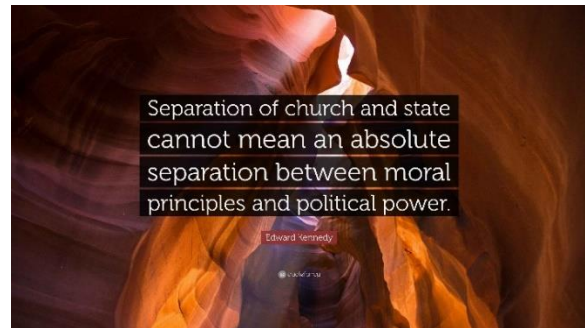


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## Church and State: How tall is that wall?

Steve Bakke  May 16, 2025



From Edward Kennedy's 1983 speech at Liberty University

The first two clauses of our Constitution's First Amendment: ***Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.....***

Two clauses, the first expresses that there can be no government sponsored or favored religion. The second declares freedom of worship for any religion. These two simple assurances from our Bill of Rights are now pitted against each other before the Supreme Court. How can these related "protections" become legal adversaries?

The Supreme Court will soon be issuing a decision in the case on the constitutionality of *St. Isidore*, a religious charter school. At issue is whether the religious school is eligible to receive public funding or is that a violation of the establishment clause. The Oklahoma Supreme Court previously ruled the charter school status of *St. Isidore* to be unconstitutional.

The school's attorneys argued that recent Supreme Court precedent has held that "a state violates the free exercise clause when it excludes religious observers from otherwise available public benefits."

Apparently leaning in favor of the school, during Court arguments Justice Kavanaugh interjected: "They're just saying, 'Don't treat us worse because we're religious.'" Predictably, others on the Court seemed to favor the "unconstitutional" argument.

This gets complicated because nowhere does the "wall of separation" metaphor appear in our Constitution, nor in the Congression Record. The metaphor gained notoriety sometime after 1802 when President Jefferson wrote a letter to the Danbury Baptist Association. This group was concerned about the possibility of government involvement in their religion. Jefferson's letter stated that the First Amendment built a very strict "wall of separation between the church and state."

Taking exception to Jefferson's letter, former Heritage Foundation visiting fellow, Jennifer Marshall, points out that the Founders truly believed that "virtue derived from religion is indispensable to limited government."

For example, George Washington, in his 1796 farewell address stated: ".....forbid us to expect that national morality can prevail in exclusion of religious principle."

And neither Presidents Jefferson nor Madison demonstrated a commitment to absolute "separation" of government and religion. Madison issued proclamations of religious fasting and thanksgiving. Jefferson signed treaties that sent religious ministers to Native Americans.

Furthermore, Supreme Court sessions have always opened with the “cry,” “God save the United States and this honorable court.” And there are legislative prayers, employment of chaplains, and public religious expressions made by government officials. These government actions apparently are considered “non-preferential”.

Despite apparent contradictions and disagreements, America got by without much controversy for over 150 years. After World War 2, strict adherence to “separateness” accelerated. In the 1947 *Everson v. Board of Education* decision, Justice Hugo Black emphasized a strict interpretation similar to Jefferson’s letter, essentially preventing “aid or preferment” to religious institutions by the state.

In contrast, in his 1985 dissenting opinion regarding *Wallace v. Jaffree*, Chief justice Renquist wrote that the Religion Clauses were NOT intended to be used to build a “wall of separation” between church and state. In fact, he emphasized the “wall of separation between church and state” is a misleading metaphor.....“It should be abandoned.”

After these many decades, America is still debating the Founders’ intent in the First Amendment? Religious scholar David Barton stated that the “First Amendment was designed to protect religious expression, not to eliminate it from public life.”

Former Heritage Foundation fellow Jennifer Marshall wrote that the Founders’ separated political from religious authority, but “didn’t intend to divorce religion from public life or politics.”

America seems to be trending toward that line of interpretation. Recent precedents in decided cases point to that conclusion. Vendors and football coaches have been let off the hook for living their religious beliefs in their professions, such as baking cakes and praying at football games.

This Court seems somewhat comfortable admitting that life intersects issues that have status in religion as well as governance. Maybe someday these two Religion Clauses will become compatible assurances rather than legal adversaries. We’ll find out how fast the interpretation of religious freedom is changing when the *St. Isidore* ruling is released in a few weeks.

Until then, let’s not forget our Founders’ declaration that our inalienable rights come from our “creator,” NOT from government. That’s really the ultimate assurance regarding the “separation of church and state.”