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# Hesburgh Lecture: Faith, Politics, and the Constitution: Understanding the Separation of Church and State

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*Faith, Politics, and the Constitution:  
Understanding the Separation of Church and State*

September 19, 2014  
Hesburgh Lecture  
Ares Auditorium  
The University of Arizona  
James E. Rogers College of Law  
Tucson, Arizona

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University of Notre Dame

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Thank you. It is such a pleasure to be with you, at this great university, in this beautiful state. I've been visiting – and occasionally living and working in – Arizona for 30 years . . . and it is still paradise. The sun and the sky and the peaks and the desert – for me, it is as striking as ever. I have many friends, and family, and happy memories here. It was here where I learned, thanks to the guidance and example of many outstanding Arizona attorneys, including my dad, to be a lawyer. (It was also here, at the University of Arizona, where I took my first bar exam. That memory, I admit, is *not* such a happy one.)

This law school is special to me for another, personal reason. It is the home of a first-rate program, the Center on the Constitutional Structures of Government, which is named after another proud Arizona lawyer, my

former boss – and teacher and mentor – William Rehnquist. It's been almost twenty years since I met him. I showed up disheveled and sweaty on a muggy Washington, D.C. afternoon for a job interview, still groggy from taking a short-notice “red eye” flight from Phoenix. I still remember our first conversation being about law practice, and obscure ghost towns, in Arizona. (He asked if I knew how “Bloody Basin” got its name. I didn't.) When he told me he'd never had a law clerk from Alaska, where I was raised, I started to get my hopes up.

“The Chief,” as we called him, was a lawyer's lawyer. He taught and inspired me, and all of his law clerks, to read carefully, to write clearly, and to think hard. It is worth remembering, as we come up on the 10<sup>th</sup> anniversary of his death, that he was a dedicated and accomplished public servant and a deeply decent man. What's more, like his longtime friend, colleague, and fellow Arizonan on the Court – Justice Sandra Day O'Connor – he had a clear and significant impact on the Supreme Court's decisions and doctrines involving faith and politics, including the landmark decision upholding school choice. And while I'm not sure he'd agree with everything I'll say tonight, I am confident that he would be – actually, that he *is* – pleased and proud to be associated with the Center and with this University.

I am also grateful to the Notre Dame Club here in Tucson, and to the Notre Dame Alumni Association, for inviting me to speak here as part of the Hesburgh Lecture series. This series is named, of course, for the University of Notre Dame's longtime and legendary president, Fr. Ted Hesburgh. A few years ago, my 97-year-old grandma – who also lives here in Arizona – remembered fondly to me a long train journey, back in the 1960s, from New York to Chicago during which she sat next to “Fr. Ted.” I guess he made quite an impression. She joked that I *must* finally be amounting to something if I was giving talks named after *him*.

And, it seems to me that our topic this evening – “faith, politics, and the Constitution” – is particularly appropriate for an event named for Fr. Hesburgh, given his faith-inspired and very public efforts, and achievements, in the struggles for civil and human rights, and his collaboration with the *Reverend* Dr. King. For Fr. Ted, as for Dr. King, “faith” had the power to move and elevate “politics,” in ways that helped to make more real the promises in the “Constitution.”

And so . . . to those of you who are alumni or friends of Notre Dame, I bring greetings from Our Lady's South Bend Mothership, where the leaves are starting to change color, the Dome is gleaming gold, and the Fighting Irish are undefeated. (For now.) I did not attend Notre Dame, but I came

there to teach 15 years ago because I was (and still am) intrigued by, and attracted to, its ideals, community, and mission. I am inspired by, and grateful for, all that those of you who *are* graduates do to help the University be – as our founder, Fr. Edward Sorin, hoped it would be – a “powerful force for good.” And if any of you here are teachers with the Alliance for Catholic Education program, or at the Notre Dame ACE academies here in Tucson . . . I had the privilege of visiting two of the schools, St. John the Evangelist and St. Ambrose, and all I can say is “wow!” and “thank you.” Your energy and engagement – *just as much* as the teaching, writing, and research that my colleagues and I do – help Notre Dame – in the words of our president, Fr. John Jenkins – to “heal, unify, and enlighten a world that is deeply in need.”

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So . . . “Faith, politics, and the Constitution.” This topic is timely and always interesting but, I have to admit, it also makes me a little bit nervous. After all, it’s often said that “religion” and “politics” are two subjects that are best avoided when talking with strangers . . . or even with friends . . . and I’m not sure “the Constitution” is much safer. It might seem strange, but I think it’s true: We Americans – as a political community, as a society, as a culture – have long been distinguished both by our religiosity and by our

attachment to our written Constitution, but we have a long tradition of arguing about both.

We have never had a national church, but some have suggested that our Constitution – whose birthday we celebrated this week – and the values it is thought to reflect have served for us as something like an established church. And yet, we disagree – deeply, often very strongly – about the meaning of the Constitution and the relation between “faith” and “politics.”

We’re probably all familiar with the arguments, and the complaints, that America is becoming, in many ways, more divided and more polarized. We’ve all seen the maps, of “Red” and “Blue” states, counties, and neighborhoods. We’ve experienced this division, maybe in painful ways, in arguments about which cable-news channel should be on in the gym or in decisions about whom to “friend” and “follow” in social media. Our currency proclaims “in God we trust,” but increasingly – and despite that trust – it seems that we are, as my friend Prof. Noah Feldman put it, “divided by God.”

I do not mean to start on such a gloomy note. But, I think it makes sense – I think it is *necessary*, actually, if we hope to learn from each other – to recognize that tonight’s subject is controversial, that it raises questions that are difficult, and that it presents the danger of causing

misunderstanding, offense, or even anger. If we recognize and confront this fact, though, we can then commit ourselves – not just tonight, but also tomorrow, and generally – to doing our very best to engage this topic, and our disagreements about it, in good faith, humility, and charity.

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So . . . I teach, study, and write about the Constitution, about the First Amendment, about the freedoms of speech and religion, and about the complicated relationship between “church and state.” And while I do my best to distinguish, as a scholar, between what the law *is* and what I think it *ought to be*, I do not pretend to be “neutral.” None of us is, really. So here – by way of “fair warning” – are some of my starting points:

Religious freedom, I believe, is a fundamental human right. It does not matter because the Constitution protects it; instead, the Constitution protects it because it matters. It is not a gift *from* the government; it is a limit *on* the government. Every person, *because* he or she is a person, has the right to religious liberty – to embrace, *or to reject*, religious faith, traditions, practices, and communities. This freedom is enjoyed by, and is important to, religious believers and nonbelievers alike. Religious freedom, protected through law, helps both individuals and communities to flourish. It protects the “private” conscience and also promotes the “public”, common

good. Religious or not, devout or not, we all have a *stake* in the religious-liberty project, and in the success of what Thomas Jefferson called our First Amendment's "fair" and "novel" experiment.

It is true that religious freedom is sometimes *inconvenient* for overreaching governments. Sometimes, it comes at a cost. The same is true, of course, of other constitutional rights, like the right to be free from unreasonable searches, or the right to remain silent, or the right to say unpopular or even offensive things. Legal and constitutional protections for fundamental human rights are sometimes inefficient; they sometimes get in the way. (This fact caused the columnist, Thomas Friedman, to remark a few years ago that it would be great if we "could be China for a day." I respectfully disagree.) The fact that our fellow citizens have constitutional and other legal rights means, sometimes, that we have to tolerate a lot of speech and action that we don't like, and sometimes even pay for it. A premise of our Constitution, though, is that it's worth it.

Now, in the United States, our understanding and our practice of religious freedom are tightly linked to a crucial, and complicated idea, that is, the "separation of church and state." These specific words do not appear in the Constitution but, correctly understood, I believe that they capture an important truth about what the First Amendment means for "faith,"



“politics,” and the law. In my view – again, by way of a disclaimer -- our governments and our laws are, and should be, “secular” . . . in a way that is “positive,” “healthy,” cooperative, and balanced. America’s Constitution, laws, traditions, and practices distinguish between – that is, they “separate – “church” and “state” precisely in order to protect religious freedom -- in private, in public, in civil society, and also in “politics.” We are, as one scholar has put it, appropriately *secular*, without being aggressively *secularist*.

Again, as I mentioned earlier, we Americans disagree sharply – and these disagreements appear to be sharpening – about what our constitutional commitment to religious liberty means, in practice. We disagree about how to strike the balance between religious freedom, on the one hand, and other goals and values, on the other. Most of us probably believe that religious minorities and dissenters can be accommodated, at least to some extent. But . . . where is the limit?

Some are concerned – and, I admit, I am one of them – that what once seemed like an underlying consensus about the foundational importance of religious liberty is breaking down, and that more and more people are rejecting the idea that religious beliefs and practices deserve any special treatment. Some are concerned – and, I admit, I am one of them – that, in

some contexts, we are backsliding, and becoming less willing to tolerate – let alone to accommodate – inconvenience, disagreement, pluralism, and offense. What President Clinton once called “our first freedom” seems, sometimes and in some cases, to be vulnerable.

It is true – and it is worth remembering, especially during Constitution week – that even fundamental rights cannot be taken for granted. It is also true – and it is worth remembering, as we are bombarded with news from around the world of oppressive and increasing religious persecution and religiously motivated violence – that, notwithstanding our controversies, we are fortunate and blessed. According to the Pew Research Center, 75 percent of the world’s people are denied meaningful religious liberty by their governments. In North Korea, in Iraq, in Nigeria, and in far too many other places, the question is not whether a war-memorial cross maybe displayed in the desert or whether a kid should be able to use a scholarship funded by tax-credits to attend a parochial school. It is, too often, whether a church will be demolished, a family will be attacked, or an alleged apostate will be executed. In so many places, so many people pray for the day when they will have the luxury of arguing about which minister may say which prayer at the opening of a town-council meeting. Our religious-freedom

experiment, like our Constitution, is not perfect, but it is a gift worth cherishing nonetheless.

My friend Prof. John Witte, one of the leading scholars of religious-liberty law in America, has reported that the “bold constitutional experiment in granting religious liberty to all remains in place, [*but also*] *in progress*, in the United States.”<sup>1</sup> This experiment is contested, and controversial, and even vulnerable, but it has – in the words of James Madison, the “father of the Constitution” – added “a lustre to our country,” just as he hoped it would.

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I mentioned a few minutes ago the words – that is, the *idea* – “separation of church and state.” I think we can better understand this idea, and its place in our constitutional law, if we pair, and compare, the word “separation” with another one – one that just happens to rhyme: “integration.” Let me try to explain what I mean.

As you’ve heard, I’m a law professor. I teach and train new lawyers at the University of Notre Dame. There, my colleagues and I do the usual “law-school thing” – we answer questions with questions, we spin out bizarre hypotheticals, we hide the ball, and we make first-years more argumentative and obnoxious at family Thanksgiving dinners. (Sorry!)

More importantly, though, we invite our students to bring their commitments and hopes *to* their studies, and also to carry them back out – in good shape, and perhaps better understood – to their lives in the law. We do not think we can expect young lawyers to think deeply and well about service, and justice, and the common good if we tell them to privatize their ideals or to put up a wall between the meaning of life and the practice of law. And so, we urge our students to approach their professional vocations as *whole persons*. We challenge them, in other words, to *integrate* what they *do* with what they *believe*. We encourage them to remember who they are and to resist the temptation to “check their commitments at the door.”

Well, let’s turn back now to this important idea of church-state “separation”: As I see it, the fact that religious and political authorities are “separate” is perfectly compatible with the *other* fact that, under our Constitution, we are entirely free to participate in public life, and to cooperate with our fellow citizens, as *whole* and *integrated* persons – in other words, as *ourselves*.

Aristotle was right (and I’m sure he’s relieved that I think so!): We *are* “political animals.” It’s part of our nature to “do politics,” to gather in communities and around shared values, to pursue common goods and goals, to take care of each other and – in this way – to take care of ourselves. We

are *also*, many of us believe, creatures made in the image and likeness of God. We are also, many of us think, “hard wired” to search for, and cling to, the transcendent, and the truth. On this view, part of what it means to be human is to be *both* “religious” (broadly understood) and “political.” Of course, this view might be wrong. Certainly, many of us reject it. But, nothing about the Constitution of the United States *requires* us to reject it. And, nothing in America’s tradition of church-state “separation” requires those who *do* hold this view to accept *dis*-integration as the “price of admission” to public life, to citizenship, or to “politics.”

To be clear: we wisely distinguish, or “separate,” religious and political authority. Those who drafted and debated our Constitution knew what a coercive national “establishment” of religion looked like, and they knew they didn’t want one. (Many of them were comfortable with what John Adams called “mild and equitable establishments” at the state level, but that’s a topic for another day.) They did not, however, purport to build a “wall of separation” between “faith” and “politics”, but instead to differentiate between “church” and “state.” There’s a difference. They emphasized the distinction between “religious” and “political” authority, while respecting the proper place and role of both. They did this – as James Madison famously and eloquently argued – not to cage “religion” or enclose

it behind a “wall” but instead to protect religious *freedom*, which includes – the freedom to build and live an integrated, balanced, public life.

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Of course, when it comes to faith, politics, and the law, this “balance” is not achieved in the abstract, or in theory, or in law-school examinations. It is struck, instead, “in the trenches” and in the context of real-world disputes. And, as we know, such disputes are not in short supply.

Earlier in our history, the questions presented might have involved military-service exemptions for Quakers, or mail delivery on Sundays, or federally funded religious schools in Indian Country. These and other disputes were not, for the first century or so of our history, hashed out in the Supreme Court, but instead in legislative chambers, state courts, and the “courts of public opinion.” In fact, the Court was a non-factor, and the First Amendment itself played only a small part, in the American “experiment” until the federal government’s aggressive campaign in the late 1800s against the practice of polygamy and, indeed, the LDS Church itself.

For the last 70 years or so, though, and certainly today, we’ve tended to “make a federal case”, and to ask the Court to resolve, our arguments about church-state relations, religious liberty, and the role of religion in the public square. We’ve asked the courts to answer questions like: Should we

permit religious holiday displays in front of government buildings, or depictions of the Ten Commandments on courthouse walls, or kitschy statues of Jesus at ski resorts on leased public lands? Should we exempt religiously motivated drug use from the scope of narcotics laws, or church-renovation projects from the reach of historical-preservation regulations? Do laws requiring the teaching of “intelligent design” in science classes or calling for a “moment of silence” in schools lack the required “secular” purpose? Should children in poor families be allowed to use public scholarship funds to attend a parochial or other religious school? May a judge review the decision of a bishop to close a parish, or order a bankrupt diocese to close a homeless shelter, or supervise the selection and training of clergy, or award church property to a breakaway congregation?

I could go on and on – and, because I’m a law geek, it’s tempting. The streamlined version, though, of the story of the Supreme Court’s religious-freedom cases revolves around three general categories of cases: First, there are the cases about money and other forms of support for the educational, healthcare, social service, and other “secular” activities of religious schools, universities, hospitals, and charities. For a fairly long time, the Court often treated such support as an unconstitutional “establishment” of religion, and as a violation of the “separation of church

and state.” In recent years, though – and again, this is an area where Justices Rehnquist and O’Connor played leading roles – the tendency has been to allow such funding, so long as the programs and funding mechanisms are “neutral.”

The second category of cases involve objections by religious believers to laws that, in their view, burden their “free exercise of religion.” The question here is whether the First Amendment’s “Free Exercise Clause” requires the government to accommodate these objectors and to exempt them from the law’s burdensome requirements. The Court has changed course on this question several times over the last 50 years but the rule now is that such exemptions are not *required* by the Constitution. They are, however, usually allowed, and so legislatures are generally permitted to remove such burdens, and accommodate religious objectors, if they want to.

A prominent example of such an accommodation, of course, is the federal Religious Freedom Restoration Act, which the Court applied in last summer’s *Hobby Lobby* case, but there are many others. Sometimes these exemptions are categorical, other times they call for a balancing of the government’s interests, on the one hand, and the burdens on religious exercise, on the other. In a few weeks, the Court will hear oral arguments in a case called *Holt v. Hobbs*, which presents the question whether a federal



religious-liberty law requires prison officials in Arkansas to exempt from its strict grooming policy a man whose Muslim beliefs require him to grow a beard.

Finally (for now), a third (and large) category of cases involve religious symbols and speech *by* public officials or *in* the public square. Think, for example, of the famous school-prayer decisions, or the annual Holiday Season ritual of lawsuits over Nativity scenes and menorahs on government property, or the Supreme Court's decision last year involving the practice of a small town in New York of opening its town council meetings with a prayer offered by a local minister. These cases are very fact-specific and context-sensitive. They come out, frankly, all over the map. *Perhaps*, though, it is safe to say that religious symbols and speech are unconstitutional when they are seen as "coercive" or as "endorsing" religious faith; they are usually permissible when they merely involve traditional, ceremonial practices like "God save this honorable Court"; and they are constitutionally protected, even on public property, when they are used by private parties.

Again – this is a very rough and incomplete set of categories. In any event, engaging these and similar questions requires us to identify the foundations, content, and limits of the freedom of religion that is protected

by our Constitution and laws. They require us to try to locate the sometimes blurry border that separates “church” and “state.” Where should we begin?

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As I mentioned earlier, President Clinton observed, when he signed the Religious Freedom Restoration Act into law, that “religious freedom is literally our first freedom.”<sup>2</sup> His point was not simply that religious liberty happens to come first in our Bill of Rights. It was, instead, that the freedom of religion was *central* to the Founders’ vision for the American political community. It was “in the bricks” and part of the foundation, not merely a decoration. His point was *not* that America was, is, or should be a “Christian nation” or a religious *nation* of any kind. It was, instead, that our Constitution was not set up to displace, suppress, or erase religion. Unlike the *French* Revolution, ours did not try to replace religious faith with state-worship.

However, what this liberty *meant* had to be worked out (and is still being worked out). From the very beginning, John Adams foresaw a “glorious uncertainty” in the law of religious liberty and a “noble diversity” of opinion regarding its details. History has confirmed his prediction, though I have to admit that my students usually find the “uncertainty” more irritating than glorious! The early Americans, like Americans today, did not

always agree about what the “freedom of religion” means, or about how it should be protected in law. Still, they tended to agree – for both theological and practical reasons – that religious freedom matters, and not just to religious believers. It was widely believed, as James Madison insisted, that if our most sacred things are unprotected, then our *other* freedoms – press, speech, conscience, association, property, and privacy -- are vulnerable. Religious freedom, like clean water and the rule of law, is a public good, in which we all have a stake.

President Clinton’s point, then, is worth emphasizing: the religious-freedom protections afforded through our constitutional text and in our constitutional traditions are not accidents or anachronisms. They are not – as a prominent scholar has claimed, lingering “aberration[s] in [our] secular state.”<sup>3</sup> Our Constitution does not regard religious faith with grudging suspicion, or as a quaint relic left over from our primitive past. The purpose of our First Amendment is not to push religion to the margins, in the hope that it will wither; it is, instead, to safeguard and support it, so that it can flourish . . . not propped up and exploited by government . . . but on its own. Our laws protect the freedom of religion for *reasons*, and one of those reasons is that the search for truth and meaning – on one’s own and in community with others – is worth protecting.<sup>4</sup>

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I suggested earlier that our country's approach to church-state relations and law-and-religion questions is, at its best, one of "healthy" or "positive" secularity. We might call this "the American model" of religious freedom. It's just a model, of course, and not a straightjacket; it has evolved, reformed, and been revised over time. It could be under some strain and stress these days. What, in broad strokes and generally speaking, does this "American model" of "healthy secularity" – America's version of the "separation of church and state" – look like?

In the "American model," the right to religious freedom is – again – a fundamental human right, a right that is "endowed by our creator" and not loaned out by our government. At the same time, this freedom co-exists in balance with the government's obligation to secure public order and promote the common good. As a number of Founding-era writers and texts put it, religious liberty is not "license." It is not absolute.

In the American model, officials and laws do not exclude religious believers and values from public life and debate on the theory that they are somehow unworthy or inappropriate. Instead, the right to "public religion" is honored, as is the freedom of "private" religion, which includes – obviously – the liberty to reject religion altogether. The government leaves the business

of religious formation, education, and evangelization to families, clubs, associations, schools, and congregations. At the same time, it carefully protects these associations' freedom to do this work without excessive interference.

In the “American model,” at its best, “church” and “state” are separate, not in the sense that “faith” is eliminated or excluded entirely from “politics” – after all, this would be impossible – but instead in the “healthy” sense that *government* institutions and *political* authorities are restrained from intruding unjustifiably into the affairs of *religious* communities. They are “separate” and “distinct,” but not entirely alien or unfamiliar. And so, religious organizations and public officials can and do cooperate in promoting shared goals – feeding the hungry, clothing the naked, caring for the sick, educating the young. But, governments do not presume to declare religious truths or second-guess theological teachings. The “American model” is “secular,” not in the sense that it is “anti-religious” but instead in the sense that laws and policies are not supplied directly by religious authority.

Now, this is a thumbnail sketch of the “American model” at its ideal best. We all know, though, that American courts, legislators, officials, and voters do not always act in accord with this model. Why does this happen? Specifically, why does the view persist that our Constitution requires the

exclusion of religious voices and arguments in the public square or that the First Amendment makes religious faith a matter of strictly private concern?

Part of the answer, certainly, is . . . “nobody’s perfect.” Another part, of course, is . . . “life is complicated.” Some would say that this view simply reflects prejudice or hostility toward those religious believers whose values and commitments are “behind the times” or “out of sync” with majority opinion, but I don’t think this is the whole story. It seems to me, instead, that this mistake reflects two related misunderstandings regarding our Constitution and our history.

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For starters, many of us forget that “social” space and life exist between the purely “private” and the purely “public.” That is, between the personal sphere of homes, hearts, and minds . . . and the government sphere of taxation, representation, legislation, and prosecution . . . is the large, busy, boisterous, and crucially important sphere that of “civil society.” Almost everyone agrees that religion is protected in the purely private realm – in “houses of worship” or in that Jiminy Cricket place we call “conscience.” Similarly, almost everyone also agrees that the government’s laws and activities should remain secular. What is sometimes forgotten, though – and this accounts for some of the confusion I just mentioned – is that a “healthy”

secularism can still, and should, tolerate and welcome religion in the “public square,” that is, in civil society.

The First Lady made a similar point recently, noting that one’s “faith journey isn’t just about showing up on Sunday for a good sermon and good music and a good meal. It’s about what we do Monday through Saturday as well.” Many of us strive to *integrate* – there’s that word again – rather than to segment and compartmentalize our lives, and the “public square” is where this happens.

Remember, the First Amendment limits government conduct only; it says what *governments* may not do. It reads, “*Congress* shall make no law.” It has nothing to say, though, about private action, other than to confirm that religious expression, exercise, and worship are worth protecting, even “in public.”

The First Amendment forbids the “establishment” of religion. But, this “Establishment Clause” is not supposed to be the government’s sword, driving private religious expression from the marketplace of ideas; rather, the Clause *constrains* government. It is a *shield* that *protects* religious and religiously motivated speech and action.

Our Constitution does not demand what the late Richard John Neuhaus called a “Naked Public Square.” It does not impose a “don’t ask,

don't tell" rule on religious believers who participate in public life.<sup>5</sup> If a member of the Sierra Club, or the AARP, can bring her values of stewardship and solidarity into civic life, then so can a member of the United Methodist Church.

Of course – and this is really important – there are plenty of reasons for reasonable and faithful believers to decide that not every political argument needs to be a religious one. The fact that religious arguments are protected does not mean that they are always helpful or appropriate. We should be able to figure out the details of our budgets and zoning regulations without diving into theological waters. Although I believe that religious leaders have an obligation to proclaim the truth as they see it, even when that truth is uncomfortable or unpopular, it is also true that there are many questions – *most* questions – about which reasonable and faithful believers can disagree. It compromises the faith if we water it down to avoid offense; but it also disrespects religion to offer clunky, hasty baptisms of our favorite policy proposals. “What would Jesus do?” is an important question for Christians to ask, but – standing alone – it probably won't tell us whether medicinal marijuana should be legal or what the sales tax should be on Big Gulps.



Now, it is true – as the Supreme Court has observed – that, under our Constitution, “religion must be a private matter for the individual[.]”<sup>6</sup> This is true, but it does not mean that religious faith has nothing to say to questions of public policy and social justice. William James once quipped, “in this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]”<sup>7</sup> As we all know, lots of strange things can be tolerated, so long as they are kept private. (Instagram and SnapChat are making this toleration more difficult, perhaps.) But maybe, sometimes, religious people are called to “make a public nuisance.” As Pope Francis put it recently, “if we annoy people . . . well, blessed be the Lord!”

To be sure, the Constitution protects our right to keep our faith private. However, and again, it does not require us to privatize our faith – to *disintegrate* our lives – before entering the public square and taking up the responsibilities of citizenship.

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A *second* source of confusion has to do with this important, but tricky idea we’ve been discussing, that is, “the separation of church and state.” This is, in my view, one of the most misunderstood terms in American

conversations about religion, politics, faith, and public life. What does it mean, really?

Well, step back with me, for a moment, to “kinder, gentler” days. In 1988, while out on the campaign trail, then-Vice President George H.W. Bush recalled his experience, as a young pilot in World War II, being shot down over the South Pacific. He said:

Was I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was.

What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them, and God and faith—and the separation of church and state.<sup>8</sup>

Now, this train-of-thought probably strikes us as strange, or even absurd. And yet, it is entirely American. That the would-be President thought it was important to invoke “God” and “faith” as “fundamental values” – but also thought it was necessary to tack on “and the separation of church and state” – says a lot about how we Americans think when it comes to our “first freedom.”

Almost 200 years earlier, another President, Thomas Jefferson, wrote a letter to the Danbury Baptist Association of Connecticut. In that letter,

which was in part a response to the Baptists' complaints about their treatment by the state legislature and in part an attempt to secure political support, Jefferson famously professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize "wall" of church-state "separation."<sup>9</sup> In so doing, he supplied what is for many the "authoritative interpretation" of the First Amendment.<sup>10</sup> Indeed, it has been suggested that "[n]o metaphor in American letters has had a greater influence on law and policy than Jefferson's 'wall of separation between church and state.'"<sup>11</sup> These words are, for many of us, "more familiar than the words of the First Amendment itself."<sup>12</sup>

However, the fact that we're familiar with Jefferson's words does not mean – hardly! – that we agree about their meaning. Notwithstanding our third President's "reverence" for church-state separation, and despite the comfort it supplied to our 41<sup>st</sup> President when he was stranded in the Pacific, the idea remains controversial. What does it mean, really, for "church" and "state" to be "separate"?

To make things even more muddy and complicated, what about claims like the one once made by former Congresswoman Katherine Harris (and others) that the separation of church and state is a "lie we have been told" to keep religious believers out of politics and public life?<sup>13</sup> This claim

misses the mark, I think. It is true, as I mentioned earlier, that the “wall of separation” does not appear in the Constitution’s text but the *idea* of a “healthy” differentiation between religious and political authority is connected in important ways to religious freedom (just ask someone living in Iran) and so it is equally important that we get this idea right. And yet, there is no denying that separation is often presented as an anti-religious concept, rather than – as the influential American Jesuit John Courtney Murray once put it – a “policy to *implement* the principle of religious freedom.”<sup>14</sup>

Now, it is fair to say that the Supreme Court, over the years, has probably given excessive weight to Jefferson’s views on religion and government and has made too much of his “wall of separation” metaphor. In some areas, including the school-funding cases, this image has been unhelpful. As the late Chief Justice Rehnquist put it, 30 years ago, it is difficult “to build sound constitutional doctrine . . . on a figure of speech.”

Still . . . the appropriate distinction between, and “separation” of, religious and government authority is crucial to America’s “healthy secularity” and to religious freedom more generally. It is not a “lie.” The previous Pope, Benedict XVI, was right – and very “American” – when he said that the “distinction between what belongs to Caesar and what belongs

to God, in other words, the distinction between Church and State”, it not only fundamental, it is “fundamental to Christianity.”<sup>15</sup>

The separation of religious and political authority and the independence of religious communities from government oversight and control are “separationist” features of our constitutional order and they have helped religious faith to thrive in America. Properly understood, then, the separation of church and state is not a clever invention of the ACLU, but is a safeguard against governments tempted to assume the power to direct religious life or supervise religious decisions.

True, some will argue that the “separation of church and state” requires governments to energetically scrub away all of the “religious residue” from the public square. But this view of church-state separation is mistaken. It is untrue to the vision of our Founders and to the text of our Constitution. To quote John Courtney Murray again, arguments like these stand the First Amendment “on its head. And in that position it cannot but gurgle nonsense.”<sup>16</sup> Our Constitution separates “church” and “state” not to confine religious belief or silence religious expression, but to curb the ambitions and reach of governments.

\* \* \* \* \*

Now, back to the “American model” of religious freedom and church-state relations. I’ve talked for a while about some sources of confusion; I’d like to try now to suggest a way of thinking about our “model” that might help to clarify things. I want to suggest that we should think about religious freedom not merely as “freedom from,” or “freedom of,” but also (and especially) as “freedom *for*” religion. So . . . what do I mean?

“Freedom from religion” accepts religion as a social reality, but regards it primarily as a danger to the common good, and regards it as a practice that should be confined to the private, personal realm. On this view, it is “bad taste” – or worse! – “to bring religion into discussions of public policy.”<sup>17</sup> On this view, as Prof. Stephen Carter memorably put it, religion is “like building model airplanes, just another hobby: something quiet, something trivial—not really a fit activity for intelligent . . . adults.”<sup>18</sup> Religious belief is protected, but the permissible implications and expressions of those beliefs are limited. Under this approach, the dominant concern is the domestication – the housetraining – of religion. Religious freedom is the right not just to choose not to be religious, it is also the right to not be constrained or burdened by the religious beliefs of others, or by religiously motivated policy. The role of law and government is to maintain strictly the boundary between private religion and public life; it is certainly

not to support, and only rarely to accommodate, religious practice and formation.

This way of thinking about the matter has found *some* expression in American law and policy, both in the past and – in some instances – today. We see it, I think, in the arguments of some – like the editorial writers for *The New York Times* – that those religious employers challenging the new contraception-coverage mandate are seeking to “impose” their religious views on employees who do not share them. In my view, though, this “freedom from” approach is incomplete; by itself, it is not true to the Constitution, to religious liberty properly understood, or to the nature of the human person. And, thankfully, its influence seems more pronounced among academics and activists than among Americans generally.

The second approach – “freedom of religion” – emphasizes toleration, neutrality, and equal-treatment. Religion, on this view, is something that matters to many people – it is an important and often beneficial social and historical phenomenon – and so the law does not permit it to be singled out for special hostility or discrimination. Equality is the fundamental norm. It is recognized and accepted that religious believers and institutions are at work in society, and the stance or response of the law is even-handedness. Because we are *all* entitled to express our views, and to try to live in accord

with our consciences, religious believers are so entitled, too. The law, it is thought, should be “religion-blind.”

This way of thinking is certainly not hostile to religion, but it is nervous about regarding religion as something special. Religious liberty is just “liberty,” and liberty is something to which we all have an “equal” right. Religious conscience is just a dimension of conscience. Religion is not something to be “singled out,” either for accommodations and privileges, or for burdens and disadvantages. Religious commitment, expression, and motivation are all, in the end, matters of taste: not scary, but not special.

This approach represents an improvement on, and a valuable supplement to, the “freedom from” view and it, too, has been, and is, reflected in American law. Indeed, it is fair to say that its influence is much more pronounced in the Supreme Court’s recent decisions. The Justices have emphasized, for example, that officials may not treat religiously motivated speech worse than speech that reflects other viewpoints. Similarly, courts have ruled that public funds may be allocated to religiously affiliated schools and social-welfare agencies – so long as they are providing a secular public good – on the same terms as non-religious ones. At the same time, governments are not required to provide special accommodations for religious believers, or to exempt religiously motivated conduct from the



reach of generally applicable laws. (If, for example, the government decides to protect Bald Eagles, it is not required by the Constitution to exempt those who practice Native American religions, and use Eagles' feathers in their rituals, from the scope of the law.)

Finally, a third approach: “freedom *for* religion.” This way of thinking about the matter, in my view, represents the American experiment in “healthy secularism” at its best. According to this approach, the search for religious truth is acknowledged as an important human activity. Religion *is* special – and not just especially dangerous. Its exercise is seen as valuable and good, and worthy of accommodation, even support. The idea is not, to be clear, that the public authority should demand religious observances or establish religious orthodoxy; it is, instead, that a political community, committed to positive secularity, can and should still take note of the fact that people long for the transcendent and are called to search for the Truth. The appropriately secular and limited state will not prescribe the path this search should take, but it will take steps – positive steps – to make sure that “freedom for” religion, and the conditions necessary for the exercise of religious freedom, are nurtured. The government, under this approach, will not only refrain from discriminating against religion, it will take special care to accommodate and facilitate it – though always in a way

that respects the distinction between “church” and “state”, and the liberty of individual conscience. It not only avoids imposing unnecessary burdens on religion, it also looks for ways to lift such burdens where they exist.

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To be sure, religious liberty is not absolute, and not all requests for exemptions and accommodations can, or should, be granted. In a pluralistic society, people will often disagree, and – at the end of the day – the majority is entitled to pursue its understanding of the common good and protect its conception of public order. But, in such a society – like ours – if we *can* accommodate religious objectors, and if we *can* clear out space for “freedom *for* religion,” we should.

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Admittedly, as many commentators, scholars, and judges have complained, American law dealing with religious liberty is not entirely coherent. This is, in my view, precisely because of the tensions between and among these three ways of thinking about the matter. Still, things could be worse. We should be vigilant, but we should also be very grateful.

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<sup>1</sup> Id. at xix.

<sup>2</sup> President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995).

<sup>3</sup> Suzanna Sherry, *Enlightening the Religion Clauses*, 7. J. CONTEMP. LEGAL ISSUES 473, 477 (1996).

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<sup>4</sup> JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42, 57 (1996).

<sup>5</sup> Jean Bethke Elshtain, *How Should We Talk?*, 49 Case WESTERN RES. L. REV. 741, 744 (1999).

<sup>6</sup> *Lemon*, 403 U.S. at 625.

<sup>7</sup> WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY xi (1897) (Dover ed. 1956).

<sup>8</sup> Cullen Murphy, *War Is Heck*, WASH. POST, April 8, 1988, A21.

<sup>9</sup> Letter from the Danbury Baptist Association to Thomas Jefferson (Oct 7, 1801) (on file with the Thomas Jefferson Papers Manuscript Division, Library of Congress, Washington, D.C.).

<sup>10</sup> Philip Hamburger, *Separation and Interpretation*, 18 J. L. & POL. 7, 7 (2002).

<sup>11</sup> Daniel L. Dreisbach, *Origins and Dangers of the "Wall and Separation" Between Church and State*, IMPRIMIS, Vol. 35, No. 10 (October 2006).

<sup>12</sup> Hamburger, *Separation and Interpretation*, at 7.

<sup>13</sup> Jim Stratton, *Rep. Harris Condemns Separation of Church, State*, ORLANDO SENTINEL, Aug. 26, 2006, at A9.

<sup>14</sup> John Courtney Murray, *Law or Prepossessions?*, 14 J. L. CONTEMP. PROBS. 23, 32 (1949).

<sup>15</sup> Pope Benedict XVI, *Deus caritas est* ¶ 28(a).

<sup>16</sup> Murray, *Law or Prepossessions?*, *supra*, at 23.

<sup>17</sup> Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

<sup>18</sup> STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 22(1993).