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SEPARATION OF CHURCH AND STATE
AND THE FIRST AMMENDMENT: A HISTORICAL JOURNEY

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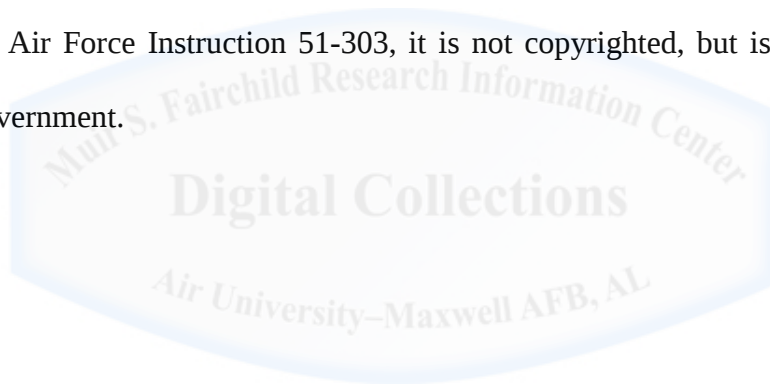
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SEPARATION OF CHURCH AND STATE

AND THE FIRST AMMENDMENT: A HISTORICAL JOURNEY

By

Chaplain, Major Peter N. Fischer

*Congress shall make no law respecting an establishment of religion
or prohibiting the free exercise thereof....*

—Religious Clause of the First Amendment, U.S. Constitution

Before the birth of United States “[n]o other government had been launched without the protection of an official cult.”¹ In fact, every ancient society relied upon or looked to the Divine (or more often the *divines*) for their continued existence, protection, and prosperity. “Aristotle included religion among the functions of a state; the Roman Emperor was called by the religious title 'Pontifex' (a title later assumed by the pope), and the Roman law attributed religious powers to the state.”² In his book, *Head and Heart: A History of Christianity in America*, Gary Hart says this division of religious and state powers in a country’s founding document is “the only original part of the Constitution.”³ Some scholars even refer to this innovative concept as America’s “greatest contribution to human history.”⁴ So, where did this novel idea come from? What are the origins of the theory that civil and sacred powers should occupy separate spheres? This paper argues that the roots of the concept of *separation of church and state* are very ancient and still have a significant impact on Court jurisprudence in the United States to this day.⁵

It is important to understand the immediate context of the phrase *separation of church and state* as it has been handed down to us. In January of 1802, while in his first term as President of

the United States and a full eleven years after the ratification of the Bill of Rights, Thomas Jefferson wrote a letter to the Danbury Baptist Association of Connecticut saying (in part):

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, 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 & State.⁶

There has been much debate over Jefferson's true intentions in penning this letter. However, recent work by the FBI—at the request of the Library of Congress—has helped to clarify his purpose. The original draft of his letter has significant portions which are no longer legible because they have been crossed out. Using modern forensic techniques the FBI lab was able to restore the complete, original text.⁷ What is revealed is Jefferson's first draft which he gave to, among other people, his Attorney General Levi Lincoln for review. In reading the draft as well as his note to Lincoln it becomes clear that Jefferson was using this letter to respond to his detractors who were critical of his refusal to issue executive declarations of fast days and days of thanksgiving. This had been the custom of both British monarchs as well as previous presidents.⁸ In the original draft, Jefferson explains his reasons for writing:

I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect.⁹

Further cementing Jefferson's intention is his unambiguous note to the Attorney General which accompanied his draft letter in which he told Lincoln he wanted to use this letter as a chance to explain "why I do not proclaim fastings & thanksgivings, as my predecessors did."¹⁰ In the words James Hutson, Chief of the Library of Congress' Manuscript Division:

The unedited draft of the Danbury Baptist letter makes it clear why Jefferson drafted it: He wanted his political partisans to know that he opposed proclaiming fasts and thanksgivings, not because he was irreligious, but because he refused to continue a British practice that was an offense to republicanism.¹¹

But where did this idea of separate civil and sacred realms originate? Was Jefferson the first to conceive this concept or was he in fact expressing the culmination of centuries, even millennia of western thought and debate on this issue? John Whitte, Jr. and Joel Nichols in their book

Religion and the American Constitutional Experiment support the latter of these views writing:

[w]hile the principle of *separation of church and state* is often regarded as a distinctly modern American invention, it is in reality an ancient Western teaching. It has its roots in biblical passages that speak of “separation” and “walls of separation” between believers and nonbelievers, and between priests and commoners, and the need to maintain “two swords” to govern earthly life...Martin Luther, for example, spoke of “a paper wall” “between the spiritual estate [and] the temporal estate” [italics added].¹²

In fact, Jefferson’s thought of a *wall of separation* echoes very closely the writings of the Scottish Whig James Burgh who in 1767, over thirty years before the Danbury letter, wrote of building “an impenetrable *wall of separation* between sacred and civil...[italics added].”¹³ The point is, what Jefferson was expressing in his letter to the Danbury Baptist Association was not an original thought but rather the culmination of centuries of discussion on the issue of appropriate interactions between church and state in the west.

A full thirteen-hundred years earlier the Roman Emperor Constantine the Great issued his *Edict of Milan* (313 AD) which de-criminalized Christianity in the Roman Empire. The year prior Constantine had converted to faith of his mother (Helena) and became the first Christian Roman Emperor. Thus began in the western world the union of church and state. This marriage of sacred and political power was nothing out of the ordinary as every government before and for centuries after was tied to some religion or religious cult. The difference in 313 AD was that for

the first time ever, the *Christian Church* was officially adopted by a state and not just any state, but the most powerful on the planet, Rome.

However, even in its infancy, this union was not without its difficulties. To begin with Jesus the founder of the Christian faith had said, “[r]ender to Caesar the things that are Caesar’s, and to God the things that are God’s” and for the first two and a half centuries of her existence, the Church¹⁴ had not only been separate from the state, but in fact often persecuted by it.¹⁵ Thus, it is no surprise that “[d]uring the early middle ages...a separation developed between Church and State, or—in the language of the time—between priesthood and kingship.”¹⁶ One hundred and eighty-one years later in 494 AD, Pope Gelasius I wrote a letter to emperor Anastasius describing two distinct spheres, “the sacred authority of the priesthood and the royal power.”¹⁷ Gelasius asserted that the bishops submit themselves to the temporal realm for the sake of “public order” but the responsibility of priests is a weightier issue and princes should be subject to clergy as far as spiritual matters are concerned. This theory eventually became known as the “Two Swords” theory (based on a Gospel pericope found in Luke 2:38) and although identifying two distinct realms, it never called for a *wall* of separation between them.¹⁸

During the eleventh to thirteenth centuries the papacy began to assert that the spiritual authority of the Church gave her permission to intervene in the temporal realm if a prince’s actions were unjust, which made the issue a matter of sin and under the authority of the Church.¹⁹ This, of course was not well received by all through-out Europe; in particular, John of Paris, a clergyman himself, who wrote *On Royal and Papal Power* in 1302 AD. John argued that God is supreme Lord in both realms *spirituals and temporals* but on earth there is no one individual who is God’s vicar in both areas at once. The secular ruler is God’s vicar in the temporal sphere and the pope is Christ’s vicar in the spiritual sphere.²⁰ Surprisingly, the genesis

of separation of church and state was beginning to be formulated in the most unlikely place, within the Church.

The tension caused by increasing papal authority (and in some cases abuse of that power) continued and finally exploded into what was to become the Protestant Reformation. This traumatic season forever changed the relationship of church and state in the west. Specifically, in England where a sort of 'parallel' reformation to that of the European continent was occurring, the Church became nationalized much like the Orthodox Church in the Eastern Roman Empire. There was, however, one significant difference in that the Church in England was to be *under* the authority of the King who was declared by parliament to be the Supreme Head of the Church of England. Later, when Queen Elizabeth ascended to the throne the title was changed to Supreme Governor of the Church of England. In 1701 a law was passed which required the monarch to be Protestant (i.e. *not* Roman Catholic). Meanwhile, back on the European continent various princes provided patronage to emerging branches of the church (e.g. Lutheranism, Calvinism, and Roman Catholicism) as best suited their personal and political positions. It was from this immediate context that many of the first English and other European settlers fled to the Colonies in the new world.

Close on the heels of the Protestant Reformation came the Enlightenment. This movement emphasized human reason and not religion as the means to discover ultimate truth. One enlightenment thinker in particular, John Locke, had tremendous impact upon Thomas Jefferson's thought and writings. Concerning church-state relations Locke argues that religion is a private, inward matter that cannot be regulated by the state.²¹ As to the Church's authority he writes:

It is not my business to inquire here into the original of the power or dignity of the clergy. This only I say, that whencesoever their authority be sprung, since it is

ecclesiastical, it ought to be confined within the bounds of the Church, nor can it in any manner be extended to civil affairs, because *the Church itself is a thing absolutely separate and distinct from the common wealth. The boundaries on both sides are fixed and immovable* [italics added for emphasis].²²

Here we can see the nearly fully matured idea behind Jefferson's phrase, "separation of church and state" built upon the argument that the Church should be kept out of state business, classic Enlightenment thought on this issue.

Another writer and contemporary of Locke who had significant influence on Jefferson was the founder of Rhode Island, Roger Williams.²³ Garry Wills calls this 17th century American patriot "a prophet of the separation of church and state in the United States Constitution."²⁴ In his article "Wall of Separation" W. Clark Gilpin refers to Williams as "a forgotten architect of the wall of separation."²⁵ As a minister who had been banished from Massachusetts Bay colony because of his religious beliefs in 1635, Williams fought for both tolerance and an end to state-sponsored churches. In response to a pamphlet written in 1644 by the Puritan minister John Cotton, Williams wrote of a "*wall of separation* between the garden of the church and the wilderness of the world [italics added]" separating believers from the world.²⁶

Roger Williams argued that throughout history whenever this *wall* or *hedge* had been broken down the "garden of the church" turned into the "wilderness" of the world. "Williams identified the human act that dismantled *the wall of separation* as the Christian impulse to establish a national church [italics added]."²⁷ Essentially Williams was advocating for a separation of church and state with the aim of purifying the Church by protecting it from worldly influence. In other words the wall was required not to keep the state protected from the influence of the Church, as Enlightenment thinkers asserted, but rather to protect the Church from the corrupting effects of the state.

Using scriptures to illustrate his point Williams proposed that just as God had set forth the “two tables” of the Ten Commandments, one set of duties owed to God and the other set to our fellow humans. God had ordained “essentially distinct” governments, one “properly and adequately fitted by God to preserve the civil state in civil peace and order” and the other “a spiritual government and governors in matters pertaining to his worship and the consciences of men.”²⁸ Interestingly, this argument of keeping the Church pure from state influence was made by the Roman Catholic Church several centuries earlier. In the *Cum ad verum* canon the Roman Catholic Church argued that the “mutual limitation” of the powers of the clergy and king “would restrain the pride of priest and emperor, and that those on God's service (the clergy)” would “be kept free of worldly entanglements.”²⁹

For those who argue that the founders never intended freedom of religion to be extended beyond the various Christian sects, Williams insisted that “papists [Roman Catholics], Protestants, Jews, or Turks” were all equally competent when it came to political matters and effective and just government requiring mutual respect among various citizens.³⁰ In fact, “[m]ost founders extended the principle of equality before law to all peaceable theistic religions, including Jews, Muslims, and Hindus”; it was only the atheist who was left outside the protection envisioned by most of the founders.³¹

Another minister and supporter of the separation of church and state was John Leland. Leland was an early American Baptist preacher and personal friend of Thomas Jefferson. Raised in New England, he set-off in 1775 to Virginia to preach the gospel and strengthen the Baptist churches in that area. After traveling through the state, being mistreated and witnessing his fellow Baptists being persecuted (the Anglican Church was the official church of Virginia at that time) he wrote:

The notion of a Christian commonwealth should be exploded forever...
Government should protect every man in thinking and speaking freely, and see
that one does not abuse another. The liberty I contend for is more than toleration.
The very idea of toleration is despicable; it supposes that some have a pre-
eminence above the rest to grant indulgence, whereas all should be equally free,
Jews, Turks, Pagans and Christians.³²

Leland also wrote, “[m]ay the combination of rulers and priests, church and state, be dissolved
and never re-united”³³ further illustrating that the concept of separation of church and state was
already well formulated prior to Jefferson’s authoring of the Danbury letter. Some have
speculated that it was because of Leland’s strong views on separation that Jefferson felt he could
attend his friend’s worship services held in the House of Representatives in Washington, D.C.
during his presidency. This allowed Jefferson to appease his party base who insisted on church-
state separation as well as his opponents who had accused him of being a godless atheist.

Enlightenment thinkers like Jefferson and Evangelicals like Leland were not the only groups
of the day with an interest in the church-state debate. The most influential of these groups were:
[1] the Puritans (or Congregationalists), [2] Civic Republicans (Washington, Adams and others
who advocated for a sort of ‘civic’ religion of the nation),³⁴ [3] the Enlightenment Thinkers (who
held that religion is a private matter not to be regulated by the state), and [4] the Evangelicals
(who argued that salvation is a private matter between God and a person and the state has no
place in that realm).³⁵ However, what eventually emerges from these groups is, by today’s
standard, an unlikely alliance between the Evangelicals and the Enlightenment thinkers. These
two groups join forces in support of, in fact demanding, a separation of civil and religious realms
in the fledgling nation. To use the words of Gary Wills, this was an alliance of *Head and Heart*
or *Skeptics and Believers* (in Howe’s terms).³⁶

What is quite surprising is that the Evangelicals were just as adamant concerning this
separation as the Enlightenment thinkers. Whitte and Nichols note that:

American Evangelical writers also had a trove of historical Anabaptist confessional statements, sermons, and pamphlets calling for a “*wall of separation*” between the redeemed church of Christ and the fallen world...They recurred in other American Evangelical writings that called for a ‘wall,’ ‘hedge,’ ‘line,’ or ‘fence’ between church and state and an ‘absolute divorce’ between church and state [*italics added*].³⁷

Today, the descendants of these same two groups often appear to be on opposite sides of debates concerning church-state issues (e.g. prayer in school, “under God” in the Pledge of Allegiance, disagreements over the national motto of “In God We Trust”, etc.) To understand this journey from the alliance of Enlightenment and Evangelicals to today’s animosity requires an exploration of the Supreme Court’s application of the First Amendment principles, specifically to the states.

In Jefferson’s time it was widely held that both religious clauses of the First Amendment were intended to restrict the actions of the federal government. In fact, “[i]t was commonly assumed at the [Constitutional] convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government.”³⁸ The joining of church and state (establishment) were not to be handled on a national level, “Congress shall make no law...” However, this did not prevent such unions from continuing at the state level and below. As Whitte and Nichols put it “[t]he specification of ‘Congress’ underscored the founders’ general agreement that the religion clauses were binding not on the states but on the most dangerous branch of the new federal government, the Congress.”³⁹ In fact, it wasn’t until 1833, more than thirty years after Jefferson’s letter to the Danbury Baptists, that Massachusetts finally ended its state sponsorship of the Congregational Church.

At the time of the drafting and ratification of the Bill of Rights several colonies officially sponsored the Episcopal Church (Anglicanism) or required public officials to acknowledge Trinitarian or Christian beliefs before holding offices (albeit in some cases these laws were ignored). It was clear that the early founders did not see the religious clauses as having any

authority over the states but merely upon the federal government (as Jefferson seemed to believe) or more narrowly just the *Congress* (as previous presidents who had issued prayer and fasting proclamations apparently supposed). Today however, the religious clauses of the First Amendment *do* apply to state governments. The story of how this prohibition, originally placed upon the federal government, was transferred to the states requires another short survey, this time through various rulings of the third branch of government, the Judiciary, and more specifically, the Supreme Court. It also includes the Supreme Court's lifting and use of Jefferson's words *separation of church and state* and placing it into the case law of the land's highest court.

The first time the Supreme Court used Jefferson's verbiage *separation of church and state* was in the 1878 ruling of *Reynolds v. United States*, a case concerning the legality of polygamous marriages within the Mormon Church.⁴⁰ In the majority opinion the Court echoes Jefferson's earlier thoughts about the role of government concerning matters of conscience and included a significant portion of his Danbury letter (including the section containing the phrase *separation of church and state*). Jefferson had written back in 1785 in his *Notes on Virginia* that "the rights of conscience" are never submitted to government, rather "[w]e are answerable for them to our God."⁴¹ The authority of government extends only to actions, specifically actions that are "injurious to others."⁴² The 1878 opinion authored by Justice Field stated that "Congress was deprived of all legislative power over mere *opinion*, but was left free to reach *actions* which were in violation of social duties or subversive of good order [*italics added*]." To further illustrate the difficulty of allowing each individual to opt-out of various laws based on the Free Exercise Clause, the Court argued:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of

the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.⁴³

Over sixty years later a group of Jehovah's Witnesses found themselves at the Supreme Court over the issue of distributing church literature (some which was very offensive to local Catholic citizens) and more specifically soliciting donations. In *Cantwell Et. Al. v. Connecticut* (1940) the state of Connecticut argued that the Witnesses were in violation of a law forbidding the solicitation of donations from non-organization members without prior approval from the public welfare council. According to the law in question, the secretary of the council would "determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."⁴⁴ The court sided with the religious group reversing the lower courts conviction stating in part,

[w]e hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.⁴⁵

This decision pulled the entire First Amendment, including the religious clauses, under the jurisdiction of the federal government via the application of the Fourteenth Amendment due process provision. It would now be possible for other establishment and free exercise cases to be taken to the Supreme Court and that is exactly what began to happen.

In *Everson v. Board of Education* (1947) Jefferson's language once again appears in the majority opinion.⁴⁶ Justice Black wrote, "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"⁴⁷ The next year Jefferson's language was again inserted into the *McCullum v. Board of Education* (1948) ruling where the majority used some of the identical language as in the *Everson* case.⁴⁸ Additionally, the *McCullum* ruling asserted that in the previous *Everson* case

(which had been decided on a five/four split decision) both majority and minority opinions, although disagreeing on some points, “agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State.”⁴⁹ In other words, all nine judges were in agreement on this point.

This was a significant shift in the position of the federal government since the adoption of the Constitution and its first ten Amendments, the Bill of Rights. Until the time of the *Cantell* (1940) and the subsequent rulings of *Everson* (1947) and *McCullum* (1948) the federal government had viewed the states as the arbiters of church-state issues; these issues were not within the purview of the federal government. Whitte & Nichols illustrate this point by noting that prior to the *Everson* ruling in 1947,

...forty-three of the forty-eight state constitutions...included in their preamble some ceremonial expression of gratitude to “Almighty God” (or “Supreme Legislator” or “Supreme Being” or “Supreme Ruler of the Universe” or “Sovereign Ruler of Nations”).⁵⁰

From 1940-1948 the Supreme Court removed the authority of states to decide church-state issues (citing the Fourteenth Amendment “due process” as their authority)⁵¹ and placed both federal and state governments squarely under the religious clauses of the Constitution.

The Supreme Court’s application of Jefferson’s language to the Establishment Clause was not universally accepted with subsequent justices. In the 1962, Justice Potter Stewart in his dissenting opinion to *Engel v. Vitale* wrote:

I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the “*wall of separation*,” a phrase nowhere to be found in the Constitution [italics added].⁵²

Chief Justice William H. Rehnquist, in his dissenting opinion for *Wallace v. Jaffree* (1985) also disagreed with the high court’s use of the Jeffersonian phrase *separation of church and state* as applied to the First Amendment. He chastised the court saying, “It is impossible to build sound

constitutional doctrine upon a mistaken understanding of constitutional history.”⁵³ In a lengthy argument he maintained that Jefferson, who was out of the country in France at the time of the drafting of the First Amendment, is not the best interpreter of the Establishment Clause’s meaning. He calls Jefferson “a less than ideal source of contemporary history as to the meaning of the Religion Clauses.”⁵⁴ Additionally, he notes that Jefferson’s oft quoted Danbury letter was written fourteen years after the First Amendment’s drafting and eleven years after its ratification.⁵⁵ It is Madison, according to Rehnquist who is a far superior choice for the court when seeking to discover the intention of the founders on this issue. Madison authored the first draft of the religious clauses and was present and engaged through-out its subsequent re-writes and final adoption in its present form. So adamant was Rehnquist on this issue that he went on to write, “the Establishment Clause has been expressly freighted with Jefferson’s *misleading metaphor* for nearly 40 years [italics added].”⁵⁶

Regardless of dissenting views, issues of church-state relations had moved from state to federal jurisdiction and a series of cases followed as the Supreme Court tried to navigate the paper-thin territory between the Establishment and Free Exercise Clauses of the First Amendment. Whitte & Nichols describe the process which transpired over the next several decades as a “vacillation” between total separation and significant accommodation.⁵⁷ Finally, in the early 1960s a sort of *via media* or middle way was sought and the policy of governmental neutrality concerning religion and non-religion was formed. To aid the courts in determining whether a law had remained neutral or not, Chief Justice Burger developed what became known as the *Lemon Test*, after the case in which it appeared *Lemon v. Kurtzman* (1971). According to this judicial test the government would ask three questions concerning a law in question: (1) Does the law have a secular purpose? (2) Does its primary effect hinder or promote religion? (3)

Does it promote or foster excessive entanglement between church and state?⁵⁸ If the answer to the first question is, “Yes” and the second and third are answered in the negative, then the law is constitutional. If any answer was opposite of that than the law *may* not be constitutional. In *Agostini v. Felton* (1997) the Court shortened the Lemon to two questions: (1) Does the law create excessive governmental entanglement with religion?⁵⁹ (2) Does the law amount to governmental endorsement or disapproval of religion? A constitutional law would receive two negative responses; a questionable law would receive a yes to either or both questions. Neither of these tests have been adopted universally by the Court. In some cases they have been used and applied and in others discarded all together.⁶⁰ However, it was clear by the mere existence of these tests that the federal court and not the states was too continue as the arbiter of church-state issues for the foreseeable future.

One final area which is unique to the whole discussion of separation of church and state is the institution of state and federal chaplaincies, both legislative and military. At first glance it would appear that the concept of government funds given to clergy members for religious functions conducted in public buildings is a clear violation of the establishment clause of the First Amendment and that is exactly what one State Legislator (Ernest Chambers) from Nebraska argued. His case, *Marsh v. Chambers* was argued before the Supreme Court in 1983. The Supreme Court reversed the lower court’s ruling which had determined that the regular legislative prayer itself was not unconstitutional, but paying the chaplain out of public funds was and must cease. In reversing this decision, the Supreme Court cited the long-standing practice (almost two-hundred years at the time of the ruling) of Congress opening each session with prayer by a paid chaplain. They noted that the same Congress which passed the First Amendment also authorized paid chaplains for the same body. The Court concluded that those

legislators clearly saw no conflict between the Establishment Clause and a paid legislative chaplain. Finally, they argued that,

[i]n applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret the Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.⁶¹

A second case involving a chaplaincy is one that did not reach the Supreme Court. That was *Katcof v. Marsh* (1985) Second Circuit Court, which alleged that the U.S. Army chaplaincy was a breach of the First Amendment because clergy were paid by government funds. The plaintiffs did not dispute the need for a chaplaincy but argued that a ‘volunteer’ chaplaincy sponsored by private churches could be instituted without violating the First Amendment. The court held that “not establishing an Army chaplaincy would deny soldiers the right to exercise their religion freely, particularly given the mobile and deployable nature of the nation's armed forces.”⁶² In this case, a chaplaincy is *necessary* even though it clearly did not pass the *Lemon* test in order to ensure soldiers’ rights of “free exercise” are not impeded. As Rosen writes, it is “the Free Exercise Clause upon which the military chaplaincy is now largely justified.”⁶³ So, even where separation of civil and sacred powers is the rule of the land there are unique exceptions when other portions of the Constitution take precedence. In this case, Congress’ War Powers and the Free Exercise Clause trumped the Establishment Clause.

This leads to the present time where there is still significant debate over the interpretation of the First Amendment’s religious clauses and almost as much conflict concerning the use of Jefferson’s phrase *separation of church and state* to explain the Establishment Clause. The fact remains that these concepts have contributed to both a vibrant civic life *and* healthy spiritual life within the nation. Gary Wills argues against the “conservative myth” of declining spirituality in the nation pointing out that from 1776 to 2000 religious adherence rates have sky-rocketed from

17% to 62% (with a 44% attendance rate). Compared this to the United Kingdom where church and state are still joined and as little as 27% of the population attends church and it represents astronomical growth for the Church in America.⁶⁴ As for a vibrant civic life, one need only tune in to the latest political debate or peruse the internet to see that all ideologies are still welcomed in the market-place of ideas. It is hard to debate the fact both church and state have fared well and even flourished under this great American experiment of separate sacred and civic spheres.

It has been demonstrated that from its genesis back in the fifth-century with the first inclining of the Two Swords theory through its culmination in Thomas Jefferson's letter to the Danbury Baptist Association to the present challenges of legislative and military chaplaincies, the concept of *separation of church and state* has had a long history. Both Catholic and Protestant clergymen such as John of Paris and John Leland of New England saw the need for some sort of separation between these two realms. Enlightenment thinkers and Evangelicals such as John Locke and Roger Williams argued for this great experiment. Some saw danger in the state interfering in the Church while others were concerned over excessive influence of the Church in affairs of the state. Yet, both agreed that to concentrate temporal and spiritual powers under a single head was a toxic combination. Thus, the roots of the concept of *separation of church and state* are very ancient and still have an impact on legal jurisprudence in the United States to this day. What a tremendous heritage the founders have left, what a privilege for the citizens of this remarkable nation living-out America's "greatest contribution to human history."⁶⁵

1. Gary Wills, *Head and Heart: A History of Christianity in America* (New York: Penguin Books, 2007), 6.

2. John Kilcullen, "Medieval Political Theory," draft of essay published in Gerald F. Gaus & Chandran Kukathas, eds., *Handbook of Political Theory* (London: Sage Publications, 2004). Kilcullen writes, "[i]n the classical world there was no separation between religion and politics."

3. Wills, *Head and Heart*, 6.

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4. George L. Alexander, "Separation of Church and State." *Friends Journal* (Published by Friends Journal: 12 November 2011), <http://www.freindsjournal.org/node/2384>
 5. Thomas Jefferson, *Letter to the Danbury Baptists*, Library of Congress, (accessed 3 Dec 11 at 9:17 AM), <http://www.loc.gov/loc/lcib/9806/danpre.html>.
 6. Jefferson, *Letter to Danbury*.
 7. James Hutson. *A Wall of Separation: FBI Helps Restore Jefferson's Obliterated Draft*. Library of Congress, (accessed 3 Dec 11 at 9:26 AM), <http://www.loc.gov/loc/lcib/9806/danbury.html>. Here is a portion of Mr. Hutson's biography: "James H. Hutson received his Ph.D. in History from Yale University in 1964. He has been a member of the History Departments at Yale and William and Mary and, since 1982, has been Chief of the Library's Manuscript Division."
 8. Hutson, *A Wall of Separation*.
 9. *Ibid.*
 10. *Ibid.*
 11. *Ibid.*
 12. John Witte, Jr. & Joel A. Nichols. *Religion and the American Constitutional Experiment: Each According to the Dictates of his Own Conscience*, 3d ed. (Boulder, CO: Westview Press, 2011), 51-52.
 13. James Burgh, *Crito, or Essays on Various Subjects* (1767), 2:117-119.
 - 14 I have elected to capitalize "church" through-out this paper wherever it is preceded by the definite article "the" (i.e. "the Church") and have left it as originally written in all direct quotes.
 15. *The Holy Bible*, English Standard Version. (Wheaton, IL: Crossway Bibles of Good News Publishers, 2001), Mark 12:7.
 16. Kilcullen, *Medieval Political Theory*.
 17. *Ibid.*
 18. The name "Two Swords" is a reference to a biblical story found in Luke 22:38 where Jesus tells his followers "...let the one who has no sword sell his cloak and buy one." They respond, "Look, Lord, here are two swords" to which Jesus replies, "It is enough" (Holy Bible, ESV). The Two Swords theory interprets these two swords as the temporal and spiritual powers and since both were given to the Church (via the apostles) thus both are subject to Church.
 19. Kilcullen, *Medieval Political Theory*.
 20. *Ibid.*
 21. Locke, *A Letter Concerning Toleration*.
 22. *Ibid.*
 23. "Roger Williams was a Puritan minister who arrived in Boston from England in 1631 and was officially banished from the Massachusetts Bay Colony in 1635. In January 1636, Williams was to be arrested and returned to England; however, he fled the colony. Later that year, he bought some land from Native Americans and founded Providence." Michael Corbett & Julia Corbett. *Politics and Religion in the United States*. (U.S.: Garland Reference Library for Social Science, V. 1197, 1999), 38.
 24. Wills, *Head and Heart*, 28.
 25. W. Clark Gilpin, Building the "Wall of Separation": Construction Zone for Historians. *Church History*, 79:4 (December 2010), 872.

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26. Roger Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered," in *The Complete Writings of Roger Williams*, ed. Reuben Aldridge Guild (New York: Russell & Russell, 1963), 1:392.
27. Gilpin, *Building the Wall*, 75.
28. Kilcullen, *Medieval Political Theory*.
29. *Ibid.*
30. *Ibid.*
31. Whitte, *Religion and...America*, 50.
32. John Leland, "A Chronicle of His Time in Virginia," as cited in *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders*, ed. Forrest Church, (Boston: Beacon Press, 2004), 92.
33. *Ibid.*
34. Whitte, *Religion and...America*, 34.
35. Wills, *Head and Heart*, 7.
36. Mark de Wolfe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965), 19.
37. Whitte, *Religion and...America*, 52.
38. *Ibid.*, 76.
39. *Ibid.*, 91.
40. Hutson, *A Wall of Separation*.
41. Paul L. Ford, *The Works of Thomas Jefferson*, Federal Edition (New York and London: G.P. Putnam's Sons, 1904-5), Vol. 3., 48. This particular treatise was written by Jefferson in 1785.
42. *Ibid.*
43. *Reynolds v. United States*. Supreme Court of the United States. 98 U.S. 145. October Term, 1878.
44. *Cantwell Et Al. v. Connecticut*. Supreme Court of the United States. 310 U.S. 296. Decided May 20, 1940.
45. *Ibid.*
46. *Everson v. Board of Education*.
47. *Everson v. Board of Education*.
48. *McCullum v. Board of Education*. Supreme Court of the United States. 3330 U.S. 203. Decided March 8, 1948.
49. *Ibid.*
50. Whitte, *Religion and...America*, 118.
51. The 14th Amendment 'due process' clause states in in part, "...[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..." (Section 1 of the Fourteenth Amendment of the Constitution of the United States).
52. *Engel v. Vitale*. Supreme Court of the United States. 370 U.S. 421. Decided June 25, 1962.
53. *Wallace v. Jaffree*. Supreme Court of the United States. 472 U.S. 38. Decided June 4, 1985.
54. *Ibid.*

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55. *Ibid.* Justice Rehnquist only mentioned the thirteen years after drafting in his writing, I have inserted the eleven years after ratification here.
56. *Ibid.*
57. Whitte, *Religion and...America*, 171.
58. *Lemon v. Kurtzman*. Supreme Court of the United States. 403 U.S. 602. Decided June 28, 1971.
59. *Agostini et al. v. Felton et al.* Supreme Court of the United States. 96 U.S. 552. Decided June 23, 1997.
60. Concerning *Marsh v. Chambers* [Supreme Court of the United States of America. 463 U.S. 783. Decided July 5, 1983.] Whitte & Nichols write, “[i]n a few cases, the Court has used tradition or history to uphold a practice against establishment clause challenges, disregarding the Lemon test and all other approaches in the process...this argument from tradition became the exclusive basis for upholding a state legislature’s practice of funding a chaplain and opening its sessions with his prayers” (Whitte, *Religion and...America*, 185).
61. *Marsh v. Chambers*
62. Richard Rosen. “Katcoff v. Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State.” *University of Toledo Law Review*, vol. 38., 1141.
63. Rosen, *Katcoff v. Marsh*, 1145.
64. Wills [Wills, *Head and Heart*, 8.] citing Roger Finke and Rodney Stark, *The Churching of America, 1776-2005*, (Rutgers University Press, 2005). See also, NationMasters.com for attendance statistics.
65. Alexander, *Separation of Church and State*, 2.

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