

Archbishop Lori's Talk: Reflections on Church and State

Reflections on Church and State; Red Mass

Diocese of Fort Worth, Texas

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Thank you so much for inviting me to offer the annual Red Mass. It is a pleasure to be with Bishop Olson whose courageous, cogent, and loving pastoral leadership I greatly admire. Thank you, Bishop, for your leadership – locally, nationally, and beyond.

I am also grateful to Robert Gieb, for leading the committee that organized this wonderful Red Mass and our present gathering. And thanks to all of you, dear friends, who are kind enough to take the time to listen to me not once but twice in one day. You will have a high place in heaven, I assure you! May God reward your efforts to live your faith and bear witness to it!

In his kind letter of invitation, Bishop Olson asked if, as the Chairman of the Bishops' Ad Hoc Committee on Religious Freedom, I would offer some reflections on the relationship of Church and State here in the United States of America. I am happy to do so, noting that I approach this question not as a lawyer but rather as a pastor of souls and a churchman. As a result, you are likely to get from me a lot more Church than State!

In fact, I sort of stumbled into my present work on religious freedom. Throughout most of my forty years as a priest and twenty-two as a bishop, I knew, of course, that there are tensions between Church and State. In the 1990's, for example, I recall a discussion between Cardinal James Hickey, my old boss and former Archbishop of Washington, and then-Attorney General, Janet Reno, on the separation of Church and State. I would say that the Attorney General felt that this metaphorical wall was pretty high and rather impenetrable. Cardinal Hickey smiled disarmingly at her and said, "Yes, but couldn't we lower the wall a little and talk over it as neighbors?" Ah, the beauty of a metaphor! We can make it work in so many ways! During my years in

Washington I also listened to a lot of homilies at annual Red Masses where visiting prelates do their best to preach the Gospel to a healthy majority of the justices of the Supreme Court. These homilies too alerted me to the importance of understanding more deeply how Church and State are separate yet related and how tensions in that relationship can and should be addressed creatively.

However, it wasn't until 2001, when I started serving as a bishop in Connecticut, that it began to dawn on me that religious liberty was entering a period of crisis. As Bishop of Bridgeport, I couldn't help but notice overt hostility toward the Church on the part of some legislators and government officials. Working with brother bishops and dedicated lay persons in the State, we tried our best to protect the Church's legitimate interests while advancing laws and policies we thought served the common good. Things were sort of simmering on the back burner when, in 2009, a bill was introduced into the legislature mandating that the Catholic Church change its governance structure to accord with the will of certain state legislators. The bill would have removed the bishop and pastor from parish administration and forced parishes to elect committees to oversee all administrative matters. And this gem of a bill was given the innocuous title, "Corporate Forms". Well, the Church in Connecticut sprang into action and killed the bill handily - but the episode itself made it clear that we can no longer take for granted that government will always guarantee and protect religious freedom. Vigilance really is the price of freedom.

So I wrote a pastoral letter on religious freedom, and in 2011 was drafted by Cardinal Timothy Dolan of New York, then the President of the USCCB, to chair a newly formed Ad Hoc Committee on Religious Freedom. Over the last six years, I've become associated with the issue of religious freedom, so much so, that I may be like a typecast actor who is remembered only for one role! Religious liberty is by no means the only issue but it should be important to all of us as a basic right and a beautiful gift given us by our Creator so that we may love him above all things and love our neighbor as ourselves.

As you know better than me, the phrase "wall of separation" appears nowhere in the Constitution and still less in the Bill of Rights. Rather, it originates in an 1802 letter that Thomas Jefferson wrote to the Danbury (CT) Baptist Association whose members had written to him complaining that their religious freedom and rights of

conscience were eclipsed by the established church in Connecticut, the Congregationalist Church; it would remain the established Church in Connecticut until 1819. Jefferson responded thus: "I contemplate with sovereign reverence the act of the whole of the American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise of, thus building a wall of separation between Church and State.'" In using this metaphor, Jefferson echoed the words of Roger Williams, the founder of the Baptist Church in America who wrote of "a hedge or a wall of separation between the garden of the church and the wilderness of the world."

Whatever Jefferson may have meant, he didn't seem to envision the banishing of religion from public life or, for that matter, public property. The Sunday after he sent his letter to the Baptists in Connecticut, church services were held in U.S. Senate Chamber. Nonetheless, Jefferson's metaphor has given risen to conflicting interpretations of the Constitution and the Bill of Rights right down to our own day. In the first decades of the our country's history, the First Amendment was understood mainly as an affirmation that the federal government is denied all power over religious matters. The phrase, "wall of separation" made a cameo appearance in the U.S. Supreme Court's 1878 ruling *Reynolds v. the United States*, a case which, broadly speaking, held that religious duty is not a defense to a criminal indictment . . . but scholars say that this metaphor was not at the heart of the high court's ruling. In the meantime, however, many states enacted Blaine amendments that sought to rule out any form of aid to religiously based schools on the grounds of the separation of Church and State. Although the recent U.S. Supreme Court Decision, *Trinity v. Comer*, struck a blow against the Missouri iteration of the Blaine Amendment, nonetheless, Blaine amendments remain on the books of 38 out of 50 states.

Jefferson's metaphor did not attain a central place in a Supreme Court decision until *Everson v. Board of Education* in 1947. This was a case that pertained to the legality of New Jersey public school district providing transportation for parochial school students. Justice Hugo Black, writing for the majority, shifted the emphasis in how the First Amendment was to be interpreted. Instead of primarily defending religion against incursions of government, Black advanced the view that the First Amendment is primarily about the strict separation of Church and State. In this

ruling the “wall of separation” was seen as so “high and impregnable” as to exclude “every form of public aid or support for religion.” With the 1948 Supreme Court ruling, *McCullum v. Board of Education*, the phrase “wall of separation” became the dominant way of understanding and interpreting the First Amendment. Instead of primarily protecting the interests of religion, it became a way of trying to delimit the role of religion in public life, and specifically of curbing the influence of religion on the conduct of civil government. Yet, it’s worth noting all other First Amendment protections, such as freedom of the press, are designed to function as a check on the power of the government – not to shield the government from the unwelcome press coverage.

The high court’s invocation of the “wall of separation” has had consequences. Instead of promoting toleration of differing religious views and welcoming the influence of religion on society, certain laws, court decisions, and administrative regulations treat religion as a divisive and disruptive force better kept out of public life – not as a contributor to our nation’s common morality. Some invoke this metaphor to exclude the Church from public policy, thus ignoring the historic role of churches in ending slavery, securing civil rights, in promoting just labor practices, and much more.

Thus, we are living in an era, when no matter what party is in power, and no matter what the precise composition of the Supreme Court may be, the First Amendment is interpreted more or less consistently more as a restraint on religion rather than as a protection of religious freedom. Even so, the bar remained still high for governmental intrusion into the internal affairs of religion... until, that is, the 1991 Supreme Court decision, *Employment Division v. Smith*, a case that pertained to the State of Oregon’s denying unemployment benefits to a person who violated the state law against using peyote on the grounds that it was part of his religious practice (a redux of *Reynolds*). In its majority opinion, authored by Justice Antonin Scalia, the Court held that, while the government did not have the power to regulate religious belief or practice, it does have the power to enforce “a neutral law of general applicability”. This lowered the bar considerably for governmental intervention in the affairs of churches and believers. There no longer had to be a “compelling interest” for government to intervene. The Congress promptly responded to this high court ruling with legislation designed to re-set the standard for governmental

intervention by passing a bipartisan bill, The Religious Freedom Restoration Act – it passed overwhelmingly and was signed into law by President Bill Clinton. Today RFRA laws, especially at the State level, are under assault for allegedly allowing religious individuals and groups to discriminate through their teaching, public advocacy, and practices against LGTB rights.

All of the foregoing might help us better understand the context for state governments and later the Federal government to put in place mandates that force churches to violate their teachings. Among the most notable is the HHS mandate that requires conscientiously objecting church organizations to include in their employee health insurance plans coverage for sterilization procedures, all forms of contraception, and reproductive counseling for underage daughters of employees. Not surprisingly, in California and New York, an abortion mandate is in the making. In crafting these mandates the working definition of religious freedom has been narrowed to include little more than freedom of worship. By contrast, the Church's ministries of service to the broader society, – education, healthcare, charity, social services – have been deemed too “secular” to be protected from these intrusive mandates.

And while there have been notable victories – e.g., the *Hobby Lobby* decision – and some indications that the high court may be looking to restore balance, we should not imagine that these kinds of challenges have seen their day. For, as we know so well, law is but the tip of the societal iceberg. And in this case, the iceberg is a society that has grown increasingly secular with less tolerance for religion and religious values. Let us not overlook the point that aggressive secularism is also a system of belief. In failing to accommodate people of faith and religious institutions, both law and culture are establishing “un-religion” as the “religion” of the land. As for the HHS mandate, the matter is still not settled with the DOJ and we are awaiting an executive order protecting religious freedom – recognizing, of course, that executive orders of all kinds are but temporary fixes.

So metaphors can be illuminating but they can also be mischievous – and while Jefferson himself did not aim to pen a mischievous metaphor his later interpreters did indeed make considerable mischief with his metaphor. Perhaps in the time remaining we can go beyond this metaphor by taking a concise look at the Church's

teaching on religious freedom.

It is based on an understanding that basic human freedoms are inherent to human dignity, coupled with an understanding that our freedoms are granted not by the state but rather are given us by our Creator. As President John F. Kennedy said in his inaugural address, the rights for which our forebears fought “come not from the generosity of the State but rather from the hand of God...” even as the Church teaches that “the ultimate source of human rights is not found in the mere will of human beings, but in man himself, and in God his Creator.”

Religious liberty, then, is prior to the state. It is neither given by government nor can it be legitimately revoked by government. Rather it is to be guaranteed and protected by government. We can rightfully expect our government to promote religious tolerance and broadly to accommodate the place of religion in American life. We can expect our government not to allow religious liberty to be easily compromised by other claims and interests, in effect, to become “a second-class right” (cf. Mary Ann Glendon). On the contrary, religious freedom is our most basic freedom, “the source of all other human rights, a kind of litmus test or touchstone for the protection of human dignity generally” (cf. JP II, Mary Ann Glendon) – and the robust exercise of religious freedom is not bad for democracy but as George Washington recognized it is one of the pillars “for our country’s great experiment in ordered liberty.”

Let me offer a word about the scope of religious freedom which is more than freedom of worship, important as that is. It is first an individual right, it is part of human nature, and as Vatican II’s Declaration on Religious Liberty teaches, it consists “in those internal, voluntary, and free acts whereby man sets the course of his life directly toward God.” (DH, 3). So religious freedom pertains not merely to what one does on the Sabbath but to the way one conducts the whole of one’s life, at home, at work, at leisure. It is further not merely an individual right but it also belongs to churches and religious institutions set up by citizens and believers who seek to create, not a theocracy, but rather to be leaven and light in their culture. Thus, religious freedom extends to worship but also to the good works of faith and guarantees the rights of believers and their churches to bring into the public square truths and values that flow from faith and reason, and thus to transform the world,

even as they set their hearts on the world to come.

Speaking of toleration, you've been very kind in tolerating this talk! Let me conclude by expressing my appreciation for your role as members of bench and bar and as members of the laity. The creation of a just and tranquil society is not really the work of the clergy. People like me can teach and advocate and hopefully inspire and warn . . . but it really is the role of persons such as yourself to create a culture that is truly just and tolerant, a society that is receptive to the truths and values that flow from faith and reason. As we witness how divided our society has become, we need to step back and remind ourselves that our Church's teachings on religious freedom and on social justice really do contain a direction and a wisdom that is badly needed right now, perhaps now more than ever, as we search for a way to be *cohesive in our diversity* and *principled in our inclusivity*.

May the Lord guide us in our efforts to build a civilization of truth and love! Thanks again for listening!