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Religious Freedom, Church Autonomy, and Constitutionalism

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RELIGIOUS FREEDOM, CHURCH AUTONOMY, AND CONSTITUTIONALISM

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Our topic at this symposium is "religion, the state, and constitutionalism"—not "the Constitution," or "the First Amendment," but "constitutionalism." Countless conferences, cases, books, and articles have wrestled with one version or another of the question, "how does our Constitution, with its First Amendment and its religion clauses, promote, protect, or perhaps restrain religion?" We are considering, it seems to me, a question that is different, and that is different in interesting and important ways: What are connections between religion and religious freedom, on the one hand, and constitutionalism, on the other?

So what is "constitutionalism"? This is a huge and complicated question to which I will provide a quick-and-dirty answer. Constitutionalism is the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways. For some, it is essential to this enterprise that it happens in and through writing. Walton Hamilton, for example, said more than seventy years ago that "[c]onstitutionalism is the name given to the trust which men repose in the power of words . . . to keep a government in order."[1] The historian Charles McIlwain was even more succinct. "Constitutionalism," he said, "has one essential quality: it is a legal limitation on government."[2] Yet another feature of constitutionalism—perhaps even an "essential" one—is that the enterprise is animated by an appreciation for the fact that the authority of government, which is limited legally by the constitution, is not the only authority at work in human society and affairs. As Harold Berman put it, "[p]erhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse

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1. Richard S. Kay, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 16 (Larry Alexander ed., 1998) (quoting Walton H. Hamilton, *Constitutionalism*, *in* 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 255 (Edwin R. A. Seligman & Alvin Johnson eds., 1931)).

2. CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 24 (2005).

jurisdictions and diverse legal systems. It is this plurality of jurisdictions and legal systems that makes the supremacy of law both necessary and possible."[3] This pluralism, Berman thought, has nurtured legal, political, and economic growth; it also both reflects and protects political and other freedoms.[4]

Great English legal historians like Maitland and Maine also appreciated the fact that distinctions and competition among plural authorities have been and remain crucial to constitutionalism's success.[5] And so, a regime that concentrates authority in any one place—the state, the church, the market, the mob—and suppresses it elsewhere is not really an authentic constitutional regime. To say that "there can be no rights except the right of the State, and . . . there can be no other authority than the authority of the Republic" is, it would seem, to reject constitutionalism.[6] Rousseau's assertion that "a democratic society should be one in which absolutely nothing stands between man and the state,"[7] like his contention that non-state authorities and associations should be proscribed,[8] was deeply anti-constitutional.

The Constitution of the United States, on the other hand—for all of its flaws and foibles—seems to me a shining example of constitutionalism. As (I hope) every law student learns, those who designed and ratified the Constitution understood and embraced the idea that political liberties are best served through competition and cooperation among plural authorities and jurisdictions, and through structures and mechanisms that check, diffuse, and divide power.[9] As Justice O'Connor observed, "perhaps our

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3. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983).

4. *Id.*

5. HENRY SUMNER MAINE, *The Constitution of the United States*, *in* POPULAR GOVERNMENT: FOUR ESSAYS 196, 196–254 (1886) (discussing and praising the separation of powers in the United States); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 78–79 (James F. Colby ed., 1915) (describing the Magna Charta as one example of a beneficial product of competing interests and authorities and as a "prologue" to British constitutionalism).

6. William A. Galston, *The Idea of Political Pluralism*, *in* NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 95, 102 (Henry S. Richardson & Melissa S. Williams eds., 2009) (quoting J.N. Figgis, *The Great Leviathon*, *in* THE PLURALIST THEORY OF THE STATE 112 (Paul Q. Hirst ed., 1989)).

7. George H. Sabine, *The Two Democratic Traditions*, 61 PHIL. REV. 451, 464 (1952).

8. Robert A. Nisbet, *Rousseau and Totalitarianism*, 5 J. POL. 93, 103 (1943).

9. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

oldest question of constitutional law . . . consists of discerning the proper division of authority between the Federal Government and the States."[10] Our Constitution is more than a litany of prohibitions or a catalogue of individual rights. Our constitutional law *is*, at bottom, "the law governing the structure of, and the allocation of authority among, the various institutions of the national government."[11] And our constitutional experiment reflects, among other things, the belief that the structure of government matters for, and contributes to, the good of human persons. "Th[e] constitutionally mandated division of authority," Chief Justice Rehnquist once wrote, "was adopted by the Framers to ensure protection of our fundamental liberties."[12] Indeed, "the promise of liberty," Justice O'Connor suggested, lies in this "tension between federal and state power."[13] The "[s]eparation of powers," in other words, "was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."[14] One could go on and on, of course, gathering observations by Madison and Montesquieu, Tocqueville and Tiebout; expounding on "checks and balances," subsidiarity, localism, and pluralism; and compiling imposing citation lists in support of the proposition that our Constitution was designed to protect individual liberty by dividing, enumerating, and reserving governments' powers and authority. There is no need, however, to belabor even a point as fundamental as this one: "The genius of the American Constitution"—of American *constitutionalism*—"lies in its use of structural devices to preserve individual liberty."[15]

Well, what does this all have to do with religion? Here is the claim: Constitutionalism relies, both in theory and in fact, not only on the separation and limitation of the powers of the political authority, but also on the existence and the health of authorities and associations outside, and meaningfully independent of, the state. And, *our* tradition of constitutionalism was made possible, and might still depend today, on the independence of the church from secular control. It is a mistake, then, to

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10. New York v. United States, 505 U.S. 144, 149 (1992).

11. Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 885 (2005).

12. United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

13. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991).

14. Clinton v. City of New York, 524 U.S. 417, 450 (Kennedy, J., concurring).

15. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155 (1992).

regard "religion" merely as a private practice, or even as a social phenomenon, to which constitutions respond or react. Instead, we should understand the ongoing enterprise of constitutionalism as one to which religious claims and authorities contribute in many ways. Constitutionalism requires for its success not the exclusion of religious faith from political life or civil society, but the differentiation of religious and political authorities.[16]

These are highly abstract thoughts and general observations. They can, though, be connected to the American conversation about church–state separation. Step back with me for a moment to kinder and gentler days. In 1988, out on the campaign trail, then-Vice President George H. W. Bush recalled being shot down over the South Pacific during World War II:

> Was I scared floating around 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.[17]

This train of thought strikes us as absurd, but it is entirely American. That "God" and "faith" could not be invoked by the would-be-president as "fundamental values" without the clunky addition of "the separation of church and state" speaks volumes about how we think about the content and the implications of religious freedom.

An earlier president—Thomas Jefferson—in his 1802 letter to the Danbury Baptists, famously professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize church–state "separation."[18] In so doing, he supplied what is for many the "authoritative interpretation" of the First Amendment's Religion Clauses.[19] Indeed, Professor Daniel Dreisbach has observed that "[n]o

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16. For more on "differentiation"—the "degree of mutual autonomy between religious bodies and state institutions in their foundational legal authority"—see Daniel Philpott, *Explaining the Political Ambivalence of Religion*, 101 AM. POL. SCI. REV. 505 (2007).

17. Cullen Murphy, *War Is Heck*, WASH. POST, Apr. 8, 1988, at A21.

18. Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html.

19. Philip Hamburger, *Separation and Interpretation*, 18 J.L. & POL. 7, 7 (2002).

metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson's 'wall of separation'" image.[20] "Jefferson's words," Professor Hamburger has observed, "seem to have shaped the nation,"[21] and are, for many of us, "more familiar than the words of the First Amendment itself."[22] However, that we are familiar, even intimate, with Jefferson's words hardly means that we agree about their meaning. Notwithstanding the third President's "reverence" for church–state separation and the comfort that it supplied to our paddling forty-first President, the idea remains controversial and contestable. What does it mean for "church" and "state" to be separate? Is church–state "separation" even an imaginable reality, let alone a constitutional requirement? Or are Professors Eisgruber and Sager right to insist, in their recent and important book, that "[c]hurch and state are not separate in the United States, and they cannot possibly be separate"?[23] Indeed, what about the assertion by then-Representative Katherine Harris that the separation of church and state is a "lie we have been told" to keep religious believers out of politics and public life?[24] This charge seems well off the mark, but there is no denying that separation is often presented, both by opponents and by defenders of the idea, as an aggressively anti-religious program, rather than, as John Courtney Murray put it, "'a policy to implement the principle of religious freedom.'"[25]

Now, we can and do fight and write about the question whether the Supreme Court was correct to constitutionalize Jefferson's "wall of separation."[26] For now, put that question aside. The distinction between, and the separation of, religious and governmental authority is crucial to America's healthy secularism and to religious freedom more generally. So, contrary to the clumsy claims of some, church–state separation is not a lie. Pope Benedict XVI was clear and correct when he praised recently the "positive" secularity that has characterized the American approach to

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20. Daniel L. Dreisbach, *Origins and Dangers of the "Wall of Separation" Between Church and State*, IMPRIMIS, Oct. 2006, at 1, 1.

21. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002).

22. *See* Hamburger, *Separation and Interpretation*, *supra* note 19, at 7.

23. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6–7 (2007).

24. Jim Stratton, *Rep. Harris Condemns Separation of Church, State*, ORLANDO SENTINEL, Aug. 26, 2006, at A9.

25. John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 32 (1949) (quoting Thomas B. Keehn, *Church–State Relations*, SOC. ACTION, Nov. 15, 1948, at 31).

26. *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947).

religious liberty and church–state relations.[27] "Fundamental to Christianity," he wrote, "is the distinction between what belongs to Caesar and what belongs to God (cf. *Mt* 22:21), in other words, the distinction between Church and State, or . . . the autonomy of the temporal sphere."[28] Notice, he did not characterize this distinction as something imposed on Christianity from the outside, or as something to which religious believers might possibly adapt. The distinction, instead, is "fundamental *to Christianity*."[29] In a similar vein, he has emphasized that "[t]he idea of the separation of Church and State came into the world first through Christianity. Until then the political constitution and religion were always united. It was the norm in all cultures for the state to have sacrality in itself and be the supreme protector of sacrality."[30] Christianity, however, "deprived the state of its sacral nature. . . . In this sense," he has insisted, "separation is ultimately a primordial Christian legacy."[31]

Thus, institutional and jurisdictional separation of religious and political authority, the independence of religious communities from government oversight, the right to church autonomy and self-government, a strict rule against formal religious tests for public office—these are all separationist features of our experiment in constitutionalism, and not just bullet-points taken from the Court's First Amendment doctrine. Properly understood—to be sure, it is not always properly understood—church–state "separation" stands as a safeguard against governments tempted to assume for themselves the power to direct religious life. It is a limit on government and such limits, again, are essential to constitutionalism. Now, some say that church–state separation requires the government to maintain a thoroughly secular civil conversation, a public square scrubbed clean of religion. This is wrong. It is not true to the principles that animate constitutionalism, or our Constitution. Our Constitution separates church and state not to confine religious belief or silence religious expression but, I think, to curb the ambitions and reach of governments. In our laws, "Caesar recognizes that he is only Caesar and forswears any attempt to

27. *See* POPE BENEDICT XVI, DEUS CARITAS EST ¶ 28 (2005), *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.

28. *Id.*

29. *Id.* (emphasis added).

30. JOSEPH CARDINAL RATZINGER, THE SALT OF THE EARTH: THE CHURCH AT THE END OF THE MILLENNIUM 239 (IGNATIUS PRESS, 1997) (1996).

31. *Id.* at 240.

demand what is God's."[32]

Now, to say all this is not to imagine that a high "wall" between "church" and "state" is possible or that one could ever separate cleanly the roles of citizen and believer. The point is not to say that religion should be radically privatized or that political arguments should be limited to those that sound in cost–benefit analysis. It is, instead, to affirm the independence of religious institutions from government control. This independence is *the* church–state issue. It is important to the pluralism that sustains our experiment in constitutionalism. And, it is vulnerable.

Why, and how, is it vulnerable? It is not new to observe that American public conversations about religious freedom tend to focus on individuals' rights, beliefs, consciences, and practices. The distinctive place, role, and freedoms of religious groups, associations, and institutions are often overlooked. However, an understanding of religious faith, and religious freedom, that stops with the liberty of individual conscience, and neglects institutions and communities, will be incomplete. And, so will the legal arrangements and constitutional structures that such an understanding produces.

32. William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 27–28 (1958).


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DR. JEREMY GUNN: Rick, I think that was a terrific presentation—it was nuanced and in many ways I agree with it—but there is one thing that troubled me a little bit. It is an expression that I hear that I think of as a straw man, so I will give you a chance to show that it is a flesh and blood man. It is the expression about "scrubbing the public square clean of religion." That is the kind of expression I hear is often directed at the ACLU—that the ACLU will stop at nothing until it has destroyed every vestige of religion in the public square. And this strikes me as nonsense because in the public square in the United States, religion is pervasive—whether preachers on public airwaves, candidates speaking about religion, Bibles sold through the United States Postal Service, or people giving religious talks on sidewalks. If somebody tries to stop any of those forms of religious expression in the public square, my organization and other organizations will defend it. Nobody is trying to take that discussion of religion out of the public square. And if a politician says that he or she is voting against a law that would allow abortion because he or she is Catholic—although there might be a disagreement about whether that is a good idea or not—nobody is going to sue that politician and argue that he or she cannot say that. And there is no standing to sue. Religious expression in the public square is there, it is constitutionally protected, and nobody is trying to scrub it. I do not know where this stuff comes from.

PROFESSOR RICHARD GARNETT: Thanks, Jeremy. You are right—religion is pervasive in this country's public life, and no one could scrub it away, even if one wanted to. What I meant to say is that we should not think that the separation of church and state, properly understood, requires any such thing. Now, that said, one does sometimes hear it claimed that a commitment to liberal democracy and to church–state separation also requires the privatization of religious arguments. I do not think it does. So, while I agree with you that the ACLU has an excellent record of defending private religious expression in the public square, I do think it is always worth taking the time to disentangle the idea of separation—which is important—from the demand for privatization, which is misplaced.

PROFESSOR FRANK RAVITCH: I think there is an interesting corollary to the separation you are talking about that might also explain a lot of what you are talking about: Roger Williams's notion of the garden and the wilderness—the idea that there must be a strong hedge wall between the garden of religion and the corrupt, growing, weedy wilderness of government, because without that hedge wall government will overtake

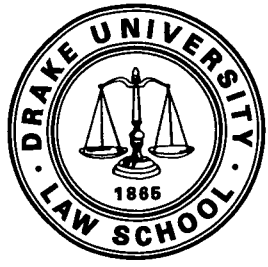
religion. And actually although Roger Williams is the one most people quote, there were others before and after him who used the same analogy. So I think that one of the things that supports your suggestion—although I am just throwing it out there—is the idea that there are very strong religious arguments for separation that augment Jefferson's "protecting the state from religion" argument. And together, those would suggest the structural sorts of things that you, and I think also Carl Esbeck, have talked about a bit. So I am wondering if that is relevant to what you are talking about or if I am just off the mark.

PROFESSOR RICHARD GARNETT: No, you are not off the mark at all. That image of "the garden and the wilderness" is helpful to understanding the church–state relationship. I would add a cautious footnote to Williams, though: In my view, our commitment to the distinction between church and state does not require us to write off as just weeds and wilderness the important work of politics or the challenge of promoting the common good. So, I think religious believers have very good *religious* reasons for insisting on a distinction between religious and political authority. There are good *religious* reasons for protecting religious authority from state interference. But I probably would not go as far as Williams seemed to in disdaining the possibility that religion or religious believers might need to come out from behind the wall, now and again, to contribute to the shared, public project of trying to order our lives together.

PROFESSOR ABDULLAHI AHMED AN-NA`IM: I appreciate your emphasis on the communal and institutional dimension of religion in that you have to respect the autonomy and independence of all religious organizations. But the state still has to deal with those groups. And how can it deal with them without having anything to do with the way they are organized, and how one goes on within those organizations, and how to keep the possibility of dissent within those communities alive so that the existing structures do not stifle vigorous dissent within the community itself? I am particularly struck with the case of Europe because I am trying to write something about Muslims in Germany. The German system is so structured around the Catholic and Evangelical churches that the state is very effective in dealing with those institutions and very respectful and cooperative—what they call positive neutrality—but they do not know what to do with the Muslims because they are not organized in the same way. And I worry about the state having to deal with communities, coercing or repressing those communities to organize in Christian ways so that we can recognize them and deal with them.

PROFESSOR RICHARD GARNETT: I would like to affirm the concerns you are expressing. You are right that the understanding of church–state separation I am talking about does not include or suggest a rule that the government may not or will not ever deal with religion. Such dealings are unavoidable. And I agree with you that we should worry if and when the government, for its own purposes, attempts to impose certain models of polity and governance on religious communities. We might disagree, though, over whether it is ever appropriate for governments purposely to facilitate "dissent" within religious communities. The government, it seems to me, should not artificially prop up either the orthodox or the dissenters. It is sometimes suggested that the public authority should be proactive in identifying and encouraging the dissenters—assuming those dissenters' views are consistent with the government's aims. But this is dangerous, and it should make us uneasy. The government might well have hopes for the dissenters in some communities and traditions, but if church–state separation means anything, it means that struggles within the church over doctrine, teaching, and orthodoxy have to be the church's own business.

The ongoing church property disputes illustrate and confirm the difficulties that arise when the government gets involved—or is invited to get involved—in intra-religious controversies. As I am sure many of you know, in the Episcopal community there are disagreements between some parishes and the national church over some social, political, and theological issues, and these disagreements are leading to arguments about who owns and gets to keep all of the community's nice buildings and property. Now, if the community breaks up, or if some parishes break away, the government cannot avoid entirely the problem of deciding who gets the property. It has to come up with some rules for adjudicating these disputes. The challenge is finding a rule that is consistent with both the government's obligation to protect and enforce rights and its obligation to respect religious self-government.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