Facts and Fictions of Separation of Church and State

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In the past decade, a veritable cottage industry of important new books, articles, briefs, and judicial opinions has emerged devoted to the history of separation of church and state. We now know a great deal more about the history of separationist rhetoric from Thomas Jefferson’s famous 1802 Letter to the Danbury Baptist Association to Justice Hugo Black’s opinion in the 1947 case of Everson v. Board of Education. We know more about the odious manipulation of separationist rhetoric by the Ku Klux Klan and other nativist groups against Catholics, Jews, and other minority faiths and immigrant groups in the later nineteenth century. And we now see more clearly than before that Justice Black drew some of his inspiration from these nativist teachings, particularly those of the KKK of which he was a member, in crafting his famous Everson opinion. For peculiar souls like me who labor on the history of law, religion, and the First Amendment, this has all been a sobering, but edifying corrective to the traditional story.

But the newly corrected history of religious liberty is quickly beginning to create its own distortions of the historical record. The first distortion is the argument that the principle of separation of church and state was an invention of nineteenth-century anti-clerical and anti-religious elites, starting with Thomas Jefferson. The second distortion is the argument that this principle was hijacked by later nineteenth-century anti-Catholic and anti-religious nativists who introduced all manner of prejudicial changes in nineteenth century American law in the name of separation of church and state but to the detriment of religious liberty. Because of its recent paternity and because of its odious pedigree, it is now argued, we should jettison the principle of separation of church and state and some of the harsher laws that it occasioned, including old laws against state funding and support of religious institutions.

I respectfully disagree. My reading of the sources leads me to conclude that separation of church and state has a much longer history, and much more complex and much more wholesome pedigree than some recent historiography allows. Today, I shall argue that, long before Jefferson penned his 1802 letter to the Danbury Baptists, the eighteenth-century American founders had at least five understandings of separation of church and state, several with deep Western roots. Each of these understandings made important contributions to the protection of religious liberty in the nineteenth century. Each of these understandings still hold enduring lessons for us today, as I shall argue by way of conclusion.
I.

Separation of church and state is often regarded as a distinctly American and relatively modern invention. In reality, separationism is an ancient Western teaching rooted in the Bible. The Hebrew Bible repeatedly commanded the chosen people of ancient Israel to remain separate from the Gentile world around them and to separate the Levites and other temple officials from the rest of the people. The Hebrew Bible also made much of building and rebuilding walls to protect the city of Jerusalem from the outside world and to separate the temple and its priests from the commons and its people. The New Testament warned Christian believers to remain separate from the world and its temptations and ever mindful that their true citizenship lies in heaven. Echoing the Hebrew Bible, St. Paul spoke in Ephesians 2:14 literally of a “wall of separation” between Christians and non-Christians interposed by the Law of God.

These biblical passages have inspired a long history of Western reflection on separation and the wall of separation between church and state. The archives hold a massive farrago of patristic, medieval, and early modern sermons and biblical commentaries that call for a separation between the faithful and fallen, the religious and the political, the clergy and the laity, the spiritual and the temporal, the prelate and the magistrate, the church and the state. At the same time, churchmen and statesmen over the centuries forged countless treaties, statutes, and constitutional texts to define and delimit their respective offices and powers and to determine their mutual duties and rights. These theological and political teachings were distilled into powerful models of separationism -- two ways, two cities, two powers, two swords, two kingdoms, and other dualistic constructions. Many of these models were transmitted across the Atlantic to the American colonies, and then transmuted to accommodate local colonial conditions.

The eighteenth-century American founders called on this European and colonial legacy to press at least five concerns.

First, the principle of separation was invoked as a means to protect the church from the state. This had been a common Christian understanding of separation since the first century. It was captured in the Christian clergy’s perennial call in subsequent centuries for “freedom of the church” – or what the Edict of Milan of 313 had called the “free exercise and practice of religious groups.” The eighteenth-century American founders’ principal concern was to protect church affairs from state intrusion, church properties from state encroachment, church rules and rites from political coercion and control.
This understanding of separation of church and state was prominent in eighteenth century America. Elisha Williams, the great New England Puritan jurist, spoke for many churchmen when he wrote: “[E]very church has [the] right to judge in what manner God is to be worshipped by them, and what form of discipline ought to be observed by them,” and what clergy are to be elected by them, from all of which the state must be utterly separate. George Washington wrote in 1785 of the need “to establish effectual barriers” so that there was no threat “to the religious rights of any ecclesiastical Society,” including particularly beleaguered minorities like Jews, Catholics, and Quakers. Thomas Jefferson called for government to resist what he called “intermeddling with religious institutions, their doctrines, discipline, or exercises.” “Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own peculiar tenets,” Jefferson wrote in 1784. And none of this can concern or involve the state.

This first understanding of separation of church and state was captured especially in state constitutional guarantees of the free exercise rights of peaceable religious groups – the right of religious bodies to incorporate and to hold property, to appoint and remove clergy and other officials, to have sites and rites of worship, education, charity, mission, and burial, to maintain standards of entrance and exit for their members, and more -- all of which were specified in state constitutions. This understanding of separationism was also implicit in the First Amendment free exercise guarantee. Earlier drafts of the First Amendment, and the cryptic House debates that have survived about these drafts, spoke repeatedly of the need to protect religious sects, denominations, groups, or societies, to guarantee their rights to worship, property, and practice. None of this concern for the detailed rights of religious groups was rejected in the House debates – and can at least be plausibly read into the generic free exercise guarantee that was ultimately passed.

Second, the eighteenth-century founders invoked the principle of separation to protect not only the church from the state, but also the state from the church. This was a more recent Western understanding but it became increasingly prominent in the seventeenth and eighteenth centuries. “The sorest tyrannies have been those, who have united the royalty and priesthood in one person,” wrote the authors of Cato’s Letters in 1723. “Churchmen when they ruled states, had not only double authority but also double insolence and remarkably less mercy and regard to conscience, property,” and the domains and demands of statecraft. In the same vein, John Adams devoted much of his 1774 Dissertation on the Canon and the Feudal Law to documenting what he called the “tyrannous outrages” that the medieval Catholic Church and early modern Protestant churches had inflicted through their control of the state. This was “a wicked confederacy between two systems of tyranny,” Adams wrote with ample
bitterness. This second understanding of separation of church and state helped to inform the movement in some states to exclude ministers and other religious officials from participating in political office. Such exclusions had been commonplace among seventeenth-century American Puritans and Anabaptists. But arguments for such clerical exclusions became more commonplace in eighteenth-century America. Seven of the original thirteen states and 15 later states banned ministers from serving in political office – state constitutional provisions not formally outlawed until the 1978 Supreme Court case of McDaniel v. Paty.

Third, the principle of separation of church and state was invoked as a means to protect the individual’s liberty of conscience from the intrusions of both church and state. This had been an early and enduring understanding of separationism among colonial Anabaptists and Quakers. This argument became more prominent in eighteenth century America. “Every man has an equal right to follow the dictates of his own conscience in the affairs of religion,” Elisha Williams wrote in 1744. This is “an equal right with any rulers be they civil or ecclesiastical.” James Madison put this case in his 1785 Memorial and Remonstrance calling for what he called “a great barrier” between church and state to defend the religious rights of the individual. Thomas Jefferson’s famous 1802 letter to the Danbury Baptist Association also tied the principle of separation of church and state directly to the principle of liberty of conscience. After his opening salutation, Jefferson’s letter reads thus:

Believing with you that religion is a matter which lies solely between a man and his God, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

In Jefferson’s formulation here, separation of church and state assured individuals of their natural right of conscience, which could be exercised freely and fully to the point of breaching or shirking social duties. Jefferson is not talking here of separating politics and religion altogether. Indeed, in the very next paragraph of his letter, President Jefferson performed an avowedly religious act
of offering prayers on behalf of his Baptist correspondents. He wrote: “I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man.”

Fourth, the principle of separation of church and state was occasionally used to argue for the protection of individual states from interference by the federal government in governing local religious affairs. Thomas Jefferson sometimes used the principle of separation in this federalist jurisdictional sense as well. Jefferson said many times that the federal government had no jurisdiction over religion; religion was entirely a state and local matter in his view. As he put it in his Second Inaugural: “In matters of religion, I have considered that its free exercise is placed by the constitution independent of the [federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities.”

The separation that Jefferson had in mind here was between local church-state relations and the federal government. The federal government could not interfere in the affairs of local churches. And the federal government could not interfere in the affairs of local states vis-à-vis these local churches. Under this federalist jurisdictional reading of separationism, state governments were free to patronize and protect religion, or to prohibit or abridge religion, as their own state constitutions dictated. But the federal government was entirely foreclosed from the same.

Some scholars have imputed this fourth understanding of separation of church and state into the First Amendment provision that “Congress shall make no law respecting an establishment of religion.” The argument is that Congress shall make no laws “respecting” a state establishment of religion. In 1789, when the First Amendment was being drafted, six states still had some form of religious establishment, which both their state legislatures and constitutional conventions defined and defended, often against strong opposition. Moreover, Virginia had just passed Jefferson’s bill for the quote establishment of religious freedom, also against firm opposition. Having just defended their state establishments (of whatever sort) at home, the new members of Congress were not about to relinquish control of them to the new federal government. This is a plausible reading of the “respecting” language in the First Amendment, though the evidence for this reading is very thin. This federalist reading of the establishment clause is becoming more prominent today. It was given strong expression in a very recent concurring opinion by Justice Thomas in the Newdow pledge of allegiance case -- as part and product of the Court’s neo-federalist revolution of many areas of constitutional law in the past decade, and as part of the Court’s
seeming effort to unincorporate the religion clauses from the due process clause of the Fourteenth Amendment.

Fifth, and finally, the principle of separation of church and state was adduced as a means to protect society and its members from unwelcome participation in and support for religion. Already in later colonial America, several religious groups used separationism to argue against the established church policies of mandatory payments of tithes, required participation in swearing oaths, forced attendance at religious services, compulsory registration of church properties and more. At the turn of nineteenth century, the language of separation of church and state also began to fuel broader campaigns to remove traditional forms and forums of religion in law, politics, and society altogether, and of special state protection, patronage, and participation in religion.

This was the most novel, and most controversial, understanding of separation of church and state in the young American republic, but it began to gain rhetorical currency in the nineteenth century. The first notorious instance came in 1800 during the heated election debates between Thomas Jefferson’s Republican party and John Adams’ Federalist party. This was a clash of propaganda machines that made the recent Bush-Kerry campaign look like child's play. Adams’ party accused Jefferson of being the anti-Christ and whore of Babylon, a Jacobin infidel and secularist bent on destruction of the necessary religious foundations of law and necessary alliances of church and state. Jefferson’s party accused Adams of being a Puritan pope and religious tyrant bent on subjecting the whole nation to his suffocatingly narrow beliefs and to his smug, self-serving ministers who stood foursquare against liberty and progress.

These proved to be only the opening shots in a century-long American battle over the meaning and means of separating church and state. The battles broke out thereafter over dueling, freemasonry, lotteries, drunkenness, Sunday laws, slavery, marriage, divorce, women's property rights, women’s suffrage, religious education, blasphemy prosecutions, enforcement of Christian morals, and more. These were battles fought in Congress and in the courts, in states and on the frontier, in churches and in the schools, in clubs and at the ballot box. They were largely wars of words, occasionally wars of arms. The battles included many familiar foes -- Republicans and Federalists, the north and the south, native Americans and new emigrants. They also included a host of newly established political groups: the Know-Nothing Party, the American Protective Association, the National Liberal League, the American Secular Union, the KKK, and dozens of other new groups.

Let me just focus on one running episode in this great nineteenth-century battle, namely, the repeated clashes between Protestants and Catholics over
separationism. The long and sad story of the anti-Catholicism of nineteenth-century American Protestants is well known. Around 1800, American Protestants and Catholics had seemed ready to put their bitter and bloody battles behind them. But with the swelling tide of Catholic émigrés into America after the 1820s -- all demanding work, building schools, establishing charities, converting souls, and gaining influence -- native-born Protestants and patriots began to protest. Catholic bashing became a favorite sport of preachers and pamphleteers. Then rioting and church-burnings broke out in the 1830s and 1840s, followed by even more vicious verbal pillorying and repressive actions against Catholics.

What several recent studies have made clear is that the principle of separation of church and state became one of the strong new weapons in the anti-Catholic arsenal. Foreign Catholics were for the union of church and state, the propagandists claimed. American Protestants were for the separation of church and state. To be a Catholic was to oppose separationism and American-style liberties. To be a Protestant was to defend separationism and American-style liberties. To bash a Catholic was thus not a manifestation of religious bigotry, but a demonstration of American patriotism. Protestants and patriots began to run closely together, often tripping over each other to defend separationism and to decry and deny Catholics for their failure to do so. All this a proper corrective that students of American religious liberty need to hear.

But it is important that the corrected story not now be read as a simple dialectic of Protestant separationist hawks versus Catholic unionist doves, as several recent writings and briefs have done. And it is important to be clear that the Protestant-Catholic battle over separation of church and state had two sides, with Catholics giving as well as taking, winning as well as losing.

First, many American Catholic clergy were themselves separationists, building their views in part on ancient patristic and medieval models of two communities, two cities, and two powers. These American Catholic clergy saw separation of church and state as an essential principle of religious liberty and embraced the doctrine without evident cavil or concern. Both Alexis de Tocqueville and Lord Acton commented on this at some length.

Second, many Protestant anti-Catholic writings started not so much as gratuitous attacks upon American Catholics as counterattacks to several blistering papal condemnations of Protestantism, democracy, religious liberty, and separation of church and state. The papacy, charred by the savagery of the French Revolution, had a quite different view of separationism than many American Catholics. In the 1832 papal document Mirari vos, for example, Pope Gregory XVI condemned in no uncertain terms all churches that deviated from the Church of Rome, and all states that granted liberty of conscience, free
exercise, and free speech to their non-Catholic citizens. For the pope it was an “absurd and erroneous proposition to claim that liberty of conscience must be maintained for everyone.” The pope “denounced freedom to publish any writings whatever and disseminate them to the people.... The Church has always taken action to destroy the plague of bad books.” The pope declared anathema against the “detestable insolence and probity” of Luther and other Protestant “sons of the devil,” those “sores and disgraces of the human race” who “joyfully deem themselves ‘free of all’.” Even worse, the Pope averred, “were the plans of those who desire to separate the Church from the state, and to break the mutual concord between temporal authority and the priesthood.” The reality, the Pope insisted, was that state officials “received their authority not only for the government of the world but especially for the defense of the [Catholic] Church.”

In the blistering Syllabus of Errors of 1864, the papacy condemned as cardinal errors the proposition that “Protestantism is nothing more than another form of the same true Christian religion, in which it is equally pleasing to be than in the Catholic Church.” It is a cardinal error that “the Church ought to be separate from the State, and the state from the Church.” Six years later, the Vatican Council declared the pope’s teachings to be infallible, and condemned Protestants as “heretics” who dared subordinate the “divine magisterium of the Church” to the “judgment of each individual.”

It is perhaps no surprise that American Protestants repaid such alarming comments in kind -- and then with compounding interest. The Pope, as Americans heard him, had condemned the very existence of Protestantism and the very fundamentals of American democracy and liberty. Many Protestants saw in the papacy’s favorable references to its past medieval powers specters of the church’s tyrannical rule in a unified Christendom. This simply could not be for Protestants. Conveniently armed with new editions of the writings of Martin Luther and John Calvin, American Protestants repeated much of the vitriolic anti-Catholic and anti-clerical rhetoric that had clattered so loudly throughout the sixteenth century Protestant Reformation.

At least initially, the loud commendation of America’s separation of church and state and loud condemnation of the Catholic union of church and state was more a rhetorical quid pro quo to the papacy than a political low blow to American Catholics. But inevitably there was plenty of political imitation and plenty of cheap shots taken at the American Catholic clergy, particularly those who echoed the papacy. And inevitably, this rhetoric brought anti-Catholicism and pro-separationism into close association in the minds of the propagandists.

A third and final caveat is that when local anti-Catholic measures did pass, as they too often did in the later nineteenth and twentieth centuries, both the U.S.
Supreme Court and Congress did sometimes provide Catholics with relief, often using the very principle of separation of church and state. Thus in *Cummings v. Missouri* (1866), the Court held that a state may not deprive a Catholic priest of the right to preach for failure to take a mandatory oath disavowing his support for the confederate states. In *Watson v. Jones* (1871) and four later cases, the Court required civil tribunals to defer to the judgment of the highest religious authorities in resolving intrachurch disputes, explicitly extending that principle to Catholics. In *Church of the Holy Trinity v. United States* (1892), the Court refused to uphold a new federal law forbidding contracts with foreign clergy, a vital issue for the Catholic magisterium. In *Bradfield v. Roberts* (1899), the Court upheld, against establishment clause challenge, a federal grant to build a Catholic hospital in the District of Columbia. In *Pierce v. Society of Sisters* (1925), the Court invalidated a state law making public school attendance mandatory, thereby protecting the rights of Catholic parents and schools to educate children in a religious school environment. These and other Supreme Court holdings were, in part, expressions of the principle of separation of church and state. And there were many more such Catholic victories in state courts, in cases where separation was again used as a means to protect religious consciences, clergy, and corporations from state interference.

II.

All this changed rather dramatically with the Supreme Court case of *Everson v. Board of Education* (1947). This case made two major moves at once. First, the Court applied the First Amendment establishment clause to the states: "Congress shall make no law....", now became "Governments of any kind shall make no law respecting an establishment of religion" – a complete rejection of the federalist understanding of separation of church. Second, Justice Black read into the establishment clause a strict separationist logic that was amply coated and coded with the anti-religious sentiments that Black had absorbed as a former ranking member of the KKK. The largely fringe anti-clerical and sometimes anti-religious sentiments of the later nineteenth century were suddenly lifted to a constitutional mandate for the entire nation.

The First Amendment establishment clause “means at least this,” Justice Black wrote for the Everson court: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."
“Religion is too powerful, too sinister, and too greedy,” Black wrote a bit later, “to permit its unhindered pervasion” or perversion “of the civil magistracy.” “[T]he same powerful religious propagandists who are allowed to succeed in making one inroad on the state and its laws, doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it is nearly always by insidious approaches that the citadels of [religious] liberty are most successfully attacked.” “The First Amendment has thus erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”

The Supreme Court applied its strict separationist logic primarily in cases challenging the traditional state patronage of religious education. In more than two dozen cases after Everson, the Court purged religion from the public school and removed religious schools from direct state support. In Lemon v. Kurtzman (1971), the Court distilled the separationist logic of its early cases into a general test to be used in all establishment clause cases. Henceforth every law challenged under the establishment clause would pass constitutional muster only if it could be shown (1) to have a secular purpose; (2) to have a primary effect that neither advances nor inhibits religion; and (3) to foster no excessive entanglement between church and state.

The Lemon test rendered the establishment clause a formidable obstacle to many traditional forms and forums of church-state cooperation. Particularly the lower courts used this Lemon test to outlaw all manner of government subsidies for religious charities, social services, and mission works, government use of religious services, facilities, and publications, and more. Some of these establishment clause cases in the name of separation of church and state helped to extend the ambit of religious liberty, particularly for minority faiths. But some of these cases also helped to erode the province of religious liberty by effective empowering a single secular party to veto popular laws touching religion that caused him or her only the most tangential constitutional injury.

It must be remembered that separation of church and state is only one principle that the establishment clause embraces, and the establishment clause is only one guarantee the First Amendment embraces for the protection of religious liberty, the other being the free exercise clause. The First Amendment says: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

These two religion clauses hold complementary guarantees of religious freedom. The free exercise clause outlaws government proscriptions of religion -- actions that unduly burden the conscience, restrict religious expression,
discriminate against religion, or invade the autonomy of churches and other religious bodies. The establishment clause outlaws government prescriptions of religion -- actions that coerce the conscience, mandate forms of religious expression, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. No burden on, no coercion of conscience. No undue restrictions on, no undue mandating of religious expression. No discrimination against, no discrimination for religion. No government intrusions within, no government alliances with religious bodies. Read together this way, the free exercise and establishment clauses afford reciprocal and complementary protections to liberty of conscience, freedom of religious expression, religious equality, and separation of church and state.

When viewed in isolation, separation of church and state serves religious liberty best when it is used prudentially not categorically. James Madison, a firm proponent of separationism in his later life, warned already in 1833 that quote "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 distinctness, as to avoid collisions & doubts on unessential points."

Madison's caveat has become even more salient today. For better or worse, the modern American welfare state reaches very deeply into virtually all aspects of modern life through its vast network of education, charity, welfare, child care, health care, construction, zoning, workplace, taxation, immigration, security, and sundry other regulations. Madison's preferred solution was what he called "an entire abstinence of the Government from interference [with religion] in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."

This traditional understanding of a minimal state role in the life of society in general, and of religious bodies in particular -- however alluring it may be in classic libertarian theory -- is no longer realistic in practice. Some level of confrontation and cooperation between church and state are almost inevitable in our modern polity.

It is thus even more imperative today than in Madison's day that the principle of separation of church and state not be pressed to reach, what Madison called, the "unessentials." Government must strike a balance between coercion and freedom. The state cannot coerce citizens to participate in religious ceremonies and subsidies that they find odious. But the state cannot prevent citizens from participation in public programs and forums just because they are religious. It is one thing to outlaw Christian prayers and broadcasted Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private religious speech in
these same public schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who choose to educate their children in religious schools. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike. To press separationist logic too deeply into the "unessentials" not only "trivializes" religion, as Stephen Carter has argued. It also trivializes the Constitution, converting it from a coda of cardinal principles of national law into a codex of petty precepts of local life.

Individuals should exercise a comparable prudence in seeking protection from the public expressions of religion that they cannot abide. In the constitutional schemes of nineteenth-century America, it was not so much the courts as the frontier that provided this freedom—a place away from it all, where one could escape with one's conscience and co-religionists. Today, the frontier still provides this freedom—if not physically in small towns and wild mountains, then virtually in our ability to sift out and shut out the public voices of religion that we do not wish to hear.

Both modern technology and modern privacy make escape to this virtual frontier considerably easier than in the days of covered wagons and mule trains. Just turn off Pat Robertson and Jerry Falwell. Turn away the missionary at your door. Close your eyes to the city crucifix that offends. Cover your ears to the public prayer that you can't abide. Forgo the military chaplain's pastoral counseling. Skip the legislative chaplain's prayers. Walk by the town hall's menorah and star. Don't join the religious student group. Don't vote for the collared candidate. Don't browse the Evangelicals' newspapers. Avoid the services of the Catholic counselors. Shun the readings of the Scientologists. Turn down the trinkets of the colporteurs. Turn back the ministries of the hate-mongers. All these escapes to the virtual frontier, the law does and will protect—with force if necessary. Such voluntary self-protections from religion will ultimately provide far greater religious freedom for all than pressing yet another tried and tired constitutional case.

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