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HIGH WALL OR LINES OF SEPARATION?

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The issue of religion and the role it should play in government has long evoked spirited debate. Recently, an argument has been made that the "separation" between religion and politics has played a large factor in what many consider to be our nation's "moral decay." Such an argument, however, is not new.

In reviewing Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate, *edited by Daniel L. Dreisbach, James Knicely examines the power of elected government to act benevolently toward religion and the moral values associated with it in light of today's social ills.* Religion and Politics in the Early Republic *includes a noted sermon given by Jasper Adams in the 1800s. Knicely establishes that among the four "interests" Jasper Adams conceived as important to an understanding of American culture, religion was the most important. At the time Adams made such an argument, Adams believed that a growing indifference to Christian values in America's political institutions threatened the foundation of civil society. Knicely also examines the reaction that Jasper Adams's viewpoint evoked from other scholars and statesmen, such as James Madison, John Marshall, and Joseph Story, thus providing a unique look at the opinions regarding religion and government among the generation that produced the First Amendment. Knicely then poses the idea that Jasper Adams could be correct; instead of turning to money and welfare programs to solve a "moral decay" crisis, it might be more helpful to encourage religious and moral values.*

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> Now there are two ways, and two ways only by which men can be governed in society; the one by physical force; the other by religious and moral principles pervading the community, guiding the conscience, enlightening the reason, softening the prejudices, and calming the passions of the multitude.[1]

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[1] JASPER ADAMS, THE RELATION OF CHRISTIANITY TO CIVIL GOVERNMENT (1833) [hereinafter RELATION OF CHRISTIANITY], *reprinted in* RELIGION AND POLITICS IN THE

Freedom and order in any society are measured by the balance society strikes between an imposed social order and one that arises from adherence to shared values. This truth has become painfully evident in recent years, most notably in the former Soviet Union, where newfound freedoms are threatened by an epidemic of lawlessness in the wake of totalitarianism.[2] The United States has experienced its own problems with lawlessness. As Professor James Q. Wilson recently observed in the Harvard Godkin lectures:

> Many Americans worry that the moral order that once held the nation together has come unraveled. Despite freedom and prosperity—or worse, perhaps because of freedom and prosperity—a crucial part of the moral order, a sense of personal responsibility, has withered under the attack of personal self-indulgence. . . . High rates of crime, the prevalence of drug abuse and the large number of fathers who desert children and women who bore them all support the popular belief that responsibility has given way to selfishness.[3]

Over 150 years ago, there arose a similar lament. It was not, so much as today, about the harvest of crime and social decadence, but about the perceived state hostility to religion and how it might undermine the moral order and produce adverse social conditions. In 1833, Jasper Adams, one time President of the College of Charleston (South Carolina), some time professor of moral and political philosophy at Brown University, and a member of the Adams family of Massachusetts, published a sermon to the 1833 Convention of the Protestant Episcopal Church of the South Carolina Diocese entitled *The Relation of Christianity to Civil Government in the United States*. The sermon and accompanying notes were widely circulated among the intellectual and governing elites in America. It provoked significant commentary from statesmen such as John Marshall, Joseph Story, and James Madison, as well as critical review in the *American Quarterly Review*—all

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EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE 39, 51 (Daniel Dreisbach ed., 1996) [hereinafter RELIGION AND POLITICS].

[2] *See generally* Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizen Rights in Estonia*, 38 HARV. INT'L L.J. 315 (1997); Gennady L. Lezikov, *Statistical Information on Crime and Its Use in Crime Control*, presented at the Ninth United Nations Conference on the Prevention of Crime and the Treatment of Officers, Cairo, Egypt, Apr. 29-May 8, 1995, at 1-2 ("Crime became one of the major destabilizing factors of social development [in the former Soviet Union], its scale reached a threshold posing a real threat to the safety of the state and to realization of socioeceonomic reforms.").

[3] JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? 1 (1997).

of which are included in a new book, *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate*,[4] edited by Daniel L. Dreisbach.[5] The book makes available the full text of Adams's sermon and the diverse commentary it provoked. It also provides a unique glimpse of the various opinions concerning religion and government among the generation that produced the First Amendment. In making these historical sources available and in his exposition of their significance, Dreisbach reminds us of Oliver Wendell Holmes's oft-quoted aphorism that "[a] page of history . . . is worth a volume of logic."[6]

I. ADAMS'S THESIS

It is generally recognized that the early leaders of our country "shared the conviction that 'true religion and good morals are the only solid foundation of public liberty and happiness.'"[7] Indeed, "[t]he Founders . . . acknowledged that the republic rested largely on moral principles derived from religion."[8] In the 1820-30s, however, the federal government began abandoning past sympathies to religion. The ascension of populist Andrew Jackson to the Presidency brought anti-establishment views to the fore. Jackson's abandonment of the issuance of religious proclamations by the federal government and his strong opposition to the popular campaign to forbid Sunday mail delivery were perceived as political atheism and antireligious secularism.[9] Compounding this perception, Thomas Jefferson stepped forward to challenge the widely and largely unquestioned view that Christianity was part of the common law.[10] As an educator and clergyman, Jasper Adams observed this growing indifference to Christian values in America's political institutions. These provocations challenged Adams to explicate the historical

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[4] *See* RELIGION AND POLITICS, *supra* note 1.

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[6] RELIGION AND POLITICS, *supra* note 1, at xi (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)).

[7] City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor J., dissenting). "[T]he climate of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Charles Fahy, *Religion, Education and the Supreme Court*, 14 LAW & CONTEMP. PROBS. 73, 77 (1949); *see also* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 31 (1965) ("[A]mong the most important purposes of the First Amendment was the advancement of the interests of religion."); Arthur Sutherland, Jr., *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1318 (1949) (The history of church and state reveals "an intimate association between government and religion.").

[8] *Flores*, 117 S. Ct. at 2185 (O'Connor, J., dissenting).

[9] *See* RELIGION AND POLITICS, *supra* note 1, at 3-5.

[10] *See id.* at 12-14.

understanding of the relationship between religion and the national government. Drawing on early legal sources, Adams argued that in adopting the Establishment Clause the Framers did not intend for government to break all ties with religion, but only to prevent preference from being shown to any particular Christian sect.[11]

Adams perceived four "interests" as critical to the dynamic of American culture and society: peace, intellect and education, religion and morality, and pecuniary well-being.[12] Adams viewed religion as the most important of these interests because it was grounded in the founding values of the colonies and evidenced by the special protection afforded religion and religious conscience in the First Amendment.[13] In his view, the First Amendment charted a course that under the Establishment Clause prohibited governmental preferences among religious sects and under the Free Exercise Clause protected freedom of conscience. What Adams lamented in 1833, and the motivating reason for his sermon, was what he perceived to be the degradation and waning influence of religion among government leaders and in the community at large.[14]

Adams argued that the "disconnect" between law and the prevalent moral standard (Christianity) threatened the foundation of civil society.[15] In his view, the glue of society was not the *force* of government or even the force of reason embodied in the documents founding the republic, but, rather, the shared religious and moral values of the people.[16] These values, which at the time were rooted principally in Christianity, provided order where the force of the state failed or where the state was otherwise incapable of providing order. Adams believed that the failure of officials to affirm and nurture this essential, shared foundation through benevolence to religion sowed seeds that would yield a harvest of moral breakdown, threatening individual freedom and, ultimately, the freedom of society in general. In Adams's words:

> By excluding a Supreme Being, a superintending Providence, and a future state of rewards and punishments, as much as possible, from the minds of men, it will destroy all sense of moral responsibility; for, the lively impression of an omnipresent Ruler of the Universe and a strong sense of moral obligation, have, in the history of mankind, always accompanied each other; and whenever the former has been weak-

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[11] *See* RELATION OF CHRISTIANITY, *supra* note 1, at 46.

[12] *See id.* at 49 n.26.

[13] *See id.* at 49.

[14] *See id.*

[15] *See id.*

[16] *See id.* at 49-51.

> ened, it has never failed to be followed by a corresponding moral declension.[17]

Adams viewed the Constitution as a nonpreferentialist political document favoring religion in general, but prohibiting government from favoring any one religious sect and providing freedom of conscience for all. Because of the diversity among established churches and Christian sects in Colonial America, the Framers were indeed establishing a framework of government that of necessity required a "neutral" course among religious sects.[18] Thus, the Declaration of Independence could speak boldly of the Creator's endowment of certain inalienable rights, and the Constitution could include neutral references to religion. The Constitution was dated with reference to the birth of Christ ("in the year of our Lord"), as well as with the year of American independence.[19] It also acknowledged the importance of the Sabbath by extending the President's time limit to veto bills.[20] The Free Exercise Clause protected rights of conscience, permitting religion to flourish.[21] The Establishment Clause restrained Congress from making any "change in the religion of the country," something which Adams regarded as "too delicate and too important a subject to be entrusted to their guardianship."[22] Constitutional provisions in the states continued in effect, "not only recognizing the Christian religion, but affording it countenance, encouragement and protection."[23] For example, religious tests were excluded as a requirement for holding political office, which is also the case in the Federal Constitution. The failure to express more sympathy to religion in the Constitution, however, was in Adam's view by design, just as the Constitution left unstated other fundamental truths, such as the inalienable rights of the people, the political sovereignty of the people, and the right of the people to resist and abolish tyranny.[24]

II. THE DISPUTE—REACTIONS TO ADAMS'S VIEWS

The reaction to Adams's views was immediate and varied. John Marshall complimented Adams for giving "full influence" to the tense duality of official respect for religion and official protection of freedom of con-

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[17] *Id.* at 56 (quoting Jasper Adams).

[18] *See id.* at 46-47.

[19] *See* Jasper Adams, Notes to *The Relation of Christianity to Civil Government* [hereinafter Sermon Notes], *in* RELIGION AND POLITICS, *supra* note 1, at 59, 63.

[20] *See id.* at 63-64.

[21] *See* RELATION OF CHRISTIANITY, *supra* note 1, at 46-47.

[22] *Id.*

[23] Sermon Notes, *supra* note 19, at 61-63.

[24] *See generally* U.S. CONST.

science.[25] Marshall allowed that "the object of the colonial charters was avowedly the propagation of the Christian faith" and indicated that it would be strange, in a nation whose population was "entirely Christian," if "our institutions did not presuppose Christianity, [and] did not often refer to it, [and] exhibit relations with it."[26]

Joseph Story and James Madison commented more extensively, though in predictably different directions. Story, then an Associate Justice of the Supreme Court and later a professor of law at Harvard, shared Adams's nonpreferentialist views in that he generally thought that "Christianity [was] indispensable to the true interests [and] solid foundations of all free governments," but abjured preference toward any sect.[27] Story confessed that he looked "with no small dismay upon the rashness [and] indifference with which the American people seem in our day to be disposed to cut adrift from old principles, [and] to trust themselves to the theories of every wild projector in to [?] [sic] religion [and] politics."[28] Story later wrote at Harvard in his Commentaries on the law as follows:

> Probably at the time of the adoption of the constitution, and of the amendment to it . . . the general, if not the universal sentiment in America was, that christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government.[29]

Story also took issue with Thomas Jefferson's then published sentiment that the common law did not include precepts of Christianity, writing that "I am persuaded, that a more egregious error never was uttered by able men" and

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[25] Letter from John Marshall to Jasper Adams (May 3, 1883), *in* RELIGION AND POLITICS, *supra* note 1, at 114, 114.

[26] *Id.* at 113-14.

[27] Letter from Joseph Story to Jasper Adams (May 14, 1833), *in* RELIGION AND POLITICS, *supra* note 1, at 115, 115.

[28] *Id.*

[29] 2 JOSEPH STORY, COMMENTARIES OF THE UNITED STATES ON THE CONSTITUTION 593-94 (2d ed. 1851). Other nineteenth-century legal scholars have supported Justice Story's construction. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 224 (3d ed. 1898).

suggesting that Jefferson relied "on authorities [and] expositions which are wholly inadmissible."[30]

James Madison, in his eighty-third year, wrote to express disagreement with Adams's views. He felt that government should not support the religious inclinations of the American people. Madison appealed to "experience" as the "admitted umpire" of the relationship "between government [and] Religion."[31] In Madison's judgment, "[t]he worst of Government," were the papal systems, which wholly unified government and religion.[32] Likewise, European governments with legally established churches and "very little toleration of others" made for systems unfavorable "either to Religion or to government."[33] Writing to Adams, Madison proffered a comparison of the five colonies without established churches to those with established churches. Madison concluded that the colonies that prospered best were those that left the support of religion to "voluntary associations [and] contributions of individuals . . . ."[34] Madison saw in the latter "greater purity [and] industry of the pastors [and] in the greater devotion of their flocks," particularly in Virginia, as between the period during which Virginia had a state-supported church and the latter period during which it did not have a state-sponsored church.[35] Madison also thought that any tendency for excess or extravagance by "[r]eligion left entirely to itself" would be temporary and eventually tempered by reason.[36] What Madison called a "line of separation" between church and state would effect "an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, [and] protecting each sect against trespasses on its legal rights by others."[37]

The most severe criticism of Adams's work was contained in an unsigned review in the *American Quarterly Review*. It urged that "there can be no middle ground between perfect liberty of conscience and despotism—since to give government power to protect Christianity for instance, is to give it power to declare what *is* Christianity, and what is necessary for its protection—in other words to give it unlimited power."[38] The reviewer methodically disputed Adams's reliance on the evident sympathy to Christianity of the common law, colonial charters, and state constitutions. Instead,

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[30] Letter from Joseph Story to Jasper Adams, *supra* note 27, at 116.

[31] Letter from James Madison to Jasper Adams (Sept. 1833), *in* RELIGION AND POLITICS, *supra* note 1, at 117, 117.

[32] *Id.* at 118.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 118, 120.

[36] *Id.* at 120.

[37] *Id.*

[38] *Immunity of Religion*, AM. Q. REV., June 1835, at 319 [hereinafter *Immunity of Religion*], *reprinted in* RELIGION AND POLITICS, *supra* note 1, at 127, 149.

the reviewer argued that a careful review of these documents showed no such sympathy, but, rather, a uniform intent to eliminate established religion. The reviewer argued the error of governmental sympathy to religion, contending that it "will necessarily create a marked distinction between those who believe and those who do *not* believe the religion upheld and protected by law."[39] It would lead to discrimination, the invasion of conscience, and the demise of other liberties, such as freedom of speech.

III. COMPARISONS FOR TODAY

The original understanding of the Framers has played a significant role in the Supreme Court's interpretation of the meaning and reach of the Establishment Clause. In *Everson v. Board of Education*,[40] the Court proclaimed that the Framers intended to erect a "high wall" of separation between church and state.[41] In reaching this conclusion, the Court relied heavily upon the historical experience of Thomas Jefferson and James Madison in disestablishing the Church of England in Virginia. The Court's position has been heavily criticized. Professor Mark DeWolfe Howe has called it "pretentious" and "over simplified."[42]

> [T]he Supreme Court, by pretending that the American principle of separation is predominantly Jeffersonian and by purporting to outlaw even those aids to religion which do not affect religious liberties, seems to have endorsed a governmental policy aimed at the elimination of *de facto* establishments. The Court too often has allowed itself to become involved in an exercise in scholastic dogmatism—a venture in the acrobatics of logic which cannot, for very long, have an important effect on the actualities of American life.[43]

Howe suggests that separation between the precincts of religion and government was not so much a Jeffersonian, as an evangelical principle.[44] The

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[39] *Id.*

[40] 330 U.S. 1 (1947).

[41] *See id.* at 16. The Court relied on its previous holding in *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld the enforcement of a federal bigamy statute in the Utah Territory over a Mormon free exercise defense.

[42] HOWE, *supra* note 7, at 12.

[43] *Id.*

[44] *See id.* at 5. Howe attributes separationism to Roger Williams, a Baptist who was exiled to and later founded Rhode Island, because he believed government-established religion in Massachusetts had corrupted true religion. Williams wrote long before Jefferson of a wall of separation, mainly for the benefit of religion: "[W]hen they have opened a gap in the hedge or wall of separation between the garden of the church and

Court's choice of the Jeffersonian dialect ignored what Howe labels as the *de facto* establishment of religion in America and served to widen "the gap between current social reality and current constitutional law."[45] The Court also failed, in his view, to recognize more than a century of federalism in matters of religion and the "common assumption in the first decades of the nineteenth century that state governments [could] properly become the supporters and the friends of religion."[46]

In recent years, members of the Court have revisited the rendition of colonial history in *Everson*.[47] Notwithstanding Madison's Virginia roots and his role in drafting the First Amendment,[48] revisionists point out that it took all thirteen colonies and their representatives to ratify the Bill of Rights. They make reference to written sources, such as state constitutions and treaties, to contemporaneous and subsequent state and federal governmental practices, including presidential proclamations, as well as to congressional and military chaplaincies and publicly sanctioned prayer in Congress. Revisionists point out that Jefferson's alleged "high wall of separation," was

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the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day." HOWE, *supra* note 7, at 5. Professor Dreisbach points out in another recent work that other writers have disputed Howe's suggestion that Williams had any influence on Jefferson. *See* Daniel L. Dreisbach, *"Sowing Useful Truths and Principles": The Danbury Baptists, Thomas Jefferson and the "Wall of Separation,"* 39 J. CHURCH & ST. 455, 458 (1997) ("As for any direct influence of his thought on the ultimate achievement of religious liberty in America, he [Williams] had none.") (quoting Perry Miller, *Roger Williams: An Essay in Interpretation*, *in* VII THE COMPLETE WRITINGS OF ROGER WILLIAMS 10 (1963)). Indeed, the "wall" reference may have derived from the *Political Disquisitions* of James Burgh, a Scotsman whose writings influenced leaders of the American Revolution. *See id.* at 486-90 (1997). Burgh spoke of "an impenetrable wall of separation between things sacred and civil." *Id.* at 488 (citing JAMES BURGH, II CRITO, OR ESSAYS ON VARIOUS SUBJECTS 119 (1767)); *see* ISSAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH CENTURY ENGLAND AND AMERICA 205 (1990). Both John Adams and Thomas Jefferson recommended Burgh's *Political Disquisitions* to others. *See* Letter of Thomas Jefferson to Thomas Mann Randolph, *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 496-97 (1944); Letter from John Adams to James Burgh, *in* THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 351 (1851).

[45] HOWE, *supra* note 7, at 11.

[46] *Id.* at 28.

[47] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 609-30 (1992) (Souter, J., concurring); *id.* at 630-45 (Scalia, J., dissenting); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29-46 (1989) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 64-84 (1985) (O'Connor, J., concurring); *id.* at 84-90 (White, J., dissenting); *id.* at 91-113 (Rehnquist, J., dissenting); March v. Chambers, 463 U.S. 783 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970); *cf.* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

[48] Jefferson was in France at the time the Bill of Rights was drafted.

not in the Bill of Rights, but appeared in an 1802 letter from Jefferson to the Danbury (Connecticut) Baptists.[49] To revisionists, the "wall" is not nearly so high as the one constructed in *Everson*.

The views expressed today in the continuing debate over the proper boundaries of the Establishment Clause and of religion in American political life are as diverse as those expressed by Marshall, Story, Madison, and others in response to Jasper Adams's sermon. Dreisbach views the positions of Adams and Madison as more moderate among the views espoused by strict separationists and nonpreferentialists:

> Despite suggestions to the contrary, Adams did not advocate theocracy (at least not in the strictest sense of the word), any more than Madison championed infidelism or doctrinaire secularism. Adams was not intolerant of religious minorities, and Madison was not indifferent to religion and the concerns of the religious community. Significantly, Adams and Madison eschewed the extreme positions of exclusive establishment and strict separation respectively. Adams's "middle course" and Madison's "line of separation" were attempts to craft moderate responses to delicate political and constitutional questions. Those aligned with Adams and Madison, however, were often less moderate in their approaches and rhetoric. Participants in the debate have frequently talked past each other and often have unnecessarily inflamed passions and nurtured distrust of their opponents' motives.[50]

Dreisbach interprets Adams's motivation as a desire to buttress what Adams viewed as weaknesses in the requisite moral underpinnings of a free social order and societal stability, rather than as a desire to establish a national religion or church. If shared religious values were undermined, Adams feared that "it [would] be succeeded by a decline of public and private morals, and by the destruction of those high and noble qualities of character, for which as a community we have been so much distinguished."[51] Likewise, Madison had a beneficent motivation, "to promote the best and purest religion and to protect liberty of conscience from invasion by the state."[52] For Madison, "true religion prospered in the marketplace of ideas unre-

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[49] *See* Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802), *in* 16 THE WRITINGS OF JEFFERSON 281-82 (Albert Ellery Bergh ed., 1907).

[50] RELIGION AND POLITICS, *supra* note 1, at 152-53.

[51] *Id.* at 155 (quoting Jasper Adams).

[52] *Id.* at 157.

strained by the monopolistic control of the civil authority."[53] Dreisbach points out that Madison abandoned Jefferson's image of a "wall of separation" in favor of a more subtle metaphor that acknowledged the complex and ambiguous intersection of religion and civil government: "I must admit, moreover, that it may not be easy, in every possible case, to trace the *line of separation*, between the rights of Religion [and] the Civil authority, with such distinctiveness, as to avoid collisions [and] doubts on unessential points."[54]

Today, Adams's proposition that government should favor, or even endorse, religious precepts in recognition of the foundation of the social order sounds foreign. Greater diversity in the religious experience of the American people and forty years of Supreme Court Establishment Clause decisions anchored in *Everson*'s "high wall" doctrine would make efforts to carry out such a proposition nearly impossible, if not illegal.[55] At the same time, Adams's prophetic warning that a divorce between government and religion could lead to social breakdown is troubling in the face of recently spiraling statistics for drug use and abuse, murder, sexual harassment, child molestation, family disintegration, and other personal and social ills that cheapened the quality of life and imputed a tremendous human, as well as economic, cost. Social dysfunctions of this magnitude require governmental responses. Under current Establishment Clause doctrine, however, governmental responses must be weighted more toward the application of brute force than, as Adams would urge, an appeal to religious and moral principles that "pervad[e] the community, guid[e] the conscience, enlighten[ ] the reason, soften[ ] the prejudices, and calm[ ] the passions of the multitude."[56]

In recent decades, American government has chosen to advance its moral concerns through the appropriation of billions of dollars for public welfare and social programs. These programs temporarily have ameliorated problems of material want but have been less successful in curing the deeper problems of self-indulgence and personal irresponsibility. Recognizing that the symptoms of moral breakdown require a cure, government in recent years has resorted to the application of physical force by enacting laws with stiffer penalties,[57] restricting opportunities for parole,[58] punishing recid-

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[53] *Id.* at 156.

[54] *Id.* at 157 (quoting James Madison).

[55] *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

[56] RELATION OF CHRISTIANITY, *supra* note 1, at 51.

[57] *See* The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. §§ 13701-14223 (1994) [hereinafter 1994 Federal Crime Control Act].

[58] *See* VA. CODE ANN. § 53.1-151 (Michie 1994); *Brown v. Virginia Dept. of Corrections*, 886 F. Supp. 531 (E.D. Va. 1995); *Fleming v. Murray*, 888 F. Supp. 734 (E.D. Va. 1994).

vism,[59] incarcerating more offenders,[60] expanding enforcement of the death penalty,[61] and appropriating hundreds of millions of dollars for prisons, weaponry, and police.[62] This effort may have achieved some success in stemming the rise in crime rates.[63] Will such force, however, prove to be enough? At what cost to humanity and freedom? Is there any more that law and government can or should do to encourage a climate in which shared morality based in religion may act as an antidote to these seemingly rampant social ills?[64]

Because current Establishment Clause doctrine restricts government promotion of moral values associated with religion, there may be very little that law and government can do directly to encourage a climate of shared religious mortality, at least insofar as benevolence to religion is concerned. Jasper Adams undoubtedly would view current Establishment Clause doctrine as pitting government against religious belief and exercise. He would view the present barrier between politics and religion as too high, or perhaps unnecessary, because it prevents government from drawing upon an important, indeed essential, element of America's heritage—religious belief and exercise—as part of the solution to societal problems. In contrast, Madison

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[59] *See* Peter J. Benekos & Alida V. Menlo, *Three Strikes and You're Out! The Political Sentencing Game, in* MARILYN MCSHANE & FRANK R. WILLIAMS III, CRIMINAL JUSTICE: CONTEMPORARY LITERATURE IN THEORY AND PRACTICE 89 (1997) [hereinafter CRIMINAL JUSTICE].

[60] *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995 Table 1.9, at 8.

[61] *See* Amnesty International, *Amnesty International Report (1990): United States of America, in* MARGERY B. KOSSED, CAPITAL PUNISHMENT: THE PHILOSOPHICAL MORAL AND PENOLOGICAL DEBATE OVER CAPITAL PUNISHMENT 451 (1996); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of Attitudes: Americans' Views on the Death Penalty, in* CAPITAL PUNISHMENT, *supra*, at 486.

[62] *See* 1994 Federal Crime Control Act, *supra* note 57; U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 1990, at 2 tbl. 2, 6 tbl. 7.

[63] *See* U.S. Department of Justice, Federal Bureau of Investigation, Press Release, *Crime in the United States 1996* (Oct. 4, 1997). The F.B.I. states in releasing its final 1996 Uniform Crime Reporting Program statistics that the volume of serious reported crime declined 3% in 1996. Violent crime dropped 6%, and property crime 2%. The Crime Index Rate of 5,079 offenses per 100,000 United States inhabitants was 4% below the 1995 rate. *See id.*

[64] The relationship between positive law and shared societal values is, of course, interrelated. The law appropriates values to fashion social character. Indeed, "Aristotle believed that the repetitive conduct that forms habits and builds character is traceable, directly or indirectly, to the laws." Miriam Galston, *Taking Aristotle Seriously: Republican-Oriental Legal Theory and the Moral Foundations of Deliberative Democracy*, 82 CAL. L. REV. 331, 377 (1994). For Aristotle, moral argument without the force of law is ineffective, especially when people "habitually live a life ruled by passion." *Id.* at 377.

would herald this barrier as the beauty of the system, a sort of inverse benevolence. By restraining government from the precincts of religion, Madison would argue that true religion is enabled to flourish and exert its influence upon society with maximum freedom in ways that a closer relationship would corrupt and debilitate.

One asks whether these two positions are irreconcilable and just how far government is required by the constitutional scheme to withdraw from encouraging the beneficial effects of religion in society. Was Adams right in believing that the Constitution does not require government to disconnect itself from the benevolent accommodation of religion, while preserving rights of conscience under the Free Exercise Clause?

Relying mainly on political theory, the prevalent sentiment in the modern legal academy is generally "that law ought to be conducive to the religious experience and expression of its citizenry," but only if it operates "independent of the particular belief systems within society."[65] Dreisbach does not debate this sentiment, as such, but suggests that the modern lines of separation drawn by the Supreme Court have perhaps inhibited religious influences upon society now more than in the founding days of the republic.[66] In doing so, he cautions against the temptation "to impose twentieth-century values on eighteenth-century text" or "to view the actions of the framers through a secular lens."[67] He suggests that the answer to the question of the proper line of separation between church and state lies not so much in the text or the actions of the Framers, but in the federalism of the governmental system adopted in 1789.[68]

The principal government at the time of the framing of the Bill of Rights was state government. In most states, laws and practices that would

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[65] Diane Leenheer Zimmerman, *To Walk a Crooked Path: Separating Law and Religion In the Secular State*, 27 WM. & MARY L. REV. 1095 (1986). A sampling of the diversity of views in the academy's church-state debate may be seen in HAROLD JOSEPH BERMAN, THE INTERACTION OF LAW AND RELIGION (1974); David S. Caudill, *Pluralism and the Quality of Religious Discourse in Law and Politics*, 6 U. FLA. J.L. & PUB. POL'Y 135 (1994); Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1986); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990); Gary C. Leedes, *Rawls's Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083 (1993); Yehuda Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986); Michael J. Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 25 (1987); and Mark Tushnet, *The Emerging Principle of Accommodation or Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

[66] Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 999 (1996).

[67] *Id.*

[68] *See id.* at 997-99.

today be deemed an establishment of religion were widespread.[69] In all states, religion played a significant role in their affairs.[70] The new federal government, as Professor Stephen Botein has observed, was designed for certain general purposes:

> It did not police or educate; it did not embody the immediate will of the people. Compared with the governments of the several states, conceivably it was too distant from the citizenry and too restricted in the scope of its responsibility to require an official religious dimension. By the very nature of its limitations, it did not have to be directly associated with "sacred things." It was not so much that church and state had to be separated at the federal level, then, as that there was no federal state to be kept separate.[71]

The future would be handled by the Establishment Clause, which would protect against the establishment of a national religion, and by the Free Exercise Clause, which would guarantee the rights of conscience. The new national government was, in Dreisbach's words, "fragile and uncertain, and the framers no doubt thought it imprudent to address a subject the states jealously guarded."[72] Existing state constitutions would continue to define the importance and nature of the interrelationships between religion and government.[73] As Elizabeth Clark has written:

> The puzzling silence of the federal constitution makes more sense if seen in this light: one important function of the First Amendment was to restrain the federal government's power to interfere with state regulation of religion. The state was the appropriate overseer of religion under the federal system, and states were assumed to have been left free to establish, disestablish, or partially establish religion as they saw fit.[74]

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[69] *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 105-07, 218-21 (1986).

[70] *See id.* at 218-21.

[71] Stephen Botein, *Religious Dimensions of the Early American State*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 315, 322 (Richard Beeman et al. eds., 1987).

[72] Dreisbach, *supra* note 66, at 998.

[73] *See* HOWE, *supra* note 7, at 29-31; *see also City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

[74] Elizabeth B. Clark, *Church-State Relations in the Constitution-Making Period*, *in* CHURCH AND STATE IN AMERICA: A BIBILOGRAPHICAL GUIDE: THE COLONIAL AND EARLY NATIONAL PERIOD 157 (John F. Wilson ed., 1986).

In effect, the Constitution's reservation of powers to the states recognized the diversity of the colonial religious experiences, which included, in some instances, a close union between government and religion.

This all changed in the middle of this century, however, with the Supreme Court's incorporation and enforcement, through the Fourteenth Amendment, of important provisions of the Bill of Rights. The 1947 *Everson* case effected a profound shift of power premised upon what Professor Howe has described as "the blunt and undocumented assumption that when the nation adopted the Fourteenth Amendment it was the people's purpose to outlaw all state laws respecting an establishment of religion, even those which do not appreciably affect property, liberty or equality."[75] Whereas before *Everson* the states had been free to define church-state relationships, *Everson* withdrew from "the states the ability to define church-state relationships within their own jurisdictions."[76] More importantly, *Everson,* in effect, subjected the states to a uniform national regime of law expounded by the Supreme Court. Prior to *Everson*, there were few, if any, Establishment Clause decisions in any of the federal courts. After *Everson*, they have become legion. Lower court judges, lawyers, commentators, and government officials must now read the tea leaves of the United States Reports quite literally to discern the height, length, and depth of what Justice Jackson once predicted would be, and has now become, the "serpentine wall" dividing church and state.[77] The power of elected government to act benevolently toward religion and the moral values associated with it, once geared more loosely to standards prevalent in the communities of the states, is now bound by a straitjacket of judicial doctrine that has become increasingly indecipherable because of shifting divisions on the Court.[78]

The only remaining role for elected government apart from designating forums for speech of all kinds, is to outlaw religious discrimination, and even that, the Supreme Court suggests, must be limited strictly to clearly defined remedial purposes.[79]

If, as Adams and others suggest, there are principles in our society's religions that "guid[e][ ] the conscience, enlighten[ ] the reason, soften[ ] the prejudices, and calm[ ] the passions of the multitude,"[80] then the Supreme Court's doctrinal choices in the last fifty years between benevolent

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[75] HOWE, *supra* note 7, at 172.

[76] Dreisbach, *supra* note 66, at 999.

[77] McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

[78] *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995).

[79] *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[80] RELATION OF CHRISTIANITY, *supra* note 1, at 51.

accommodation,[81] nondiscrimination and coercion,[82] purpose, effect, and entanglement,[83] endorsement,[84] and hermetic separation[85] assume a unique and critical significance in our constitutional system. If Adams is right, those doctrinal choices may even determine whether society will have more prisons or more schools.

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[81] *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Hobbie v. Unemployment Appeals Comm'n., 480 U.S. 136 (1987); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

[82] *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Lee v. Weisman, 505 U.S. 577 (1992); Larson v. Valente, 456 U.S. 228 (1982).

[83] *See* Agostini v. Felton, 117 S. Ct. 1310 (1997); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[84] *See* County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

[85] *See* Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980).