"Two or One: On the Law of Church and State"

Richard W. Garnett

The Twelfth Edward Cardinal Egan Lecture

Union League Club
New York City,
April 25, 2026

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It was the Year of Our Lord 494, and the emperor in the east, Anastasius Augustus, was behaving badly. Specifically, he was going scandalously soft on heresy. He had signed off on—that is, he had given his imperial *imprimatur* to—a squishy theological deal with some Monophysite schismatics. And he expected Pope Gelasius—a no-nonsense pontiff who, as it happens, would establish Valentine's Day a few years later—to go along.

Instead, the pope sent the emperor a respectful reminder about the locations of their respective lanes. In so doing, he shaped political theory and theology for centuries. Indeed, the great legal historian Harold Berman, in his magisterial *Law and Revolution*, credited Gelasius with laying the foundations of western constitutionalism. It is not for the emperor, the pope insisted, to dictate religious duties or determine religious questions. In other words, "No. I'll decide how to deal with these obstinate and wayward Monophysites."

"Two there are," he wrote, "by which this world is chiefly ruled: the sacred authority of the priesthood, and the royal power [of the emperor]. If the bishops themselves...obey your laws, so far as the sphere of public order is concerned, with what zeal ought you to obey those who have been charged with administering the sacred mysteries." *Two there are*. Not one.

Now, fast-forward, just a bit, to December of 1960. The United States has just elected its first Roman Catholic president—only a few months after he assured a gathering of Protestant ministers in Texas that he "believe[d] in an America where the separation of church and state is absolute, where no Catholic prelate would tell the President...how to act," and "where no religious body seeks to impose its will...upon the...public acts of its officials." A different perspective, perhaps, on the inter-authority dynamic addressed in Pope Gelasius' decree.

And while it is hard to believe, today, that the cover of *Time* magazine was ever a big deal, it was in fact a big deal that, just a few weeks after President Kennedy's election, *Time*'s cover featured an image of the American Jesuit theologian John Courtney Murray superimposed on Saint Robert Bellarmine's *De Controversiis*, with the caption "U.S. Catholics and the State." The story marked the publication, and engaged the thesis, of Murray's newly released, and much remarked, book, *We Hold These Truths: Catholic Reflections on the American Proposition*, the ninth chapter of which was called "Are There Two or One? The Question of the Future of Freedom."

Many scholars have proposed that this chapter influenced the drafting of the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis Humanae*, which was promulgated five years later. Maybe so. (In any event, I can report, infallibly, that I borrowed the title of Murray's chapter for the title of this lecture.)

Murray, in *We Hold These Truths*, looked back to Gelasius. He called the pope's letter to the emperor the "Magna Carta of the...'freedom of the Church.'" That letter was short, yes, but it said a great deal. It was, Murray said, "the charter of a new freedom, such as the world had never known." Emperors, Jacobins, and Soviets had asserted, and were asserting: "One there is." One authority; one loyalty; one community; one jurisdiction. To introduce plurality and competition—as Hobbes put it, to invite or even permit "lesser commonwealths in the bowels of a greater"—is to welcome "worms in the entrails of a natural man." But the Church, Murray suggested—both in the time of Gelasius and in our own—proposed then, and proposes today, a "new Christian theorem"—"Two, not One"—that constrains the coercive power of political authorities while "mobilizing the moral consensus of the people." The Church's claim furnished, and still furnishes, a "social armature to the sacred order"—a shield, a defense, a hedgerow—within and by which the human person is "secure in all the freedoms that his sacredness demands." The Freedom of the Church, in other words—its distinctness and differentiation from the state—secures and supports the freedom of persons by reminding the state—cooperatively but competitive-

ly—of its limits. As Pope Gelasius gently instructed, and in Jacques Maritain's words a millennium-and-a-half later, there are "things that are not Caesar's."

Well. These are deep waters, and their depth reminds me that I am just a lawyer. (Perhaps, like Anastasius Augustus, I should steer back to my lane.) My aim here is to propose that these words of Maritain's, and these reflections of Murray's, and reminders from Pope Gelasius, point us toward a sound understanding of the American law of church and state.

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Let's time-travel again. In 1988, while out on the campaign trail, then-Vice President George H.W. Bush recalled his experience, as a young torpedo-bomber pilot in World War II, of being shot down over the South Pacific. (He was rescued by a submarine and awarded the Distinguished Flying Cross.) He said (I will leave the Dana Carvey impersonation to your imaginations): "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."

Now, this train of thought probably strikes us as strange, even absurd. And yet, it is entirely American. That the would-be president thought that it was important to recall "God" and "faith" as "fundamental values"—but also that it was necessary to invoke "the separation of church and state"—says and reveals much about our understanding of, and confusion about, our "first freedom," the freedom of religion.

Almost two hundred years earlier (and I apologize for causing chronological whiplash), 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 from Congregationalists who feared he was an atheist, Jefferson famously professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize a "wall" of church-state "separation."

In so doing, he supplied what is for many the authoritative interpretation of the First Amendment. Indeed, it has been suggested that "no metaphor in American letters has had a greater influence on law and policy" than Jefferson's "wall." These words are, for many, "more familiar than the words of the First Amendment itself."

But, notwithstanding our third president's "reverence" for church-state "separation," and with all due respect to the comfort the idea supplied to our afloat and adrift 41st President, its meaning and merits are contested. What does it mean, really, for "church" and "state" to be "separate"? Were Gelasius and Kennedy, Murray and Jefferson, and Bush and Bellarmine talking about the same thing?

About twenty years ago, former Florida Congresswoman Katherine Harris—who, you might remember, became well known during the 2000 election recount—caused a stir when she said, in a Baptist newspaper, that church-state separation is a "lie we have been told" to keep religious believers out of politics and public life. At around the same time, though—in his 2005 encyclical letter *Deus Caritas Est*—the late Pope Benedict XVI wrote that the "distinction between what belongs to Caesar and what belongs to God, in other words, the distinction between Church and State," is "fundamental to Christianity" and is a "decisive factor for freedom." Father Murray wrote similarly, characterizing this distinction as a "policy to implement the principle of religious freedom."

To be sure, and to understate the matter considerably, there were years, even decades, when the justices of the Supreme Court gave excessive weight to an over-literal and un-historical version of Jefferson's "wall of separation." As my former boss, the late Chief Justice William Rehnquist, put it—at a time when he was regularly a lone dissenter—it is difficult to "build sound constitutional doctrine...on a figure of speech."

And so, courts and commentators, scholars and advocates, distracted by this "misleading metaphor," would invoke the "wall"—as if it enjoyed the constitutional status and solidity of the "two senators from every state" or "House members have to be at least twenty-five years old" rules—to hamstring beneficial cooperation between governments and religious institutions, or to deny special accommodations to religious believers burdened by general regulations, or to exclude religious speech and symbols from the public square. To hear some tell it, if a public-school fifth-grader were permitted to do a book report on Cardinal

Egan's predecessor Archbishop "Dagger" John Hughes; or if a historic mission church in Texas benefitted from disaster relief; or if a community of religious sisters were exempted from a requirement that employers pay for contraceptives; the inevitable result of such a "breach" in the "wall" could only be another Saint Bartholomew's Day Massacre or Republic of Gilead.

This way of thinking about church-state relations—that is, about the "two, not one" arrangement—is not, one suspects, what Pope Gelasius had in mind. True, some have argued—and some still do—that the "separation of church and state" requires governments to energetically scrub away all "religious residue" from the public square. But this contention, and this ambition, are untrue to the vision of the American Founders and to the text of the American Constitution. To quote John Courtney Murray again, arguments like these stand the First Amendment "on its head. And in that position it can only gurgle nonsense." Our Constitution differentiates "church" and "state" for more Gelasian reasons: not to confine religious belief or silence religious expression, but to curb the reach of governments and secure religious freedom.

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Please hold that thought. And prepare for yet another temporal jaunt—and also for a three-mile trip uptown: In 1952, the Supreme Court decided a case called *Kedroff v. Saint Nicholas Cathedral*. It is, I have to admit, not a case that looms large in the syllabi of many law-school courses. And yet, few cases have more affected my own thinking about the law of church and state, and few connect us so neatly with Pope Gelasius' message to Emperor Anastasius.

Strictly speaking, the *Kedroff* case emerged from an everyday land-use dispute involving the "right to possess and use certain church property known as Saint Nicholas Cathedral of the Russian Orthodox Church located on East 97th Street in the city of New York." Such a matter, we might think—and Justice Jackson complained in his dissenting opinion—is almost paradigmatically one of only local concern, and hardly "within the proper province of [the] Court." In fact, however, in striking down a New York law that purported to transfer control of the Cathedral from one religious authority to another, the Court's decision affirmed and vindicated both the core and aim of church-state separation, correctly understood, namely, what it called "a spirit of freedom for religious organizations." In so doing, as Professor Mark DeWolfe Howe recognized, in a short essay published in the *Harvard Law Review* soon after the decision, the justices engaged "a classic problem of political theory," that is, the "pluralistic thesis...that government must recognize that it is not the sole possessor of sovereignty"—in other words, that "Caesar…is only Caesar, [and so should] forswear any attempt to demand what is God's."

I have written elsewhere about the pre-history of this case, about the history of Russian Orthodoxy in America (and, especially, in my home state of Alaska), about the construction—with Tsar Nicholas II's financial support—of Saint Nicholas Cathedral, and about the Cold War drama and intrigue—the political statecraft and ecclesiastical spycraft—that resulted in a New York court's decision putting the Russian Orthodox churches in New York under American, rather than Russian, control. I will not impose all that on you here.

For our purposes, it is enough to say that, by the time the *Kedroff* case arrived at the Supreme Court of the United States, the question presented was whether the State of New York had the power to reorganize and codify the governance of the Russian Orthodox Church in that state and, indeed, in the United States—or whether these moves were "invalid under the constitutional prohibition against interference with the exercise of religion." Writing for a majority, Justice Stanley Reed concluded that New York had imposed "a transfer by statute of control over churches" and that "this violates our rule of separation between church and state." The relevant precedents, he thought, "radiate[d]...a spirit of freedom for religious organizations, an independence from secular control or manipulation, [and the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

Pope Gelasius could not have said it better. Here is an understanding of "separation" that just might be worthy of the young life-vested and shark-dodging George H.W. Bush.

No doubt, the justices were clear-eyed about the realities of the relationship between the Russian Orthodox Church and the Soviet state, and yet, they held the Gelasian line. Remember the times: Only days before the decision in *Kedroff*, the Court had denied *certiorari* in the cases of Julius and Ethel Rosenberg, who had been sentenced to death for sharing nuclear

secrets with the Soviets. The North Korean People's Army was brutalizing American prisoners of war through such propaganda stunts as the 1952 P.O.W. "Olympics." Senator Joseph McCarthy published that year his book *The Fight for America*, and Arthur Miller would soon put on his play *The Crucible*. This is not necessarily the environment in which we might have confidently expected the Court to dutifully and determinedly exercise its role, on behalf of an allegedly Soviet-controlled church, as the enforcer of the Constitution's religious-freedom guarantees.

John Courtney Murray—no surprise—welcomed the decision, and saw in it an affirmation of the truth that "within society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state." He rejected, in other words, Hobbes' colorful warnings about worms and entrails. Again, "the government must recognize," as Professor Howe put it, "that it is not the sole possessor of sovereignty," and that there are, in the end, "things that are not Caesar's." Or, for that matter, the Czar's.

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Here is my suggestion, so far: The 5th-century dust-up between the pope and the emperor, Father Murray's reflections on the Freedom of the Church, the unedifying history of President Jefferson's masonic metaphor, the church-state misunderstandings of both then-Senator Kennedy and his Protestant critics, and the Supreme Court's resolution of a Cold War skirmish over Saint Nicholas Cathedral all point toward two related proposals: First, the appropriate distinction, and differentiation, between the jurisdictions of religious and political authorities—what the late Pope Benedict XVI called "healthy secularity"—is a support and safeguard for human freedom. And, second, the American law of religious liberty, of church-state relations, and of the First Amendment should—and, increasingly, does—reflect and honor this fact. Once again: Two there are, not one.

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Pope Gelasius' formulation, I believe, is the key to what I have called the "American model" of religious freedom, a model that balances differentiation with cooperation and separation with support. What are this model's features, and what is its structure?

In the "American model," the fundamental right to religious freedom is "endowed by our creator" and not loaned out by our government. As the Second Vatican Council's Declaration stated, it "has its foundation in the very dignity of the human person" and is attached to our "very nature." Of course, this freedom exists in balance with the obligation of governments to secure public order and promote the common good.

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, inappropriate, or inaccessible. Instead, the right to "public religion" is honored, and so is the freedom of "private" religion, which includes the liberty to reject religion altogether. The government leaves the business of religious formation and evangelization to families, clubs, associations, schools, and congregations. At the same time, it carefully protects and unjealously promotes these institutions' freedom to do this work without manipulation or interference and cooperates enthusiastically with them in pursuit of the common good and in promoting shared goals—feeding the hungry, clothing the naked, caring for the sick, educating the young.

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" but instead in the "healthy" sense that political authorities are restrained from intruding unjustifiably into the affairs of religious communities. They are "separate" and "distinct," but not alien or unfamiliar. The American model is "secular," not "secularist." Ours is—again, quoting Pope Benedict XVI—a "healthy," "positive" secularity, a secularity that respects the truth that there are "two, not one."

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As we know, American courts, legislators, officials, and citizens—and law professors—do not always think, talk, and act in accord with this model. Why not? That is, what explains the durability and prevalence of the misguided and morally unattractive view that our Constitution requires the exclusion of religious voices and arguments in the public square, that the First Amendment makes religious faith a matter of strictly private concern, and that "religious freedom" is little more than an

unjustified privilege or a partisan talking point? Part of the answer, I think, is that many forget the Tocquevillian truths about the "social" space between the purely "private" and the purely "public." That is, between the personal sphere of homes, hearts, and minds and the governmental sphere of taxation, representation, legislation, and prosecution is the large, busy, boisterous, and crucially important sphere 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 own laws and activities should remain secular: The Mayor of New York shouldn't pick the Archbishop of New York, and the USCCB shouldn't set the speed limit.

What is sometimes forgotten is that, again, a "healthy" secularity can still, and should, tolerate and welcome religion in the "public square," that is, in civil society. Michelle Obama, when she was First Lady, made a similar point, noting that one's "faith journey isn't just about showing up on Sunday for a good sermon and good music. It's about what we do Monday through Saturday as well." Many of us strive to integrate rather than to compartmentalize our lives, and the "public square" is often where this happens. Nothing about Pope Gelasius' charge to the emperor, and nothing about the appropriate differentiation between "church" and "state," requires the disintegration, or what Saint John Paul II called the "pulverization," of the human person.

Remember, the First Amendment limits government conduct only; it says what governments may not do. It has nothing to say, though, about the actions of non-state actors—of persons, churches, associations, and societies—other than to confirm that religious expression, exercise, and worship are worth protecting, including "in public" and in "civil society." Our Constitution forbids the "establishment" of religion. But this so-called "Establishment Clause" is not and should not be the government's sword, driving private religious expression from the marketplace of ideas; rather, it is a shield that protects religious and religiously motivated speech and action. The American law of church and state, correctly understood, 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 and engage in public life.

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Remembering, again, that I am only a lawyer, and that these historical and theoretical musings might be pulling me—like an impudent Byzantine emperor—out of my lane, I should address, even if only briefly, the advertised topic for this lecture, namely, the actual "law of church and state," at least as it stands in the Supreme Court of the United States.

Noting and conceding the risk of oversimplification, the American law of church and state can be divided into four categories or seen as an effort to deal with four problems: cooperation, accommodation, expression, and autonomy. The Court's doctrines, in all four categories, dealing with all four problems, have evolved, in some cases dramatically, in recent years—in my view, for the better.

The "cooperation" cases and controversies are, generally speaking, about money. More precisely, they are about financial and other forms of support, by governments, through contracts, grants, and other mechanisms, for educational, healthcare, social service, and other "secular" activities of religious schools, universities, hospitals, and charities. They are about the relationships, obligations, and entanglements that result from or are entailed in this support, the conditions that are attached to it, the forms that it takes, and the ends to which it is directed.

Whether or not this is the original or oldest religious-freedom controversy in our constitutional law, culture, and politics, it can fairly be said to have been the most neuralgic. For many decades, the American church-state question simply and for practical purposes only was whether governments should be permitted to cooperate with Catholic schools in the project of educating American children for citizenship. Over the years, different groups and voices emerged—Nativists and Know Nothings, Progressives and Pragmatists—insisting that the answer to this question must be "no." In the late 1940s, the *Everson* case nationalized the question and, in the early 1970s, the now-discarded *Lemon* test saw most of its use in inconsistent and inscrutable attempts to answer it.

By the late 1980s, though, there was widespread dissatisfaction with the Court's attempts to distinguish permissible from impermissible forms and instances of cooperation through entrails-reading analyses

focused on whether or not "religion" was excessively "advanced" by this or that program or disbursement. A new view emerged—or, rather, an older one returned—that required neutrality and nondiscrimination, not nervous predictions about downstream policy effects. On this view, "equal treatment is not establishment," and governments are free to cooperate with authentically and unapologetically religious actors—again, mainly but not only schools—to secure secular goods.

This is the law now. Indeed, the Court's most recent decisions in this area have established and reaffirmed that not only may governments cooperate in this way, they sometimes must—that is, they may not discriminate against religious actors once they decide to partner with non-state institutions.

The "accommodation" category is also, probably, a familiar one. Recall, for example, the debates, in courts of law and in courts of public opinion, during the COVID pandemic, about vaccine requirements and restrictions on religious gatherings, or earlier ones about federal mandates that orders of Catholic women religious provide insurance coverage for contraceptives. Before that, some landmark cases involved Amish parents seeking exemptions from high school attendance requirements or Native Americans seeking to use peyote in religious rituals.

Here are questions about whether, and to what extent, religious actors and actions may or must be exempted from otherwise applicable restrictions and regulations. When is special treatment for religious exercise permitted, when is it warranted, and when is it required? The cases in this area have, over time, served as a reminder that operationalizing a commitment to religious freedom is relatively easy when political communities are homogenous or when political authorities do not do very much. The increase in religious diversity and disagreement, along with the expansion of governments' regulatory authority, interests, and ambitions, has complicated things considerably.

In any event, debates about, for example, exempting Quakers from conscription into military service were arguably the nation's first religious-freedom controversies. And the Supreme Court's first decisions involving and interpreting the First Amendment's religion clauses had to do with the national government's unwillingness to accommodate, or even to tolerate, the Mormons' polygamist teachings and practices.

For nearly two centuries, although legislative and local accommodations were common and, generally, uncontroversial, the constitutional rule was that religious actors were not guaranteed by the First Amendment a right to exemption from validly enacted and nondiscriminatory regulations of conduct. In 1963, though—in the context of a general turn by the Supreme Court away from a deferential stance toward legislative and official decisions—the Court announced a new approach, according to which close judicial review would be applied to all state actions that burdened, even indirectly, not merely religious belief but also sincere religious exercise.

For a few decades, the Supreme Court and lower courts struggled to reconcile the invocation and application of this rule with the workings of the modern regulatory state. And then, in 1990, a bare majority of the justices appeared to give up and to adopt, or perhaps return to, the view that the Free Exercise Clause does not require strict judicial scrutiny of government rules and regulations that impose even substantial burdens on religious exercise and religiously motivated conduct, so long as those rules and regulations are "neutral" and "generally applicable."

This decision was a controversial one and it prompted, among other things, legislative responses, by national, state, and local governments—including, for example, the 1993 Religious Freedom Restoration Act—that were intended to ameliorate the effects of the Court's move. The Court, too, has recently developed various carve-outs and work-arounds that have complicated the application of its stated standard, and at least several justices seem poised to join those commentators who call for yet another reset and for a more close, active judicial role in the accommodation of religion.

The "accommodation" category, it should be noted, raises (at least) two distinct questions. First, should religious exercise, or religiously motivated conduct, be exempted from otherwise applicable regulation and, if so, why? What, after all, is so "special" about religion? Should religious believers be exempt from, say, vaccine requirements or drug-use prohibitions to which they object? Should religious communities be exempt from, say, restrictions on in-person gatherings or land-use regulations? Are such exemptions unjust, or inconsistent with rule-of-law values, or otherwise undesirable? Do they, or can they, cross the line into prohibited preference for, or "establishments" of, religion? Next, if and when

exemptions are extended and accommodations are made, who decides? That is, should accommodations be primarily the product of politically accountable actors' deliberations and decisions or of litigation and judicial balancing? There is broad and deep, if not universal, agreement that religious accommodations and exemptions are at least sometimes warranted, but substantial disagreement on the second question.

The "expression" category is a broad one, and its boundaries are not obvious, but it includes controversies involving religious symbols and speech by public officials or in public spaces. 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 involving the practice of a small town in New York of opening its town council meetings with a prayer offered by a local minister, or the recent rulings involving a war-memorial cross on public land in Maryland and a high school football coach's post-game prayers.

This category is, compared to the last two, relatively new. For a long time, it did not occur to litigants that ubiquitous and familiar reminders and acknowledgments of Americans' religious traditions and inspirations amounted to unconstitutional religious establishments. No one imagined that, say, Corpus Christi, Texas and Sacramento, California were, as the kids say, "problematic." Disagreements about the consistency with religious-liberty commitments of practices like Thanksgiving proclamations and legislative chaplains were, for most of the country's history, worked out in other non-judicial venues.

A detailed survey of this category's contents or excursion into the fever swamp of the relevant precedents would reveal little in the way of bright lines or clear rules. For a while, the question courts and officials were told by the Court to ask was whether the expression in question amounts to an "endorsement" of religion, one that makes "adherence to a religion relevant in any way to a person's standing in the political community" or "sends a message to nonadherents that they are outsiders, not full members of the political community." This "endorsement test," though, was both unadministrable and untethered from constitutional text and historical practice, and it appears to have been discarded by the Roberts Court.

It is not yet settled what rule or standard determines whether a particular religious symbol, or expressive act, is a permissible bit of "American Shinto" or an unconstitutional establishment of religion. We have been assured, and admonished, by the justices that "history and tradition" are relevant considerations, as is the presence or absence of coercion, broadly understood. More colloquially, the key consideration might be whether the display, practice, or symbol in question is old or new. And particular concerns about the public-school context, and the assumed or asserted impressionability and vulnerability of school-age children, have long shaped outcomes in this area and seem likely to do so going forward, including in cases emerging from the newfound enthusiasm in some states for mandating public-school displays of the Ten Commandments. It does seem clear, though, that our Constitution does not require fastidious judicial devotion to French-style *laicite* or to the maintenance of what, again, Father Neuhaus famously called the "naked public square."

The fourth and, for present purposes, final category is for the "autonomy" decisions. In a way, these cases and controversies are those that connect most closely to the original—indeed ancient—questions about the relationships between "church" and "state": the questions we began with this evening. They don't involve imperial deals with Monophysites these days but do implicate the right of religious institutions and communities to decide religious questions for themselves, free from government interference or second-guessing. A few summers ago, the justices reaffirmed this right, in cases involving Catholic schools in California. They insisted that the First Amendment guarantees the right of religious institutions to decide who will—and who will not—play teaching, ministerial, and leadership roles in connection with their religious missions and character. Put another way, governments may not use employment discrimination law to supervise or second-guess such decisions. It is—as I feel sure Pope Gelasius would have wanted—for the religious institution, and not political authorities and officials, to decide questions about religious teachings' content or religious teachers' qualifications.

This category includes more than just the recent "ministerial exception" cases involving employment-discrimination actions, however. Some courts and scholars have identified a "church autonomy" doctrine and a practice of "ecclesiastical abstention" that

supplement and complement this "exception." Other disputes that fit well in this category include litigation over church property emerging from denominational or congregational splits, efforts to use tort law in what are essentially religious disputes among congregants or between the members of religious communities and their ministers, situations where the legislature or a government official appears to have delegated secular political authority to religious actors or bodies, and state efforts to superintend directly what are inescapably matters of religious polity and practice.

Borrowing from Maritain again, one might think of this category as the doctrinal repository for "things that are not Caesar's" and as reflecting the idea that the "separation of church and state"—correctly understood, and "wall" metaphors notwithstanding—is not about banishing religious believers, expression, and commitments from the public sphere but is instead a means of protecting the right of religious authorities, not political ones, to make religious decisions. As Justice Clarence Thomas put it, concurring in the Court's unanimous recent ruling in the *Catholic Charities* case, "the First Amendment's guarantee of church autonomy gives religious institutions the right to define their internal governance structures without state interference." His discussion, no doubt, would have warmed Pope Gelasius'—and Murray's, and Maritain's—heart: In American law, he explained, "church and state are 'two rightful authorities,' each supreme in its own sphere.... Jesus famously said to render 'unto Caesar the things which are Caesar's; and unto God the things that are God's.'" Indeed.

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We can see, I think, how the "two there are" claim plays out in each of these categories and, I believe, increasingly shapes the Court's rules, doctrines, and decisions. The "accommodation" cases remind us that our obligations and loyalty run not only to the state, and that we are, as Saint Thomas More put it, "the King's good servant, and God's first." The claimants in these controversies do not deny the regulatory power of the political authority, in its "lane," but they do insist on the reality of competing duties and demands.

The rulings in the cooperation category underscore that the appropriate differentiation between church and state does not rule out common aims and interests, and that to distinguish between religious and political authorities and institutions is not to set the two at odds. It is, both of the "Two" might well think, a good thing to educate the young and care for the old, and there's no reason why the "Two" cannot work together. And, crucially, this cooperation need not, and should not, require religious institutions and actors to secularize, as the price of participation in the common project.

The "expression" cases, correctly understood, are moving toward an acceptance of—indeed, an appreciation for—the fact that an appropriately secular government does not require and should not impose an aggressively secularist public square. Religious belief, celebrations, holidays, traditions, and teachings are, for us—and, indeed, for human persons generally—part of life, and nothing about constitutional democracy requires us to pretend otherwise. The fact that, again, we have cities called Sacramento and Corpus Christi does not mean we are creeping toward theocracy. Quite the contrary: It is a misplaced, ahistorical, and dis-integrating secularism that would seek to erase—today we might say "cancel"—the Christian character of much of our shared common life and history. That there are "two, not one," means, among other things, that the state does not get to claim sole ownership over the character and tone of civil society.

Finally, and perhaps most obviously, the Court's cases in the autonomy category should—and, increasingly, do—take seriously the reality that religious communities enjoy meaningful independence, self-government, and jurisdiction. I mentioned earlier Justice Thomas's *Catholic Charities* opinion and, in the interest of time, I will say only that it is a tour de force—an essay, a treatise, I will not say an "encyclical" on the church-autonomy doctrine and its central, anchoring role in our law of religious freedom.

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I spoke earlier of an "American model" of religious freedom and church-state relations, and described a few of its features. Before I conclude, I would like to suggest an additional, and I hope not *too* oversimplified, way of thinking about that "model": We should think of it as aiming not for "freedom from" religious faith, and not even merely for "freedom of" religious exercise and belief. The

Second Vatican Council's Declaration on Religious Freedom—and, I believe, the American model at its best—urges us to aim higher, for a legal, practical, and cultural commitment to "freedom *for* religion."

The Declaration does not ask for mere "neutrality" or "religion blindness." Instead, it calls for governments to exercise respectful care for the "conditions for the fostering of religious life," that is, the conditions within which "people may be truly enabled to exercise their religious rights, to fulfill their religious duties," and so, to flourish. This, in my view, is the American model of "healthy secularity" at its best. Here, the search for religious truth is acknowledged as an important human activity. We are, after all, made to know, love, and serve God in this world and to be happy with him in the next. We are made for beatitude, and—as Saint Augustine beautifully put it—our "hearts are restless until they rest in Thee." Religion *is* special—and not just especially dangerous. Its exercise is valuable and good, and worthy of accommodation, even support.

The idea is not that public authorities 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 and to adhere to it when it is found. And so, an appropriately limited state will not prescribe the path this search should take, but it will take steps to make sure that "freedom for" religion, and the conditions necessary for the exercise of religious freedom, are nurtured.

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The American law of church and state is changing—in several ways, it is healing and improving. American citizens, communities, and governments have deep historical and constitutional commitments to religious freedom, even if there are persisting and perhaps sharpening disagreements about what those commitments entail in practice and policy.

Political and other forms of polarization and fragmentation make it plausible to hypothesize that religious freedom has become more controversial as it has been linked in many minds with large corporations, and contraception-coverage, rather than with Amish schoolchildren, or the rituals of the Native American Church. Some are not unreasonably concerned that consensus about the foundational status and role of religious liberty is eroding or being undermined and that what President Clinton could call, not that long ago, our "first freedom" is now a luxury we can no longer afford or a childhood hobby we have outgrown.

And yet, as Professor John Witte has observed, that "bold constitutional experiment" in granting religious liberty to all remains "intact, [but also] in progress, in the United States." It has, as James Madison hoped it would, added a "lustre to our country." And, as Father Murray argued, that "bold experiment" can and should be understood as carrying forward and codifying an idea, and a proposal, that—as we have seen—is quite old. Our Constitution, correctly understood, connects Pope Gelasius' insistence on Two, not One, to what Murray called "the American consensus": "Within society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state." There remain, in other words, Things That Are Not Caesar's.