# FREEDOM OF RELIGION

## INTRODUCTION

Religious freedom is guaranteed in the two opening clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Together, the clauses guarantee freedom from and of religion by pointing in opposite directions. The establishment clause points toward a principle of the separation of government from religion; neither should involve itself with the other. The free exercise clause suggests a principle of voluntarism – freedom from coercion in choosing a religion or no religion.

Religious freedom has never been absolute, however. The First Amendment, as the Court observed in *Cantwell v. Connecticut* (1940), "embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation of society." Distinguishing religious belief and religious conduct, the Court wrote into constitutional law a mind-body distinction that runs back to Thomas Jefferson. In his *Bill for Establishing Religious Freedom* for the State of Virginia in 1779, Jefferson noted that "the acts of the body," unlike "the operations of the mind, are subject to the coercion of the laws."

Nor does the text and historical record of the First Amendment provide simple interpretative solutions for the continuing controversies in constitutional politics over religious freedom. What is "an establishment of religion," for example, and what is a "law respecting" the establishment of religion? What is and who defines religion? Many of the contemporary disputes over the separation of government and religion, moreover, could not have been foreseen during the founding period; there was no controversy over school prayer, for example, because there was no system of public education.

The traditions and aspirations of religious freedom from the colonial through the revolutionary period and to the time the First Amendment was adopted and ratified in 1791 were complex and occasionally conflicting. Although populated by many escaping religious persecution in England or on the European continent, colonial settlements remained religious enclaves, discriminating against those of other faiths. In Massachusetts, the established Congregational Church taxed and harassed Quakers, Baptists, and others. In Virginia and four other southern colonies, the Anglican Church of England was established.

By the 1770s, the original thirteen colonies, always predominantly Protestant, were on their way to a new form of establishment, unlike the European single state-church denomination. Christianity or Protestantism, in contrast with Judaism, Islam, and Hinduism (as well as, for some colonists, Catholicism), was established in the northern colonies, but they

allowed for multiple churches and denominations. Maryland's "declaration of rights" in 1776, for instance, recognized the religious freedom of "persons professing the Christian religion."

Religious freedom found expression in Article VI of the 1787 Constitution, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." But that was not enough to silence critics pressing for the addition of a bill or rights.

Defenders of religious freedom, however, were not of one mind. Some maintained that disestablishment of church and state was necessary to safeguard religion from the corrosive influence of politics. For example, when celebrating the purity of evangelical faith in 1644, Roger Williams invoked the metaphor of a "wall of separation" in defense of the integrity of religion.

More than 150 years later, President Jefferson again relied on the metaphor of a wall of separation in his famous letter to the Danbury Baptist Association in 1802: "Believing with you that religion is a matter which lies solely between man and his God, . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." Unlike those who shared Roger Williams's view, Jefferson was more concerned

about insulating government from the influences of religion and religious fervor.

James Madison agreed that a wall of separation would help preserve the integrity of government, but he also thought that it might benefit religion as well. Madison, along with Jefferson, opposed proposals to establish religious taxes in Virginia. In his famous "Memorial and Remonstrance against Religious Assessments" in 1785, Madison persuasively argued against government support of religion. Governmental assistance to religious establishments, Madison maintained, tended to divide society into factions and produce "pride and indolence in the clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution." Nor did Madison think government depended on the support of religion. "That is not a just government," he wrote in 1792, in which "a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy."

But Madison proved unsuccessful in persuading the First Congress that the states as well as the federal government should be barred from passing laws respecting the establishment of religion and religious freedom. Among his original proposals for amendments to the Constitution was one that provided: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." And another read: "No State shall violate the equal rights of

conscience . . . ." Of course, after political jockeying in the House, the Senate, and the joint conference committee, the amendment on religion was changed to its present form: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Thus, Madison's efforts to forbid the states from violating "the equal rights of conscience" failed. States continued vestiges of establishment and restrictions on religious freedoms. Massachusetts, for one, denied Jews the right to hold public office until 1828 and did not remove its final vestiges of establishment until 1833. Not until *Cantwell v. Connecticut* (1940) did the Hughes Court hold the free exercise clause applicable to the states. Seven years later, the Vinson Court made the establishment clause applicable to the states in *Everson v. Board of Education* (1947).

Before turning to the Court's rulings and rival interpretations of the religion clauses, it may be helpful to consider two different theoretical approaches to religious freedom that have animated constitutional politics: nonpreferentialism and the high-wall theory of the separation of government and religion.

President Ronald Reagan's attorney general, Edwin Meese III, championed the *nonpreferentialism position*, advocated over 200 years ago by Patrick Henry, when he wrote: "the First Amendment forbade the establishment of a particular religion or particular church . . . but it did not go further. It did not, for example, preclude federal aid to religious groups so long as

that assistance furthered a public purpose and so long as it did not discriminate in favor of one religious group against another." Chief Justices Burger and Rehnquist, along with other justices, shared this view. In short, nonpreferentialism holds that government may aid religion, but not support or endorse any particular religion.

In contrast to nonpreferentialism is a *strict high-wall theory* of the separation of government and religion. Historian Leonard Levy supports this interpretation when attacking the nonpreferentialist's approach to the religion clauses:

> Nonpreferentialism, unfortunately, is but a pose for those who think that religion needs to be patronized and promoted by government. When they speak of nonpreferential aid, they speak euphemistically as if they are not partisan. In fact, they really are preferentialists. . . . Nonpreferentialists prefer government sponsorship and subsidy of religion rather than allowing it to compete on its merits against irreligion and indifference. They prefer government nurture of religion because they mistakenly dread government neutrality as too risky, and so they condemn it as hostility. They prefer what they call, again euphemistically, accommodation.

Conflicts in constitutional politics over religious freedom involve, in part, deciding between and applying the nonpreferentialist or accommodationist approach versus the high-wall theory of separation of government and religion. Moreover, in the contemporary administrative state, laws and exemptions from laws may be challenged for violating either the establishment clause or the free exercise clause. There is an essential tension between these two guarantees. Scholarships, grants, tax credits, or reimbursements have been viewed as infringing, alternatively on one or the other of the two religion clauses.

Derived from David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties* (Norton, 8th ed. 2011), pp. 729-735.