Why Do We Think the American Framers Wanted to Separate Church and State?

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George H.W. Bush, America's first President Bush, was a Navy aviator during World War II. His plane was shot down, and he found himself floating in a dark and dangerous Pacific Ocean. Years later, during his presidential campaign, he was asked what he had thought about during those desperate hours. The future President responded, "Fundamental values, Mother, Dad, . . . and God – and the separation of church and state."

What I'd like to talk about today is how we've come to think that the separation of church and state is such a fundamental American constitutional value that a presidential candidate had to give it equal time with God in describing what could have been his last moments on earth.

Perhaps the clearest statement of this American commitment to church-state separation comes from Supreme Court Justice Hugo Black's majority opinion in a 1947 case called *Everson v. Board of Education*. Justice Black noted that many of the "early settlers" came to America "from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." In particular, by the time of the American Revolution, what Black described as America's "freedom-loving colonials," led by Thomas Jefferson and James Madison, had won a hard-fought political battle to eliminate Virginia's established Anglican church.

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This dramatic and catalytic event in Virginia, according to Black, later culminated in the religion clauses of the First Amendment to the United States Constitution, "the drafting and adoption of which," Black wrote, "Madison and Jefferson played such leading roles." As a result, that Amendment "had the same objective" as the Virginia Statute for Religious Freedom, which had been drafted by Jefferson. This allows Justice Black to invoke Jefferson's image of a "wall of separation between church and state" as the heart of a constitutional provision whose language is actually considerably less evocative: It reads, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . . "

I like to call this the classical mythology of the First Amendment because it is both a compelling story and largely untrue. When the Constitution was adopted in 1787, Americans were actually sharply divided over church-state issues. In fact, the freedom-loving colonials could not even agree on whether states should have tax-supported churches. While a slight majority in Virginia voted for the disestablishment of what had been the Church of England, a similarly close vote in Massachusetts ensured tax support for churches there for another 50 years. There simply was no national consensus on church-state matters.

So why was the First Amendment adopted? The issue was limited to the one thing everyone **did** agree on: that there would be no national church. And so, the Framers were simply answering a non-controversial, yes-or-no question without having to deal with their considerable church-state differences at the state government level, which is where the battles would continue almost indefinitely.

Thus, the First Amendment was not the triumph of the Virginia disestablishmentarian view over the Massachusetts method of tax-funded churches. It was simply an acknowledgement that the new federal government would not set up a national religious

establishment, something the Baptists, in particular, were worried about because they saw the country's two largest denominations – the Calvinist Congregationalists and Presbyterians – beginning to hold joint annual meetings. Here's the background.

During the debates over the proposed Constitution, occasionally someone would raise the point that there was the risk of a national establishment of one church to the detriment of all the others. In response, the defenders of the Constitution would say that Congress had no power over religion, and, besides, America's religious diversity would prevent any one church from becoming dominant.

Ultimately, only three states proposed an anti-establishment amendment, and they did so in almost identical language: "no particular religious sect or society ought to be favored or established by law in preference to others." And New Hampshire submitted an amendment reading, "Congress shall make no law touching religion."

Beyond these proposals, the record is impressively silent. A few people were worried about the "establishment of a national religion," something no one was in favor of. Those who endorsed tax-supported churches – and there were many in New England – wanted them to exist at the state level, not as a feature of the national government. The only disagreement was whether an amendment was needed to say what everyone agreed about.

Ultimately, the Constitution was ratified without change, and the subject of amendments was deferred until Congress was elected.

In that initial congressional campaign, James Madison had a tough race to win one of Virginia's seats in the House of Representatives. To get elected, he had to promise his Baptist constituents that he would take care of their concerns about religion. And so, when he reluctantly assembled a Bill of Rights, something he had opposed during ratification, he included

a non-establishment clause. In introducing it, he said, "whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to [think that Congress might have the power to] establish a national religion." His amendment read, "nor shall any national religion be established."

When the House had its brief debate, there was impressively little interest in this clause. Daniel Carroll was the only one who spoke in favor of it. He said, "many sects have concurred . . . that they are not well secured under the present constitution." He said he wouldn't "comment . . . about phraseology" since he just wanted to satisfy the community's wishes.

Roger Sherman said it was unnecessary because "Congress had no authority . . . to make religious establishments." And Madison said again what it meant: "that congress should not establish a religion, and enforce the legal observation of it by law."

A committee took out the politically-charged word "national," a term the anti-Federalists were generally opposed to, so it read, "nor shall any religion be established." This led Connecticut's Huntington to worry that the federal courts might read it in a way that would prevent them from enforcing financial pledges for the support of local churches. Madison then proposed to put "national" back in, so that it would be clear that it was only a "national religion" being discussed.

Livermore of New Hampshire introduced his state's "no touching" provision, that is, "Congress shall make no law touching religion," saying that "the sense of both provisions was the same." His language passed 31-20. A few days later, it was replaced by language from Fisher Ames of Massachusetts that read, "Congress shall make no law establishing religion." That was the final House version.

With no recorded debate, the Senate responded with: "Congress shall make no law establishing articles of faith or a mode of worship."

In the end, the final version read: "Congress shall make no law respecting an establishment of religion." And the best evidence we have for what Congress had in mind is that the goal was simply to say that there would be no Church of the United States. Congressmen who commented to friends and family about this and other provisions in the Bill of Rights called them "frothy and full of wind" – uncontroversial language designed to placate people who were worried that the federal government might have too much power.

Representatives from both anti-establishment Virginia and pro-establishment Massachusetts could embrace it because it had nothing to do with their own state's activities, nor did it stand for any broad church-state principle. It simply answered in the negative the question of whether there would be one national church like the Church of England.

So, if the Constitution did not actually articulate a grand American principle of church-state separation, where did Justice Black's classical mythology come from? After all, that mythology – not the Framers' understanding of the language – is what has largely defined the First Amendment for the last 65 years.

In an era in which academia is judged as much by its real world impact as anything else, I'm pleased to report that the answer is: scholarship. Through the transformational medium of the Supreme Court, eminent 19th and 20th century historians have made the First Amendment what it is today.

It all started with a wedding. On August 3, 1874, 32 year old George Reynolds married Amelia Jane Schofield. This was a first marriage for Amelia Jane, but it was George's second, and that was the problem. He had just violated a new federal law against polygamy.

Reynolds was convicted, and he appealed to the Supreme Court. One of his claims was that since his Mormon faith required him to be polygamous, he was merely exercising his constitutionally protected religious rights. And so, ninety years after the First Amendment was adopted, the Supreme Court would interpret the religion clauses for essentially the first time.

Chief Justice Morrison Waite didn't know what to do. Before he was appointed Chief Justice, he had been an unknown railroad lawyer from Toledo, Ohio. He was what we now call a stealth nominee from a swing state during a tight presidential election. His new colleagues called him "His Accidency."

With no previous cases to rely on, Chief Justice Waite turned instead to his next-door neighbor. The neighbor was historian George Bancroft, perhaps the preeminent American historian of the era. Bancroft wrote history as heroic literature, and he rarely let facts get in the way of a good story. In this case, Bancroft pointed to his hero, Thomas Jefferson, saying that his Virginia Statute on Religious Freedom "shows the opinion of the leading American statesmen" at the time of the Constitution. The fact that Jefferson was actually out of the country when the First Amendment was adopted never came up.

The Chief Justice then went to the library and skimmed through the index to Jefferson's collected works. There, he discovered an 1802 letter, in which Jefferson said that the First Amendment built a "wall of separation between church and state." This statement had been buried for nearly 80 years until Chief Justice Waite unearthed it and cemented it into the foundations of church-state jurisprudence. Bancroft, by the way, got a thank-you note, but no visible credit for creating the Jeffersonian First Amendment.

70 years later, the *Everson* case arrived at the Court. It involved a state law providing bus fares for children attending religious schools. One of Black's colleagues, former professor

Wiley Rutledge, took the lead in sending the Court back into the 18th century via a lengthy opinion centered on a biography of James Madison. The biography was written by Rutledge's old friend, historian Irving Brant. Brant had given Madison top First Amendment billing over Jefferson, but, once again, separation was the major theme. When he wrote his opinion, Rutledge didn't point to Madison's relaxed comments about a national religion during the Congressional discussion of the establishment clause, but instead quoted at length from Madison's much sharper Virginia disestablishmentarian rhetoric.

Meanwhile, Justice Black was calling on Madison's friend Jefferson to the same separationist end, and his opinion culminated in what has been called by one scholar "the most famous *dictum* in any Supreme Court opinion on the Establishment Clause." Black goes on for 150 words about the meaning of the clause, stating in particular that neither the state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." A clause that had been narrowly designed to speak only to the issue of a national church had been fully transformed into a broad church-state principle applicable to every state, city and school district in the country.

And, once again, academic scholarship set the tone. This strongly separationist statement was lifted virtually verbatim from a historian: one-time Oxford student Charles Beard. In particular, Beard's 1943 book, *The Republic*. Beard, however, isn't cited at all, and it took another 50 years for Black's biographer to award him the credit that was due.

In both of these cases, the justices looked past the arguments of litigants and lawyers for constitutional raw material. On their own initiative, they sought out learned scholars with no interest in the parties or the lawsuits, whose insights, would then inform the justices' view of the law of the land.

Is it merely "law office history"? That is, amateur history performed by lawyers or judges simply to promote a favorable outcome in a particular case. Some commentators certainly think so. In reviewing the *Everson* opinions, Princeton Politics professor Edward Corwin thundered, "the Court has the right to make history…; but it has no right to make it up."

In the case of Chief Justice Waite's opinion in the polygamy case, I don't think it is as much law office history as what we might call constitutional creation *ex nihilo.* Conveniently located historian George Bancroft may have taken Chief Justice Waite down a more narrow historical path than the facts deserved, but Bancroft appears less likely to have been motivated by a desire to influence constitutional interpretation than to tell the story in a way that provided maximum credit to the statesman he most revered. And Justice Waite seems just to have been trying to get the Constitution right.

Everson presents a different case. The justices' private papers make it clear that they knew in advance what decision they wanted to reach, and history was the convenient means to that jurisprudential end. "We all know," wrote Justice Rutledge in a memo to his colleagues on the Court, "that this [case is about] a fight by the Catholic schools to secure … money from the public treasury. It is aggressive and on a wide scale."

He then set off on a premeditated search-and-employ mission to find historical sources to bolster his opinion. As he later wrote to a friend, "I felt pretty strongly about the … case but tried to keep the tone of what I had to say moderate and also to avoid pointing … in the direction of any specific sect. The Virginia history," he wrote, "was admirable for [that] purpose."

And Justice Black's first draft of his *Everson* opinion hardly mentioned a word of history. Only when Rutledge summoned up the Framers did Black borrow – liberally and without attribution – from any sources that were close to hand that would take him where he wanted to

end up. In short, the historical analyses in *Everson* merely served to validate, and to camouflage, a set of preordained conclusions.

To conclude, then, Why ***Do*** We Think the American Framers Wanted to Separate Church and State? As one distinguished historian has recently written, "Before the revolution, it was broadly assumed that shared religious convictions were the … ideological glue that made any sense of community possible. By insisting on the complete separation of church and state, the founders successfully overturned this long-standing presumption."

But that's really not quite right. We tend to think that church-state separation is a fundamental American constitutional value because of a long-standing but impressively silent partnership among what we might call the cognitive power elite – Supreme Court justices and scholars. These jurisprudential and intellectual leaders jointly devised a constitutional creation myth that may be oversimplified, irredeemably whiggish, and quite possibly just wrong. But it has certainly stood the test of time. And it has given us the chance today to see, at least in the American setting, an example of what we might call the historical construction of constitutional reality. That is, the direct impact of scholarship on the Supreme Law of the Land. It may not necessarily be good history, but it is certainly what the lawyers call good law.