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RICHARD A. EPSTEIN

Separation versus Accommodation: Why We Should Favor the Latter

The question that I shall address in this short article has been mooted extensively since the Founding Period, when Jefferson spoke of the creation of the wall of separation between church and state. That enduring image makes strong reference to notions of private property, because of the implicit boundary that it purports to draw between political and religious activities, each relegated to its respective sphere. An apt literary metaphor, appropriate to this side of the Midway, comes from Robert Frost:

Good fences make good neighbors. It is as though the two New England farmers can each prosper the most by doing nothing to interfere with the production of the other.

Buried in this instructive metaphor lies a strong appeal to some version of the minimal or night-watchman state which, while fashionable to some (such as myself), does not represent the current reality in the United States. But before we lament the current state of politics, I think that it is best to go back to the Founding Period to see if we can get some sense of how religion was thought about before the advent of the modern social democratic state. It would be a mistake to regard the views of that critical period as monolithic, for they were surely not. But there are some important tensions that we can identify that help clear the path toward a better understanding of the use and, more importantly, the limitations of Jefferson's enduring image of the wall of separation.

In earlier times and also today, political theory serves two offices: one is to justify the current state of affairs, and the other is to attack it. In our Constitution, we find a strong, consistent vision of limited government that works off the following paradigm. We begin with the notion that good fences do make good neighbors, and thus with the view that autonomy and private property form the sensible basis for any viable social union. The explanation for the fences is not all that different from Robert Frost's. The recognition that people have different values, aspirations, talents, temperaments, and, of course, religious beliefs means that a single life plan will not work for large numbers of disparate individuals, but would force all people to make unnecessary compromises that leave them unsatisfied. The idea of property,

The author delivered this essay on October 12, 2005, at a Wednesday lunch in Swift Common Room.

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which guarantees the exclusive right to some thing — most commonly, but not exclusively, land or chattel — embodies that ideal of separation. Once we are liberated from the necessity of making collective choices, then each of us can go his or her own way, so that life plans better match individual temperaments. You may prefer strawberry ice cream while I prefer chocolate; a system of private property means that neither of us has to settle for plain vanilla. You may be Roman Catholic, and I may be Jewish; neither of us has to settle for nondenominational prayer.

There are two critical but friendly qualifications that have to be made in this basic plan. The first is a clarification: Property and autonomy do not imply strict separation; rather, they praise the idea of separation for its role in the delineation of original rights of all individuals who are, in the words of John Locke, “free, equal, and independent” in a state of nature. But there is no obligation to celebrate strict separation as a permanent and desirable state of affairs. This position need not be maintained, as like-minded individuals wish to join forces for one of two reasons. Either they have complementary skills that allow them to achieve more together than working separately, or they have sufficiently similar tastes such that they prefer sociability to isolation. The key insight is that in both these ways gains from trade are still appropriate in all domains of life, temporal and spiritual.

These gains, moreover, can only be achieved through voluntary exchange and cooperation (where the former is a spot exchange like a purchase or lease, and the latter is a more enduring tie, as a partnership or association). The initial strong separation allows us to choose the people we work with, while excluding all others, so that the sorting mechanism increases the odds that the collaborative ventures will work. Without that right to exclude and to choose, the system will be severely compromised because the fit between separate and distinctive persons cannot be maintained. It is a piece of sensible folk wisdom among lawyers that the single most important feature of a contract is not what it says, but who it is with. Choosing good trading partners or collaborators is the key to business and social success, in both secular and religious pursuits. So property and exclusion are not the antithesis for cooperation, but the prerequisite for it.

The second point is not a clarification, but a necessary emendation. The sad truth is that, standing alone, this

wholly voluntarist model fails because it cannot sustain itself against the incessant forces of disorder. The social contract theory fills this gap by postulating a situation whereby each person surrenders some portion of his liberty and property to the state in exchange for the provision of greater security for the rest. There is in the end no total separation, because some collective endeavor is needed to make sure that the voluntary ones work well. The questions of constitutionalism within this framework simply ask what set of institutions is most likely to confine state power to its proper sphere — that is, to making the old model of separation plus voluntary exchange work. That in turn leads quickly into a discussion about the preservation of property and liberty, and restrictions on the power to tax (chiefly in the form of a flat tax over various forms of income) and a requirement of compensation for property that is taken when private owners resist the sale of strategically located land.

Enter Accommodation

In light of these opening remarks, one way to look at this approach to political theory is as a set of collective accommodations that start off from a separatist base. The system stood in the Founding Period, moreover, in sharp opposition to the common view that the cooperation between church and state led to some highly distasteful practices. The most obvious of these was religious persecution by state authorities at the instigation of the dominant religion. That was often joined by the view that persons or groups (such as Native American tribes) outside the faith could not get compensation when stripped of their lands. Judged by that baseline, impositions of explicit religious qualifications for public office were instances that cried out for some degree of separation between church and state, for example, by the basic constitutional norm that precluded religious tests for service in public office. This form of favoritism led to an uneasiness with an “established church,” that is, one that receives the support of all through public exactions, even though it represents the will of only some segment of the population. Note that the litany of complaints is effectively neutralized by a system of strict separation even before we start to speak of the modern concern with the accommodation

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of religious beliefs in a secular state. But it should not be thought that the modern defense of accommodation would allow any of these practices to flourish either. On the contrary, the sensible theory of accommodation has no truck with any practice that seeks to advance one religion at the expense of its rivals, or indeed all religions at the expense of nonbelievers. Rather, it only makes this modest proposal: Knock down the wall of separation for those cases in which all individuals, regardless of religious persuasion or affiliation, or lack thereof, will prosper. In other words, accommodations will pass muster only if they meet the relatively stringent test for a social contract: a set of exactions that improves the lot of all individuals relative to their previous state of well-being in equal proportion; that is, without altering the balance of advantage among them.

Why Accommodate?

Within this basic framework, the question then is which of these two visions—separation or accommodation—works best in addressing the full range of problems that arise in the modern welfare state. The point here is not to denigrate the achievements that the principle of strict separation made in dealing with the political abuses of earlier times. But circumstances have changed in two ways: The major abuses of previous times have been curbed, while the consistent expansion of state activities requires a level of coordination between secular and religious activity that the separationist doctrine will not allow. These changes in our political constitution do not justify relaxing our vigilance with regard to two forms of incursion that should remain off limits: religious institutions taking advantage of secular institutions, and, conversely, secular institutions taking advantage of religious ones.

No one can claim that the choice between accommodation and separation is clear cut; if it were, a social consensus on these power relationships would have been reached long ago. But, while caution is always needed, the basic point remains true. As the need for cooperation across various activities increases, the separation principle becomes less fit for the challenges that lie ahead. So let us acknowledge that the separationist view is simpler to administer, and thus less

subject to erosion by the set of political forces that constantly seek to undermine it. That said, it has, in my opinion, the greater disadvantage in that it prevents the use of state power to increase the welfare of all in the same proportions—something that the accommodationist view allows for, though at the cost of a more delicate system of administrative oversight of the permitted forms of cooperation.

There is, moreover, a powerful asymmetry between church and state that drives us toward accommodation even within the framework of classical political theory, once we get past the initial set of abuses that drove the separationist impulse. The enduring relationship between church and state is not one of equal but divided power, as was the relationship between two Roman consuls. The state has the monopoly of force within the jurisdiction, and all other residual rights (such as self-help or self-defense) are subject to its oversight. That includes the use of force by religious groups, even in their self-protection. The United States has many police forces—local and state, with the FBI thrown in for good measure—and no religious police forces. The system of separation cannot prohibit any of our established police forces from providing services to religious institutions. The United States also has lots of roads and infrastructure, but no principle of separation could make it illegal to allow religious vans on public roads or to keep religious materials from the U.S. Post Office—itself a regrettable monopoly.

Thus we reach our first critical junction. If religious institutions are part of the social contract, then they cannot be left out in the cold with respect to the two fundamental obligations of the small state: protection and access to infrastructure and other essential facilities. But here the risk moves in the opposite direction: No longer is the concern that one religion will gain huge influence and preferences because of its alliance with national, state, or local government. Now the tables are turned: Once it is determined that the service must be supplied, religious institutions should not be reduced to second-class status.

In some cases, the application of the problem takes care of itself. Just use the same tolls on public roads, collect the same gas taxes, and use the standard rate structure for public utilities. The key here is that a principle of accommodation allows the state to furnish these essential facilities to religious

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organizations, but requires that they pay for them under the same rate structure as everyone else. The principle of strict separation is thus replaced by a nondiscrimination rule similar to that which assures that citizens of one state are able to do business in another state on equal terms with local residents.

The situation, however, becomes more difficult when services are not priced separately, as is often the case with real estate taxes that are used to fund a full range of government services, from schools to sewers. The current view allows for the exemption of religious institutions from these local taxes on grounds that are troublesome, to say the least. Conventional thinking tells us to lump them in with other forms of charity and fraternal organizations, and that they are not singled out for advantage. Even so, the power of religious institutions (from which only some benefit) is increased relative to that of their nonreligious competitors who need not get the same subsidy. But here the taxes are often a substitute for direct services, and if you do not pay for them, then someone else must. The separationist position would not allow the provision of the service. The accommodation position requires the provision of the service but demands the elimination of the subsidy. We thus find that it resonates with the standard appeal to limited government. You can and should mix church and state subject to one condition: no cross subsidies.

The question then is how all this plays out. In the earlier times, once the problem of corruption and favoritism in appointment to public office was overcome, the residual tensions would be far less than they are today, when the state injects itself into every area of social life. We do not have to deal with the role of religion in public schools, for example, if we do not have public schools in the first place. Quite simply, the fewer the activities that the government undertakes, the less the pressure on church-state relationships. Yet all is not so easy, even in the smallest of states. As a general matter, the state works in two separate fashions. In the first, it taxes and regulates in order to maintain social order. In this regard, the correct position is one that includes religious organizations in the mix, but on terms that do not (to the extent that it is possible with human institutions) alter the relative strength of religious versus nonreligious groups. Nor should state intervention alter the balance among different religious groups.

Greater difficulties arise, however, with the second side of the coin. Even in small states the government does more than regulate. At minimum, it must hire employees to operate its various systems. In addition, it necessarily supplies infrastructure (such as roads) and public spaces (such as squares and parks), all of which are open to all people on terms of equal access. The question here is how it ought to manage these operations and these spaces. Both require more work than does a system of regulation and taxation, because now all levels of government discharge highly complex and sensitive management functions. The situation only gets more complicated with education. Let us consider representative cases from these three areas.

Employment

Consider a simple example. Suppose that a Jewish military chaplain wants to wear a keepah during working hours when a general and neutral military regulation, adopted for other reasons (uniformity within the armed forces) prohibits the use of all headwear. We have a liberal system that now seeks to obey the tenets of both prongs of the religion clauses, intended to preserve the free exercise of religion on the one hand, without establishing any religion on the other. Walking this tightrope is not easy. First, the conscientious government wishes (in line with the minimal state) to minimize the interference of the state in the religious affairs of its citizens. Second, that government wants to avoid any establishment of religion that is introduced when cross subsidies are given to religious groups or individuals. We thus have a tough situation. To restrict the use of the keepah is to pose a limit on religious liberties; this does not comport with the usual prohibitions against the use of force and fraud that are the hallmarks of the small state. But to allow the wearing of the keepah is to give this person some advantage over other individuals who are not allowed to wear headwear of their choice, be it a turban or a baseball cap. And the problem becomes no easier if we allow the keepah but ban the turban, which is more likely to pose additional administrative hazards.

The key insight here is that all businesses must have in their internal operations a greater degree of latitude than regulators have in overseeing the economy. Running a business

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means making soft and debatable judgments about who gets along with whom, and under what circumstances. Those judgments necessarily require some degree of managerial discretion. In my view, this argument is so powerful that we should never allow the government to oversee the hiring or firing of any individuals in private firms. Voluntary sorting in labor markets will outperform any effort to impose either a strict antidiscrimination norm or an affirmative action program, or elements of both. But the state organization cannot be allowed that degree of freedom, given that it operates with public funds and has genuine coercive powers. It could not, without upsetting the political balance, exclude members of certain religions from military service altogether. So all this results in some lower standard of judicial review for the military.

When faced with this problem in *Goldman v. Weinberger* (1986), the Supreme Court opted in favor of discretion on the grounds that “neutral rules” were the best way to navigate the delicate line between the free exercise and establishment clauses. The simple recitation of the clause helps illumine the issues at stake: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The tension between these two clauses quickly becomes apparent. Any restriction on the personal liberties of religious persons runs into the free exercise clause. Any special protection of religious liberty runs into the establishment clause. In this case, the Court threw up its hands in frustration, and took the position that Congress had to decide whether to veer too far in one direction or the other, so that the constitutional challenge failed. I tend to think that the Court was wrong in this conclusion, because this was one instance in which a rule that was neutral on its face exerted a disparate impact on religious individuals. Most people could care less about the rules on headwear, but an observant Jew does not have the luxury of that indifference. Rather than rest on the neutrality principle, I would follow the commonly held view that the restriction should be struck down in the absence of some specific demonstration of why this restriction was needed to maintain military efficiency or discipline in an office setting. (In truth, the whole matter could have been averted by a more sensible commanding officer.) Deciding when to force the state to give and when not will require courts to show some discretion in

deciding which accommodations to require and which to resist. But the strong neutrality principle, like any principle of strict separation, cuts too deeply into the exercise of religious liberty. The implicit test that I use to break the impasse is this: If private employers have some discretion, would a solid majority of them take the position that wearing the keppah is acceptable, or would they push hard to ban all headwear? My causal empiricism says that the keppah will be allowed in office settings. Battlefield conditions may well require different answers, but it should be relatively easy to explain why various forms of headwear and the like should not be used. In other words, the lenient standard of review seems appropriate here, but it is not without teeth.

Public Spaces

Our second collective example involves the use of public spaces by religious organizations. The basic nondiscrimination principle takes care of this problem without difficulty when, for example, religious groups just want to drive their vans along the public highways. But the situation becomes much more difficult when religious groups seek to use public spaces for their own expressive functions, that is, to present their own worldviews to the public at large. The questions that arise are numerous. For example: May religious organizations rent public spaces for their own events? May they mount displays of religious exhibits in public spaces?

In dealing with these issues, the strict separationist is inclined to answer these questions in the negative. In their view, there are plenty of private places in which such activities could take place—so why bring religious activities into public spaces? The other side argues that this exclusion amounts to discrimination against religious groups, which are prohibited from using facilities routinely made available to other private groups for private purposes. Hence, their view is that the activities should be allowed to proceed on the same terms and conditions that apply to other parties.

A litmus test analogous to the one above would put the question this way: How could a conscientious owner of private space respond to these different pressures? More specifically, would ordinary sectarian private schools, for example, ban

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all religious songs on their premises, or would they have to allow participation in some carefully regulated setting of religious activities, such as a lobby sing that included songs from all represented religious groups? Here there is no single answer, for some thoughtful teachers, parents, and students would opt for the strict separationist approach. On balance, I think that most would choose the “all in,” as opposed to the “all out,” approach on the grounds that it allows for richer experiences for all concerned. At that point, the concern is with balance and restraint in representation on the one hand, and with the protection of the rights of those individuals who wish not to participate in these activities on the other.

My sense is that these guidelines, blurry as they are, work best in public places. They would allow both the crèche and the menorah to be located outside city hall, rather than demanding that the holiday season pass in silence. And they would allow all groups with proper permits to conduct services in public places, subject to the usual restraints. But there are limits, which are well captured in two recent Supreme Court cases, *Van Orden v. Perry* (2005) and *McCreary County v. ACLU* (2005), both of which were decided by 5-to-4 votes—in opposite directions. *Van Orden* raised the question of whether the establishment clause prevented the inclusion of a six-foot monolith of the Ten Commandments in a display before the Texas state capital, which contained a wide assortment of monuments and historical markers that had been in place for about forty years. A single citizen who encountered the monument on his trip to the site sought to have the monolith removed, on the grounds that it was a violation of the establishment clause.

I think that the decision to let that exhibit stand was correct. Four members of the Court (Rehnquist, Scalia, Kennedy, and Thomas) supported this decision on broad grounds of the key role of religion in public life. I prefer the approach of Justice Breyer, who supplied that critical fifth vote on narrower grounds. All establishment clause cases are tricky when a single citizen tries to upset a strong community consensus in the opposite direction. And the inclusion of religion along with other influences in American life does not seem to pose the threat of religious domination of public institutions. Even if one might be uneasy about the initial decision to mount the original exhibit, some respect for settled expecta-

tations should allow an exhibit that has been on display for over 40 years to stay there. When it is hard to find the ideal intellectual balance, some respect should be paid to the use of tradition as a stabilizing force.

I also think that Breyer was correct, in *McCreary County*, to join with the four dissenters from the *Van Orden* case (Stevens, O’Connor, Souter, and Ginsburg) to strike down displays of the Ten Commandments in Kentucky county courthouses. It was quite clear that this exhibit had been pushed hard by religious groups. Their original efforts to have only the Ten Commandments on display was aborted because of obvious establishment clause concerns: Putting a source of law in a court house does suggest that it has disproportionate influence over judicial deliberations—and that result was not sanitized by a new installation surrounding the Ten Commandments of other symbols of American life, such as a copy of the Star-Spangled Banner, to conceal the original motivation.

In cases like this it is easy to see why grounds of distinction between the two exhibits in public spaces are hard to defend, and hence it is easy to praise the stout consistency of the eight justices who voted either up or down in both cases. But in the end, since the issue does count as one of balance, the Breyer approach offers about the right compromise in an area that will always require some measure of judgment and discretion. No one thinks that the establishment clause concerns are stronger in *Van Orden* than in *McCreary County*. Why not draw the line between them?

Education

Our last problem area involves education, and here there are two very different forms of concern. One is whether individual students should be allowed to opt out of the public system of education in order to enroll in private religious schools or whether the state may force them to remain in it. On this point, the separationists are in general happy to see the creation of private religious schools, because it helps cordon off the influences of religion in public space. The accommodationists think that opting out of public institutions is a way to correct against the dangers of a state monopoly in education. Thus the easy

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position is one that protects the ability of all individuals to obtain private schooling as a right, in either religious or nonreligious institutions.

But this is just where the difficulties begin—for what should be done to respect religious liberties of students who remain within the public system? Here the first round of litigation involved the question of whether Jehovah's Witnesses should be required to recite the Pledge of Allegiance, when it conflicted with their religious beliefs. After some false starts the right conclusion was reached: Respect for religious liberty meant that these students could stand silently aside during the ceremony and not be forced to participate against their conscience.

The harder question arose more recently in connection with the words "under God" in the Pledge of Allegiance. Here the question was whether the use of these words in school counted as an establishment of religion. In the end, the question is a difficult matter of balance, where parallels to the Ten Commandments cases are striking. There is no doubt that the state could not put its force behind a pledge that asked individuals to swear allegiance to a state "under Jesus." But the words "under God" are less specific and more inclusive, and have in any event been around for over fifty years. At this point, the great danger of establishment-clause litigation is that a single outlier in the general population might determine which educational institutions are operated—too high a price to pay in a democratic system charged with operating public institutions. So the words should stay in the pledge, and those who choose not to recite it can stand aside, no questions asked, just as in the Jehovah's Witnesses cases.

A second issue that arises with education is that of public funding for various activities, such as remedial education, that are undertaken in both public and religious schools. Here the strict separationist line says that public funds can be spent only for education supplied in public schools, which cuts the private religious schools out of these programs. I think that this line of argument is in general a mistake, because it is clear that parents of religious students have to contribute to the public schools to which they choose on principle not to send their children. Some form of opt-out from general taxation is not really feasible, if only because the school taxes are imposed on all sorts of people and businesses with no children of school age. So the better solution

is to allow the participation of religious schools and students in these programs on equal terms with those children in public schools. I would also allow this education to be supplied in religious schools proper. It is too costly in terms of time, money, and emotional wear and tear to ship students around from school to school for special education. It is relatively easy to make sure that moneys are not funneled into purely religious activities. If we are to have public education at all, then a somewhat messy accommodation seems better than a rule of strict separation that puts religious institutions at a serious disadvantage with regard both to public schools and private religious schools.

A Sober Conclusion

This analysis of church and state reveals several main points. First, we Americans should take some pride in having organized both public and private institutions in ways that have defused the abuses of church-state relationships that were common earlier in our history. But the rhetoric of separation that proved so effective in those settings does not quite work in more modern times, when the expectations for state involvement in all areas of life are so much greater than in earlier times. Perforce we have to move from separation to accommodation, along the lines that I have set out. This principle works well in easy cases of police protection and highway use, and less well with respect to government employment, the management of public spaces, and public education. But it is important not to despair at the messy judgments at the margins and the deep-seated divisions on these issues. When one steps back from the grubby particulars, the overall structure looks about right where it now is. On matters like these, we can only rely on our general sensitivity to the strong claims on both sides to steer a steady course through treacherous shoals. To be forewarned is to be forearmed, the old saying goes. It certainly applies to the vexed topic of church and state relations. ✕