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American Jews and Church-State Relations

The Search for "Equal Footing"

Jonathan D. Sarna

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J. D. S.

FOREWORD

Recent AJC surveys demonstrate continued Jewish attachment to the principle of separation of church and state. The absence of an official religion in the United States and government neutrality toward all forms of religious expression have enabled a variety of religions to flourish. Like other religions, Judaism has thrived in this free environment, and Jews have become, in the words of Leonard Fein, "mentors of American pluralism."

Separation of church and state is by no means universal among Western democracies. The State of Israel does not separate synagogue and state. It identifies Judaism as its official religion, albeit with provisions safeguarding the religious freedoms of non-Jews. Great Britain and Canada maintain government support for organized religion, and Jewish institutions, along with those of other faiths, have benefited from such assistance. Nevertheless, American Jewish leaders maintain that the intrusion of government -- even for beneficial purposes -- leads to standards and regulations that tend to weaken the sectarian content of religious institutions, thereby undermining the principle of religious pluralism. Moreover, they fear, government support of religion can easily lead to the favoring of one faith over others, threatening the equality of religions. American Jews feel that, in pluralistic America, religion fares best when government keeps its hands off.

Have American Jewish leaders always been separationists in their approach to church-state issues? Historically, Judaism itself knew no such separatism. As Jews lived under gentile governments, they increasingly articulated the principle of "the law of the state is the law," respecting and obeying the law of the surrounding society if such norms had legal authority behind

them. In turn, Jewish communities often received substantial support and broad grants of power to regulate internal Jewish life.

Emancipation significantly altered Jewish relationships with the state. No longer could communal groups in the nation-state regulate their own affairs. In their relations with the state, citizens were individuals, not members of corporate groups. In the United States particularly, new models of church-state relationships developed. To explore changing Jewish attitudes to these developments, the AJC commissioned this paper by Jonathan Sarna, a distinguished historian of American Jewry. Sarna finds that Jews initially accepted the fact of a Christian America and tried to accommodate to it through an "equal footing" doctrine in which Judaism should receive the same recognition as other faiths. Thus, for instance, rather than fight Sunday "blue laws," Jews sought exemptions from them for Jewish Sabbath observers. By the end of the nineteenth century, however, Jewish leaders had shifted to a far more unequivocal stance supporting disengagement of government from organized religion. This stance, heavily indebted to Jefferson and Madison, required the refusal of government aid to religious institutions and the exclusion of religious instruction from the public schools.

In recent decades the consensus within the Jewish community on church-state separation has generally held. A minority, however, has urged a return to the more accommodationist patterns of the nineteenth century. This debate is focused especially upon the issue of government aid to Jewish day schools. The AJC, like most other major Jewish organizations, opposes government aid as an unconstitutional and unwise intrusion of government into religious life. The same concern for religious liberty also informs AJC's advocacy of a broad interpretation of the First Amendment's guarantee of free exercise of religion. As Professor Sarna notes, the very first case in which AJC filed an amicus brief was *Pierce v. Society of Sisters*, which protected the right of parents to send their children to parochial schools.

Our intention in publishing this paper is to provide historical background and to explain the range of positions which underlie the contemporary debate. This essay was

originally commissioned in honor of the Constitutional Bicentennial. It is our hope that Jewish groups and leaders will study it and discuss fully its implications for communal social action.

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AMERICAN JEWS AND CHURCH-STATE RELATIONS: THE SEARCH FOR "EQUAL FOOTING"

THE CONSTITUTIONAL CONVENTION meeting in Philadelphia in 1787 received exactly one petition on the subject of religious liberty. The petitioner was Jonas Phillips, a German Jewish immigrant merchant, and what he requested -- a change in the Pennsylvania state constitution to eliminate a Christological test oath -- was outside of the convention's purview. But the sentiments expressed in the petition contain one of the earliest known American Jewish statements on religious liberty. "The Israeletes," it declares, "will think them self happy to live under a government where all Relegious societies are on an Eaquel footing."[1]

Eighteen days before Phillips penned his September 7th petition, the Constitutional Convention, meeting behind closed doors, had accepted the provisions of Article VI: "No religious test shall ever be required as a qualification to any office or public trust under the United States." Two years later, under pressure from six different states,[2] Congress passed a much more explicit guarantee of religious liberty as part of the First Amendment (ratified on December 15, 1791): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." For Jews, however, these constitutional provisions did not immediately translate into the kind of "Eaquel footing" that Jonas Phillips had sought. Indeed, the whole question of what equal footing means and how best to achieve it would continue to occupy American Jewish leaders for two centuries.

The Colonial Experience

In the colonial period, Jews never expected to achieve complete religious equality. Given the right to settle, travel, trade, buy

land, gain citizenship, and "exercise in all quietness their religion," they put up with blasphemy laws, Sunday laws, Christian oaths, church taxes, and restrictions on their franchise and right to hold public office. "They had not come to North America to acquire political rights," Jacob Marcus reminds us, and besides, as late as the 1760s "there was not one American colony which offered political equality to all Christians."[3]

Actually, dissenting Christians gained increasing equality as time went on. Recent scholarship has contended that, in colony after colony, traditional religious establishments, in the European sense of "a single church or religion enjoying formal, legal, official, monopolistic privilege through a union with the government of the state," eventually gave way to "multiple establishments." Dissenters, so long as they were Protestant, could arrange to have their taxes remitted to the church of their choice. Jews and other non-Christians, however, failed to benefit from these arrangements, and for the most part neither did Catholics. Although many states enacted new liberal constitutions after the Declaration of Independence, religious tests and other restrictive measures remained in force. North Carolina's new (December 16, 1776) constitution, for example, promised inhabitants the "natural and unalienable right to worship Almighty God according to the dictates of their own consciences," yet also decreed that "no person who shall deny the being of God or the truth of the Protestant religion . . . shall be capable of holding any office or place of trust or profit in the civil department within the state." Similar provisions found in other state constitutions make clear that most Americans in 1776 spoke the language of religious liberty but had not yet come to terms with its implications. While in theory they supported equality and freedom of conscience, as a practical matter they still believed that Christianity was essential to civil order and peace, and that the state should be ruled only by God-fearing Protestants.[4]

The New Nation

The first decade and a half of American independence saw the parameters of religious liberty in the new nation steadily widen. New York, one of the most religiously pluralistic of the states,

became in 1777 the first to extend the boundaries of "free exercise and enjoyment of religious profession and worship" to "all mankind," whether Christian or not (although it retained a limited anti-Catholic naturalization oath). Virginia, in its 1785 Act for Religious Freedom (originally proposed by Thomas Jefferson in 1779), went even further with a ringing declaration "that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . but that all men shall be free to profess and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities." The Northwest Ordinance, adopted by the Continental Congress in 1787, extended freedom of worship and belief into the territories north of the Ohio River. Finally, under the Constitution and the First Amendment, "no establishment" and "free exercise" became fundamental principles of federal law.[5]

America's 2,000 or so Jews played no significant role in bringing these developments about. They received their rights on the federal level along with everybody else, not, as so often the case in Europe, as part of a special privilege or "Jew bill." Religious liberty developed from de facto religious pluralism and a complex web of other social, ideological, political, and economic factors affecting the nation as a whole. For this reason, Jews were always able to couch their demands for religious equality in patriotic terms. In seeking rights for themselves on the state level, they appealed to principles shared by Americans of all faiths.[6]

Initial Jewish Efforts to Attain Equal Rights

The first half-century following the adoption of the Constitution and First Amendment saw America's small Jewish communities engaged in a wide variety of local campaigns to achieve equal rights in the states. First Amendment guarantees, until the Supreme Court ruled otherwise in 1940, affected congressional legislation only; states remained free to engage in religious discrimination. There was no Jewish communal defense agency, and much depended on the work of concerned individuals, often working in concert with sympathetic gentiles. Typically, Jews

pointed up contradictions between their rights under the Constitution and their rights under state law, pleaded for religious equality on the basis of liberty and reason, and then legitimated their claims by trumpeting their contributions to the war effort against Britain.[7]

More often than not, Jews found that their boldness in defense of Jewish rights eventually paid off. In 1783, for example, a delegation of prominent Philadelphia Jews petitioned against a Christological state religious test. They argued that it deprived them "of the most eminent rights of freemen," and was particularly unfair since they had "distinguishedly suffered" for their attachment to the Revolution. Seven years later, when a new state bill of rights was passed, the problem was remedied.[8] In 1809, when several legislators sought to deny Jacob Henry his seat in the North Carolina House of Commons for refusing to subscribe to a Christian test oath, he too refused to concede. Instead, he delivered a celebrated address defending his "natural and unalienable right" to worship according to the dictates of his own conscience, and won his place. In this case, however, the offensive test oath remained on the books, apparently unenforced, until a new constitution was promulgated in 1868.[9]

The most widely publicized of all religious-liberty cases took place in Maryland. According to that state's constitution, anyone assuming an "office of trust or profit" (including lawyers and jurors) was required to execute a "declaration of belief in the Christian religion" before being certified. Solomon Etting, one of the first Jewish merchants in Baltimore, petitioned in 1797 and 1802 to have this law changed, "praying to be placed on the same footing as other good citizens," but to no avail.[10] It took thirty years, a great deal of help from non-Jewish lawmakers, particularly Thomas Kennedy, and a state political realignment before the bill permitting Jews to subscribe to an alternative oath won final passage in 1826 by a narrow margin.[11]

Christian America or Religious America?

By 1840 Jews had won formal political equality in twenty-one of the twenty-six states. In the others, legal disabilities would shortly disappear, or would remain largely unenforced.[12] Yet full equality still proved elusive, for church-state separation, the

principle upon which Jews based so many of their hopes, turned out to mean different things to different people. Many Americans, especially in the wake of the Second Great Awakening, the religious revival that overtook the country in the early nineteenth century, had come to understand religious liberty in pan-Christian terms, as if the Constitution aimed only to place all Protestant denominations on an equal footing. Christianity, according to this argument, formed the basis of American society and was implicitly endorsed by the Constitution, even if not mentioned explicitly.[13] The legal case for this school of interpretation was made by Justice Joseph Story writing about the First Amendment in his famous *Commentaries on the Constitution*:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[14]

This understanding of America as an essentially "Christian nation" carried wide appeal. Leading judges and lawyers, including James Kent of New York and Theophilus Parsons and Daniel Webster of Massachusetts, endorsed it, and it accorded with British precedent that recognized "the Christian religion . . . as constituting a part of the common law."[15] This same view led South Carolina governor James H. Hammond, in an 1844 Thanksgiving Day proclamation, to urge citizens of his state "to offer up their devotions to God the Creator, and his Son Jesus Christ, the redeemer of the world." In the face of Jewish protests, he refused to relent. "Whatever may be the language . . . of [the] Constitution," he wrote, "I know that the civilization of the age is derived from Christianity, that the institutions of this country are instinct with the same spirit, and that it pervades the laws of the State as it does the manners and I trust the hearts of our people."[16]

American Jews naturally opposed this "Christian America" interpretation of the First Amendment, and denied that Christianity formed part of the common law. They called instead for "equal

footing" for all religions, Judaism included. Philadelphia Jews thus petitioned for the "rights of freemen, solemnly ascertained to all men who are not professed Atheists." Jacob Henry argued that "if a man fulfills the duties of that religion which his education or his Conscience has pointed to him as the true one; no person . . . has the right to arraign him at the bar of any inquisition." Mordecai Noah, perhaps the leading American Jew of his day, defined religious liberty as "a mere abolition of all religious disabilities." "You are free," he explained, "to worship God in any manner you please; and this liberty of conscience can not be violated."[17]

This sense of America as a broadly inclusive religious nation, while understandable as a response to "Christian America," was quite different from the theory of religion and state espoused by Thomas Jefferson and James Madison. Jefferson believed that religion was a personal matter not subject to government jurisdiction at all; we owe to him the famous interpretation of the First Amendment as "a wall of separation between church and state." Madison called in a similar vein for the "entire abstinence of the Government from any interference [with religion] in any way whatever."[18] The view that government should in a nondiscriminatory way support religion did, however, have firm roots in American tradition. The Northwest Ordinance of 1787 grouped religion with morality and knowledge as things "necessary to good government and the happiness of mankind." When the First Amendment was adopted, Samuel Huntington of Connecticut, speaking in Congress, quite explicitly sought "to secure the rights of conscience, and free exercise of the rights of religion, but not to patronize those who professed no religion at all." Several state constitutions and the writings of men like Benjamin Franklin all reinforced the same idea: that religion, defined in its broadest sense, benefits society and government alike.[19]

The fact that early American Jews embraced this tradition explains why, as a community, they never linked their rights to those of nonbelievers. Nor did they protest when several states, including Pennsylvania and Maryland, accorded Jews rights that nonbelievers were denied. Indeed, in one unusual petition in 1813, the trustees of New York's Congregation Shearith Israel, seeking a share of the state's school fund, attacked the

appropriation made to the New York Free School because it "encourage[d] parents in habits of indifference to their duties of religion." Siding with Presbyterians, Roman Catholics, Baptists, and Methodists against the school, they praised religious education as "the greatest foundation of social happiness," and argued on the basis of "the liberal spirit of our constitution" that funds should be made available to religiously operated charity schools as well.[20]

Defenders of American Jewish Rights

By the middle decades of the nineteenth century, thanks to immigrants from Germany and Poland, the American Jewish population had grown substantially, reaching 15,000 in 1840 and almost 150,000 twenty years later. Jews now formed a sizable and self-conscious minority community, complete with its own institutions and leaders. Jews also had their first regular periodicals -- the *Occident* (1843-68), the *Asmonean* (1849-58), and the *Israelite* (later the *American Israelite*; 1854-) -- to keep them informed, to help them maintain ties with one another, and to promote vigilance in defense of Jewish rights. Where before church-state violations (except in unusual cases such as the Maryland bill) had usually been matters of local Jewish concern, now thanks to these newspapers they were trumpeted far and wide.[21]

Jews during this period looked to the First Amendment as a guarantor of Jewish rights and used it to legitimate their claims to equality. "The laws of the country," explained Isaac Leeser, editor of the *Occident* and the foremost traditionalist Jewish religious leader of his day, "know nothing of any religious profession, and leave every man to pursue whatever religion he pleases." He insisted that neither Christianity, nor Judaism, nor "infidelity and atheism" was the law of the land, but that "there is here freedom for all, and rights and protection for all."[22]

Religious liberty, to Leeser and most of his fellow Jews, meant "the right to worship God after the dictates of our own hearts." Nathaniel Levin, one of the leading Jewish citizens of Charleston, went out of his way to underscore this point when he delivered a public toast to religious liberty in 1859. "Separate

man from religion in any of the duties of life," he declared, "and you degrade him to the level of the brute." Religious liberty, as he defined it, meant "liberty of conscience" and "freedom of thought" within a religious context.[23] Having defined religious liberty in this way, mid-nineteenth-century Jews saw no need to protest that Congress and most state legislatures began their sessions with religious invocations. They simply insisted that Jews be invited to deliver such prayers as well -- and in at least three cases rabbis were invited to do so. Similarly, when in 1861 Jews learned that only "regularly ordained minister[s] of some Christian denomination" could legally serve as regimental chaplains in the Union army, they did not object to the chaplaincy itself, although on its face it violated principles of strict church-state separation. Instead, they campaigned to have the law broadened to include rabbis, which, thanks to support from President Lincoln, it eventually was.[24]

From a Jewish point of view, church-state violations were no different from anti-Jewish defamations and Christian missionizing. All alike, Jews thought, aimed to deprive them of their equal status in American society.[25] Thanksgiving Day proclamations that excluded Jews by referring to Christianity, references to Americans as a "Christian people," discriminatory laws and practices, anti-Jewish slurs and stereotypes, conversionist sallies, efforts to write Christianity into the Constitution -- these and similar instances of thoughtlessness, maliciousness, and prejudice seemed to Jews not just wrong but distinctly un-American, a violation of the Constitution as they understood it.[26] They usually responded forcefully, for as Isaac Leeser explained, Jewish rights had jealously to be guarded:

> Though a captious fault-finding and a constant nervousness to take offense should never be manifested by Israelites, as unbecoming and unmanly, at the same time, no public insult either of omission or commission should be passed over in silence; for we ought to take good care of our rights and never allow them to be tacitly violated.[27]

Rabbi Isaac M. Wise of Cincinnati, America's leading Reform

rabbi and editor of the *American Israelite*, was even more vehement in defense of Jewish rights. He saw Jews engaged in a political war to safeguard not only their own hard-won equality but American liberty as well. "Not because we profess Judaism do we oppose the attempt to crush religious liberty," he wrote in 1865, "we do it because we love liberty and justice, and hold them in esteem infinitely higher than all earthly gifts." By explicitly linking the safeguarding of Jewish rights to the safeguarding of American liberties, he raised Jewish vigilance on church-state issues to the level of a patriotic duty -- which is what many Jews have considered it ever since. No wonder, then, that Wise was so proud of the fact that on these issues he had fought to the hilt. Looking back late in his life, he claimed, according to his biographer, that he had never shirked his "duty" on the issue of civil and religious rights, whatever the cost.[28]

Beginning in 1859, individual rabbis no longer had to fight church-state battles on their own. The Board of Delegates of American Israelites, founded that year, made defense of Jewish rights one of its central objects, and although it was never truly representative of the American Jewish community, on these issues it spoke for a broad constituency. It thus repeatedly objected to efforts by the National Reform Association to rewrite the preamble to the Constitution to include references to "Almighty God," "the Lord Jesus Christ," and "Christian government." It likewise protested provisions of the 1866 Reconstruction Act providing that southerners' mandatory oath of allegiance be administered upon the "Holy Evangelists," and was instrumental in having the form of oath modified.[29] That same year it published an address to "the friends of Religious Liberty in the State of North Carolina" attacking an article in the state's proposed new constitution that would have barred from government office those who "deny . . . the divine authority of both the Old and New Testaments." "Do not enact a Constitution which denies the equality of citizens whatever their religious profession," the board implored, reprising Jonas Phillips's "Equal footing" demand of eighty years before. Significantly, the board did not speak out against *all* religious tests, only those that denied equality to "good citizens because they worship God in accordance with their conscientious convictions."[30]

Sunday Laws

The issue that most occupied nineteenth-century Jews, and that remained a central church-state issue well into the twentieth century, involved the emotional question of Sunday ("blue") laws, regulations that required all businesses to close down on the Christian Sabbath, thereby making it economically difficult for Jews to rest on their own Sabbath, observed on Saturday. Explicit discrimination was not the issue here; in theory, if not in effect, Sunday laws treated Jews and Christians alike. Indeed, proponents proudly pointed out that limiting the work week to six days benefited *all* workers, made it possible for Christians to have a day off to go to church, and ensured that rich and poor alike would have an equal chance to keep Sunday holy without facing economic hardship. But what seemed to many Christians to be a legitimate means of assuring religious "free exercise" was in Jewish eyes an effort to "establish" Christianity as the national religion. Jews found laws requiring observance of the Christian Sabbath to be religiously coercive, blamed such laws for lax observance by Jews of their own Sabbath (when most Jews had to work), and insisted that forcing observant Jews to keep two days of rest, their own and the state's, amounted to economic discrimination, for it required Jews to suffer monetary losses on account of their faith. The question tested the meaning and limits of church-state separation, and raised anew the problem of majority rule versus minority rights.[31]

To be sure, American Christians were by no means of one mind regarding the "Sunday question." Laws and practices varied from state to state, immigrants from different lands brought divergent Sabbath traditions with them, and Protestant denominations differed among themselves not only over how the Sabbath should be observed but whether it should be observed on Sunday at all. Seventh Day Baptists, for example, advocated a return to the biblical Sabbath. Still, all the states in the nineteenth century enacted Sunday laws in some form or other, and religious leaders mounted recurrent campaigns to revitalize Sabbath observance, both by enacting new laws and by promoting enforcement of those already on the books. Especially when strictly enforced, such laws caused Jews a great deal of hardship.[32]

Jewish responses to Sunday laws covered a broad and re-

vealing spectrum. There were, first of all, a small number of Jewish leaders who took it for granted that the Christian majority could exercise some power in shaping the nation's character, and therefore found Sunday laws unobjectionable. Mordecai Noah, for example, felt that the laws had "nothing to do with liberty of conscience at all," but were a "mere local or police regulation." Believing that Jews would enforce similar laws regarding Saturday if they "possessed a government of their own," he advised Jews to keep quiet. "Respect to the laws of the land we live in," he warned, "is the first duty of good citizens . . . ."[33] Half a century later, Rabbi Emil G. Hirsch of Chicago offered Jews similar advice, albeit for different reasons. As an exponent of social justice, Hirsch believed that the state had to be "the guardian of the community's interest, to be the protector of the weaker in the community." Sunday laws, to his mind, were a form of security for working people. Without them he feared "that for six days' hire seven days work will be exacted from all." In his own temple, he shifted the Sabbath day to Sunday in conformity with American norms.[34]

At the opposite extreme stood Jews who considered all Sunday laws to be illegal, a violation of strict church-state separation. Isaac Leeser, perhaps the best known exponent of this view, characterized Sunday legislation as a whole as "tyrannical and unconstitutional." He argued on the basis of "freedom of conscience" that Sabbath observance should be left up to the "conviction of individuals," and considered it the "natural right" of all human beings to work whenever and for however long they pleased without state interference. Indeed, he believed that the Christian Sabbath would have a "stronger hold on the affections" if it were observed voluntarily, as the Jewish Sabbath was, rather than under coercion.[35]

This argument, resting on basic American principles, was thoroughly egalitarian; it did not demand exceptions for those who observed the Sabbath on another day. In 1889, Rabbi David Philipson made a similar case in opposing Ohio's Sabbath law, and parallel ideas were expressed as late as 1958 in a bold address by Rabbi Harold Silver. Yet the claim, as expressed by Silver, that the Sabbath is entirely a matter of "private religious conscience" and that "in a democracy like ours, a man has the right to work or rest seven days a week or none" never won widespread

support. It not only alienated many workers who thought otherwise, it also logically required Jews to oppose other forms of labor legislation, including the minimum wage and the forty-hour week. Moreover, it ran afoul of the courts, which generally declared that states *could* legally enact blue laws on the basis of their well-accepted right to regulate trade.[36]

The strategy that succeeded better and enlisted more widespread support was a live-and-let-live attitude toward Sunday blue laws, a middle-ground position. It saw Jews acquiesce to the laws on the basis of their social and religious benefits, while insisting upon exemptions for those, like themselves, who observed the Sabbath on the seventh day of the week. As early as 1817, a Jewish lawyer named Zalegman Phillips, the son of Jonas Phillips, argued in this vein, seeking to persuade a Philadelphia judge that "those who profess the Jewish religion and others who keep the seventh day" should be exempted from blue laws on freedom-of-religion grounds. Without contesting the application of the laws to others, he declared that the Decalogue, according to Jewish tradition, not only commanded rest on the seventh day but also labor on the previous six, and that Jews should therefore not be obliged to close their businesses on both Saturday and Sunday.[37] Phillips lost his case, but his argument -- that Jews and others who observed Sabbath on Saturday should be exempt from Sunday legislation -- won considerable popular support. Leading early-nineteenth-century proponents of Sunday legislation, faced with charges that blue laws violated freedom of conscience, advocated exemptions for all who conscientiously observed the Sabbath on Saturday, and in time several states (twenty-four by 1908) enacted them into law. Following the model of New York's 1860 statute, however, most only permitted adherents of the Saturday-Sabbath to labor in private where others would not be disturbed; stores and other businesses operating in public had to remain closed.[38]

Many Jews nevertheless applauded this approach to the Sunday law problem as a sensible compromise. In 1838, a group of Pennsylvania Jews (writing in a memorial that was composed but apparently never sent) thus expressed a willingness "to yield any outdoor occupations which might be offensive to the community at large on the First day of the week," as well as indoor labors that might disturb Christians "in their public or domestic de-

votions," so long as they could be assured the right to follow "indoor occupations . . . in a quiet and orderly manner," and to attend "to their field labors if occasion should require the same." A half-century later, Rabbi Isaac M. Wise lauded a similar accommodationist approach to Sunday laws as "sensible and constitutional in harmony with the idea of personal liberty." The Union of American Hebrew Congregations, founded in 1873, agreed. Its resolutions did not oppose Sunday laws as a whole, but only "unjust and oppressive" ones. It sought equality for Jews, the right for them to keep their Sabbath and still be able to work six days like everybody else, nothing more.[39]

Louis Marshall, the foremost American Jewish leader of the early twentieth century, also backed this approach. He urged the New York State legislature to agree that

> No person who observes the seventh day of the week as the Sabbath, and actually refrains from secular business and labor on that day, or from sundown on Friday to sundown on Saturday, shall be liable to prosecution for carrying on secular business or performing labor on Sunday, provided public worship is not thereby disturbed.

He claimed to have support for his bill from Orthodox and Liberal Jews, as well as from the membership of the American Jewish Committee.[40]

By supporting exemptions, rather than opposing Sunday laws entirely, Jews were able to project a proreligion, pro-Sabbath attitude, even as they spoke of religious freedom and sought to advance their own goals. The very names assumed by twentieth-century Jewish anti-blue-law organizations -- "Upholders of the Sabbath" and the "Jewish Sabbath Alliance" (the Jewish answer to the Christian "Lord's Day Alliance") -- underscored this point. Similarly, in advocating exemptions for Jews, Louis Marshall first defended Sunday laws, and then explained that he sought to extend the same Sabbath benefits without accompanying disabilities to the minority that rested on a different day of the week. "Every right-thinking man must favor one day of rest in seven," he agreed, "but no right-thinking man should compel another to observe two days in seven."[41]

In the final analysis, of course, it was not the policy of granting Jews exceptions that won the day so much as the advance of the five-day work week that made the whole problem increasingly moot. Supported by Jews and Christians alike for social and economic as well as religious reasons, the five-day week created, in effect, two possible days of rest. This, plus changing consumer habits, the decline of small-merchant ("mom and pop") businesses, and pressure from department stores seeking to remain open seven days a week, led many states in the 1970s and '80s to modify their blue laws; some abandoned them altogether. Still, the lesson of the long battle over Sunday laws remains instructive. On this issue, the bulk of the Jewish community pragmatically supported a proreligion, live-and-let-live stance that took Jews' own special needs into account.[42]

The Shift to Separationism

The last third of the nineteenth century witnessed a momentous change in American Jewish attitudes toward issues of religion and state. Where before, as we have seen, the community generally adhered to a proreligion stance, supporting impartial government aid to *all* religions as long as Judaism was treated equally, now an increasing number of Jews spoke out unequivocally for a government free of *any* religious influence whatsoever, a secular state. To some extent this reflected the changing spirit of the times. In the post-Civil War decades, James Turner has recently shown, agnosticism emerged as a respectable alternative to traditional religion: "Disbelief in God was, for the first time, plausible enough to grow beyond a rare eccentricity and to stake out a sizable permanent niche in American culture." Even more important, however, is the fact that Jews during this period found to their dismay that calls for religious equality fell more and more on deaf ears. The spiritual crisis and internal divisions that plagued Protestant America during this era -- one that confronted all American religious groups with the staggering implications of Darwinism and biblical criticism -- drove Evangelicals and liberals alike to renew their particularistic calls for a "Christian America." Evangelical leaders championed antimodernist legislation to protect the "Christian Sabbath," to institute "Christian

temperance," to reintroduce Christianity into the schoolroom, and to write Christian morality into American law codes. Liberal Christians may have been somewhat more circumspect, but as Robert Handy indicates, their goal too was "in many respects a spiritualized and idealized restatement of the search for a specifically Christian society in an age of freedom and progress."[43] The implication, spelled out in 1867 by a writer in the *American Presbyterian and Theological Review*, was that non-Protestants could *never* win full acceptance as equals:

> This is a Christian Republic, our Christianity being of the Protestant type. People who are not Christians, and people called Christians, but who are not Protestants dwell among us, but they did not build this house. We have never shut our doors against them, but if they come, they must take up with such accommodations as we have . . . If any one, coming among us finds that this arrangement is uncomfortable, perhaps he will do well to try some other country. The world is wide; there is more land to be possessed; let him go and make a beginning for himself as our fathers did for us; as for this land, we have taken possession of it in the name of the Lord Jesus Christ; and if he will give us grace to do it, we mean to hold it for him till he comes.[44]

A proposed "Christian Amendment" designed to write "the Lord Jesus Christ" and the "Christian" basis of national life into the text of the Constitution attempted to ensure that these aims would be speedily realized. Then, in 1892, the Supreme Court in *Church of the Holy Trinity v. United States* declared that the United States actually *was* a "Christian Nation." The justice who wrote this decision, David Brewer, the son of a missionary, subsequently added insult to injury by defending his views in a published lecture, *The United States -- A Christian Nation* (1905), where he relegated Judaism to the level of a tolerated creed.[45]

Jews, all too familiar with the anti-Jewish rhetoric of Christian romantics in Europe, were understandably alarmed by these developments. As in the Old World so in the New, they thought, proponents of religion were allying themselves with the

forces of reaction. "The Protestants come now and say defiantly that this is a Protestant country," Rabbi Max Lilienthal warned in a celebrated public address in 1870. "When I left Europe I came to this country because I believed it to be free." In search of a safe haven, many Jews now settled down firmly in the free-thinking liberal camp; it seemed far more hospitable to Jewish interests. They also turned increasingly toward a more vehement response to "Christian America" claims -- the doctrine of strict separation.[46]

Strict church-state separation was, of course, an old idea in America; its roots lay deeply embedded in colonial and European thought. As we have seen, the idea had been embraced by Thomas Jefferson and James Madison, who believed that the state should be utterly secular, religion being purely a matter of personal preference. While certainly not hostile to religion, they believed that religious divisions were salutary and that religious truth would be most likely to flourish in a completely noncoercive atmosphere. "Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin," Madison wrote in his *Memorial and Remonstrance* (1785), "we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." Jefferson refused to proclaim so much as a Thanksgiving Day lest he "indirectly assume to the United States an authority over religious exercises."[47] However, theirs was a decidedly minority view that fell into disfavor with the revival of national religious fervor early in the nineteenth century. It was only now, in the post-Civil War era and as a response to "Christian America" agitation, that strict separation attracted a school of new adherents.

Jews became particularly ardent supporters of the Jefferson-Madison position. Alarmed by the tenor of public debate, they began to participate in such groups as the Free Religion Association and the National Liberty League, both dedicated to complete church-state separation. Notable Reform Jewish leaders, including rabbis Isaac M. Wise, Bernhard Felsenthal, and Max Schlesinger, as well as the Jewish lay leader Mortiz Ellinger, embraced the separationist agenda spelled out in *The Index*, edited by Francis Abbot. "The issue of church-state relations," observes Professor Benny Kraut, "precipitated a natural, pragmatic alliance uniting

Jews, liberal Christians, religious freethinkers, and secularists in common bond, their religious and theological differences notwithstanding."[48] Thus in 1868, Rabbi Max Lilienthal elevated complete church-state separation to one of the central tenets of American Judaism:

> [W]e are going to lay our cornerstone with the sublime motto, "Eternal separation of state and church!" For this reason we shall never favor or ask any support for our various benevolent institutions by the state; and if offered, we should not only refuse, but reject it with scorn and indignation, for those measures are the first sophistical, well-premeditated steps for a future union of church and state. Sectarian institutions must be supported by their sectarian followers; the public purse and treasury dares not be filled, taxed and emptied for sectarian purposes.[49]

Lilienthal's Cincinnati colleague, Rabbi Isaac M. Wise, proclaimed a year later that "the State has no religion. Having no religion, it cannot impose any religious instruction on the citizen, adult or child."[50] Chicago's Rabbi Bernhard Felsenthal, in an 1875 polemic written to prove that "ours is not a Christian civilization," went even further:

> God be praised that church and state are separated in our country! God be praised that the constitution of the United States and of the single states are now all freed from this danger-breeding idea! God be praised that they are "atheistical," as they have been accused of being by some over-zealous, dark warriors who desire to overcome the nineteenth century and to restore again the fourteenth century. God be praised that this has been accomplished in our Union and may our constitutions and state institutions remain "atheistical" just as our manufactories, our banks, and our commerce are.[51]

This soon became the predominant American Jewish position on church-state questions, seconded by one Jewish organization

after another. The Union of American Hebrew Congregations (not originally intended to be an organ of the Reform movement), for example, in 1876 expressed its support for the "Congress of Liberals" in its efforts "to secularize the State completely." The Central Conference of American Rabbis, meeting in 1892, leveled a similarly emphatic protest "against all religious legislation as subversive of religious liberty."[52]

To be sure, as Shlomith Yahalom has shown, Jewish advocates of church-state separation stopped short of supporting the blatantly antireligious planks advocated by some separationist organizations. Calls by the Liberal League, the American Association for the Advancement of Atheism, and others for taxation of church property, elimination of chaplains from the public payrolls, abolition of court and inaugural oaths, and removal of the phrase "In God We Trust" from the currency never won serious Jewish support, even from those who seconded their larger objectives.[53] Indeed, the Central Conference of American Rabbis, in attacking religious legislation in 1892, went out of its way to recognize at the same time "the value of religious sentiment." Similarly, Rabbi David Philipson, a champion of strict separation, (naively) records his "amazement" at finding that the American Secular Union, which he had been invited to address on church-state separation, "was practically an irreligious organization." One speaker, he writes, so outraged him "that . . . I cast my manuscript aside" and spoke instead "on religion and the Bible."[54] Eager to foster voluntary adherence to religion, even as they sought to combat any form of state religion, American Jews sought to steer a middle course. They embraced separationism in theory as the best and most legitimate defense against a Christian-dominated state, but as a practical matter they were much more circumspect and pragmatic, generally keeping in mind other competing considerations and speaking up only in those instances when they believed Jewish interests to be genuinely at risk.

The Battle Over Religion in the Public Schools

The issue that stood at the heart of church-state debates in late-nineteenth- and twentieth-century America and affected American Jews significantly concerned the emotional question of

religion in the public schools. Open to rich and poor children alike, organized on a uniform and systematic basis, largely tax-supported, and dedicated to moral education and good citizenship, these schools emerged in America during the three decades prior to the Civil War.[55] Whatever their claims to the contrary, the schools then were culturally Protestant: "They associated Protestant Christianity with republicanism, with economic progress, and with virtue."[56] Curriculum and textbooks were, consequently, rife with material that Catholics and Jews found offensive. As early as the 1840s, New York Jews are known to have protested the use of such textbooks in the public schools, but to no avail; the board of education, controlled by Protestants, refused to declare stories about the "Son of God" or readings from the New Testament out of bounds. As a result, Jews who could afford to do so sent their children to Jewish schools -- which flourished not only in New York but in every major city where Jews lived.[57]

But not for long. As public schools, under pressure from Catholics and others, became more religiously sensitive, Jews flocked to them for they were free, convenient, often educationally superior, and usually far more commodious than their Jewish counterparts. Furthermore, public schools had in a short time become symbols of American democracy: "temples of liberty," Julius Freiberg of Cincinnati once called them, where "children of the high and low, rich and poor, Protestants, Catholics and Jews, mingle together, play together, and are taught that we are a free people, striving to elevate mankind, and to respect one another."[58] As such, the schools came to have an insurmountable advantage over "sectarian" schools; Jews perceived them as an entree to America itself and supported them as a patriotic duty. By the mid 1870s, most Jewish day schools had closed, replaced by Sabbath, Sunday, and afternoon supplementary schools. "It is our settled opinion here," Rabbi Isaac M. Wise reported to the U.S. Commissioner of Education in 1870, "that the education of the young is the business of the State, and that religious instruction . . . is the duty of religious bodies. Neither ought to interfere with the other. The secular branches belong to the public schools, religion in the Sabbath schools, exclusively."[59]

Wise's "settled opinion," Lloyd Gartner points out, "became ideology." To attend public schools and to guard them from sectarianism became not just a matter of Jewish communal interest

but a patriotic obligation as well. In carrying out this "obligation," however, Jews frequently came into conflict with their Protestant and Catholic neighbors. Many schools, for example, began the day with morning religious exercises "usually including, in whole or in part, reading of the King James version of the Bible, reciting of some form of prayer, and singing of hymns." In several states such devotions were even mandated by state law, on the theory that public schools should not be "godless," and that while "sectarianism" was constitutionally enjoined, religion (which usually meant Protestantism) was not.[60] A Texas court, in a 1908 opinion, upheld this view, and defended it with an argument that many at the time found convincing:

> Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading of the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy . . . .[61]

The problem faced by American Jews was how to dissent from this approach without embracing the very "godlessness" that so many devout Christians sought to preclude. Since the public school symbolized American ideals, Jews wanted their children to be treated in accordance with what they believed those ideals demanded. They wanted the public schools to make their children "Americans," not Christians. It was not enough, then, that most states, particularly in the twentieth century, made provisions for students who wished to be excused from religious exercises, for coercion was not the major issue.[62] Instead, as so often before, the issue was one of religious equality. Jews sought to have schools and other public institutions that would be "undisturbed," in the words of Rabbi Max Lilienthal, "by sectarian strife and bigoted narrow-mindedness."[63]

How to achieve this goal proved a most difficult problem. Rabbi Isaac M. Wise sought to make religion a private affair: "Parents, guardians and especially clergymen must make it their business to teach religion," he wrote in 1869, "the public school can not do it."[64] Later that year, when the Cincinnati school

board, in an effort to placate the city's Catholics, resolved to dispense with the reading of the Bible in the public schools, he was pleased. Indeed, he and Max Lilienthal were among those who loudly supported the board's decision when it was challenged in court by outraged Protestants. Denouncing both Catholic and Protestant leaders as religious fanatics, the former for seeking to destroy the public schools in favor of Catholic ones and the latter for seeking to make the schools Protestant, Lilienthal, in a celebrated address, firmly aligned himself with "the Americans" -- those who favored, as he did, religious liberty and freedom of conscience.[65] This strategy -- to associate the position claimed by Jews with the patriotic position on church and state -- was widely emulated. "Opposition to sectarianism," explained one Jewish pamphleteer in 1906, "is not an indication of hostility to Christianity but of devotion to American ideals."[66]

Much as they opposed sectarianism in the public schools, many Jews in this period sympathized with Christian fears that schools devoid of religion might become secular and "godless." They searched, therefore, for some way of reconciling their belief in church-state separation with their conviction that education needed to be (in Max Lilienthal's words) "thoroughly . . . pre-eminently and essentially Godful." Lilienthal himself urged educators to stress the importance of "good deeds and actions." Teach young people "to cling to that sacred covenant of mutual love, mutual good will, and forbearance . . . ," he wrote, "and you will make our schools Godful and truly religious in the noblest sense of the word."[67] Rabbi Bernhard Felsenthal, a Reform rabbi in Chicago, called for "instruction in unsectarian ethics." In a letter to the *Nation*, he sketched out a program of "systematic ethical instruction," carefully avoiding any mention of God, covering all grades, and embracing such concepts as "virtue and vice, equanimity and passion, good and evil, true and untrue, egoism and altruism, and so forth."[68] This, however, did not satisfy the more Orthodox editors of the *American Hebrew*. Calling it "absurd to ask that the State should support schools and identify them with agnosticism," they called on government to teach not just bland ethics but

> . . . the three great religious facts upon the verity of which all religions are united, viz.:

1. The existence of God,
2. The responsibility of man to his Maker,
3. The immortality of the soul.

These principles did not, to their mind, conflict with church-state separation for they were "nonsectarian" and represented a religious consensus. Foreshadowing arguments that would be widely heard a century later, they warned that it would be "just as wrong to associate the schools with implied agnosticism as with any sectarianism."[69]

The twentieth century brought with it no resolution to the public-school problem. Fueled in part by mainstream Protestants who saw public schools as a vehicle for Americanizing the immigrants and stemming their own movement's decline, pressure to strengthen the religious component of state-sponsored education heightened. Jewish pupils suffered particularly acutely, for both prayers and Bible readings tended to be cast in a Protestant mold; in some cases, they even included New Testament passages that doomed Jews to eternal damnation. Determined to protect Jewish children, the Reform movement's Central Conference of American Rabbis, in 1906, established a standing committee on church and state to collect information and work for Jewish rights.[70]

Initially, the committee focused all its attention on battling "sectarianism in the public schools." It marshaled evidence to prove that "morning religious exercises" in most public schools involved "Protestant religious worship" and argued that, as such, the exercises were both offensive and un-American. Unity dissolved, however, when the question turned to what function the public schools *should* play in the realm of religion and ethics. In 1911, Rabbi Tobias Schanfarber opposed ethical instruction in the public schools, believing that ethics could not be divorced from religion and that "the secular character of the public schools should be maintained sacred and inviolable." Rabbi Martin Zielonka, appealing to "all who have the welfare of childhood at heart," disagreed. "In our anxiety to keep religion out of the schools," he warned, "let us not prove our excessive zeal by seeking to keep out moral instruction."[71]

The same kind of debate took place over the so-called Gary Plan, initiated in Gary, Indiana, in 1913, permitting released time

during the school day for moral and religious instruction outside of school property. Many rabbis were opposed to the plan, despite its nationwide popularity, fearing that once the wall between church and state was breached "the religion of the majority will receive general sanction." One rabbi went so far as to urge his colleagues to line up with the Free Thinking Society and fight the Gary Plan tooth and nail. Rabbi Samuel Schulman of New York, on the other hand, supported the plan with certain changes and urged his colleagues to become more accommodationist and proreligious in their policies. The CCAR, he proclaimed, "should not content itself merely with the negative attitude of insisting upon the complete separation of church and state, but should, wherever it can, constructively and helpfully meet all efforts made for the improvement of ethical and religious education in the nation."[72]

As one of the leading American rabbis of his day, Schulman actually sought to change the whole tenor of church-state thinking within the American Jewish community. In a private letter to Samson Benderly, director of New York's Bureau of Jewish Education, he explained why:

> In America, we have a unique and therefore, very delicate problem. We, of course, want to keep religion, Bible reading, hymn singing out of the public schools. At the same time we know that there is not enough efficient moral and religious education in the country . . . . Jews make a mistake in thinking only of themselves and assuming always a negative and critical attitude. They must supplement that negative attitude with a constructive policy. Otherwise, they will soon be classed in the minds of the Christian men and women in this country with the free-thinkers and with those who have no interest in the religious education of the youth. That, of course, is undesirable both because it is contrary to our genius as Jews and also contrary to the real spirit of Americanism, which while not ecclesiastical, and separates Church from State, has always been religious.[73]

Many of the leading figures in Reform Judaism, including

rabbis Samuel Sale and Julian Morgenstern, came to agree with Schulman, and in 1926, in a highly significant and much disputed policy departure, the Dismissal Plan, a modified version of the Gary Plan that called on schools to "reduce their time schedule by . . . one hour or more at the end of the school day," won CCAR approval, in the hope that parents would devote the time gained to their children's religious education. Related plans were endorsed by the Conservative movement's United Synagogue of America and by the Commission of Jewish Education of the (Reform) Union of American Hebrew Congregations.[74] Louis Marshall was prepared to go even further. He believed that released time *during* the school day was constitutional and "highly commendable," and urged his fellow Jews to support the idea, fearing that "unless something of this sort is done, we shall have a Godless community."[75]

Fears of godlessness, however, were soon drowned out by renewed fears of Christianization, as evidence mounted that released-time programs were being abused. "Practices employed by overenthusiastic religious groups in many communities," the *American Jewish Year Book* reported in 1947, "not only involve the public schools as a co-partner in the enforcement of their own sectarian instruction, but employ public school facilities . . . ." Teachers in some communities pressured students to attend religious classes; in others, Jewish students were taunted for studying apart from everybody else. In one unhappy incident, public-school children were asked to pledge allegiance to a "Christian flag" as a mark of their "respect for the Christian religion."[76] The dilemma that American Jews faced, especially in the 1940s, was whether, given these abuses, released-time programs should be opposed everywhere, even at the risk of being seen as "godless," or whether in the interests of Jewish education, as well as goodwill and interfaith harmony, only the abuses themselves should be attacked, not the program as a whole. Rabbis themselves were divided on the issue: in one memorable case, the Northern California Board of Rabbis opposed a released-time bill, while the Southern California Board supported it! Conservative and Orthodox rabbis tended to be more sympathetic to such plans than Reform rabbis, although the Conservative Rabbinical Assembly went on record in 1946 against any form of religion in the public schools, released time included. And even

in Reform congregations, the issue sometimes pitted rabbis opposed to released time on principle against congregants who pragmatically sought to make the plan work, if only for the sake "of good public relations."[77]

The Supreme Court decision in *McCollum v. Board of Education* (1948), declaring unconstitutional released-time plans that used public-school classrooms for religious instruction during regular school hours, strengthened the hands of those in the Jewish community who favored a high wall of separation between church and state. The Synagogue Council of America (representing Orthodox, Conservative, and Reform rabbinic and congregational associations) as well as the organizations associated with the National Community Relations Advisory Council (NCRAC), founded in 1944 as the national coordinating body in the field of Jewish community relations (representing the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith, the Jewish Labor Committee, and the Jewish War Veterans), had all filed *amici curiae* (friends of the court) briefs in the case supporting the McCollums. This raised some eyebrows since the McCollums were atheists, but most Jewish organizations felt that Jews had a compelling interest in the case, especially given the abuses that released-time programs entailed. When the Supreme Court declared that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere," the organizations felt vindicated.[78] A month after the decision, the Synagogue Council of America and NCRAC, allied in a Joint Committee on Religion and the Public Schools (later the Joint Advisory Committee on Religion and the State), issued an important statement of principles embodying the new spirit that *McCollum* had unloosed. "The maintenance and furtherance of religion are the responsibility of the synagogue, the church and the home," the statement declared. It proceeded to condemn not only religious education and sectarian observances in the public schools, but also all government aid (other than lunches and medical and dental services) to denominational schools.[79]

Major Jewish organizations scarcely deviated from this position in the ensuing decades; indeed, it represented somewhat of a Jewish consensus for over a generation. During these years, the Supreme Court became increasingly involved in church-state

problems -- a consequence of *Cantwell v. Connecticut* (1940), which applied "the liberties guaranteed by the First Amendment" to the states under terms of the Fourteenth Amendment -- and Jewish organizational activities, as a result, shifted ever more toward the legal arena. The American Jewish Committee, the Anti-Defamation League of B'nai B'rith, and the American Jewish Congress became particularly active in this realm -- especially the latter, whose Commission on Law and Social Action, directed for many years by attorney Leo Pfeffer, maintained "an absolutist approach to the First Amendment." Pfeffer's view that "complete separation of church and state is best for the church and best for the state, and secures freedom for both" seemed to most Jews to be both logically consistent and historically convincing.[80]

The Supreme Court appeared increasingly to agree. In a critical decision, *Engel v. Vitale* (1962), it outlawed state-composed prayers as constituting an impermissible establishment of religion. The particular prayer involved was a nondenominational one composed by the New York Board of Regents and actually approved by several rabbis, including Rabbi Menahem Schneerson, the Lubavitcher Rebbe, who argued that "it is necessary to engrave upon the child's mind the idea that any wrongdoing is an offense against the divine authority and order."[81] But the overwhelming majority of American Jews, along with many liberal Christians, applauded the decision, notwithstanding the firestorm of protest from Evangelicals, and hailed it "as an affirmation of the position they had long espoused." The same kind of reactions greeted the Court's complementary decision a year later, in *Abington Township School District v. Schempp* (1963), outlawing all devotional reading of the Bible in the public schools, including the practice of reciting the Lord's Prayer.[82]

With these two decisions, the long agonizing battle over the character of America's public schools -- a battle that, as we have seen, really reflected divergent views over the character of the nation as a whole -- was, from a legal point of view, effectively settled. Jewish organizations continued to keep a vigilant watch lest religion reenter classrooms through the backdoor via mandated teaching of "creationism" or other devices, and the Supreme Court on several occasions found it necessary to reiterate, as it did in *Wallace v. Jaffree* (1985), that state encouragement of school prayer was unconstitutional.[83] But the central focus

of church-state controversy now shifted from the public schools to public funding of religious schools. And on this issue Jews found themselves seriously conflicted.

State Aid to Parochial Schools

Unlike other church-state issues that aroused Jewish concern, state aid to parochial schools did not involve the question of Jewish equality. Where Sunday closing laws and prayer in the public schools clearly disadvantaged Jews and could be fought on the basis of Jewish group interests as well as minority rights, state aid to parochial schools was offered to Christian and Jewish schools alike. The issue, then, was not the "equal footing" demand insisted upon since the days of Jonas Phillips, but rather the "wall of separation" axiom upon which Jews had built so much of their twentieth-century church-state philosophy. The debate, which began in earnest in the 1960s, pitted advocates of principle, who felt that any breach in the "wall of separation" would affect America and its Jews adversely, against proponents of pragmatism, who argued for an accommodationist policy benefiting Jewish days schools, interfaith relations, and American education as a whole.

In early America, before the modern public-school system existed, Jews readily supported state aid to parochial schools, and at least in New York City received funds on the same basis as Protestant and Catholics.[84] With the rise of the "nonsectarian" public school and the developing view that parochial (especially Catholic) schools were separatist, if not indeed un-American, most church schools lost state funding, and, as we have seen, most Jewish day schools closed down. In 1927 there were no more than twelve Jewish parochial schools in the whole United States.[85] Consequently, the issue of state aid to parochial schools scarcely arose in Jewish circles during this period. In one case, *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925), the Supreme Court ruled unconstitutional a Ku Klux Klan-sponsored anti-Catholic Oregon law that sought to require all parents to send their children to public schools. In another case, *Cochran v. Louisiana State Board of Education* (1930), the Court permitted the State of Louisiana to lend secular textbooks

to schoolchildren who attended parochial schools. Neither case, however, affected the great majority of Jews directly. Yet Louis Marshall, representing the American Jewish Committee in an *amicus curiae* brief opposing Oregon's public-school law, did enunciate a basic principle -- the right of parents to control the education of their children and to send them to private schools -- that made all subsequent debate possible. Attacking as "an invasion of liberty" any effort to make public schools "the only medium of education in this country," Marshall pointed out that private schools could in many cases accomplish what public schools could not -- including "religious instruction, the importance of which cannot be minimized."[86]

The growth of parochial schools, Catholic and Jewish alike, during the 1940s, coupled with heightened national concern over the quality of primary education, led to renewed pressure on behalf of state and federal measures to grant limited assistance to parochial schools on the basis of the "child benefit theory," the idea, supported by the Supreme Court, that state aid could be extended to parochial-school children so long as "the school children and the state alone are the beneficiaries."[87] As early as 1945, the Central Conference of American Rabbis had expressed concern over this development. In the wake of *Everson v. Board of Education of Ewing Township* (1947), an important case that permitted states to fund the cost of transporting students to parochial schools, this concern turned into real alarm.[88] "The wall of separation between the church and state is surely being breached," Rabbi Joseph Fink, chairman of the Committee on Church and State, exclaimed. He called on his colleagues to do all they could to uphold the status quo. For a time, leading Jewish organizations and religious bodies, including the Orthodox, united behind the 1948 Synagogue Council-NCRAC statement broadly opposing *all* government aid to parochial schools. Beginning in the 1950s, however, demands for a reevaluation of this policy sounded from a variety of quarters.[89]

In 1952, Will Herberg, author of *Judaism and Modern Man* and considered at the time "a fresh voice in the world of modern religious thought," published in *Commentary* magazine a widely read article urging Americans of all faiths to rethink their views on the problem of church and state given the new pluralistic realities of American life. Herberg was especially harsh on his

fellow Jews. "Judging by their public expressions," he wrote, "they seem to share the basic secularist presupposition that religion is a 'private matter' -- in the minimizing sense of 'merely private' -- and therefore peripheral to the vital areas of social life and culture." He urged Jews to "rid themselves of the[ir] narrow and crippling minority-group defensiveness," called for interreligious harmony, and insisted that Jews had little to fear from proposals to extend limited federal aid to parochial schools.[90] Six years later, Rabbi Arthur Gilbert reiterated some of these same concerns in an address to his Reform colleagues at the annual convention of the Central Conference of American Rabbis. "Our record is stuck in its groove," he warned, and he specifically attacked Reform opposition to the use of public funds to pay for the transportation of parochial-school children. Drawing from his own experience at the Anti-Defamation League of B'nai B'rith, he called for policy positions "that appear to be more realistic and respond in a more sophisticated fashion to the temper and needs of today's society."[91]

While still highly unusual in the 1950s, by the 1960s these views were gaining a more respectful hearing. For one thing, advocates of Jewish day schools found themselves increasingly in sympathy with their Catholic counterparts; like them they complained that on account of their religious beliefs they were unfairly required to pay twice for education. Moreover, public education itself was under widespread attack. Some turned to parochial schools looking for higher quality education; others, shocked by Russia's success in launching the Sputnik satellite, advocated enhanced federal aid to *all* schools in America, public and parochial alike. Thus, in 1962, the *American Jewish Year Book*, reviewing the events of the previous year, noticed for the first time that "unexpectedly strong support for the Catholic position [favoring state aid to parochial schools] appeared within the Jewish community, especially among the Orthodox." Rabbi Moshe Sherer, executive vice president of Agudath Israel of America, had testified before Congress in support of federal aid to private and parochial schools, arguing that Jewish day schools faced "extremely difficult financial circumstances." He was soon joined by representatives of the National Council of Young Israel and the Jewish day-school organization, Torah Umesorah. Even more surprisingly, aid to parochial schools was simultaneously endorsed by a leading Con-

servative Jewish layman, Charles H. Silver, who was also at the time president of the New York City board of education.[92]

In the years that followed, calls for change sounded in more and more circles. Professors Jakob J. Petuchowski of Hebrew Union College and Seymour Siegel of the Jewish Theological Seminary spoke out on the issue, supporting not only state aid to parochial schools but abandonment of the whole separationist agenda in favor of a more proreligious, "equal-footing" stance. Milton Himmelfarb, writing in *Commentary*, posed a pragmatic argument for change:

> It is time we actually weighed the utility and cost of education against the utility and cost of separationism. All the evidence in America points to education, more than anything else, influencing adherence to democracy and egalitarianism. All the evidence points to Catholic parochial education having the same influence . . . . Something that nurtures a humane, liberal democracy is rather more important to Jews than twenty-four-karat separationism.[93]

At the same time, Orthodox leaders insisted that aid to parochial schools was "good for Torah," "good for the Jews," and "good for America." It was, they argued, "both constitutional and equitable" for the government to share the cost of secular programs, since the government required such programs, set standards for what they should contain, and derived benefit from the well-educated citizens they produced.[94] In 1965, when Congress debated the Elementary and Secondary Education Act that included "child benefit" money earmarked for special educational services to parochial and private schools, intra-Jewish divisions came out into the open. Jewish spokesmen testified on both sides of the issue, and as a result of the debate the National Jewish Commission on Law and Public Affairs (COLPA) was formed to support aid to parochial schools and to promote the rights and interests of the "observant Jewish community."[95]

Since then, the Jewish community has consistently spoken with two voices on programs to assist secular education in parochial schools. Most Jewish organizations continue to condemn them on "no establishment" grounds. Any breach in the "wall of

separation between church and state," they fear, will ultimately work to the detriment of Jews and America as a whole. A minority of Jewish organizations, meanwhile, staunchly defend such programs on pragmatic and "free exercise" grounds. The tangible benefits that would result from federal aid to parochial education, they insist, would more than compensate for any potential problems.

"Overhauling Our Priorities"

The creation of COLPA and the attendant calls for a new American Jewish policy on church-state questions carried implications that went far beyond the issue of aid to parochial schools. A growing minority came to agree with Rabbi Walter Wurzburger, a leading Modern Orthodox rabbi and one-time president of the Synagogue Council, that the time had come for a "thorough overhauling" of Jewish priorities on *all* church-state issues. In place of what Wurzburger spoke of as "obsessive preoccupation with the Establishment Clause," they called for far greater attention to "free exercise" claims. They especially sought support for initiatives that could make it easier for Jews to observe their religious traditions.[96]

Surprisingly, the religious tradition that most frequently found its way into the courts concerned public displays of the menorah (candelabrum), symbol of the relatively minor Jewish holiday of Hanukkah usually celebrated in December. The issue as popularly understood involved a basic question: should government property be devoid of *any* religious symbols, or should it be open to *all* religious symbols? What made the issue complex was the widespread public celebration of Christmas, the only American legal holiday from which Jews, as non-Christians, felt emotionally excluded. Jews had long protested sectarian celebrations of Christmas, especially in public schools, and in more recent years they had also fought to remove such Christmas symbols as the cross and the creche from public property, arguing (as opponents of menorah displays also did) that these amounted to an impermissible establishment of religion. The Supreme Court in the controversial case of *Lynch v. Donnelly* (1984) partially overruled this objection, declaring that the creche, at least in the company of other "secular" Christmas symbols, was constitu-

tionally unobjectionable. The question, then, was whether the menorah too was unobjectionable and whether, if so, Jews should ask for it to be placed on public property alongside the permissible symbols of Christmas.[97]

Most Jewish organizations, unhappy with the *Lynch* decision, continued to believe that religious symbols of any sort should be kept off public property on First Amendment grounds. Some Orthodox groups, however, and particularly the Chabad (Lubavitch) organization, took an opposite stance. They insisted that menorahs *should* be placed on public property both as a Jewish response to Christmas and as a symbol of religious pride.[98] This claim raises complex legal questions to be decided by the Supreme Court. The intra-Jewish debate, however, is extremely revealing. Supporters of the publicly displayed menorah have argued that the public square should be filled with a multitude of religious symbols. These, they believe, would foster respect for religion, stimulate Jewish observance, and help fight assimilation. Opponents, meanwhile, have feared that displays of religious symbols on government property would foster fanaticism and intolerance. They believe that confining such symbols to public display on private property is the best guarantee of church-state separation and the rights of religious minorities.

Similar debates have swirled around other Jewish attempts to reorder church-state priorities. In one celebrated case, *Goldman v. Weinberger* (1986), an Orthodox Jewish Air Force officer named Simcha Goldman contested the military's uniform dress requirements that barred him from wearing a yarmulke while serving on duty. The Supreme Court ultimately ruled against Goldman, but the fact that his case was supported on "free exercise" grounds by COLPA, the American Jewish Committee, and other Jewish organizations points to a renewed emphasis on freedom *for* religious practices.[99] Related "free exercise" cases, most of them confined to lower courts, have involved everything from issues of Sabbath and holiday observance, to the religious rights of Jews incarcerated in prison, to divorce-law protection for women whose husbands refuse to issue them a traditional Jewish divorce (*get*).[100] No matter how different the circumstances in each case, however, the ultimate goal has generally been the same: "to remove the obstacles which face adherents of minority religions in the exercise of their religious rights."[101]

Conclusion

In the 200 years since Jonas Phillips pleaded with the Constitutional Convention for religious freedom, the condition of Jews in America has improved dramatically. They have won full legal equality under federal law and in each of the states; they face few if any hardships from Christian Sunday laws; and their children, at least in most places, can attend state-sponsored public schools without fear of intimidation on religious grounds. Most of these improvements derive, directly or indirectly, from the principles set forth in the Constitution itself, particularly the "no establishment" and "free exercise" clauses of the First Amendment. What these clauses mean, however, has remained a subject of continuing controversy. Does the First Amendment imply that America is a Christian nation (as some Evangelicals claim), a religious nation, or a secular nation? Does it envisage a government guaranteeing equality to *all* religions, one divided by a high wall from *any* religion, or one occupying some middle ground? And what happens when the "no establishment" and "free exercise" clauses conflict with one another? Which takes precedence?

American Jews have never been of one mind on these questions. While generally opposed to those who would Christianize the country or discriminate on religious grounds, they have been far less certain about what their communal priorities should be: religion in all aspects of American life or governmental secularism? governmental accommodation to religion or separation from it? Historically, as we have seen, American Jews have supported a wide range of positions on church-state relations; indeed, over the long span of American Jewish history there has been far less communal consensus on the subject than generally assumed. Fearing the persecutory potential of a Christian state, on the one hand, and the possible antireligious animus of a secularist state, on the other, many American Jews have sought a middle ground, a quest that may prove elusive. But if there has been no community-wide consensus on specific policies and approaches, there has, at least, been a common vision, one that links Jonas Phillips with his modern-day counterparts. It is the search for "equal footing," the conviction that America should be a land where people of all faiths are treated alike.

Notes

AJH - *American Jewish History*
AJYB - *American Jewish Year Book*
CCARYB - *Central Conference of American Rabbis Yearbook*
PAJHS - *Publications of the American Jewish Historical Society*

1. Reprinted in Bernard Schwartz, *The Roots of the Bill of Rights* (New York, 1980), pp. 439-440; and with minor differences in Morris U. Schappes, *A Documentary History of the Jews in the United States* (New York, 1971), pp. 68-69.
2. The states were Pennsylvania, New Hampshire, New York, Virginia, North Carolina, and Maryland (minority position); see Schwartz, *Roots of the Bill of Rights*, p. 1167.
3. Jacob R. Marcus, *The Colonial American Jew* (Detroit, 1970), pp. 226, 511-512; see also Abram Vossen Goodman, *American Overture: Jewish Rights in Colonial Times* (Philadelphia, 1947).
4. The colonial situation has recently been reexamined in two related books: Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986); and Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York, 1986). See also Mark V. Tushnet, "Book Review: The Origins of the Establishment Clause," *Georgetown Law Journal* 75 (April 1987): 1509-1517. Important older studies include William G. McLoughlin, "Isaac Backus and the Separation of Church and State in America," *American Historical Review* 73 (June 1968): esp. 1402-1403; and the classic study, Anson Phelps Stokes, *Church and State in the United States,* 3 vols. (New York, 1950). For the North Carolina constitution, see Jonathan D. Sarna, Benny Kraut, and Samuel K. Joseph, *Jews and the Founding of the Republic* (New York, 1985), p. 93; see the similar situation in Pennsylvania's constitution reprinted in Schwartz, *Roots of the Bill of Rights*, pp. 264-266 (arts. II, XVI).
5. Stanley F. Chyet, "The Political Rights of the Jews in the United States: 1776-1840," *American Jewish Archives* 10 (1958): 14-75; Oscar and Mary Handlin, "The Acquisition of Political and Social Rights by the Jews in the United States," *AJYB* 56 (1955): 43-98; Conrad H. Moehlman, *The American Constitutions and*

Religion (Berne, Ind., 1938). Many of these documents are reprinted in Sarna, Kraut, and Joseph, *Jews and the Founding of the Republic*, pp. 85-102.

6. Jonathan D. Sarna, "The Impact of the American Revolution on American Jews," *Modern Judaism* 1 (September 1981): 149-160.

7. In addition to items cited in nn. 4-6 above, see Morton Borden, *Jews, Turks and Infidels* (Chapel Hill, N.C., 1984). The Rosenbach Foundation Library in Philadelphia owns a volume entitled *The Constitutions of the Several Independent States of America* (Philadelphia, 1781) with handwritten notes detailing the rights and limitations of Jews under each state's laws. Whether the notes were written, as alleged, by the Sephardi Jewish minister Gershom M. Seixas has been questioned; the fact that the volume exists at all, however, is highly revealing. See Edwin Wolf 2nd and Maxwell Whiteman, *The History of the Jews of Philadelphia* (Philadelphia, 1956, 1975), p. 147; Jacob R. Marcus, *The Handsome Young Priest in the Black Gown: The Personal World of Gershom Seixas* (Cincinnati, 1970), pp. 16-17.

8. Schappes, *Documentary History of the Jews in the United States*, pp. 61-63; Wolf and Whiteman, *History of the Jews of Philadelphia*, pp. 146-151.

9. Joseph L. Blau and Salo W. Baron, ed., *The Jews of the United States, 1790-1840: A Documentary History*, 3 vols. (New York, 1963), 1: 28-32.

10. Quoted in Isaac M. Fein, *The Making of an American Jewish Community* (Philadelphia, 1971), p. 26.

11. See E. Milton Altfeld, *The Jews' Struggle for Religious and Civil Liberty in Maryland* (Baltimore, 1924) and Edward Eitches, "Maryland's Jew Bill," *American Jewish Historical Quarterly* 60 (March 1971): 258-279.

12. Chyet, "Political Rights of the Jews in the United States," p. 80.

13. Robert T. Handy, *A Christian America* (New York, 1971); Borden, *Jews, Turks, and Infidels*, pp. 53-74; see also James R. Rohrer, "Sunday Mails and the Church-State Theme in Jacksonian America," *Journal of the Early Republic* 7 (Spring 1987): 60.

14. Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833) as reprinted in John F. Wilson and Donald L. Drakeman, *Church and State in American History* (Boston, 1987), pp. 92-93. For a modern view, see Leonard W. Levy, "The

Original Meaning of the Establishment Clause of the First Amendment," in James E. Wood Jr., ed., *Religion and the State: Essays in Honor of Leo Pfeffer* (Waco, Tex., 1985), pp. 43-83.

15. On Kent, see *People v. Ruggles*, 8 Johns Rep. (N.Y.) 294 (1811) and John Webb Pratt, *Religion, Politics and Diversity: The Church-State Theme in New York History* (Ithaca, N.Y., 1967), pp. 138. On Parsons, see Nathan Dane, *A General Abridgement and Digest of American Law* (Boston, 1823-29), 2: 337 as quoted in Borden, *Jews, Turks, and Infidels*, p. 12. On Webster, see *Vidal v. Girard's Executors*, 2 How. 127 (1844), and Jonathan D. Sarna, "The Church-State Dilemma of American Jews," in Richard John Neuhaus, ed., *Jews in Unsecular America* (Grand Rapids, Mich., 1987), pp. 10-11. For British precedent, see *Shover v. The State*, 5 Eng. 259 as quoted by Bernard J. Meislin, "Jewish Law in America," in *Jewish Law in Legal History and the Modern World*, ed. Bernard S. Jackson (Leiden, 1980), p. 159.

16. Schappes, *Documentary History of the Jews in the United States*, pp. 235-246.

17. Ibid., pp. 64, 122; Jonathan D. Sarna, *Jacksonian Jew: The Two Worlds of Mordecai Noah* (New York, 1981), pp. 132-135.

18. See Jefferson's letter to the Danbury Baptists (1802) and Madison's letter to Rev. Jasper Adams (1832), reprinted in Wilson and Drakeman, *Church and State in American History*, pp. 78-81. For the background to Jefferson's letter, see Constance B. Schultz, "'Of Bigotry in Politics and Religion': Jefferson's Religion, the Federalist Press, and the Syllabus," *Virginia Magazine of History and Biography* 91 (January 1983): pp. 73-91, esp. 85.

19. *Annals of the Congress of the United States*, comp. by Joseph S. Gales, Sr. (1834), as reprinted in Wilson and Drakeman, *Church and State in American History*, p. 76; Sarna, "Church-State Dilemma of American Jews," p. 11.

20. The petition is reprinted in *PAJHS* 27 (1920): 92-95.

21. Naomi W. Cohen, "Pioneers of American Jewish Defense," *American Jewish Archives* 19 (November 1977): 116-150.

22. *Occident* 7 (1850): 564-566.

23. *Occident* 16 (1859): 580. See Naomi W. Cohen, *Encounter With Emancipation: The German Jews in the United States, 1830-1914* (Philadelphia, 1984), p. 77: "The Jewish pioneers for religious equality generally asked for government neutrality on matters of religion . . . a neutral-to-all religions rather than a divorced-

from-religion state."
24. Bertram W. Korn, *Eventful Years and Experiences* (Cincinnati, 1954), pp. 98-124; idem, *American Jewry and the Civil War* (New York, 1970), pp. 56-97.
25. Cohen, "Pioneers of American Jewish Defense," p. 120. As late as 1913, the Committee on Church and State of the Central Conference of American Rabbis was concerned not only with infringements on church-state separation but also with "any ridicule of the Jew on the stage . . . and any prejudicial statement in our public press." See Joseph L. Fink, *Summary of C.C.A.R. Opinion on Church and State as Embodied in Resolutions Adopted at Conferences Through the Years* (Philadelphia, 1948), p. 6.
26. See Borden, *Jews, Turks, and Infidels*, pp. 97-129.
27. *Occident* 7 (1850): 525.
28. *American Israelite*, Mar. 3, 1865; James G. Heller, *Isaac M. Wise: His Life, Work and Thought* (New York, 1965), p. 621.
29. Allan Tarshish, "The Board of Delegates of American Israelites (1859-1878)," *PAJHS* 49 (1959): 23; Borden, *Jews, Turks and Infidels*, p. 63; *PAJHS* 29 (1925): 105.
30. *PAJHS* 29 (1925): 81-82, 105.
31. For the general theme, see James R. Rohrer, "Sunday Mails and the Church-State Theme in Jacksonian America," *Journal of the Early Republic* 7 (Spring 1987): 53-74; Leo Pfeffer, *Church, State, and Freedom* (Boston, 1967), pp. 270-286. For Jewish attitudes, see Shlomith Yahalom, "American Judaism and the Question of Separation Between Church and State," unpublished Ph.D. diss., in Hebrew, Hebrew University of Jerusalem, 1981, pp. 100-134; and Borden, *Jews Turks, and Infidels*, pp. 103-129.
32. See William A. Blakely, *American State Papers Bearing on Sunday Legislation* (New York and Washington, 1891); Albert M. Friedenberg, "Jews and the American Sunday Laws," *PAJHS* 11 (1903): 101-115; idem, "Sunday Laws of the United States and Leading Judicial Decisions Having Special Reference to the Jews," *AJYB* 10 (1908-09): 152-189; and Jacob Ben Lightman "The Status of Jews in American Sunday Laws," *Jewish Social Service Quarterly* 11 (1934-1935): 223-228, 269-276.
33. Schappes, *Documentary History of the Jews in the United States*, pp. 279-281; Sarna, *Jacksonian Jew*, p. 134.
34. Emil G. Hirsch, *Sunday Law, Liberty and License: A Discourse Before the Sinai Congregation, December 16, 1888* (Chicago,

[1888?]); see Kerry M. Olitzky, "Sundays at Chicago Sinai Congregation: Paradigm for a Movement," *AJH* 74 (June 1985): pp. 356-368.
35. *Occident* 4 (March 1847): 565; 16 (September 1858): 274; see p. 275 for evidence that Leeser was echoing arguments by proponents of Sunday mails.
36. David Philipson, *Sabbath Legislation and Personal Liberty: A Lecture Delivered Before Congregation B'ne Israel* (Cincinnati, 1889); Harold Silver, *What Is Wrong with the Sunday Blue Laws: Address Delivered . . . at Temple Emanuel of South Hills, Pittsburgh, Pa.* (Pittsburgh, Pa., 1958). For Supreme Court decisions on Sunday closing cases, see Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* (Waco, Tex., 1987), pp. 289-322.
37. Blau and Baron, *Jews in the United States*, 1: 22-24.
38. Rohrer, "Sunday Mails," p. 68; *AJYB* 10 (1908-09): 169.
39. Isaac Leeser, *The Claims of the Jews to an Equality of Rights* (Philadelphia, 1841), p. 90; *American Israelite*, Feb. 28, 1887; *Where We Stand: Social Action Resolutions Adopted by the Union of American Hebrew Congregations* (New York, 1960), p. 66.
40. Charles Reznikoff, *Louis Marshall, Champion of Liberty: Selected Papers and Addresses* (Philadelphia, 1957), 2: 923-928.
41. Ibid., p. 929; cf. Benjamin Kline Hunnicutt, "The Jewish Sabbath Movement in the Early Twentieth Century," *AJH* 69 (December 1979): 196-225.
42. Bernard Drachman, *The Unfailing Light: Memoirs of an American Rabbi* (New York, 1948), p. 233; Richard Cohen, *Sunday in the Sixties*, Public Affairs Pamphlet #327 (New York, 1962); Pfeffer, *Church, State, and Freedom*, p. 287.
43. James Turner, *Without God, Without Creed: The Origins of Unbelief in America* (Baltimore, 1985), p. 171; Robert Handy, *A Christian America* (New York, 1971), p. 101; see also Ferenc M. Szasz, "Protestantism and the Search for Stability: Liberal and Conservative Quests for a Christian America, 1875-1925," in Jerry Israel, ed., *Building the Organizational Society* (New York, 1972), pp. 88-102; Paul A. Carter, *The Spiritual Crisis of the Gilded Age* (DeKalb, Ill., 1971); and Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920* (New York, 1981).
44. Samuel M. Campbell, "Christianity and Civil Liberty," *American Presbyterian and Theological Review* 5 (July 1867): 390-391.

45. Borden, *Jews, Turks, and Infidels*, pp. 62-74; Cohen, *Encounter with Emancipation*, pp. 98-100, 254-256.
46. David Philipson, *Max Lilienthal* (New York, 1915), p. 121; the three paragraphs on pp. 16-17 in the text are adapted from Sarna, "Church-State Dilemma of American Jews," pp. 13-14.
47. In Wilson and Drakeman, *Church and State in American History*, pp. 69, 79; see Robert M. Healey, "Jefferson on Judaism and the Jews: 'Divided We Stand, United, We Fall!'" *AJH* 73 (June 1984): 359-374, and, more broadly, William Lee Miller, *The First Liberty: Religion and the American Republic* (New York, 1986), pp. 5-150.
48. Benny Kraut, "Frances E. Abbot: Perceptions of a Nineteenth Century Religious Radical on Jews and Judaism," in J.R. Marcus and A.J. Peck, *Studies in the American Jewish Experience* (Cincinnati, 1981), pp. 99-101.
49. Reprinted in Philipson, *Max Lilienthal*, pp. 456-457; cf. pp. 109-125.
50. Quoted in Heller, *Isaac M. Wise*, p. 620.
51. Reprinted in Emma Felsenthal, *Bernhard Felsenthal: Teacher in Israel* (New York, 1924), pp. 267-268.
52. "Commending the 'Congress of Liberals' (July 1876)," reprinted in *Where We Stand*, pp. 14-15; *CCARYB* 3 (1893): 45.
53. Yahalom, "American Judaism and the Question of Separation Between Church and State," esp. pp. 257-264; Stokes, *Church and State in the United States*, 3: 592-595.
54. *CCARYB* 3 (1893), 45; David Philipson, *My Life as an American Jew* (Cincinnati, 1941), p. 76.
55. Carl F. Kaestle, *Pillars of the Republic* (New York, 1983); Lawrence A. Cremin, *American Education: The National Experience, 1783-1876* (New York, 1980).
56. Carl F. Kaestle, *Pillars of the Republic*, p. 93; Lloyd P. Gartner, "Temples of Liberty Unpolluted: American Jews and Public Schools, 1840-1875," in B.W. Korn, ed., *A Bicentennial Festschrift for Jacob Rader Marcus* (Waltham, Mass., and New York, 1976), p. 161; see Robert Michaelson, *Piety in the Public School* (New York, 1970).
57. Hyman B. Grinstein, *The Rise of the Jewish Community of New York, 1654-1860* (Philadelphia, 1945), pp. 235-236; Joseph R. Brandon, "A Protest Against Sectarian Texts in California Schools in 1875," *Western States Jewish History* 20 (April 1988): 233-235;

Alexander M. Dushkin, *Jewish Education in New York City* (New York, 1918), pp. 46-50. Catholics, of course, were vehement in their opposition to the Protestant character of the public schools. On this issue, the *New York Herald* noted with amusement, Jews and Catholics were united for the first time in 1840 years. See Diane Ravitch, *The Great School Wars: New York City, 1805-1873* (New York, 1974), p. 53.

58. Quoted in Gartner, "Temples of Liberty Unpolluted," p. 180.

59. Reprinted in Lloyd P. Gartner, *Jewish Education in the United States: A Documentary History* (New York, 1969), p. 86.

60. Gartner, "Temples of Liberty Unpolluted," pp. 177, 182; William E. Griffiths, *Religion, the Courts, and the Public Schools: A Century of Litigation* (Cincinnati, 1966), p. 1; cf. pp. 1-92.

61. *Church v. Bullock* 104 Texas 1, 109 SW 115 (1908), quoted in Griffiths, *Religion, the Courts, and the Public Schools*, p. 50.

62. Griffiths, *Religion, the Courts, and the Public Schools*, pp. 72-92. See, however, Henry Berkowitz's memoir of religious coercion in the Pittsburgh public schools quoted in Cohen, *Encounter with Emancipation*, p. 92.

63. Philipson, *Max Lilienthal*, p. 123.

64. *American Israelite*, Jan. 8, 1869.

65. Philipson, *Max Lilienthal*, pp. 121-122. The case, *Minor v. Board of Education of Cincinnati*, is reprinted with additional documents in *The Bible in the Public Schools* (1870; reprinted New York, 1967). See also F. Michael Perko, "The Building Up of Zion: Religion and Education in Nineteenth Century Cincinnati," *Cincinnati Historical Society Bulletin* 38 (Summer 1980): 97-114.

66. Ephraim Frisch, *Is the United States a Christian Nation? A Legal Study* (Pine Bluff, Ark., 1906).

67. *American Israelite*, Sept. 19, 1873.

68. *The Nation* 34 (Jan. 12, 1882): 34.

69. *American Hebrew,* Mar. 2, 1888, pp. 50, 51, 59; Cohen, *Encounter With Emancipation*, p. 95.

70. The committee was established on the basis of a 1904 proposal by Rabbi Joseph Krauskopf; see *CCARYB* 14 (1904): 32. Its first publication was entitled, significantly, *Why the Bible Should Not Be Read in the Public Schools* (1906). Prof. Lance Sussman has generously shared with me his forthcoming article, "Rhetoric and Reality: The Central Conference of American Rabbis and the Church-State Debate, 1890-1940." See also Eugene Lipman, "The

Conference Considers Relations Between Religion and the State," in Bertram W. Korn, ed., *Restrospect and Prospect* (New York, 1965), pp. 114-128.
71. *CCARYB* 16 (1906): 153; 21 (1911): 259, 262.
72. Nathan Schachner, "Church, State and Education," *AJYB* 49 (1947-48): 29; *CCARYB* 25 (1915): 426, 428; 35 (1925): 60.
73. Samuel Schulman to Samson Benderly, Dec. 9, 1915, Schulman Papers 1/5, American Jewish Archives, Cincinnati, Ohio.
74. *CCARYB* (1926): 84, 87; *AJYB* 29 (1927-28): 40.
75. Reznikoff, *Louis Marshall*, pp. 970-971.
76. *AJYB* 49 (1947-48): 32; *CCARYB* 53 (1943): 80.
77. *CCARYB* (1941): 121; 53 (1943): 75; *AJYB* 48 (1946-47): 129.
78. *McCollum v. Board of Education*, 333 U.S. 203 at 383; Naomi W. Cohen, *Not Free to Desist: A History of the American Jewish Committee, 1906-1966* (Philadelphia, 1972), p. 440; *CCARYB* 58 (1948): 104-106.
79. *AJYB* 50 (1948-49): 221-223. According to the official history of the Synagogue Council, this position could "be fairly said to represent the majority opinion, almost the official opinion of American Jewry." Quoted in Murray Friedman, *The Utopian Dilemma* (Washington D.C., 1985), p. 29.
80. *Cantwell v. Connecticut*, 310 U.S. 296 at 303. Leo Pfeffer, "Is the First Amendment Dead," reprinted in Naomi W. Cohen, "Schools, Religion and Government -- Recent American Jewish Opinions," *Michael* 3 (1975): 373; Pfeffer, *Church, State, and Freedom*, p. 728; see Pfeffer's "An Autobiographical Sketch," in James E. Wood, Jr., ed., *Religion and the State: Essays in Honor of Leo Pfeffer* (Waco, Tex., 1985), pp. 487-533. On the Supreme Court's involvement in the question of religion and the public schools, with copies of relevant decisions, see Miller and Flowers, *Toward Benevolent Neutrality*, pp. 378-452.
81. "Letter from the Lubavitcher Rabbi (1964)," quoted in Cohen, "Schools, Religion, and Government," p. 364; Pratt, *Religion, Politics and Diversity*, p. 290.
82. *AJYB* 64 (1962-63): 110; Cohen, "Schools, Religion, and Government," p. 348.
83. Pfeffer, *Church, State, and Freedom*, pp. 342, 350; *Wallace v. Jaffree*, 105 S.Ct. 2479.
84. Schappes, *Documentary History of the Jews in the United States*, pp. 126-127; Dushkin, *Jewish Education in New York*,

pp. 42-45.
85. Pfeffer, *Church, State, and Freedom*, p. 510.
86. The brief is reprinted in Reznikoff, *Louis Marshall*, pp. 957-967; for the context, see Morton Rosenstock, *Louis Marshall, Defender of Jewish Rights* (Detroit, 1965), pp. 211-213.
87. *Cochran v. La. State Board of Education*, 281 U.S. 370 at 375.
88. Justice Hugo Black, in his majority opinion, defined church-state separation in terms that have remained influential: "The 'establishment of religion' clause of the First Amendement means at least this: 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, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and 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'" (*Everson v. Board of Education of Ewing Township*, 330 U.S. 1 at 15).
89. *CCARYB* 55 (1945): 92; 57 (1947): 122; *AJYB* 50 (1948-49): 222.
90. Will Herberg, "The Sectarian Conflict Over Church and State," *Commentary* 14 (November 1952): 450-462; David G. Dalin, "Will Herberg in Retrospect," *Commentary* 86 (July 1988): 38-43.
91. *CCARYB* 68 (1958): 55, 57.
92. *AJYB* 63 (1962): 176-178.
93. Milton Himmelfarb, "Church and State: How High A Wall," *Commentary* 42 (July 1966), reprinted in his *The Jews of Modernity* (New York, 1973), p. 171; see also Seymour Siegel, "Church and State," *Conservative Judaism* 17 (1963): 1-12; idem, "Church and State: A Reassessment," *Sh'ma* 1 (Dec. 11, 1970), reprinted in Carolyn T. Oppenheim, *Listening to American Jews* (New York, 1986), pp. 130-134; and Jakob J. Petuchowski, "Logic and Reality," *Jewish Spectator*, September 1962, p. 20.
94. Quoted in Sheldon J. Harr, "Church, State, and the Schools: A Jewish Perspective," unpublished rabbinic thesis, HUC-JIR, 1973, pp. 83-84.
95. Cohen, "Schools, Religion, and Government," pp. 378-379; *AJYB* 67 (1966): 128, 139-141.

96. Walter Wurzburger, "Separation of Church and State Revisited," *Face to Face* 8 (Fall 1981): 8; see Noah Pickus, "Before I Built a Wall -- Jews, Religion and American Public Life," *This World* 5 (Fall 1986): 28-42; see also Friedman, *Utopian Dilemma*, pp. 87-98.
97. Jonathan D. Sarna, "Is Judaism Compatible with American Civil Religion? The Problem of Christmas and the National Faith" (forthcoming).
98. See, for example, *American Israelite*, December 1987-January 1988; Yosef Friedman, ed., *And There Was Light* (New York, 1988).
99. *Goldman v. Weinberger,* 106 S.Ct. 1310; see Daniel D. Chazin, "*Goldman v. Secretary of Defense:* A New Standard for Free Exercise Claims in the Military," *National Jewish Law Review* 1 (1986): 13-40.
100. For examples, see Bernard J. Meislin, *Jewish Law in American Tribunals* (New York, 1976) with updates in *Jewish Law Annual,* and Louis Bernstein, *Challenge and Mission: The Emergence of the English Speaking Orthodox Rabbinate* (New York, 1982), pp. 184-210. J. David Bleich has surveyed Jewish divorce in American law in "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement," *Connecticut Law Journal* 16 (Winter 1984): 201-289; see also David Ellenson and James S. Ellenson, "American Courts and the Enforceability of a *Ketubah* as a Private Contract: An Investigation of Recent U.S. Court Decisions," *Conservative Judaism* 35:3 (Spring 1982): 35-42.
101. Wurzburger, "Separation of Church and State Revisited," p. 8.