The Dueling First Amendment Clauses: Are they in Tension, or do they Work Together?

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The Helm's School of Government 2024 Public Policy Conference American Revival:

Citizenship & Virtue

February 21st, 202

Introduction

When the Framers wrote the Constitution that has come to define the American nation, they envisioned a country that would both be a place where individuals could freely practice their religion, and not experience persecution at the hands of the state for not adhering to the tenets of one particular religion. History tells us that many of Americas Founding Fathers were influenced by persecution they may have felt firsthand by not holding to the doctrines of the Church of England, which was the official church of the British Empire during colonial times. The state of religion in the Framers' Day were instrumental in the formation of the two clauses of the two clauses First Amendment of the Constitution, the Establishment and Free Exercise Clauses. The former reads, "Congress shall make no law respecting a national religion," and the latter reads, "or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".[1]

The First Amendment Clauses

The establishment clause has been interpreted by a selection of both modern legal scholars and jurists to conclude that America is a secular state. Many of these interpretations point to Thomas Jefferson's letter to the Danbury Baptists, which he composed on New Year's Day, 1802, in which he reflected on the act of the American people "thus building a wall of separation between Church & State," through both First Amendment clauses.[2] These same legal interpretations want to suggest that religion should be a private matter, and that there is no place for religion in the public square, or for influencing the nation's culture, institutions, and laws. These perspectives have shaped the actions of elected officials on both sides of the political spectrum, leading them to be less supportive of Americans' fundamental right to personal freedoms than they ought to be. Such thought has also created the false impression has also created a secular-sacred divide in the minds of millions of Americans where it is arguably not necessary.

However, a deeper look at Jefferson's letter reveals a different, and more nuanced picture. A key line in Jefferson's letter states, "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties",[3] and earlier in the letter, Jefferson notes that, "Religion is a matter which lies solely between man and his God, and that he owes account to

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[1] "First Amendment" Constitution Annotated, Library of Congress, Last Modified January 2017 https://constitution.congress.gov/about/constitution-annotated/.

[2] Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists, as Sent," Library of Congress, February 8th, 2024, https://www.loc.gov/loc/lcib/9806/danpre.html

[3] Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists, as Sent," Library of Congress, February 8th, 2024, https://www.loc.gov/loc/lcib/9806/danpre.html

none other for his faith or his worship".[4] With the actual text of the 1802 letter in mind, and given the fact that the phrase "Separation of church and state" occurs nowhere else in the U.S. Constitution, Declaration of Independence, Bill of Rights, or any other founding document, there is no direct evidence that Jefferson is arguing that the establishment clause limits the ability of Americans to exercise their rights of conscience in the public square. In contrast, it seems as though Jefferson is stating that government lacks the power to keep Americans from exercising those beliefs in the public square.

Historical Contexts

Understanding this perspective requires us to look at decades, if not centuries, of prior U.S. legal and constitutional interpretation before the more secular conclusions of the 20th century. In the 1892 case, *Church of the Holy Trinity v. United States*, the question before the court was to determine of the Church of the Holy Trinity hired a clergyman from England, it was charged with violating a federal law which forbade the importation of contact laborers. In the case, the court ultimately concluded that although the church technically violated the federal statute, Supreme Court Justice David Brewer used legislative intent to conclude that the church's action was unrelated to Congress' purpose in passing the law, which was stopping the flow of cheap unskilled foreign labor. [5] Yet in a statement even more iconic that the outcome of the court ruling itself, Justice Brewer concludes that throughout American life, from its laws to its businesses, customs, multitudes of churches, charitable organizations, and missionary associations, he declared America to be a "Christian Nation".[6]

While some scholars have believed that Brewer's declaration of America as a "Christian nation" cannot be fully ascertained, this is contradicted by statements made in his 1905 book, *The United States*: *A Christian Nation*. On page 32 of his book, Brewer writes, "While the separation of church and state is often affirmed, there is nowhere a repudiation of Christianity as one of the institutions as well as benedictions of society… Whenever there is a declaration in favor of any religion it is of the Christian".[7] He goes onto note that separation of church and state is actually an argument in favor of the nation's Christian heritage, in that the Christian religion is very much a "personal relation between man and his Maker, uncontrolled by and independent of human government".[8] Interestingly enough, this assertion by Brewer also lines up with the very

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[4] Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists, as Sent," Library of Congress, February 8th, 2024, https://www.loc.gov/loc/lcib/9806/danpre.html

[5] *Church of the Holy Trinity v. United States*, 143 U.S. 457 (U.S. 1892)

[6] Jane G. Rainey, "Church of the Holy Trinity v United States (1892)". The Free Speech Center at Middle Tennessee State University, February 8th, 2024. https://firstamendment.mtsu.edu/article/church-of-the-holy-trinity-v-united-states/#:~:text=Congress%2C%20public%20domain)-,Church%20of%20the%20Holy%20Trinity%20v.,is%20a%20%E2%80%9CChristian%20nation.%E2%80%9D

[7] David J. Brewer, *The United States, A Christian Nation* (Philadelphia, PA: The John C. Winston Company, 1905), 32

[8] David J. Brewer, *The United States, A Christian Nation* (Philadelphia, PA: The John C. Winston Company, 1905), 32

words of Jefferson in his aforementioned letter to the Danbury Baptists, who stated that "religion is a matter which lies solely between man & his God, (and) that he owes account to none other for his faith or his worship".[9]

Furthermore, Brewer analyses that the United States is "A Christian Nation" not in that the country has established Christianity as its official religion, made it a requirement of holding office, or made it supreme in the context of other religions, but that ever since the founding of the very first colonies, charters and constitutions viewed it "as a controlling factor" in the life of the people, educational institutions were historically "under the control of Christian denominations", and even in organizations that took a more secular approach to the doctrine of separation of church and state, "the principles of Christianity are uniformly recognized".[10] In sum, Brewer didn't think America was a Christian nation in the sense that Christians enjoyed special privileges or that it was legally and culturally superior to all other religions, but in the sense that you could not separate America's founding and identity from the influence of the same principles that are also foundational to the Christian religion. Another legal mind of the era, Justice Joseph Story, who also served on the U.S. Supreme Court, wrote in *A Familiar Exposition of the Constitution of the United States* that the colonists who originally landed on North American shores "affected to be governed by the desire to promote the cause of Christianity, and were aided in this ostensible object by the whole influence of the Papal power".[11]

Stephen Colwell, who lived a distinguished career as an industrialist, philanthropist, and as a devout Quaker, made a compelling case for the historical role the Christian faith has in the founding and identity of America in his 1854 book, *The Position of Christianity in the United States*. In the book Colwell writes that "It was in the very spirit of true Christianity that the hospitality and blessings of the United States were offered to the world…. The Christian men of that day did not intend, in yielding to others political and religious freedom to lessen their own privileges nor to diminish the proper authority of Christianity in the land; they intended that the nation should continue to be a Christian nation, that Christianity should still pervade it's legislation and that Christianity should continue to have a home here, at least during the life of the nation".[12] Colwell's analysis shows how some of the thinkers of his day, contrary to the opinion of some, still believed that Christianity had a significant role in the American nation.[13]

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[9] Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists, as Sent," Library of Congress, February 8th, 2024, https://www.loc.gov/loc/lcib/9806/danpre.html

[10] David J. Brewer, *The United States, A Christian Nation* (Philadelphia, PA: The John C. Winston Company, 1905), 46

[11] Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Union, NJ: The Lawbook Exchange, 2002), 14

[12] Stephen Colwell. *A Familiar Exposition of the Constitution of the United States* (Union, NJ: The Lawbook Exchange, 2002), 12

[13] Stephen Colwell. *A Familiar Exposition of the Constitution of the United States* (Union, NJ: The Lawbook Exchange, 2002), 1

Edward Mansfield, a 19th century professor of Constitutional law also acknowledged the role both of religion in the role of the development of nations, as well as the place of the unique role for the Christian religion in America. In his book *American Education, It's Principles and Elements: Dedicated to the Teachers of the United States*, Mansfield argues that in the case of a nation whose thinkers sought to argue that there was no religion, there also existed no foundation upon which to build any laws or morals. Furthermore, he went on to suggest that the sense of a nation's moral obligation is founded in the "character" of its religious beliefs.[14] Ultimately, Mansfield went onto conclude that, "In the United States, Christianity is the original, spontaneous, and national religion. It is revealed from heaven, and therefore perfect. Its morals are the morals of a perfect society, untouched and unspoiled by the selfishness and tainting experiences.[15] Given the substantial evidence showing prior legal and constitutional interpretation affirming America's identity as a nation influenced by Judeo-Christian principles and values, why has there been such a massive shift towards secular perspectives by members of those same disciplines today?

Modern Day Perspectives

According to John Stonestreet and Glenn Sunshine, writing for the Breakpoint Colson Center, some legal scholars assume that if organized religion cannot officially be supported by the state, then secularism is somehow "neutral".[16] Thus, some judges have misleadingly arrived at a conclusion that for the application of region in the public square to be fair or neutral, it also has to be secular [17]. However, this interpretation is at odds with the historical context, as in the 18th century, an "established" religion referred to an official state church, legally recognized by the government. In the Founders' Day, many states already had an official church, like Virginia's Anglican Church, but the establishment clause sought to prevent Congress creating a law endorsing a national, official church. This is altogether a different framework than suggesting that every official application of religion outside what an individual practice in their private life has to be secular.

Furthermore, neither of the First Amendment clauses serve to prohibit religious exercises in government, as Congress regularly begins each session with prayer led by an official chaplain, and this has been the case since its very first session. By claiming secularism to be neutral, though, its proponents have attempted to apply laws too broadly to prevent religious schools to

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[14] Edward Deering Mansfield, *American Education, It's Principles and Elements: Dedicated to the Teachers of the United States* (New York, NY: A.S. Barnes & Company, 1877), 43

[15] Edward Deering Mansfield, *American Education, It's Principles and Elements: Dedicated to the Teachers of the United States* (New York, NY: A.S. Barnes & Company, 1877), 43

[16] John Stonestreet & Glenn Sunshine, "What Separation of Church and State is Really About", Breakpoint Colson Center, February 9th, 2024, https://breakpoint.org/what-separation-of-church-and-state-is-really-about/

[17] John Stonestreet & Glenn Sunshine, "What Separation of Church and State is Really About", Breakpoint Colson Center, February 9th, 2024, https://breakpoint.org/what-separation-of-church-and-state-is-really-about/

obtain state funds and allowing only "secular" views in the public square.[18] In 1994, in *Peloza v. Capistrano Unified School District*, the 9th Circuit Court of Appeals ruled that the concept of religion should be more broadly interpreted for free exercise clauses, arguing that "anything 'arguably non-religious' should not be considered religious in applying the establishment clause".[19] Furthermore, the ruling affirmed that secular organizations were essentially free from establishment clause purposes but could also unofficially qualify as a "religion" for free exercise clauses. The consequence of the 9th Circuit's arguably inconsistent decision put secular organizations on an uneven playing field, giving them a set of unique privileges not enjoyed by religious organizations.

The 1994 decision by the 9th circuit seems to be in conflict with the view of Founding Father James Madison, who not only believed that religious liberty was an inalienable right, but that religion would actually flourish better in a free marketplace of ideas, the perspective which formed the basis of the free exercise clause. So, given that we know that the text of the Constitution hasn't changed between the late 18th century and today, then what has? What's changed is that those adopting the more secular perspective have sought to give culture power over the law by gravitating towards the concept of "a living Constitution",[20] seeking to redefine how the Constitution is interpreted in the light of modern, 21st century culture, rather than in terms of how it was originally written. As a result, this way of interpreting the Constitution has led to decisions in which religious institutions are kept from accessing state funds and allowing only secular views in the public square. Unsurprisingly, this difference in philosophy plays out today among the current justices of the U.S. Supreme Court, between the more conservative justices who espouse "originalism", or interpreting the text of the law as it was written, or the more liberal justices on the court, who espouse the more "living Constitution" perspective.

We see legal battles over this same issue being played out at the nation's highest court. In *Kennedy v. Bremerton School District*, a high school football coach, Joe Kennedy, filed a lawsuit against the Bremerton School District who asked him to discontinue his routine practice of engaging in prayer with a number of students during and after football games for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.[21] A lower court held that because the school district suspended him solely because of the risk of constitutional liability associated with behavior expressing his religious beliefs. In a 5-4 decision, the Supreme Court rejected the so called "Lemon" test, developed in the 1971 *Lemon v. Kurtzman* case, which held that any proposed government involvement with religion had to have a clearly secular purpose, could not advance or inhibit religion, or promoted excessive entanglement between

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[18] John Stonestreet & Glenn Sunshine, "What Separation of Church and State is Really About", Breakpoint Colson Center, February 9th, 2024, https://breakpoint.org/what-separation-of-church-and-state-is-really-about/
[19] *Peloza v. Capistrano Unified School District*, 782 F. Supp. 1412 (9th Cir. 1994)
[20] John Stonestreet & Glenn Sunshine, "What Separation of Church and State is Really About", Breakpoint Colson Center, February 9th, 2024, https://breakpoint.org/what-separation-of-church-and-state-is-really-about/
[21] *Kennedy v. Bremerton School District*, 597 U.S. (US 2022)

church and state.[22] Instead, the high court concluded that Kennedy's prayers were not occurring within his official duties as a football coach, that the school district did not show that restricting Kennedy's religious behavior served "a compelling purpose and is narrowly tailored to achieving that purpose," and that the school district violated Kennedy's rights in the process.[23]

The Supreme Court's ruling matters, because Justice Neil Gorsuch, writing for the majority, cited a prior ruling in *Town of Greece v. Galloway*, which upheld prayer, and concluded that the Establishment Clause should not be interpreted through the prior test established in *Lemon*, but through the lens of "original meaning and history".[24] In addition to not finding any evidence that Kennedy had coerced anyone on the sidelines to participate in his prayers, Gorsuch argued that any rule forbidding teachers from engaging in any kind of religious speech "would be a sure sign that our sign that our Establishment Clause jurisprudence has gone off the rails,"[25] and is more on the side of restricting religious liberty rather than protecting it. This is significant because in this particular case, the high court chose not to give in to the perspective championed by some legal and constitutional analysts, who believe that the vein of modern culture should be used to reinterpret the Constitution, but instead chose to interpret the meaning of the Establishment Clause in the light of how it was originally written, for which there are decades worth' of historical evidence that give the reader context. The new test developed in the case served to give a legal foundation validating the existence of religious engagement in the public square while still not providing for the establishment of a religion in a legal sense.

Jordan Lorence, the Senior Counsel and Director of Strategic Engagement at Alliance Defending Freedom, argues that the Lemon test had been used by the government to justify censorship of private religious expression, even though the test had not explicitly called for it. In *Shurtleff v. City of Boston*, the latest in a line of six cases where the high court concluded that the Establishment Clause did not require government censorship of private religious speech, Boston had tried to use Lemon as a justification for rejecting the flying of a Christian flag outside city hall.[26] Furthermore, the New York City Department of Education had a policy which banned religious worship services in city schools during non-school hours but allowed private groups and individuals with a secular purpose to use the same facilities. The arguably discriminatory policy again used Lemon's reasoning as justification, and after a legal battle spanning over 20 years, New York City mayor Bill DeBlasio abandoned the policy.[27] The court's decision in Kennedy ends an arguably inaccurate line of reasoning and brings Establishment Clause jurisdiction more in line with the prior historical interpretation and reasoning.

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[22] *Lemon v. Kurtzman*, 403 US 602 (U.S. Sup. 1971)
[23] *Kennedy v. Bremerton School District*, 597 U.S. (US 2022)
[24] *Kennedy v. Bremerton School District*, 597 U.S. (US 2022)
[25] *Kennedy v. Bremerton School District*, 597 U.S. (US 2022)
[26] *Shurtleff v. City of Boston*, 596 U.S. (US 2022)
[27] Jordan Lorence, "The End of the Lemon Test", Alliance Defending Freedom, September 19th, 2022, https://adflegal.org/article/end-lemon-test

Enter the work of Michael McConell, a prominent legal scholar and constitutional law expert, who holds three distinct titles, the Richard and Frances Mallory Professor of Law, the director of the Constitutional Law Center at Stanford Law School, and the senior fellow at Stanford's Hoover Institution. In his newest book, in conjunction with Nathan S. Chapman, *Agree to Disagree,* McConell discusses how too many have misconstrued the Framers' intention behind the Establishment's Clause basis for a more secular society that walls of religion, when instead they wanted to promote a society of religious pluralism. He notes that how beginning in the 1980s, when students at schools wanted to form Bible clubs alongside political clubs, sports clubs, and other student-led organizations, courts would often side against them, claiming that the Establishment Clause forbade them doing so. However, McConnell goes on to argue that those rulings are inconsistent with the original text and nature of the Establishment Clause, because these students sought to form clubs that were in no way an example of the state coercing religious views upon students. He also notes that teachers are rights carrying individuals who have their own ability to practice religion in the presence of their students, that their students may be influenced by that practice, and they hold positions of authority in the school.[28]

Most critically, the Standford law expert challenges the commonly held conception that the First Amendment clauses are in tension and suggests that they are complimentary and work together. He suggests that both the secular founders such as Madison and Jefferson as well as devoutly religious minority groups were strongly in favor of the arguments behind both the Establishment Clause and the Free Exercise clauses.[29] Instead of being a predicate to secularize America from keeping religion out of the public square, McConnell believes that the Framers developed the Establishment Clause that it would enhance individual freedom of conscience by eliminating the possibility of government coercion, which also fits in like a glove with the Free Exercise clause's mandate for Americans to be able to practice their religion without government regulation. In this way, both government clauses are clearly against the power of coercion against the religious liberties of Americans, limiting the government's ability to coerce Americans to follow an official religion in the Establishment Clause, and preventing the government from limiting the ability of Americans to exercise their religion, also through coercion. Ultimately, McConnel's analysis show that even those holding a secular point of view

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[28] Michael W. McConnell & Monica Schreiber, "New Book from SLS's Michael McConnell Argues the Establishment Clause Should Promote Pluralism, not Secularism," Stanford Law School Blogs, July 11th, 2023, https://law.stanford.edu/2023/07/11/new-book-from-slss-michael-mcconnell-argues-the-establishment-clause-should-promote-pluralism-not-secularism/#:~:text=Widely%20recognized%20as%20one%20of,unfailing%20commitment%20to%20religious%20freedom.%E2%80%9D

[29] Michael W. McConnell & Monica Schreiber, "New Book from SLS's Michael McConnell Argues the Establishment Clause Should Promote Pluralism, not Secularism," Stanford Law School Blogs, July 11th, 2023, https://law.stanford.edu/2023/07/11/new-book-from-slss-michael-mcconnell-argues-the-establishment-clause-should-promote-pluralism-not-secularism/#:~:text=Widely%20recognized%20as%20one%20of,unfailing%20commitment%20to%20religious%20freedom.%E2%80%9D

can come to similar conclusions on First Amendment issues, as his reasoning is purely based on a historical understanding of the constitution, not a theological framework.

This analysis recalls the broader point of *Agree to Disagree* in that members of each religious persuasion should not use the power of the state to enforce their perspective on others, but that disputes between religion should instead be left to individual conscience and belief.[30] This goes both ways, it not only suggests that members of religious groups shouldn't attempt to use government coercion upon those who do not share their beliefs, but also, atheists and other non-religious groups should not be able to use that same coercion to keep student groups from forming a Bible study, or keeping a football coach from praying with his students after a game. In the context of broader culture war issues, such as when life begins and the meaning of marriage and family, the authors assert that the wisdom of the Establishment Clause can be applied in a boarder sense, getting the government out of the way of deciding those issues and instead leaving them up to the conscience of each individual, leaving each other the freedom to "agree to disagree," then that would go much further in fulfilling the Founders' original intention for religious pluralism.[31] This action goes so much further in fulfilling the spirit of the First Amendment clauses, which sought to preserve freedom by limiting the ability of the government to use coercion against the inalienable rights of both citizens and non-citizens to practice their sincerely held religious beliefs, both in private and in the public square.

Conclusion

Biblical evidence also shows that there is deeper support for this perspective on the First Amendment clauses beyond a secular perspective. Romans 13 clearly establishes, beginning in verse one, that "Everyone (should be) subject to the governing authorities, for there is no authority except that which God has established… Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgement on themselves" (Romans 13:1-2, English Standard Version). While those holding to the more secular interpretation want to assert that there should be a clear separation between government and religion, this is challenged by the reality that government itself was ordained and established

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[30] Michael W. McConnell & Monica Schreiber, "New Book from SLS's Michael McConnell Argues the Establishment Clause Should Promote Pluralism, not Secularism," Stanford Law School Blogs, July 11th, 2023, https://law.stanford.edu/2023/07/11/new-book-from-slss-michael-mcconnell-argues-the-establishment-clause-should-promote-pluralism-not-secularism/#:~:text=Widely%20recognized%20as%20one%20of,unfailing%20commitment%20to%20religious%20freedom.%E2%80%9D

[31] Michael W. McConnell & Monica Schreiber, "New Book from SLS's Michael McConnell Argues the Establishment Clause Should Promote Pluralism, not Secularism," Stanford Law School Blogs, July 11th, 2023, https://law.stanford.edu/2023/07/11/new-book-from-slss-michael-mcconnell-argues-the-establishment-clause-should-promote-pluralism-not-secularism/#:~:text=Widely%20recognized%20as%20one%20of,unfailing%20commitment%20to%20religious%20freedom.%E2%80%9D

by God. The passage goes on to state that "Government is God's servant for your good," in Romans 13:4, which implies that government has a God-given mandate to not excessively burden the rights of its citizens, which includes not limiting the ability of its citizens to practice their sincerely held religious beliefs. Romans 13 mirrors the true intention of both the First Amendment clauses as developed by the Framers, in that it does not exist to burden or limit the ability of the governed to practice their religion, but imposing limits on the government so it does not interfere with the practice of religious belief, both in private and in the public square.

In conclusion, analysis of the historical context of both First Amendment clauses, and perspectives by prominent legal experts today dismantle the modern assumption implying the Establishment Clause exists to secularize the nation and wall off religion from the public square as a deeply flawed and misunderstood one. Furthermore, the long-accepted belief that the Free Exercise Clause exists in tension with the Establishment Clause is also a fundamental misinterpretation, as both clauses are anchored in the shared principle of opposing government coercion to suppress religious belief. In doing so, both clauses work together, not in conflict, to help produce a society in which religious expression is honored and upheld in the public square, first by preventing the federal government from legally establishing a religion, and second, by limiting the government's ability to crack down on religious expression both in private religious gatherings and in areas of the public square where Americans exercise their religious beliefs in a broader sense. The message of the First Amendment clauses are a treatise against government coercion, and to propose anything else to the contrary would be a total and complete betrayal of the spirit of America, as our declaration reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness…That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. [32]

[32] US Declaration of Independence, para.2

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