy is unregulated, pluralism will thrive."[130] Without government regulation of religion, religious pluralism can thrive, this in turn, encourages religious organizations to become stronger and more competitive. Finke and Stark contend that they decline of the old mainline denominations resulted from their "inability to cope with the consequence of religious freedom and the rise of a free market religious economy."[131]

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[128] Ibid., 19.
[129] Finke and Stark, *The Churching of America,* 17.
[130] Ibid., 18
[131] Ibid., 54.

Esbeck contends that in the Western experience it has proven to be destructive of both the state and the church to require regular church attendance through legislation.[132] Particularly in America this set up has had a strikingly different outcome than other nations with prohibitions on establishment. Because America has been disestablished much longer, it is a more integral part of American history; unlike other nations who were at one time established and have since disestablished religion. This could explain America's unique success in promoting religious vitality through the separation of church and state.

Religiosity in the United States exceeds most European nations in religious faith and church attendance. Scholars William V. D'Antonio and Dean R. Hoge assert that religious pluralism in the United States is more prominent than in most of Europe, and that this pluralism has not led to increased secularization. D'Antonio and Hoge contend that pluralism and religious vitality have increased together.[133] American religion has been much more successful in encouraging pluralism while also maintaining a strong religious vitality than other nations with similar arrangements. This difference is likely due to the uniquely American proposition of prohibiting establishment and protecting free exercise as a foundational point in American life. No other country with disestablishment has had this set up from the very start of the nation's life, which explains America's success in promoting religious pluralism and increasing religious vitality. The separation of church and state, and the separationist type promoted religious pluralism and strengthened American religious vitality.

Conclusion

Increased religious strength in America, as compared to other countries, is largely due to the separation of church and state. Although the First Amendment, founded on the language

[132] Esbeck, "Governance and the Religion Question," 307.
[133] D'Antonio and Hoge, "The American Experience of Religious Disestablishment and Pluralism," 348.

and ideas of the *Virginia Statute for Religious Freedom*, can be challenging to interpret and contains two overlapping and, at times, contradictory clauses, it is foundational for America's religious freedom. The First Amendment's religion clauses can contradict because decisions made under no establishment may be considered to limit the free exercise of religion. On the other hand, decisions permissible under free exercise may be considered as constituting an establishment of religion.

Scholars of religion, law, politics, and church-state relations offer several different interpretations of the proper relationship between church and state; I have synthesized these different ideas into one typology with five types. The first is quasi-establishmentarianism, which contends that the state has a duty to the one supreme God and the church. The second is accommodationism, a stance that supports the separation of church and state but also supports the state making decisions that accommodate and benefit religion. The third type is neutrality; which is benign stance on church-state relations. However, true neutrality really is not a possibility because we are always affected by some influence and our opinions will always lean, to some extent, one way or another. Neutrality is ambiguous because it does not necessarily support separation or establishment between church and state; this type may be an ideological ideal, but in practice is impossible. Separationism, the fourth type, supports the separation of church and state while also maintaining that subsequent governmental legislation should not intentionally constrain or promote religion. Since strict neutrality is impossible, separationism meets the goals of neutrality better than a policy of strict neutrality can. The fifth type is secularism, which not only advocates the separation of church and state, but it also argues for the complete privatization of religious beliefs and utter removal of religion from the

public sphere. Secularism promotes hostility toward religion because it would promote decisions that inhibit the exercise of religion or religious beliefs in the public realm.

The Supreme Court has ruled on several important religion and the state cases, and has produced different outcomes. *Everson v. Board of Education* was a landmark case for the Supreme Court. It solidified the incorporation of the Bill of Rights, through the Fourteenth Amendment's due process clause, as applicable to the nations as a whole. *Everson* is an accommodationist decision; it maintains separation while allowing parents to choose where they send their children to school and aiding all families equally in public bus fare reimbursement. *Lemon v. Kurtzman* produced the "lemon" test, which outlines three criteria for determining the constitutionality of a proposed statute. *Lemon* advocates the separationist position by laying the groundwork for maintaining the separation of church and state while also not promoting hostility toward the church. In *Board of Education of Kiryas Joel Village School District v. Grumet*¸ the Court ruled that it was unconstitutional for the state to draw borders, or make decisions, based primarily on the religious affiliation of constituents. This decision is separationist because it maintains no establishment, while also limiting the bounds of accommodation. *Engel v. Vitale* is also a separationist ruling. It promotes the separation of church and state while also not aiding or inhibiting religious practices. *Engel* prohibits establishment though the prohibition of school sponsored prayers; however, it also does not inhibit the free exercise of religion because voluntary prayer in schools is not regulated. In *Engel v. Vitale* the Court asserted that a government neutral towards religion was beneficial for both the church and the state. These cases suggest that entanglements between the state and religion tend to leave both in confusing and contradictory stances. It is confusing because there

is not a clear line of separation between the two institutions, and it is contradictory because the free exercise and no establishment clauses can produce different rulings which doubly add to the confusion in determining and enacting the proper church state relationship. Despite this confusion and contradiction, the Court's decisions tend toward separationism which is the most beneficial type for both the state and the church.

How one evaluates Court case rulings and interpretation of the First Amendment is deeply rooted in the typological stance one has. For instance, accommodationists support the enforcement of the free exercise clause and will evaluate cases based on this. Accommodationists would contend that the no establishment clause can hinder the free exercise clause. On the other hand, secularists advocate decisions based on the no establishment clause and contend that the free exercise clause hinders the no establishment clause. According to the typology, accommodationists would tend to support the decision from *Everson v. Board of Education* while the secularists oppose it. In *Engel v. Vitale,* the secularists would tend to support the decision under the no establishment clause, but the accommodationists would likely oppose the ruling because it could be seen as limiting the free exercise of religion.

Neither the benevolent neutrality nor the hostile neutrality serve as the best types for the church-state relationship. Separationism is the best type of relationship between church and state because it maintains the separation which is beneficial for both the state and the church, while also prohibiting malevolence or benevolence from the state toward the church. There is a danger that separationism will lead to secularism, and this parallels the danger that accommodationism could lead to quasi-establishmentarianism. However, there is a major difference between the goals of separationism and secularism; separationism promotes attempts to eliminate governmental support of religion; whereas, secularism promotes attempts to ban

religion from all public activities and the public realm as a whole. Like secularism, accommodation is a faulty type because it is not fair and it relies on one religion being the metaphorical top dog. Over time, the power hierarchy can shift and the former power playing religion could find itself at a lower rung on the totem pole. Because of these power shifts every religion has a stake in the most level playing field, and thus it is most beneficial for religious groups to side with separationism over accommodationism or secularism.

Despite the ambiguities and challenges of maintaining the separation of church and state, it is highly beneficial for both religion and religious adherents to preserve this separation. Separation of church and state and the separationist type have encouraged religious pluralism, which in turn has created a free market for religion. The religious economy promotes high quality clergy and excellent programs, and thus is beneficial for the church as it strengthens religious vitality. This is also beneficial for religious adherents because they can choose to affiliate themselves with a church that meets their needs, and is of the highest caliber.

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