STEPHEN CARTER

The Separation of Church and State

BY NOW, MANY A PATIENT READER will be ready with another objection: it is all very well to talk about allowing the religious to enter the public square to participate in political debate alongside everybody else. But what about the Constitution? What about the separation of church and state? Don't we have longstanding constitutional and philosophical traditions that limit the influence of religious sectarianism on government policy?

The answer to the last question—as so often in the law—is "not exactly." The courts do indeed enforce a separation of church and state, and it is backed by some very impressive legal philosophy, but one must be careful not to misunderstand what the doctrine and the First Amendment that is said to embody it were designed to do. Simply put, the metaphorical separation of church and state originated in an effort to protect religion from the state, not the state from religion. The religion clauses of the First Amendment were crafted to permit maximum freedom to the religious. In modern, religiously pluralistic America, where, as we have seen, the religions play vital roles as independent sources of meaning for their adherents, this means that the government should neither force people into sectarian religious observances, such as classroom prayer in public schools, nor favor some religions over others, as by erecting a crèche paid for with public funds, nor punish people for their religiosity without a very strong reason other than prejudice. It does not mean, however, that people whose motivations are religious are banned from trying to influence government, nor that the government is banned from listening to them. Understanding this distinction is the key to preserving the necessary separation of church and state without resorting to a philosophical rhetoric that treats religion as an inferior way for citizens to come to public judgment.

From The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion (1993), *a book that defends the centrality of religion in American political life.*

THE SEPARATION METAPHOR

Religion is the first subject of the First Amendment. The amendment begins with the Establishment Clause ("Congress shall make no law respecting an establishment of religion . . .") which is immediately followed by the Free Exercise Clause ("or prohibiting the free exercise thereof"). Although one might scarcely know it from the zeal with which the primacy of the other First Amendment freedoms (free press, free speech) is often asserted, those protections come *after* the clauses that were designed to secure religious liberty, which Thomas Jefferson called "the most inalienable and sacred of all human rights."[1] What this means in practice, however, is often quite complicated.

Consider an example: at a dinner party in New York City a few years ago, I met a Christian minister who told me about a drug-rehabilitation program that he runs in the inner city. His claim—I cannot document it—was that his program had a success rate much higher than other programs. The secret, he insisted, was prayer. It was not just that he and his staff prayed for the drug abusers they were trying to help, he told me, although they naturally did that. But the reason for the program's success, he proclaimed, was that he and his staff taught those who came to them for assistance to pray as well; in other words, they converted their charges, if not to Christianity, then at least to religiosity. But this program, he went on with something close to bitterness, could receive no state funding, because of its religious nature.

5 Well, all right. To decide that the program should not receive any funds, despite the success of its approach, might seem to be a straightforward application of the doctrine holding that the Constitution sets up a wall of separation between church and state. After all, the program is frankly religious: it uses prayer, and even teaches prayer to its clients. What could be more threatening to the separation of church and state than to provide a government subsidy for it? The Supreme Court has said many times that the government may neither "advance" religion nor engage in an "excessive entanglement" with it.[2] On its face, a program of drug-rehabilitation therapy that relies on teaching people to pray would seem to do both.

It is doubtless frustrating to believe deeply that one has a call from God to do what one does, and then to discover that the secular society often will not support that work, no matter how important it is to the individual. Yet that frustration is itself a sign of the robustness of religious pluralism in America. For the most significant aspect of the separation of church and state is not, as some seem to think, the shielding of the secular world from too strong a religious influence; the principal task of the separation of church and state is to secure religious liberty.

1. Thomas Jefferson, "Freedom of Religion at the University of Virginia," in Saul K. Padover, ed., *The Complete Jefferson* (New York: Duell, Sloan & Pierce, 1943), p. 958 [Carter's note]. Thomas Jefferson (1743–1826) was the primary author of the Declaration of Independence (1776) and the third president of the United States (1801–09).

2. The quoted language is from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed later in this chapter [Carter's note].

The separation of church and state is one of the great gifts that American political philosophy has presented to the world, and if it has few emulators, that is the world's loss. Culled from the writings of Roger Williams[3] and Thomas Jefferson, the concept of a "wall of separation" finds its constitutional moorings in the First Amendment's firm statement that the "Congress shall make no law respecting any establishment of religion." Although it begins with the word "Congress," the Establishment Clause for decades has been quite sensibly interpreted by the Supreme Court as applying to states as well as to the federal government.[4]

For most of American history, the principal purpose of the Establishment Clause has been understood as the protection of the religious world against the secular government. A century ago, Philip Schaff of Union Seminary in New York celebrated the clause as "the Magna Carta of religious freedom," representing as it did "the first example in history of a government deliberately depriving itself of all legislative control over religion."[5] Note the wording: not religious control over government—government control over religion. Certainly this voluntary surrender of control is an indispensable separation if the religions are to serve as the independent intermediary institutions that Tocqueville[6] envisioned.

Over the years, the Supreme Court has handed down any number of controversial decisions under the Establishment Clause, many of them landmarks of our democratic culture. The best known are the cases in which the Justices struck down the recital of organized prayer in the public school classrooms, decisions that for three decades have ranked (in surveys) as among the most unpopular in our history.[7] But the decisions were plainly right, for if the state

3. Roger Williams (1603–1683), a proponent of religious freedom, founded the colony of Rhode Island after being banished from Massachusetts.

4. For a thoughtful discussion of the reasons that the Establishment Clause applies to the states, see Justice William Brennan's concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963). The application of the Establishment Clause to the states has its critics, including, implicitly, two members of the Supreme Court, but for a variety of reasons, most of them linked to the arcana of constitutional interpretation, I am not among them. To put matters most simply, I ally myself with those who believe that many of the rights that American citizens possess against the federal government through the First Amendment became effective against the states with the adoption of the Fourteenth Amendment after the Civil War [Carter's note].

5. Philip Schaff, *Church and State in the United States* (New York: Putnam, 1888), pp. 22–23; quoted in Robert T. Handy, *Undermined Establishment: Church-State Relations in America, 1880–1920* (Princeton, N.J.: Princeton University Press, 1991), p. 20 [Carter's note]. Schaff (1819–1893) was a Swiss-born historian and protestant theologian.

6. Alexis de Tocqueville (1805–1859) was a French political philosopher; he is best known for his study of America's political and social systems, *Democracy in America* (1835, 1840).

7. The decisions of the Supreme Court collectively known as the "school prayer cases" include: *Engel v. Vitale*, 370 U.S. 421 (1962) (no state-drafted prayer in public schools); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (no devotional Bible readings in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (no moment of silence in public

is either able to prescribe a prayer to begin the school day or to select a holy book from which a prayer must be taken, it is casting exercising control over the religious aspects of the life of its people—precisely what the Establishment Clause was written to forbid. But although the separation of church and state is essential to the success of a vibrant, pluralistic democracy, the doctrine does not entail all that is done in its name. I have already mentioned the school district in Colorado that thought it the better part of valor to forbid a teacher to add books on Christianity to a classroom library that already included works on other religions. The town of Hamden, Connecticut, where I live, briefly ruled that a church group could not rent an empty schoolhouse for Sunday services. (Cooler heads in the end prevailed.) These rulings were both defended as required by the separation of church and state; so is the intermittent litigation to strike the legend IN GOD WE TRUST from America's coins or the phrase "under God" from the Pledge of Allegiance, an effort, if successful, that would wipe away even the civil religion. In short, it is not hard to understand the frequent complaints that the secular world acts as though the constitutional command is that the nation and its people must keep religion under wraps.

10 Proponents of the hostility thesis believe that the Supreme Court bears a heavy burden of responsibility for what they see as the disfavored position of religion in America. Justice Hugo Black, in *Everson v. Board of Education* (1947), often is said to have started the ball rolling when he wrote these words: "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."[8] A year later, Justice Stanley Reed warned that "a rule of law should not be drawn from a figure of speech."[9] One critic wrote years later that Black had simply penned a few "lines of fiction."[10] The critics are not quite right, but they are not quite wrong, either. There is nothing wrong with the metaphor of a wall of separation. The trouble is that in order to make the Founders' vision compatible with the structure and needs of modern society, the wall has to have a few doors in it.

SOURING ON *LEMON*

The embarrassing truth is that the Establishment Clause has no theory; that is, the Supreme Court has not really offered guidance on how to tell when the clause is violated. Since 1971, the Justices have relied on the "*Lemon* test," so

schools if used as subterfuge for prayer); *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (no school-sponsored spoken prayer at high school graduation) [Carter's note].

8. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) [Carter's note]. Hugo LaFayette Black (1886–1971) was a U.S. Supreme Court Justice (1937–1971) whose opinions helped to end school segregation and to support the principle of separation of church and state.

9. *McCollum v. Board of Education*, 333 U.S. 203, 247 (1948) (Justice Stanley Reed, dissenting) [Carter's note]. Stanley Reed (1884–1980) served as a U.S. Supreme Court Justice from 1938 to 1957.

10. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), p. 49 [Carter's note].

named because it was framed (quite awkwardly, one is compelled to add) in the Court's 1971 decision in *Lemon v. Kurtzman*.[11] The case is so often cited that legal scholars tend to forget what it involved: a state program to reimburse all private schools, including religious schools, for expenses of textbooks, materials, and, in part, salaries used to teach nonreligious subjects. * * * The Court held the program unconstitutional and, in so doing, enunciated the *Lemon* test—a lemon indeed, for it has proved well nigh impossible to apply. In order to pass Establishment Clause muster, the Justices wrote, the statute in question must meet three criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'"

Thus conceived, the clause exists less for the benefit of religious autonomy than for the benefit of secular politics; that is, to borrow from the test itself, the Establishment Clause was written to further "a secular legislative purpose," trying to erect around the political process a wall almost impossible to take seriously. It is perhaps needless to add that *Lemon* left the critics in their glory. Did the legislation enacted at the behest of the religiously motivated civil rights movement have a secular purpose? If granting tax relief to parents whose children attend parochial schools advances religion by making the schools cheaper, does refusing to grant them inhibit religion by making the schools more expensive? If competing factions within the same church both seek control of the same church building, does judicial resolution represent an excessive entanglement?

When it promulgates complex multipart tests for constitutional violations, the Supreme Court is almost always luckless, but the *Lemon* test has been extraordinarily unhelpful to the lower courts. Indeed, the courts have reached results that are all over the map—sometimes quite literally, for one of the more interesting cases involved a rather bland "Motorists' Prayer" to God for safety that North Carolina printed on its official state maps. A federal court, missing the significance of America's civil religion, held the practice to be a violation of the Establishment Clause.[12] Another federal court ruled that the clause prohibits religious groups from petitioning the Congress for private laws (available to all other groups) in order to secure copyrights when they are unable to meet the statutory criteria.[13] The list goes on and on—but *Lemon* remains.

The Supreme Court itself has not fared much better than the lower courts in applying its test. The *Lemon* framework might not work too badly, could the courts but take the requirement of a "secular legislative purpose" to mean, as one scholar has proposed, any "political purpose"—that is, any goal the state legitimately is able to pursue. Recently, however, the courts have seemed to

11. *Lemon v. Kurtzmann*, 403 U.S. 602 (1971) [Carter's note].

12. *Bradshaw v. North Carolina Department of Transportation*, 630 F.2d 1018 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) [Carter's note].

13. See *United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152 (D.C. Cir. 1987) [Carter's note].

fumble this point, confusing the political purpose for which the statute is enacted with the religious sensibilities of legislators or their constituents.

15 A majority of the Supreme Court missed this point in *Edwards v. Aguillard* (1987), with the suggestion that a law requiring schools to teach scientific creationism is unconstitutional because most of its supporters were religiously motivated—a suggestion that would also render unconstitutional the religiously motivated teaching of evolution, or, for that matter, a religiously motivated nuclear arms freeze.[14] A similar suggestion has been made by some pro-choice scholars who have argued that pro-life legislation violates the Establishment Clause because of the religious motivation of many supporters. For the religiously devout citizen, faith may be so intertwined with personality that it is impossible to tell when one is acting, or not acting, from religious motive—and this is certainly true for legislators, unless we dismiss as hypocritical cynics the entire Congress of the United States, where over 90 percent of the members say that they consult their religious beliefs before voting on important matters. Indeed, by some estimates, an absolute majority of the laws now on the books were motivated, at least in part, by religiously based moral judgments. That is why inquiring into *why* legislators have voted as they have, rather than *what* their legislation does, is almost always a mistake. "That values happen to be religious," New York's Governor Mario Cuomo has warned, "does not deny them acceptability" as part of "the consensus view" needed to support public policy.[15] The result in *Edwards* is probably correct, * * * but not because of the Court's discussion of what was in the minds of the supporters of the statute.

The idea that religious motivation renders a statute suspect was never anything but a tortured and unsatisfactory reading of the clause. As one scholar has put the matter, there is good reason to think that "what the religion clauses of the first amendment were designed to do was not to remove religious values from the arena of public debate, but to keep them there."[16] The Establishment Clause by its terms forbids the imposition of religious belief by the state, not statements of religious belief in the course of public dialogue.[17] The distinction is one of more than semantic significance.

Consider the call by Reinhold Niebuhr and others back in the 1920s for the "Christianization" of American industry.[18] Their use of the word

14. 482 U.S. 578 (1987) [Carter's note].

15. Mario M. Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective," *Notre Dame Journal of Law, Ethics, and Public Policy* 1 (1984): 13, 19 [Carter's note]. Cuomo (b. 1932) was a Democratic governor of New York from 1983 to 1994.

16. Robert N. Van Wyk, "Liberalism, Religion and Politics," *Public Affairs Quarterly* (July 1987): 59, 68, Franklin J. Gramwell, "Religion and Reason in American Politics," *Journal of Law and Religion* 2 (1984): 326 [Carter's note].

17. See Michael W. McConnell, "Why 'Separation' Is Not the Key to Church-State Relations," *Christian Century,* 1989, p. 43 [Carter's note].

18. See Richard Fox, *Reinhold Niebuhr: A Biography* (San Francisco: Harper & Row, 1985), pp. 62–192. For a discussion of the "social gospel" movement among liberal Protestants, a movement Niebuhr largely disdained, see Robert T. Handy, *Undermined Establishment: Church-State Relations in America* (Princeton, NJ: Princeton University Press, 1991), pp. 58–67, 104–125. For an argument that the theology underlying the liberal social gospel movement was closely linked to the theology underlying that of Christian imperialism, see William R. Hutchison, *Errand to the World: American Protestant Thought and Foreign Missions* (Chicago: University of Chicago Press, 1987) [Carter's note]. Reinhold Niebuhr (1892–1971) was an American theologian who advocated "realism" in American international relations.

19. Jesse Choper, "Church, State and the Supreme Court: Current Controversy," *Arizona Law Review* 29 (1987): 551, 552 [Carter's note].

"Christianization" did not mean the imposition of ritual and doctrine; it meant, rather, the transformation of industry into a new form that would accord with a principle of respect for the human spirit that Niebuhr and the rest found lacking in industrial organizations of the day. Critics called it socialism, or perhaps communism. But whatever it was, religious faith was plainly at its heart.

Niebuhr struck a chord, not only with any number of left-leaning Protestants, but also with a good number of socialists, many of them Jews, and with other reformers of no religious persuasion. (A well-known support group was Atheists for Niebuhr.) Suppose the response had been greater, that public support had burgeoned; suppose that legislatures had begun enacting programs that matched the socialist spirit of Christianization. This reform legislation would be purely secular in operation and could certainly be justified in secular terms. But under an establishment clause that is read to equate *acting* out of religious motivation with *imposing* religious belief, the programs might be unconstitutional, because both those who proposed them and many of those who voted for them would have done so out of religious conviction.

That should be a deeply troubling result. A rule holding that the religious convictions of the proponents are enough to render a statute constitutionally suspect represents a sweeping rejection of the deepest beliefs of millions of Americans, who are being told, in effect, that their views do not matter. In a nation that prides itself on cherishing religious freedom, it would be something of a puzzle to conclude that the Establishment Clause means that a Communist or a Republican may try to have his or her world view reflected in the nation's law, but a religionist can not. Although some critics fear we are already at that point, the truth is that we have a good long way to go; but we are heading in the wrong direction in our jurisprudence, and if the courts continue to read *Lemon* as they have, the Establishment Clause might well end up not antiestablishment but antireligion.

Recognizing this danger, the Justices, and the scholars who support their Establishment Clause jurisprudence, have simply ignored the rules of *Lemon v. Kurtzman* when applying them might prove too disruptive.[19] In particular, they have tried to tiptoe around many widely accepted practices that seem to run afoul of *Lemon*. But squaring *Lemon*'s rules with the accepted usages of the society's civil religion often requires some fancy footwork. How, for example, does one justify the expenditure of government funds to provide armed forces chaplains, which looks like government sponsorship of religion? Answers one observer; "This is not so much 'setting up a church' as providing access to

churches already existing for those removed by government action from their normal communities."[20] Okay, but how to explain the use of public funds during the Christmas season to build and maintain a crèche, which celebrates the nativity of Jesus Christ? The Court itself tackled that one: "The display engenders a friendly community spirit of good will in keeping with the season" and any advancement of particular religions "is indirect, remote and incidental."[21] Oh, really? Well, what about the offering of prayers at the opening of legislative sessions? The Justices had an answer for that one too: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[22]

Part of the fabric of our society—it is easy to see why the Court is reluctant to hold that the fabric of society includes some threads of unconstitutionality, but it is difficult to imagine how that can be the right test. Racial segregation was once part of the fabric of our society; so was prohibiting the women's vote, and corrupt patronage politics in the big cities. The idea, for example, that a crèche does not advance religion is ridiculous; the point of the crèche is to celebrate the birth of the Lord. So if the Court is willing to ignore *Lemon* and hold that government funds can pay for one, it is simply not doing its job.[23] If the Justices dare not even follow their own rules, it may be time to find a new way to look at these problems. Yet the Supreme Court, although hinting around the edges, has not yet decided to make a full retreat.

Part of the problem is figuring out where the Justices can possibly retreat to. For even if the Court's *Lemon* test is insupportable, it is far from clear what should be put in its place. On this point, not surprisingly, there is a considerable scholarly battle, in which it is healthiest to be a spectator. Michael McConnell has proposed a standard based on coercion of belief, which he has labeled the "lost element" of Establishment Clause jurisprudence.[24] Douglas Laycock has shot back that this test would leave the Establishment Clause void of content.[25] Justice Sandra Day O'Connor has proposed a test asking whether the

20. Dean M. Kelley, *Why Churches Should Not Pay Taxes* (New York: Harper & Row, 1977), p. 143 [Carter's note].

21. *Lynch v. Donnelly,* 465 U.S. 668 (1984) [Carter's note].

22. *Marsh v. Chambers,* 463 U.S. 783 (1983) [Carter's note].

23. For a useful discussion of the Court's failures on this issue, see Alan M. Dershowitz, *Chutzpah* (Boston: Little, Brown, 1991), pp. 331–34 [Carter's note].

24. See Michael W. McConnell, "Coercion: The Lost Element of Establishment," *William and Mary Law Review* 27 (1986): 933 [Carter's note]. McConnell (b. 1955) was a judge on the U.S. Court of Appeals for the Tenth Circuit (2002–09) and is currently director of the Stanford Constitutional Law Center.

25. See Douglas Laycock, "'Noncoercive' Support for Religion: Another False Claim about the Establishment Clause," *Virginia Law Review* 26 (1991): 37 [Carter's note]. Laycock (b. 1948), a legal scholar known for his work on religious liberty, is a professor at the University of Virginia School of Law.

government is endorsing religious belief or not.[26] Mark Tushnet has answered that Christian judges in a Christian-dominated society are not in the best position to tell whether a message of endorsement is being sent.[27] Steven D. Smith, distinguishing between religious individuals and their organizations, has suggested prohibiting only concerted action by state and religious institutions.[28] Kathleen Sullivan has taken the opposite position, proposing to use the clause to guarantee a secular public order.[29] And one could go on this way at some considerable length.

Constitutional provisions all too rarely, alas, have easily discernible meanings, and there are elements of truth in all these readings of the Establishment Clause. Yet what is most vital, in coming to a sensible understanding of the clause, is to avoid the ahistorical conclusion that its principal purpose is to protect the secular from the religious, an approach that, perhaps inevitably, carries us down the road toward a new establishment, the establishment of religion as a hobby, trivial and unimportant for serious people, not to be mentioned in serious discourse. And nothing could be further from the constitutional, historical, or philosophical truth.

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26. See *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984) (Justice Sandra Day O'Connor, concurring) [Carter's note]. O'Connor (b. 1930) was the first woman to sit on the U.S. Supreme Court (1981–2006).

27. See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, MA: Harvard University Press, 1988), pp. 256–57, *n* 31 [Carter's note]. Tushnet (b. 1945) is a professor at the Harvard Law School associated with the Critical Legal Studies movement.

28. Steven D. Smith, "Separation and the 'Secular': Reconstructing the Disestablishment Decision," *Texas Law Review* 67 (1989): 955 [Carter's note]. Smith (b. 1952) is a professor at the University of San Diego School of Law.

29. Kathleen M. Sullivan, "Religion and Liberal Democracy," *University of Chicago Law Review* 59 (1992): 195 [Carter's note]. Sullivan (b. 1955) is a professor at, and former dean of, the Stanford Law School.

QUESTIONS

1. Carter observes that "the wall [between church and state] has to have a few doors in it" (paragraph 10). What sorts of doors does Carter advocate? Why?

2. Carter adopts a historical perspective toward the Establishment Clause and the separation of church and state. How does this perspective shape his argument?

3. Carter's prose is generally formal and academic, but he adopts a more casual tone repeatedly in the essay. What are the effects of this stylistic choice?

4. Locate and read the text of one of the Supreme Court opinions Carter discusses. What do you think the opinion is saying about the separation of church and state? Write about the ways in which your interpretation of the opinion supports or challenges Carter's.