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THE BOUNDARY BETWEEN

CHURCH STATE



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ILLUSTRATIONS BY CHRISTIAN ROUX

I appreciate the invitation to speak to this distinguished audience of religious leaders, judges, and lawyers.

I My purpose is to advance this conference’s objective to be “a forum for mutual support, understanding, edification, and collaboration between the judiciary and regional communities of faith.” I will, therefore, refrain from advocating my strongly held views on various issues affecting religious freedom. Instead, I will focus my remarks on two of your objectives: mutual understanding and edification.

I enjoyed reading the *Sacramento Lawyer*’s report of the prior court/clergy conference. I was easily persuaded by Presiding Justice Vance W. Raye’s description of the importance of judges understanding the role that religion plays in the lives of the American people; the importance of values—whether religious or secular—in shaping behavior; and the fact that churches, as institutions, offer an amazing panoply of resources to help people involved in the judicial system.¹ I will speak later of my appreciation for the remarks of Father Rodney Davis, retired appellate court justice, who spoke of “how deeply held religious beliefs of judges and litigants impact one’s experience with the judicial system.”²

While I was unable to attend this morning’s welcome addresses, presentations, and break-out sessions, I hope that my remarks will further your discourse on our important concerns.

II I begin by speaking of the inevitable relationships between two different realms: the laws and institutions of government on the one hand and the principles (or “laws”) and institutions of religion on the other. (By “religion” I refer to churches, synagogues, mosques, and others and to their adherents and affiliated organizations.) I will suggest how these inevitable relationships should affect the behavior of believers and nonbelievers toward one another and toward the two different sets of laws to which all must relate in one way or another.

My thesis is that we all want to live together in happiness, harmony, and peace. To achieve that common goal, and for all contending parties to achieve their most important personal goals, we must learn and practice mutual respect for others whose beliefs, values, and behaviors differ from our own. As Justice Oliver Wendell Holmes observed, the Constitution “is made for people of fundamentally differing views.”³

Differences on precious fundamentals are with us forever. We must not let them disable our democracy or cripple our society. This does not anticipate that we will deny or abandon our differences but that we will learn to live with those laws, institutions, and persons who do not share them. We may have cultural differences, but we should not have “culture wars.”

There should be no adversariness between believers and nonbelievers, and there should be no belligerence between religion and government. These two realms should have a

mutually supportive relationship. In that relationship governments and their laws can provide the essential protections for believers and religious organizations and their activities. Believers and religious organizations should recognize this and refrain from labeling governments and laws and officials as if they were inevitable enemies. On the other hand, those skeptical of or hostile to believers and their organizations should recognize the reality—borne out of experience—that religious principles and teachings and their organizations are here to stay⁴ and that they can help create the conditions in which public laws and government institutions and their citizens flourish.

That perceptive observer of America Alexis de Tocqueville wrote that what sustained the unique American democracy were the voluntary associations like churches—today often called “mediating institutions”—that lead citizens to choose to obey laws that governments cannot enforce.⁵ Even today our society is not held together primarily by law and its enforcement but, most important, by those who voluntarily obey the unenforceable because of their internalized norms of righteous or correct behavior. Some call this “civic virtue.” It has various sources, but all should recognize the vital contribution of religion, because religious belief in right and wrong by a large number of citizens is fundamental to producing this essential voluntary compliance.

Of course there will be differences that must be resolved by the rule of law. But these occasional differences must not obscure the basic fact that we are in this together, we need each other, and we can resolve our differences through mutual respect, mutual understanding, and the collaboration you advocate as the purpose of this gathering.

When I first studied this subject in law school about 60 years ago, the popular metaphor of the relationship between church and state was that of a “wall of separation.” Introduced into Supreme Court jurisprudence in the 1878 case *Reynolds v. United States*⁶ and brought into mainstream vernacular in the 1947 *Everson* case,⁷ this metaphor dominated discussions of the day.⁸ It even found its way into the title of a book I edited in 1963.⁹ That book is long out of print, but

the unfortunate connotations of the wall of separation metaphor persist to the present day. Those connotations inhibit the desirable collaboration that brings us together in this conference.

I reject the idea of a wall between church and state. The more appropriate metaphor to express that relation—reinforced by various decisions of the United States Supreme Court—is a *curtain* that defines boundaries but is not a barrier to the passage of light and love and mutual support from one side to the other.



I have viewed the boundary between church and state from both sides. I viewed it from the state side as a law clerk to Chief Justice Earl Warren of the United States Supreme Court, as a prosecutor in the state courts in Illinois, and still later as a justice on the Utah Supreme Court. From the church side, I have been a lifelong believer, teacher, counselor, and leader in my denomination. For me, questions about the relationship between government and religion are not academic, any more than the fate of Christian martyrs or the events of the Holocaust are academic to persons associated with them. My great-grandfather Harris—through whom I have my middle name—served time in the Utah Territorial Penitentiary for violation of a federal law intended to punish him for acting on his religious belief. Before that, my wife’s great-great-grandfather Hyrum Smith was murdered in Illinois by an anti-Mormon mob.

Rejecting a wall of separation between church and state but affirming the need for a boundary, I will discuss that boundary and invite you to walk that center path with me.

I begin by suggesting a few general principles.

First, parties with different views on the relationship between church and state should advocate and act with civility. In this country we have a history of tolerant diversity—not perfect, but mostly effective at allowing persons with competing visions to live together in peace. We all want effective ways to resolve differences without anger and with mutual understanding and accommodation. We all lose when an

atmosphere of anger or hostility or contention prevails. We all lose when we cannot debate public policies without resorting to boycotts, firings, and intimidation of our adversaries.

Second, on the big issues that divide adversaries on these issues, both sides should seek a balance, not a total victory. For example, religionists should not seek a veto over all nondiscrimination laws that offend their religion, and the proponents of nondiscrimination should not seek a veto over all assertions of religious freedom. Both sides in big controversies like this should seek to understand the other’s position and should seek practical accommodations that provide fairness for all and total dominance for neither.

For example, an influential article by Martha Minow of the Harvard Law School concludes that “[a]ccommodation and negotiation can identify practical solutions where abstract principles sometimes cannot.”¹⁰ She observes that this approach “is highly relevant to sustaining and replenishing both American pluralism and constitutional protections for minority groups.”¹¹ Thus, in a head-on conflict over individual free exercise and enforced nondiscrimination in housing and employment, for example, the Utah Legislature crafted a compromise position under the banner of “fairness for all.” It gave neither position all that it sought but granted both positions benefits that probably could not have been obtained without the kind of balancing that is possible in the law-making branch but not in the judiciary.

Third, it will help if we are not led or unduly influenced by the extreme voices that are heard from contending positions. Extreme voices polarize and create resentment and fear by emphasizing what is nonnegotiable and suggesting that the desired outcome is to disable the adversary and achieve absolute victory. Such outcomes are rarely attainable and are never preferable to living together in mutual understanding and peace.

The Supreme Court bowed toward this principle in its majority opinion in *Obergefell*, the five-to-four case establishing a federal constitutional right to same-gender marriage. It implicitly rejected several argued bases for its decision, such as alleged animus in traditional marriage laws and the need for establishing a new suspect class for laws affecting those with same-gender attraction. Either of those bases for the decision would have complicated the kind of accommodation I advocate here. Just as important, the majority opinion also included some teachings that are particularly welcome to those who argued the losing position. Writing for the majority, Justice Anthony Kennedy acknowledged the reasonableness of the religious and philosophical premises of those who argue that marriage should be limited to a man and a woman and assured that the First Amendment will protect religious organizations and persons who continue to teach them.



In addition to these general principles, I have some suggestions for each contender in current struggles over the proper boundary between the different realms of church and state. I believe these suggestions advance the mutual understanding and collaboration we seek in this conference.

A I speak first to my fellow believers—those advocating the maximum free exercise of religion. I begin with the reminder that for believers, there are two different systems of law: divine and civil. While all believers revere divine law, most acknowledge that civil law is also ordained of God. The Lord Jesus Christ directed, “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s” (Matthew 22:21). So taught, we must, to the extent possible, obey *both* systems of law. When there are apparent conflicts, we must seek to harmonize them. When they are truly irreconcilable, we should join with others of like mind in striving to change the civil law to accommodate the divine. In all events, we must be very measured before ever deciding—in the rarest of circumstances—to disregard one in favor of the other.

In that context, I say to my fellow believers that we should not assert the free exercise of religion to override every law and government action that could possibly be interpreted to infringe on institutional or personal religious freedom. As I have often said, the free exercise of religion obviously involves both the right to choose religious beliefs and affiliations and the right to *exercise* or practice those beliefs. But in a nation with citizens of many different

religious beliefs, the right of some to act upon their religious principles must be circumscribed by the government's responsibility to protect the health and safety of all. Otherwise, for example, the government could not protect its citizens' person or property from neighbors whose intentions include taking human life or stealing in circumstances purportedly rationalized by their religious beliefs.

Religious persons will often be most persuasive in political discourse by framing arguments and explaining the value of their positions in terms understandable to those who do not share their religious beliefs. All sides should seek to contribute to the reasoned discussion and compromise that are essential in a pluralistic society. And none should adopt an us versus them mentality.

Believers should also acknowledge the validity of constitutional laws. Even where they have challenged laws or practices on constitutional grounds, once those laws or practices have been sustained by the highest available authority, believers should acknowledge their validity and submit to them. It is better to try to live with an unjust law than to contribute to the anarchy that a young lawyer named Abraham Lincoln anticipated when he declared, "There is no grievance that is a fit object of redress by mob law."¹²

Clear cases for the application of this principle are the public officials in the executive or judicial branches who enforce and interpret the laws. All such officials take an oath to support the Constitution and the laws of their jurisdiction. That oath does not leave them free to use their official position to further their personal beliefs—religious or otherwise—to override the law. Office holders remain free to draw upon their personal beliefs and motivations and advocate their positions in the public square. But when acting as public officials, they are not free to apply personal convictions—religious or otherwise—in place of the defined responsibilities of their public offices. All government officers should exercise their civil authority according to the principles and within the limits of civil government. A county clerk's recent invoking of religious reasons to justify refusal by her office and staff to issue marriage licenses to same-gender couples violates this principle. Far more significant violations of the rule of law and democratic self-government occur when governors or attorneys general refuse to enforce or defend a law they oppose on personal grounds—secular or religious. Constitutional duties, including respect for the vital principle of separation of powers, are fundamental to the rule of law. Government officials must not apply these duties selectively according to their personal preferences—whatever their source.

This insistence that the constitutional and legal duties of the office override the religious or other moral scruples of the officeholder implies no compulsion on the officeholder's conscience. The operation of the government can continue when attorneys or other administrators delegate the performance of their duties and when judges disqualify themselves. Government operations can accommodate the conscience of individual officials, but neither the government nor its citizens should tolerate veto of a law (either its text or its operation) by officials not formally authorized to do so.

After I wrote those words to share here, I was pleased to read a similar position being advocated by Judge William H. Pryor Jr. of the United States Court of Appeals for the 11th Circuit. In a notable article in the *Yale Law and Policy Review* nine years ago, he wrote:

[T]here is a limit to the relevance of religion in the performance of my judicial duty. That limit is defined by the very nature of my judicial authority. Properly understood, the exercise of my authority as a federal judge is governed by the law alone. . . .

As a judge, I am not given the authority to use a personal moral perspective to update or alter the text of our Constitution and laws. The business of using moral judgment to change the law is reserved to the political branches, which is why the officers of those branches are regularly elected by the people. . . .

. . . For centuries, members of Congress have supported a variety of new laws on [moral bases, informed by religion], whether to abolish slavery, withdraw troops from foreign wars, abolish child labor, guarantee civil rights, provide assistance to the poor and sick, protect marriage, or prohibit the sale of intoxicating liquors. The changing of laws enacted by political authorities is

*not a judge's task; the duty of a judge is the application of those laws in controversies within the jurisdiction of the courts.*¹³

Here I wish to record my agreement with former appellate justice Father Rodney Davis's wise observation that we should "forthrightly face up to how [religious judges'] deeply held religious perspectives impact their decision-making."¹⁴ Father Davis observes persuasively that in "discretionary decision-making," like sentencing and custody arrangements, "judges bring their life experiences to the process and with it the perspectives, religious and otherwise, that are part of that experience."¹⁵ He reminds us of "the inescapable fact that a judge's religious perspective influences how he or she sizes up and measures the complicated conduct and motivations presented and how, if given some level of discretion, he or she reacts to them."¹⁶

How can it be otherwise? Surely a constitution that grants unique guarantees to the "free exercise" of religion cannot deny religious judges the application of their religious experiences while inevitably granting other judges the application of their secular experiences.

Of course it is different, as Father Rodney Davis observes, when a judge is required to "enforce a rule or standard or apply the analytical skill set needed to find and follow an analogous case."¹⁷ Thus, in their role to interpret or apply legal rules, judges must apply the same standards of decision, whether believers or not.



B I have been speaking to those for whom religious faith—to one degree or another—is the key to their human dignity. In recent years our society has increased its recognition that many look on race, gender, and sexual orientation as a basis of their human dignity. As these other bases have been accommodated in the law, some have placed freedom from discrimination on these grounds above the constitutional guarantee of free exercise of religion.¹⁸ The collision of these two values is the cause of many of the so-called culture wars. These conflicts inevitably undermine the kinds of mutual support and collaboration of the judiciary and communities of faith that we are seeking in this conference.

C Having given some advice to the religious side, I also have some suggestions for those who have other keys to or nonreligious values for their human dignity.

First, please respect the laws that provide unique protections for believers and religious institutions, and please accept the fact that this grants religion an honorable place in our public life. Most notable is the uniquely positioned First Amendment in the Bill of Rights, which singles out "the free exercise of religion" for special protection, along with free speech, free press, and freedom of assembly. This favored constitutional status that a unanimous United States Supreme Court recently described in part as "special solicitude to the rights of religious organizations"¹⁹ should be acknowledged in all controversies over the meaning of "free exercise" and how to balance it against contrary cultural preferences.

Surely this unique constitutional guarantee of the free exercise of religion was intended to grant unique protections to those acting in accordance with religious belief. This was intended in our nation's founding. As Professor Michael McConnell has observed, when the First Amendment was drafted, several formulations were considered, the two final ones being the protection of "rights of conscience" or the "free exercise of religion."²⁰ The ultimate "choice of the words 'free exercise of religion' in lieu of 'rights of conscience,' is," as Professor McConnell notes, "of utmost importance."²¹ First, it made clear that the First Amendment protected more than just belief; it protected action in accordance with belief.²² Second, while "conscience" emphasizes individual judgment, "'religion' also encompasses the . . . institutional aspects of religious belief."²³ Finally, the framers' preference for "free exercise of

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religion” over “rights of conscience” means that religiously based scruples are given more solicitude than nonreligiously based ones. Professor McConnell wrote about the framers’ thoughtful reasoning:

*The free exercise clause accords a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual’s control.*²⁴

Treating actions based on religious belief the same as actions based on other systems of belief is, therefore, not enough to satisfy the special place of religion in the United States Constitution. Understanding this reality is important to advancing this conference’s purposes to further mutual understanding, edification, and collaboration.

Second, we must take notice of current theories asserting that religious speech is more dangerous and therefore less deserving of protection than other types of speech. Without detailing the obvious, I merely maintain that the constitutional freedom of religion is intended to be guaranteed—and *is* guaranteed—by not only the First Amendment’s free exercise clause. It is also protected by the companion guarantees of freedom of speech and freedom of assembly. The United States Supreme Court reaffirmed that principle in a near-unanimous

1981 case, declaring that “religious worship and discussion” are “forms of *speech* and *association* protected by the First Amendment.”²⁵ Thus, these great guarantees are cumulative, strengthening, and building upon one another.

Of course there are extremist and even terrorist groups that attempt to use religious beliefs to justify illegal incitements or violent or destructive actions. Those excesses can and should be rejected by our understanding of the limits on any constitutional right. Similarly, we all understand the common-sense principle that the prospect of abuse of a constitutional right must not be used to veto that right. We resist that tendency for speech and press, and we must also resist it for religion.

For the reasons just stated, the extreme adversaries of churches should refrain from violating or ignoring the fundamental freedoms of speech and assembly that are also enjoyed by religious persons or institutions. Why do I say this? There are strong movements in our country to crowd religious voices, values, and motivations from the public square.²⁶ One way this is done is to shout down such arguments as irrational or reflective of hatred or bigotry, thus forestalling consideration of the very real secular as well as religious reasons supporting their positions. Even less extreme forms, such as the “principled toleration” argument advocated by some mainstream academics,²⁷ subvert common understanding and have a chilling effect on speech and public debate on many important issues. This jeopardizes not only the freedom of religious exercise but also the associated freedoms of speech, press, and assembly.

Since such efforts have surfaced on the campuses of various colleges and universities,²⁸ I cannot refrain from referring to the widely publicized policy on free expression in the academy put forth by my alma mater, the University of Chicago.²⁹ I am also heartened by President Barack Obama’s recently declared support for free speech on the campus³⁰ and for broader respect for religion in speech.³¹

Such expressions are encouraging examples of recent reaffirmation of the vitality of freedom of speech on religious subjects and for religious leaders. As my time is up, I will not cite further examples but only affirm the basic principle that religious leaders and religiously motivated persons should have at least the same privileges of speech and participation as any other persons or leaders when they enter the public square to participate in public policy debates.

On this occasion I conclude by urging upon those attending this conference the importance of remembering the vital constitutional rights of free exercise of religion and free speech and assembly when considering controversies involving religion and religious expression. That perspective is vital to advancing our desired collaboration between the judiciary and religious institutions. [cm](#)



NOTES

- 1 See Vance W. Raye, *Introducing Father Rod Davis*, SACRAMENTO LAWYER, May/June 2015, at 16, available at http://issuu.com/milenkovlais/docs/final_saclaw_may_june_2015_web.
- 2 Rodney Davis, *Religion's Place in Judicial Decision-Making*, SACRAMENTO LAWYER, May/June 2015, at 18, available at http://issuu.com/milenkovlais/docs/final_saclaw_may_june_2015_web.
- 3 *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
- 4 See Mary Beth McCauley, *Why Religion Still Matters*, CHRISTIAN SCIENCE MONITOR WEEKLY, October 12, 2015, at 26.
- 5 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 489–92 (Harvey C. Mansfield & Delba Winthrop eds. & trans., University of Chicago Press 2000) (1835).
- 6 See 98 U.S. 145 (1878).
- 7 See *Everson v. Board of Education*, 330 U.S. 1 (1947).
- 8 E.g., see Paul M. Butler & Alfred L. Scanlan, *Wall of Separation—Judicial Gloss on the First Amendment*, 37 NOTRE DAME L. REV. 288 (1962).
- 9 See THE WALL BETWEEN CHURCH AND STATE (Oaks ed., 1963).
- 10 Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 849, 781 (2007).
- 11 *Id.* at 783.
- 12 Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), reprinted in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 113 (Roy P. Basler ed. 1953), available at <http://quod.lib.umich.edu/l/lincoln/lincoln1/1:130.1?rgn=div2;view=fulltext>.
- 13 William H. Pryor Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE LAW & POLICY REVIEW 347, 355, 357–58 (spring 2006).
- 14 Davis, *supra* note 2, at 20.
- 15 *Id.* at 21.
- 16 *Id.*
- 17 *Id.*
- 18 See, e.g., Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 115 (2006).
- 19 *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S., 132 S. Ct. 694, 706 (2012).
- 20 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (May 1990).
- 21 *Id.* at 1489.
- 22 *Id.*
- 23 *Id.* at 1490.
- 24 *Id.* at 1497.
- 25 *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).
- 26 See, e.g., Ronald A. Lindsay, *Religion Has No Place in Government*, 24 SECULAR HUMANIST BULLETIN (Winter 2008/2009).
- 27 See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION? (2012).
- 28 See, e.g., Timothy Larsen, *No Christianity Please, We're Academics*, INSIDE HIGHER ED., July 30, 2010, <https://www.insidehighered.com/views/2010/07/03/larsen>.
- 29 See Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, THE UNIVERSITY OF CHICAGO MAGAZINE, July–Aug. 2015, at 26.
- 30 See *President Obama: College Students Shouldn't Be "Coddled and Protected from Different Points of View,"* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), Sep. 15, 2015, <https://www.thefire.org/president-obama-college-students-shouldnt-be-coddled-and-protected-from-different-points-of-view>.
- 31 See, e.g., Ashley Alman, *Obama Calls for Balancing Free Speech with Respect for Religion*, HUFFINGTON POST, Feb. 5, 2015, http://www.huffingtonpost.com/2015/02/05/obama-religious-freedom_n_6622006.html.