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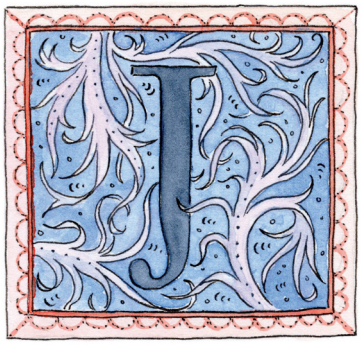
The Constitutional Case for Jewish Charter Schools

Jews have long taken the view that a strictly separationist reading of the First Amendment is better for Jewish thriving. But the time has come to change course



JEWISH charter schools (JCSs)—publicly funded but independently operated K–12 schools teaching Jewish and secular subjects—would address many of the American Jewish community's most vexing problems. JCSs avoid the "tuition crisis" that has put Jewish day schools out of reach for middle-class Jews and forced schools to rely on massive donations. They provide an alternative to public schools where Jews have traditionally thrived but feel increasingly unwelcome because of the rise of DEI programming and concurrent anti-Israel orthodoxy. And JCSs in fledgling communities would

have the salutary effect of allowing Jews to start branching out geographically, easing the pressure to live in expensive neighborhoods.

Yet no JCSs exist. Why? Simple: The First Amendment — at least in the minds of most Americans and nearly all Jews — seems to prohibit the use of taxpayer funds to charter religious schools. What's more, Jews have long believed that construing the First Amendment to preclude JCSs is not just constitutionally required but a worthwhile trade, because a strict approach to the "separation of church and state" is, overall, good for the Jews. Leonard Fein, the writer and activist known as "the father of Jewish social justice," exemplified this view: "Among our interests, the continuing separation of church from state must rank very, very high," he wrote in 1992. "There is likely no aspect of the American constitutional arrangement that has meant more to Jews, has been a more consequential factor in Jewish safety and success in this country."

Both of these claims — that the First Amendment prohibits sending public funds to religious charter schools and that this has been good for the Jews — are questionable at best. They may even be wrong — belied by history, legal analysis, and American social developments over the past 75 years.

The Bill of Rights' first command is known as the establishment clause: "Congress shall make no law respecting an establishment of religion." More than a decade after the establishment clause became law, Thomas Jefferson (who was in France when the First Amendment was written, debated, and ratified) wrote a letter to the Danbury Baptist Association in Connecticut, interpreting those words to mean that the First Amendment had built "a wall of separation between church and state."

It wasn't until nearly 90 years later, in 1879, interpreting a different part of the First Amendment, that the Supreme Court treated Jefferson's letter as relevant to the law for the first time, calling it, in passing, "almost…an authoritative declaration of [the First Amendment's] scope and effect." In the 1947 case *Everson vs. Board of Education of the Township of Ewing*, Supreme Court Justice Hugo Black dropped the "almost" and declared for the first time that the establishment clause required what is now called strict separationism: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

This is not how constitutional interpretation usually works. Usually, the Supreme Court examines materials that might illuminate a legal provision's meaning: the plain meaning of the text; what its authors were trying to accomplish by passing the law; how the public understood the words when they were ratified; common practices at the time that reflect how Americans thought the law applied to them; or even abstract values that would justify construing the law in a particular way. There is plenty of debate over which of these methods is best. But in *Everson*, Justice Black picked none of the options from the interpretive menu. Instead, he eschewed legal reasoning altogether and simply declared that Jefferson's letter had morphed into binding law, a century and a half after the ratification of a constitutional amendment Jefferson neither worked on nor even voted on.

No individual's interpretation of the establishment clause is dispositive, but it is worth noting that many of Jefferson's contemporaries disagreed with him about the proper relation between religion and American government. John Adams, who as vice president supported the Bill of Rights, famously noted the complementary relationship between our Constitution, which liberated citizens, and religion, which constrained them: "Our Constitution was made only for a moral and religious people," he wrote in 1798. "It is wholly

inadequate to the government of any other." Adams was opposed to state establishment of religion, but he nonetheless saw the public interest — that is, an interest shared by all members of the political community — in the proliferation of religion and religious ideas.

Adams's view, often called the civic republican position, is enshrined in the Massachusetts Constitution:

> The people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

There is some good evidence that the American people did not adopt strict separationism until the Supreme Court foisted it upon them. Public schools across the country regularly taught the Bible and other Protestant texts since the early 19th century. (In 1963, the Supreme Court announced that such schools had been violating the Constitution all along.) It's especially curious that Justice Black could make such a pronouncement in *Everson* given the fact that the Supreme Court itself, among many other government bodies, begins its sessions by invoking God. Historian Jonathan Den Hartog notes, "While citizens knew of Jefferson's metaphor, it was neither endorsed broadly nor practiced as Jefferson intended."

Under my preferred theory of constitutional interpretation, this kind of evidence makes rejecting strict separationism a slam dunk. But regardless of whether you agree with me, a more modest conclusion is inescapable: It is far from obvious that strict separationism is

what our Constitution requires. It is, at best, a choice among others.

The key question, then, is the perennial one we all know: Is it good for the Jews? Which interpretation — Jefferson's or Adams's — should Jews support? What relationship between church and state is best for American Jewish flourishing?

For many decades, strict separationism's role in the American Jewish interest was an article of faith. Prominent Jews and Jewish organizations considered advancing strict separationism a key part of their contribution to American life.

Supreme Court Justice Felix Frankfurter, who joined a dissent in *Everson* excoriating the majority for not taking a harder line against state funding of religion, was one of at least three Jewish co-founders of the American Civil Liberties Union. The ACLU immediately became a thorn in the state's side on religious issues and remains so to this day. Historian Samuel Walker has identified the three largest organizations that fought to banish all remnants of religion from public schools: the ACLU, Americans United for Separation of Church and State, and the American Jewish Congress. As law professor Michael Avi Helfand has summarized, "During the 1950s and '60s, few — if any — faith communities were more active in church-state advocacy than American Jews." One notable detractor from the apparent American Jewish consensus during this time was Norman Lamm of Yeshiva University, who said in 1966, "A Jewish organization which regards a dubious legal interpretation of the Constitution as more important than Jewish education must prepare to acknowledge that it has no faith in the Jewish future."

It is not hard to see why Lamm's was a minority position (as prescient positions often are). Seeking social and economic opportunity in America, Jews reasonably feared that Christian principles of social

organization would yield unfavorable conditions. At best, Jewish misalignment with a Christian culture could hamper Jews' economic flourishing, as in the case of Sunday-closing laws that forced Shabbat-observant Jews to do business only five days a week. At worst, Jews could one day be excluded from full citizenship, expelled, or subjugated in the name of their religious or ethnic difference if the Christian culture infused the coercive powers of the state, as in Europe.

Understandably, Jewish separationists shared Jefferson's dim view of European history, seeing state-enforced religious intolerance at the heart of its persecutions. Just as Jefferson believed that America would be tolerant in inverse proportion to religious influence on public life, Jewish separationists saw the consignment of all religion to the private sphere, combined with a robust right to free exercise of religion within the confines of the home and synagogue, as beneficial for Jewish flourishing in America. As long as America stayed out of the religion business, it would not stumble into crusades, inquisitions, or any other holy wars.

In short, mainstream Jewish organizations chose separationism for largely Jeffersonian reasons. Equality was the goal, and the gradual diminishment of religion from the public square — replaced by objective, nonsectarian, *secular* reason — would get us there.

An irony drawn out by historian Richard Samuelson, however, shows why advancing Jewish interests by choosing Jeffersonianism over Adams's civic republicanism should have been suspect from the beginning. Before Jews embraced Jeffersonianism, Jefferson himself, by way of an unflattering appraisal of the Jews, whom he considered the paradigm of superstitious legalists, downplayed religion's role in promoting the public good. "Moses had bound the Jews to many idle ceremonies, mummeries and observances, of no effect towards producing the social utilities which constitute the essence of virtue," Jefferson wrote in 1820. Being God's chosen people is only as honorable

as the God who chose them, and the Jewish God ordained "priests of the superstition, a bloodthirsty race, as cruel and remorseless as the being whom they represented as the family God of Abraham, of Isaac and of Jacob, and the local God of Israel." The seeds of secularist antipathy toward Jews may not have been apparent to later Jeffersonians, but they were certainly there — and prefigured contemporary anti-Jewish slanders in tone and substance.

By contrast, Adams, the conservative New England Protestant, saw wisdom and glory in the miraculous survival of the Jews and their precepts. "I will insist that the Hebrews have done more to civilize men than any other nation," he wrote. "If I were an atheist, and believed in blind eternal fate, I should still believe that fate had ordained the Jews to be the most essential instrument for civilizing the nations." Like Jefferson, Adams thought of the Jews as emblems of history. Unlike Jefferson, though, Adams was inclined to see that as a positive. Adams credited the Jewish people and their legal tradition with teaching the world "the doctrine of a supreme intelligent, wise, almighty sovereign of the universe," which was "the great essential principle of all morality, and consequently of all civilization."

Put another way, Jefferson lumped the Jews in with the benighted Old World that America was meant to leave behind, whereas Adams celebrated them for laying the groundwork of the New World. And though Jews had largely been successful and free in America for centuries prior to *Everson*, many Jewish organizations took up the Jeffersonian cause, haunted by the specters of European Christian antisemitism.

Even if Jeffersonian analysis rang true to the cautious Jews of mid-20th-century America, the past several decades have shown that it

was predicated on some significant miscalculations. Perhaps the biggest mistake of all was an abstract philosophical error. Jewish Jeffersonians thought that in a secular nation, the problem of lacking shared reason would be solved. After centuries of different religious groups grounding their behaviors in different texts and sources of authority, subduing religious reasoning would allow Americans of all backgrounds to debate and cooperate within a shared, objective, near-scientific system of facts and logic. All would agree at least on the basics of what it meant to pursue life, liberty, and prosperity. American public discourse and politics would be smoother, less riven by group differences, and generally more inclusive.

The rise of postmodernism, a movement with decidedly secular origins, put an end to that dream. Instead of a shared moral language, the ascendant philosophy among our sensemaking institutions is that nothing is objective, because all truth is constructed by powerful groups to serve their own interests. Equality isn't the goal anymore; even "equity," which prizes equal outcomes for groups, is falling out of favor. Now the goal is obtaining and asserting power on behalf of one's own group. As John McWhorter has pointed out, even these attempts have come to look more and more like the religions they were to displace. Activists championing fully secular causes such as "liberation" and "social justice" engage in "rituals of subservience and self-mortification" that "parallel devout Christianity in an especially graphic way," McWhorter says. The idea that secularism, having displaced religion, would lead to an inclusive paradise of reasoned debate has discredited itself.

In hindsight, the belief that strict separationism would elevate our public discourse was badly misguided. Separationism instead had several ill effects on the way we as Americans work out our differences. It led Americans to distinguish artificially between religious ideas and nonreligious ideas, systematically denigrating the former

and exalting the latter. Worse, it trained Americans to view religious or traditional thinking as categorically less respectable than ideas justified by a narrow set of secular principles, such as personal autonomy and authenticity, which gained something akin to state endorsement. At a profound yet subconscious level, it suggested that there is a shortcut to winning arguments: Instead of debating an idea's merits, deem it "religious" and it will be disqualified. (Substitute today's disfavored labels for "religious" and you see where such training leads.)

This is all to say that one thing separationism did not do is what American Jews, and Jefferson, had counted on it to do: foster pluralistic coexistence. We should stop expecting it to do that or hoping that, suddenly, it will. Separationism is not pluralism. It is closer to the opposite, because it wrongly suggests that we address the problem of coexistence by leveling down — that is, trying to achieve equality by excluding certain forms of argumentation, specifically pushing faith-based ideas out of the public square. We should instead commit to leveling up, encouraging all voices to speak up, thereby allowing Americans to persuade and be persuaded.

As Lamm recognized decades ago, embracing true pluralism requires faith in Jews and Judaism. Unlike separationism, pluralism stakes the Jewish future on its ability to advance its own interests through persuasion. It similarly requires us to withstand a cacophonous public square, full of proselytizing members of other religions trying to persuade us that their views are true. Supporting a JCS movement today would demonstrate in dramatic fashion the American Jewish community's confidence in itself and a pluralist America. Needless to say, this will mean accepting that Christians, Muslims, and other religions will be able to use public money for their schools, too. What will justify funding them is not that they advance a "legitimate secular purpose," as the Supreme Court used to say, but that

they further the public interest as determined by the people's elected representatives. In general, all religions should try to regain their ability to argue from that premise. If religious schools are committed to cultivating pious, charitable, good citizens, they should not be excluded because of the source of their beliefs.

The law is beginning to reflect a rejection of strict separationism in a few realms, but most pointedly in state support for education. In June 2022, the Supreme Court ruled that a Maine tuition-assistance program could not deny payments to parents who wished to use the funds at religious schools. "A State need not subsidize private education," wrote Chief Justice John Roberts, "but once [it] decides to do so, it cannot disqualify some private schools solely because they are religious." The Court may decide to extend that logic to states chartering public schools. Litigation over a new Catholic charter school established in Oklahoma raised the issue in that state's supreme court, and it's likely to appear before the nine Supreme Court justices in D.C. on appeal.

American Jews are expected to blanch at the possibility that the Court takes up the case and rules in favor of the Catholic school. But that intuition, based on a kind of separationist faith, is worth interrogating. Doing so, as Lamm argued decades ago, can be a profound expression of faith in the Jewish tradition and its future. ✳