

IN PRAISE OF SEPARATION

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The case for maintaining the wall of separation of church and state is as strong as ever. Insistence on separation reflects a commitment to Jewish equality. Although the exact parameters of separation are subject to reasonable disagreement, the essence of the Jewish community's position must remain separationist.

It is a tried and true debater's technique: set up a strawman, identify your opponent's position with the strawman, demolish the strawman, and claim you have demolished your opponent's argument.

Murray Friedman's article, "American Jews: Lowering The Separation of the Church and State Wall?," is a classic example of the technique. It ultimately fails because the strawman of absolute separation of church and state that he attacks is not the policy of separation as practiced by anybody in the Jewish community. As the doctrine is understood, it is as essential as always, and its erosion as deleterious as ever.

Neither the Jewish community nor the Supreme Court (listed in declining order of importance) has ever advanced strict separation without limits. Leo Pfeffer, my distinguished predecessor at the American Jewish Congress, for decades the leading Jewish spokesman for the separation of church and state, made no effort to stop government from providing police protection to houses of worship or from granting tax exemptions from real property taxes. Although it is an easy task to make out a case for the Constitutional invalidity of the phrase, "In God we trust," the Jewish community never did so.

More tellingly, the Jewish community has always rejected the claim that any governmental accommodation of religion—or any special treatment of religious practice in the name of protecting the free exercise of religion—established religion by granting a religious preference. That is not a trivial claim; it is made with increasing frequency today by academics. The argument is not, however, new and was always rejected by the Jewish community,

even as it remained strictly separationist. Some of the leading cases on the preferred treatment of houses of worship in the zoning process were litigated by the arch-separationist, Leo Pfeffer.

The essence of the Jewish community's position is undoubtedly separationist. Separation of church and state is indispensable for religious liberty. The Jewish community believes that the propagation of religious belief is the business of believers, not taxpayers. It asserts that it is not the place of government to lend support to propagating all, one or the other, or anti-religious beliefs in its public schools and other facilities. It posits that religious education is the responsibility of religious institutions, not public ones. The community repeatedly has considered and rejected efforts to require government to serve either as a loudspeaker for religious views or as church treasurer.

Adoption of these attitudes was shaped in large part by the doleful experience of European Jewry with governments that saw the propagation of the faith as one of their most important tasks. However, insistence on separation more profoundly reflects a commitment to Jewish equality. Jews understood that, as a religious minority, they could not hope to achieve civic or religious equality if democratic government was free to enlist itself in the service of religion. Religion is not a generic set of beliefs. It comes in specific shapes, uses specific liturgical forms, and makes demands for distinctiveness. Furtherance of these particularistic agendas is not compatible with American democratic theory.

Friedman does not seriously challenge the community's opposition to school prayer,

whether in the classroom or at graduation. As far as I can tell, the Jewish community remains united in opposition to these practices, no matter whether conducted directly by government (as in morning opening exercises) or under the guise of student choice at graduation. This opposition is not new. Jews challenged school prayer in the late 19th and early 20th century.

Similarly, notwithstanding claims that excluding Christmas from the public schools manifests hostility toward religion, Jews have for at least a century opposed religious celebrations of these holidays. By and large, they have refused to be bought off with Christmas celebrations that include Chanukah. As long ago as 1904, the Orthodox and Reform rabbinate both objected to Christmas carols in the New York City public schools. That policy is paying off. Each year, fewer school districts conduct objectionable Christmas observances. I see no evidence that the Jewish community wants to abandon separation in this regard either.

Of course, separation of church and state is not always so clearcut. There are difficult cases. Moments of silence are one example. The political motivation for these efforts is to allow a bow in the direction of religion and perhaps to signal with a blink and a nod that it is really okay for teachers to pray with their students. In at least one reported case, the moment of silence was preceded by the comment that all students should bow their heads for the moment of silence, except for the Jewish and Moslem students who don't pray anyway. On the other hand, a moment of silence itself is neutral and, when administered properly, does not in any way coerce religious practice. I would see no measurable lowering of the wall in leaving a moment of silence statute unchallenged.

Friedman's real concern is not with these manifestations of strict separation, but with the continued Jewish communal opposition to vouchers and charitable choice. He cites one series of reports that claim that vouchers improve performance of its beneficiaries. It is true that there are such studies. There are also

reports that show no benefits conferred by voucher programs. No one really knows whether vouchers help. What is certain is that many supporters of vouchers (Friedman, not among them) see vouchers as a means of ending the public role in education.

Unmentioned by Friedman is the fact that existing voucher plans come with severe restrictions on the ability to limit admissions to members of the school's faith and to require children to participate in religious activities. We need Jewish day schools precisely because they are religiously exclusive and because they can insist on participation in religious study and worship. Lowering the wall to allow vouchers would hurt, not help, Jewish schools.

Finally, and most surprisingly, Friedman says not a word about the shameful failure of the federation community to adequately support Jewish education. Certainly federations cannot carry the whole load, but, by and large, they are not even beginning to carry any significant portion of the current load (to say nothing about making up for decades of deliberate neglect). They will not be able to do so until and unless they make painful choices. Is it really the case, for example, that state-of-the-art Jewish Community Centers or luxury office buildings are a greater priority for federations than Jewish education? Last year, the Jewish Council on Public Affairs could not even manage a resolution urging Jewish federations to do more for Jewish education. The problem is not that the wall of separation is too high; it is that communal support for Jewish education is too low.

Charitable choice is a phrase that covers a number of forms of governmental support for the provision of social services by religiously affiliated groups. Many of these present no problem of separation of church and state. Charitable choice's most controversial aspects, though, involve not a minor adjustment of the level of the wall but a wholesale breach. Under these plans, the government pays social service providers for services in which religious indoctrination is an inextricable part of the services.

Two defenses for these programs are offered. One, repeated by Friedman, is that religious programs do a better job than secular programs. The first and most telling problem with this argument is that there is not a single reliable study that lends any empirical support to the argument. Before we even contemplate throwing down the wall of separation of church and state, we ought to know that we are exchanging it for something of value. We do not know that.

The second argument is closely related to the first. It claims that intractable social problems are the product of the depraved nature of human beings, a nature that can be attacked only through religion (read "accepting Jesus as savior"). Government welfare programs cannot do that. Faith-based ones can. The argument is classically Calvinist; it has its roots in nineteenth-century Protestant arguments against state social services. It is an argument resurrected by contemporary advo-

cates of charitable choice, including Governor Bush's advisor on the subject, Marvin Olasky. This is not an argument Jews ought to feel comfortable with, not only because of its Christological overtones. It is at the bottom, a very un-Jewish attitude toward social services and helping the needy.

The separation of church and state is not a religious doctrine that was given in final form at Sinai. Its exact parameters are subject to reasonable disagreement. Not every involvement of government with religion is a breach of the wall, particularly under contemporary conditions. (It would be a mistake, for example, in most cases to argue against equal treatment of purely private religious speech with secular speech on government premises.) Changes at the margins are one thing; wholesale abandonment of a high degree of separation quite another. The case for maintaining the wall is as strong as ever.