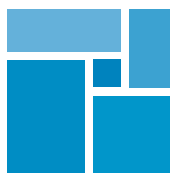


CRACKS IN THE WALL OF SEPARATION?

Jewish perspectives on the new challenges of church-state relations



THE PEW
FORUM
ON RELIGION
& PUBLIC LIFE

The American Jewish community has for decades played a crucial role in legal battles over the separation of church and state, most often siding with those who favor “strict separation.” But in recent years, as the cultural climate has shifted and First Amendment case law has allowed religion a greater role in public life, the community finds itself divided over issues such as school vouchers, faith-based initiatives and Department of Homeland Security grants to religious institutions.

In October 2004 the Pew Forum, in cooperation with the American Association of Jewish Lawyers and Jurists and the Louis Finkelstein Institute of the Jewish Theological Seminary, brought together three of the American Jewish community’s foremost church-state experts for a discussion of this widening divide. Their conversation took place within the context of an impending presidential election and the Supreme Court’s recent agreement to hear church-state cases involving public displays of the Ten Commandments in government buildings and the constitutionality of the Religious Land Use and Institutionalized Persons Act.

MARC STERN

Marc Stern is assistant executive director of the American Jewish Congress and co-director of the Commission for Law and Social Action.

It’s pretty clear where the Jewish community has been: we have been generally in support of a strict separation between church and state for 55 or 60 years. We have also supported religious liberty — that is, the legal rule that government cannot regulate religion the way it regulates other enterprises in American life.

That position has contributed, I think, much to the success of American Jewry, particularly when one

looks back to where the country was 55 or 60 years ago, with a mild Protestant hegemony everywhere, certainly in the public schools and in much of government. The Catholic Church was not hospitable to the Jewish community (this is all before Vatican II). The notion of separation of church and state and protection for religious exercise was a natural one for the Jewish community, simply as a matter of self-interest. Of course it was in large part based not only on self-interest in the United States but on historical experience with established churches, churches that, even if they weren’t formally established, worked hand in glove with governments. Moreover, given the libertarian

tinge of American Jewry with regard to government regulation of morals, it was a natural place to fall.

Without debating today whether those positions remain philosophically sound, the fact is that the world around us has changed. The Jewish community, however, has not changed or even amply reconsidered where it is. In the first place, the success of the enterprise that we undertook 55 years ago — I think, soundly — now may call for some reexamination of itself. Do we need to be exactly where we were when we had a much more hostile, less open, society?

Second, the fact is the law has changed, and it seems to me some of these changes are not likely to be undone. For example, the Supreme Court is now wedded to a vision of the Establishment Clause that focuses on equal treatment of religion with non-religion, not the older “strict” separation view championed by Justices Black, Douglas and Frankfurter.

This may sound overly broad and overly simplistic, but that’s basically where the Court is. I think they’re committed to the “equal” portion of that formulation — at least where statutes facially discriminate, they are not going to tolerate that. With regard to religious speech, the principle of equal treatment of religious speech with secular speech is so well ensconced that one is hard-pressed to think over the last 15 years of a single dissenter from it.

The rule that there can be religious clubs after hours in high school seems to me not likely to change anytime soon. It’s an appealing principle: it’s easy to work with, it’s philosophically defensible, it’s popular. There doesn’t seem to be any systematic support for changing it, not in academia and not in the public sector generally. That’s a reality. But it is not a rule the Jewish community has accepted.

The question of whether equal funding coupled with private choice ought to be the test, or whether there

ought to be a stricter rule against funding, is much more dependent on how the make-up of the court changes in the coming years. But for the moment, the rule of neutral statute/private choice is ensconced. It will be years before it is changed. And yet on both of these scores, one hears many in the Jewish community still speaking yearningly for the old rule — if it

will come back, if we wish it to come back. Certainly with regard to the speech cases, it’s not happening. It is not an achievable goal.

So where ought we to be? The first thing that needs to be said is that there is no longer a “we” in the Jewish community. I mean that, in a sociological sense, we are now riven in two in a way almost more fundamental than the impor-

tant differences in theology between the Reform, Orthodox and Conservative movements.

The polls have shown fairly consistently for some while that American Jewry is in two parts. Less than half of American Jewry is affiliated with a synagogue, and more than half of American Jewry is not. We have two attitudes towards religion. There are significant parts of our community that regard institutionalized religion with some hesitancy, and *a fortiori* they fear it if it interacts with government. There’s a fear of government intersection with religion that comes from a deep-seated secularism. Those are people I’m paid to represent. But there’s another half of the community that has a very different attitude towards religion, and I represent these people, too. They are active in synagogues. They are not disposed to see religion in every case and in every intersection with government as a hostile intruder that needs to be repulsed.

I believe that the distinction is real, substantive and palpable within our community. It is most readily discerned with regard to the Free Exercise Clause. There are substantial organizations in American Jewish life that, over the course of the last 55 years, have paid almost no attention to religious liberty. They are cer-

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tainly not prepared to see religious liberty trump secular values of equality, choice and reproductive choice — and, in fact, are actively opposed to the extension of religious liberty principles to those cases. Others in Jewish life who have a different attitude, even though they may come out in different places on individual cases, are not prepared to dismiss religious liberties claims out of hand.

The difficulty of saying where the community should be depends very much on which half of the community you are talking about. In my experience, which goes back three decades, the gap is now wider than it has ever been. I find it harder and harder to straddle it. It has become very difficult, almost impossible, to do.

There are still some fundamentals on which we agree. Nobody seriously believes the Jewish community ought to tolerate official preferences for one faith or the other; that remains a bedrock principle on which we remain united. We believe, I think, generally and across the board, that religious activities ought not to be coerced by government. But beyond that, agreement breaks down.

Naturally enough, there are disagreements about what role religion ought to have in shaping public policy. While the religious movements often will not agree on the substance of what public policy ought to be, they all believe they have some role to play in shaping that public policy. But there are others in Jewish life who are concerned about injecting religion into public policy debates.

Which way the Jewish community proceeds depends very much on the next three or four appointments to the Supreme Court — which depend, of course, upon the outcome of the upcoming presidential election. Regardless, though, the question we need to ask ourselves is whether we have now reached a point in American life where the equality principle, at least as applied to the Establishment Clause side of the ledger, is a sufficient guarantee of Jewish well-being, or whether we still need more restrictive, older separation principles to protect American Jewry.

The answer to that is not plain. In the first place, it's not plain because if you accept the equality princi-

ple with regard to non-establishment government assistance for religion, it's hard to say that you don't have to accept it on the other side of the ledger with regard to religious liberty. As for myself, I think the religious liberty loss is greater than the gain on the Establishment Clause side. But that's a debatable proposition.

Focusing only on the Establishment Clause for the moment, I think we need to ask whether equality will work for us. There are reasons to think it will not. Aside from all the philosophical arguments that could be mustered, let me give you an example. Douglas Laycock of the University of Texas Law School, probably the nation's foremost academic on the subject, has written a law review article in which he says that he thinks the government ought to be able to distribute money to religious institutions through vouchers if it does so neutrally. But — to summarize a very lengthy article — the government also ought to be able to impose neutral regulations. One regulation that he regards as neutral says if you accept vouchers, you have to admit anybody who comes with a voucher, regardless of religion. Well, that's a perfectly neutral rule if your religious worldview requires you to evangelize, to spread the word to everybody.

But the Jewish position in America is that we need to draw boundaries. I don't know of any Jewish day school, no matter who runs it, that doesn't have some sort of religiously based entry requirements. So that's a "neutral" rule. You know, Doug Laycock hasn't got a discriminatory bone in his body, so I'm not accusing Doug of anything. But what appears to be a neutral rule doesn't work for us, while it works for Catholics and perhaps for evangelicals.

On the other hand, and why I think this is such a difficult debate, I proposed recently that the Jewish community ought to give serious consideration, as other religious and social communities have done, to taking advantage of the Equal Access Act and organizing clubs for Jewish kids in public schools after hours on the same terms that evangelicals and others do. This suggestion was met with shocked horror. I'm shocked that people are shocked, because, as I said, the law is not changing. Here's an opportunity to take advantage of; why shouldn't we do it?

Those things cut in opposite directions. They're difficult decisions because one has to see what's coming, both in terms of the presidential election and upcoming Supreme Court decisions. But for me in particular, sitting at the American Jewish Congress — which, although purely secular, purports to represent American Jewry more broadly —

the problem is we don't have an American Jewry anymore. We've got at least two American Jewries pointing in very different directions, and they're both entitled to be represented. Their fears and yearnings and desires are entitled to be taken into account. And as far as I can see, they point in exactly opposite directions.

NATHAN DIAMENT

Nathan Diament is director of the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America and co-editor of *Tikkun Olam: Social Responsibility in Jewish Thought and Law*.

I want to generally spend my time fleshing out the two Jewries that Marc just spoke about. Because I do think we have, as he indicated, a lot of common ground on the jurisprudential side, but probably the differences are highlighted more on the policy side.

So let me say very briefly that from my organization and my community's perspective, on the jurisprudential side, we think the move to neutrality and equal treatment has been somewhere between a half to three-quarters good, and a quarter not good. And what I mean by that is in the Establishment Clause context, equality is something we generally welcome and appreciate — that when government deals with non-governmental entities, there should be equal treatment and non-discrimination as a general principle.

But neutrality is more of a mixed bag on the Free Exercise Clause. On the one hand, what Marc talks about — the notion of equal access for after-school religious clubs to public schools on the same terms as the Boy Scouts, the Girl Scouts, Junior Republicans or Democrats or whatever else — is something we should welcome. On the other hand, we should still realize that the Free Exercise Clause, like free speech, like many other constitutional rights, is a right granted to the individual and held by the individual to make a claim against government, and that there is a section of Free Exercise law that should allow personal individual liberty to be accommodated and sometimes demand that government make accommodations and exceptions

that are not purely even-handed. And that's a very difficult course to navigate.

On policy and politics, though, I would like to start by talking about an issue that relates to the current locus of debate in our community about government funding for religion, and that is regarding homeland security. After a long and protracted maze of events, just a couple of weeks ago Congress appropriated, and the president yesterday signed, the Homeland Security Appropriations Act, which contains \$25 million to make grants to non-profits that are deemed to be at risk of terrorist attack. And religious non-profits are not excluded from possibly being recipients of those grants.

When this legislation was being developed, there was considerable debate within the Jewish community as to whether our religious institutions would be included or not. Certainly religious institutions in our community, unfortunately, are as at risk as any other Jewish communal institution.

So to make a long story short, some safeguards and indirect mechanisms that were put into the legislation to try and assuage the fears of those who want greater separation between church and state did not succeed in assuaging everyone's fears. And so we came to a point this past summer where the Senate Governmental Affairs Committee was considering this legislation. And lo and behold, a debate ensued as Senators Durbin, a Democrat of Illinois, and Lautenberg, a Democrat of New Jersey, offered an amendment to explicitly exclude religious institutions from receiving any grants under this program that would aid them in putting up bollards around their building or a fence or mylar coating on the windows.

Senator Specter, a Republican of Pennsylvania and the lead sponsor of the legislation, also on the committee, engaged in a debate primarily with Senator Lautenberg over whether this was the right thing to do. And the debate, interestingly, devolved into a debate over which side of this debate more American Jews were on. Senator Lautenberg touted a letter from David's organization and pointed out that the Reform movement is the largest single denomination, and Senator Specter read a list of Jewish organizations endorsing his legislation, including ours, AJ Congress, and AJ Committee, and they went back and forth about where the Jews stood on this issue. And ultimately it fell to Senator Lieberman of Connecticut, the ranking Democrat on the committee, to cut off this very interesting Jewish-centric debate, and say, "I'd like to speak for those non-Jews that will be protected by this program as well."

Professor Jack Wertheimer, the provost of Jewish Theological Seminary, has an essay in this month's *Commentary* magazine in which he talks about this issue, whether Jewish defense organizations still have what he calls an other-worldly quality of "remaining committed to fighting yesterday's wars, whatever the consequences." And, specifically addressing this homeland security debate, he asks, "In what sense is the physical safety of real people, Jews in these institutions and other people in their proximity, less important to Jews than an intractable belief in the separationist faith?"

This is a cutting-edge issue for our community, one that we're going to continue to grapple with. There are really two tracks here, two threads that are intertwined where new things are happening.

One is the policy questions and the jurisprudential questions which are new; the other is related to our community, as Marc says, not being monolithic and perhaps in some respects being in transition. With great respect to our sponsors from the Pew Forum, I can illustrate this point by referencing a poll they

recently put out trying to chart the American religious landscape here in 2004, and contrast it with some Jewish community polling of late.

The Pew Forum poll went out of its way to subdivide Catholics and evangelicals and mainline Protestants into subgroups of traditionalists, centrists and modernists. They didn't do this with the Jewish set of respondents they had, probably because their sample was too small. But we can learn some things by comparing just a handful of numbers.

Of the approximately 6 million Jews in the United States, 35 percent identify themselves as Reform, 26 percent as Conservative, 10 percent as Orthodox and

20 percent just as Jewish. But in the Pew Forum survey, 24 percent of the Jewish respondents said they attended synagogue weekly. From more recent Jewish community polling, 58 percent of the Orthodox community says they attend synagogue weekly or more.

In the Pew Forum poll, 55 percent of Jews favored same-sex marriage. In a recent poll put out by the American Jewish Committee, looking behind the general numbers, 52 percent of the Orthodox opposed any legal recognition of same-sex partnerships and only 26 percent would support civil unions. In the Pew Forum poll, 42 percent of Jews favored school vouchers. In the AJ Committee poll, 64 percent of the Orthodox favored vouchers.

So within the American Jewish population you have a younger, growing, less assimilating cohort, more involved in Jewish education, less inclined to intermarry, whose values and institutional interests are not consonant with the general perception of the community-at-large and the strict separation philosophy.

And there's every reason to believe that the divergent trends you see reflected in the Pew Forum poll with regard to the Christian denominations — where the difference is not between Catholics and Protestants,

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—*Nathan Diament*

for instance, but between traditionalists and modernists or progressives — those trends are echoed in our community as well.

But lest you think I'm suggesting that Orthodox Jews and other Jewish traditionalists are merely evangelicals who read their Bible from right to left, there are significant differences, both on policy and in attitude. Because Judaism has a different theology about when life begins, we support stem-cell and cloning research. And most Jews, including Orthodox and traditionalists, will oppose wholesale prohibitions on abortions. With regard to attitudinal issues, we still have a sense in the Orthodox community of being part of a minority faith group and needing to have the accommodation and the tolerance of the general society around us.

On the policy and politics front, there are several issues where the institutional interests of our community don't hue to the policies that were put together in the 1950s, when strict separation served us very well. We were involved some months ago in the case of a community day school in Seattle which was damaged in an earthquake and applied to FEMA for federal disaster funds to rebuild — just like the office parks and private homes — and was told, "You can't receive FEMA aid because our policy is against granting such aid to your kind of institution."

Thankfully, we were able to work with the current administration to get that policy reversed. And I was gratified to see there was not much hue and cry, even from the strict separationist camp, with regard to that decision. Similarly, historic preservation grants administered by the federal government had not previously been given to preserve many religious, historic buildings in this country. And, again, you have to be careful: you don't want federal money rebuilding the altar in a historic church, or the nave in the cathedral. But it may be a different matter when the Touro Synagogue in Newport, Rhode Island — or the Old North Church in Boston, for that matter — needs structural repairs to its roof.

In the political realm in 2000, when Joe Lieberman spoke often and openly about his faith, the ADL and others in the strict separationist camp criticized him.

Yesterday, *The Washington Post* reported on Senator Kerry now talking more and more about his faith and his beliefs. He now takes to citing Bible verses regularly in his speeches.

So the Democratic presidential campaign and the camp where the separationists generally find their home, at least for the moment, are moving away from that ideology on a political level. Those who want faith kept in the private sphere — I would submit, at least — have lost the battle.

Towards summarizing and wrapping up here, I would say that we should be happy about this in the Jewish community. As Marc noted, even though we might disagree on some policy issues, my organization and David's organization agree that religious values and religious principles are important and should inform the public-policy debate.

I don't think we should think about this in terms of crass compromise — how we can get a few more dollars to protect our synagogues or what have you. But, in fact, it is an approach that is pragmatic, but grounded in principle. What should animate us is an insistence on religious freedom, diversity and tolerance — not imposed secularism. And when the government engages in government action, while still maintaining a strong and vigorous principle of individual religious liberty, that is the right and balanced approach.

Marc closed by asking, "Is the equality principle regarding the Establishment Clause enough protection for us as a religious minority in this country?" I think your answer to that question depends on whether you agree or disagree with a point that I've heard Leon Wieseltier and others make many times: The question is, is the Jewish experience in the U.S. not merely quantitatively, but qualitatively and fundamentally, different from the experience of Jewish history over the long term?

Philip Roth has a book out now in which he tries to sketch out an America which is, thank God, fictional, in which the Jewish experience is no different from what our grandparents and great-grandparents experienced in Europe. There's a reason, though, why it's fictional. And we should recognize that we've been

blessed in this country to have an experience that is qualitatively different, in which Jews enjoy an unbe-

lievable freedom and tolerance and acceptance, and we should relish that experience.

DAVID SAPERSTEIN

David Saperstein is director and counsel of the Religious Action Center of Reform Judaism and co-chair of the Coalition to Preserve Religious Liberty.

We are at a point where, as a nation, we are clearly reassessing the role of religion in public and political life, so I'm delighted to have this opportunity to contribute to the debate.

I want to turn to what I think is at the core of the discussion that you heard. It is the issue of neutrality — what it means for the government to treat religion “equally,” what it means to treat religion “neutrally.” I submit to you that what the framers intended, and what has served religions in America most well, is a neutrality principle very different from the kind of neutrality that we've heard articulated here today. The current interpretation of neutrality that we hear on the Establishment Clause side is a neutrality in which the government treats religion equally to all other groups. Whatever benefits are going to be given to other groups ought to be given to religion as well. If provision is made for public speech to take place at a certain locale, religious speech ought to be allowed as well. If financial benefits are given to a class of non-profit institutions, they ought to benefit religious groups as well. It is what I call “facial neutrality” — that is, you treat religion under the rules of the law exactly the way you treat everything else.

The problem is that that is not the historic understanding of neutrality. The historic understanding of neutrality was that the government should remain neutral on religion. It should neither be hostile to religion, nor should it benefit, support or endorse religion. Now, let me play this out on both sides of the First Amendment clauses.

For the Free Exercise Clause, let's assume, hypothetically, that the state of Connecticut passed a law saying

state employees could not wear hats indoors. A “facially neutral” approach would say that you've got to treat everyone alike, so religious hats are treated just like all other hats. A “functionally neutral” approach, on the other hand, requires government to be neutral on religious issues. So in order for the government not to either prevent or require the wearing of religious hats, it has to give an exemption to the neutral rule banning hat wearing and let the individual decide.

On the Establishment Clause side, a “facially neutral” law says, as I described before, “All these benefits, rights, privileges go to religion.” A “functionally neutral” approach says, “*Only* religion has an Establishment Clause.” The government, the framers, clearly, beyond any debate, did not want to treat religion like everything else. That seems indisputable. The government is not allowed to pass any law that even touches on the issue of establishing religion.

So the question of whether or not religion is to be treated differently is answered by the First Amendment itself. And what it required was that the government stay out of religion. What that meant is that we have all kinds of rights, protections, privileges and exemptions that non-religious entities don't have. And it has served us well. But if you keep saying, “Treat religion equally to everything else,” eventually the nation is going to believe you. And that's not really what the proponents of facial neutrality want.

The proponents want to have all of the rights that everyone else has when rights are being given, but not the responsibilities. That is, they want to keep all their exemptions from neutral regulations on the Free Exercise side, and they want to keep all of their protections on the Establishment Clause side. So, yes, they want the government money, but they want to be able to discriminate with government money. Yes,

they want the government money, but they still want to be free of requirements to register as lobbyists and to report on their lobbying activity. Yes, they want to have their speech up with other people's speech, but they want to have the special protections in tort law that they often have, and so on down the line.

Well, you can't have your cake and eat it too. You can't, for the sake of a bowl of porridge, give up a birthright about one of the things that made America great for the Jew. For it is precisely the combination of the Free Exercise Clause and the Establishment Clause that made America different from any nation before, and few after. Because what it said was, for the first time in Jewish history, it doesn't matter whether all 290 million Americans believe that the way you worship is wrong; and it doesn't matter if all 535 members of Congress, nine members of the Supreme Court, the president of the United States and, yes, even the vice president of the United States believe that what you have to say is wrong. So long as your exercise of your rights does not infringe upon anyone else's, you have the inalienable right to live and worship the way you want, and to say what you want. And we celebrate those rights not in the abstract. Rather, we celebrate those rights precisely because without them you cannot have the free marketplace of ideas that is so indispensable to religion.

And precisely because of that combination, for the first time in Jewish history — although it took many generations for us to really fulfill the promise of what the framers offered us — for the first time in American history, we had a vision of a nation that said, "Your rights and opportunities as a citizen will not depend upon your religious practices, your religious beliefs, your religious identity."

And it is precisely during the Warren and Burger Court era, which strengthened separation of church

and state, which enhanced the rights of women and minorities — Jews, Catholics, dissenters, disabled, agnostics and atheists — that the Jews moved from the peripheries of American society to the very center of American political, professional, academic and economic life.

That structure that Marc and Nathan have called the "traditional structure" served us well and the nation well. It is particularly needed in this, the most religiously diverse country in the history of the world, with two thousand religions, faith groups, sects and denominations. Keeping that separation has been vital to America's pluralism and tolerance, without the kind

of competition — for government sponsorship, our symbols here, our prayers there — against each other. The last thing that America needs is the kind of sectarian divisiveness that other nations have engaged in.

For a long time we saw the religious right assert a vision that would have imposed their views on others by changing the

Constitution's Establishment Clause, by enacting constitutional amendments on a handful of core issues or legislation, from school prayer, to abortion, to scientific creationism, to censorship. They lost all of those battles. They lost them in the courts. They lost them in the Congress of the United States.

And so in the last five to seven years, they began to shift to issues they thought could win middle America, those issues that financially benefited middle America (vouchers, charitable choice) and those symbolic issues that could win their hearts. And the polls show they were right on these symbolic issues — things like prayer before football games or graduation, or posting the Ten Commandments. People say, "What's the big deal about those issues?" That's where the battleground is now. And the same is true with a lot of these voucher cases as well as the funding cases on those on-the-cusp issues that were alluded to — disaster relief, national

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landmarks and homeland security. Marc has given a very thoughtful analysis of how you could take pieces of those and legitimately justify them, constitutionally, without greatly changing the doctrine.

But a lot of folks who want to change the doctrine jump on these marginal issues and say, “Ah-ha, they prove the principle of equal treatment, and therefore we have to apply it to everything else that they have argued for” — e.g., school prayer — and that is a real danger to us, because by buying into those things, we risk everything.

Let me just close with a few remarks about the touchiest of these issues, the Homeland Security Bill. Some people may wonder if we can really be against synagogues getting money from the government to retrofit and make them secure in an age of terrorism. This is not a case of that view being wrong. This is a case where two valid policy and moral principles are simply in tension with each other.

Let me give you my argument. First, comparatively little will be gained for security, and a great deal will be lost for religious freedom if we buy into this, because it will be used to raise up the “equality principle” and to argue that it should apply to everything. The final version of the bill was devoid of any of those protections negotiated over months between the Jewish community and the bipartisan sponsors of the bill. It was, in many regards, the worst of all possible worlds.

Second, there is a great deal we have done in training, in careful coordination with law enforcement officials and the Department of Homeland Security, to protect our synagogues — without that kind of funding.

Third, if the community were really committed to helping day schools and synagogues, since most grants pass through intermediaries (like federations and community relations councils), if directed to those institutions that can constitutionally accept them, it frees up community money that could go to the day schools and the synagogues.

Fourth, while numerous efforts were made to improve the bill, the version that passed had none of the improvements we made. And many groups

expressed serious reservations: the ADL, the American Jewish Committee, the American Jewish Congress, the Conservative movement, the Reform movement, the Reconstructionist movement. It wasn’t that they were all opposed to it — many of them hadn’t made up their mind what they would do if faced with that choice, and some stayed neutral in the end when the vote finally came about in this form — but the bill, in the form that passed, was considered very problematic for our community.

Finally, I would argue that this money will help very few congregations. The United Jewish Communities’ own consultant concluded that a full security retrofit for a decent-sized synagogue, day school or community center would run in the range of \$750,000. Obviously, you can do a lot here for less money. But it costs hundreds of thousands of dollars to do it. So a \$25 million appropriation — spread not across the Jewish community, but spread across houses of worship, hospitals, museums, schools — will have little impact on the Jewish community. But whether the allocation is \$25 million or \$25 billion, the same damage is done to our priceless protections ensuring the separation of church and state.

In the end, it has been the concept of separation of church and state that has lifted up American Jewry, giving it more protections, rights and opportunities than we’ve known anywhere else. It has been that wall keeping government out of religion that has allowed religion to flourish with a diversity and strength in America unmatched anywhere in the democratic world today. Yes, there may be places, as Marc and Nathan have suggested, where we can look at how to find compromises that can meet compelling needs. Maybe there ought to be, on the Establishment side, a “compelling interest test” akin to what we argued ought to exist on the Free Exercise side, so that in very limited, extreme instances, like terrorist threats, we could address those issues.

But to abandon our fundamental principles, to use those issues as a way to pry open the door, to end the fundamental protections offered by that wall of separation between church and state, would be disastrous for American Jewry, and, I argue to you, would be disastrous for our nation.

DISCUSSION

After their formal presentations, the speakers took questions from the audience and addressed points that the other presenters had made in their remarks. The Pew Forum has excerpted only portions of this discussion. In the question to which Nathan Diament responds below, he was asked to clarify the difference between his and David Saperstein's interpretation of "neutrality" with respect to the Establishment Clause and the Free Exercise Clause.

MR. DIAMENT: I think David reads the First Amendment and says, "Only religion has an Establishment Clause." I read the First Amendment and say, "Only religion has two clauses." I think part of the problem, aside from one's actual jurisprudential position — and the reason why Supreme Court jurisprudence in the religion arena has been such a mess — is that there are two clauses. And for a while, the court tried to issue opinions in which they seemed to realize there were two different clauses. But much more of late, they ignore that and lump them together.

But I think you can read it as saying that the Establishment Clause is a restriction on the government — we didn't want an official state-sponsored religion or anything along those lines — and the Free Exercise Clause is, like free speech and other constitutional rights, a personal individual right. It's a right that can be held by an individual religious institution; in other words, a legal person, not just a human person.

On that reading, when the government is giving out funds or other kinds of benefits, it can't choose to say, "We're funding groups in Washington, D.C., that work with homeless people and feed them 20 meals a week, but just because you're a religious organization, you automatically can't get a grant." The government can demand of you religion-neutral regulations and requirements, such as showing them the receipts to prove that you actually spent the government money on the food that you fed to the people. But that institution will also have Free Exercise rights in terms of how it defines itself and its religious mission.

MR. STERN: There is a claim in medieval Jewish philosophy that if you can imagine something, it must exist. And one can imagine a position that Nathan has described. The difficulty is that Supreme Court cases get decided in the larger matrix, and the larger matrix in America is egalitarianism. Once you introduce egalitarianism into a cause, it becomes difficult to say half the cause is egalitarian and the other half of the cause is anti-egalitarian. It's particularly so because the cases that reach the Supreme Court are typically the very hardest cases the system can throw up.

In a case that I'm working on with others now, the question is whether the religion clause requires preferential access for religious materials into a prison when equivalent secular materials are not allowed in. Under free speech doctrine, you can't prefer one kind of speech over another. It's an egalitarian doctrine. But you transfer that to the religion clause, and that becomes a hard case. The kosher food cases are no longer getting to the Supreme Court, or the Islamic kosher food cases, because those are regarded as simple.

Yes, Nathan is right; one can imagine his scenario. For a while, it was actually the law of the land. But in the larger egalitarian matrix, it isn't so easy to pull it off.

RABBI SAPERSTEIN: Let's remember that this is not a hypothetical. We actually know what has happened: With devastating consequences, the Supreme Court of the United States bought the equality argument on the Free Exercise Clause with *Oregon v. Smith* and gutted any non-equal protection arguments except for a couple of very small exceptions, gutting the entire schema of constitutional protection of Free Exercise.

Here we know what happens when you buy into this argument. The enormity of the risk of buying into this, and assuming that once you open up that Pandora's box you can control it, is of almost unimaginable consequences. We can lose everything over this, all except the most extreme abuses, if we buy into the

Justice Rehnquist argument — you can't establish a national religion, you can't prefer any one religion over the other — exactly the things the Senate in its first day of debate rejected explicitly in terms of the Establishment Clause. If that's all you're left with, and everything else is allowed, then our children will have a very different America than we have had. So we are giving up a lot for the sake of the money.

MR. DIAMENT: Of course it relates to what you think is the bigger risk and what you think is the essential principle, and I would take exception to the notion that this is all about money. There are plenty of other instances that have nothing to do with money where this could be discussed. And we agree completely that the gutting of the Free Exercise Clause in the *Smith* case is terrible, wrong, and we need to find an opportunity to roll that back.

The logical extension of David's argument is indeed that if the World Trade Center had fallen on Trinity Church, the federal government or New York state money used to rebuild the whole neighborhood couldn't rebuild that building because it's a religious building. And if you want to pay that price, if you say that's a necessary price for religious freedom, you can take that position. I don't think it's clear that it's necessary, and I also don't think it's clear that it impacts upon the ambit of free exercise.

MR. STERN: I think there is a grave danger to injecting religion into public life. I cringe every time I hear clergy endorsing candidates. I don't think it's a good idea. But whether there's a right to do it is a different question. What I find frustrating in David's remarks is that while he always does a powerful presentation on why we should be somewhere else, as a practicing lawyer I recognize that it has been 14 years since the Free Exercise Clause disappeared. I don't see a ground swell in either academia or in the lower courts for any change. Large parts of our community are, to be blunt, very happy that the law is that way.

As I also said, much of the Establishment Clause as some Jews envision it is not coming back any time soon. While Nathan doesn't talk about the dangers that I think are there, David doesn't talk about the fact that

when a federation calls me up and says, "Should we start a Jewish religious club?" I can either give them David's sermon on what the law *ought* to be, or I can tell them, "These are the ways you can do it." The debate I want to have is which advice I should give.

MR. DIAMENT: I'll take an opportunity to talk for a moment about dangers, since Marc raised that, especially in the context of charitable choice, which is, policy-wise and legally, clearly the most complicated area of this question of how government funds and interacts with religious institutions. The complication of the charitable choice context is that you're talking about drug rehabilitation programs and other kinds of programs relating to people in need, and administering them with government dollars. And how do you deal with protecting the constitutional and religious rights of the clients of the agency? How do you deal with separating out the religious functions of the agency from what's being publicly funded?

The interesting thing is — and I'm just telling this historically — that we are now in a much more dangerous place than we were when we were actually having the debates in Congress. At least in the congressional arena, there was actually a debate about the dangers, a discussion of how we could write laws and regulations to try to address those dangers and build a fence around whatever it is we wanted to build a fence around.

And there were two ways to approach that. Much of the Jewish community, David and others, said, "There's absolutely no way to do this. You can never ameliorate these dangers enough, and therefore we're flat out opposed to all of this, and we're going to fight it hammer and tong." Then there was the approach we took. I can tell you, the Orthodox community is not interested in government-funded proselytization in drug rehab programs, either. But we decided to engage with the process and see if we could get congressmen and senators to write rules and regulations that would deal with that issue.

On the one hand, David and his camp succeeded. The legislation didn't go anywhere. On the other

hand, as a result of that, the White House was freed to implement these programs on its own by executive order, however it darn well wanted to. So the box has been opened, and this has all been loosed, and we do not have the kinds of restraints in place that might have served people and the communities and these principles better.

RABBI SAPERSTEIN: I'll respond first to Marc's point and then to Nathan's. Conceptually, what Marc said, of course, is true. But we work together all the time, Marc, Nathan and I, writing guidelines about what's allowed, what's not allowed in a lot of different settings, working within the rules, et cetera. The rules are where they are. The question is, do we want to go any further? And I hear Marc on my side of that issue saying no; if we go much further we'll risk the very thing that has made America special in general and special for the Jews.

Nathan's point about charitable choice is a bit astonishing. Let me see if I got this right: But for the fact that the significant majority of the Jewish community — other than the Orthodox Union — stood together against charitable choice and got enough people in both parties to recognize the dangers of

passing it, we would not have the administration implementing all these things unilaterally. And I've got to say, what are you talking about?

This administration came in saying it was going to do it. From the day it hit office, it began issuing executive orders and rules and regulations to begin to make these changes. When they gave up on getting the Congress to do the work for them, they just went ahead and did it themselves, ignoring the will of Congress, ignoring the history of the court decisions in these areas.

Of course this was going to happen anyway. To blame me and the opponents of charitable choice is a kind of strange reading of the ideological proclivities and the behavior of this administration.

The administration said, this president says, "I do what I say I will do." It said it would do this and by hook or by crook it went ahead and did it. And I think we're all the losers for that. I think that is really bad, because it's going to result in a whole slew of new court battles over this stuff. And I think it's a bad precedent in terms of the administration ignoring the will of Congress on these issues.

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