Positive Secularism and the American Model of Religious Liberty

*By Richard W. Garnett**

At its best, the American model of religious liberty is not a freedom from religion or a freedom of religion; it is a freedom for religion.

Pope Benedict XVI has expressed his admiration for the "American model" of religious liberty and church-state liberty. For example, during his recent trip to the United States, the Pope noted, and seemed to praise, America's "positive concept of secularism," in which government respects both the role of religious arguments and commitments in the public square and the important distinction between religious and political authorities.

Is there, in fact, such a model, and such a concept, at work in America? What are its features? And, is it worthy of the Pope's apparent endorsement?

Looking back, for a moment, to America's founding, we are reminded that Thomas Jefferson regarded the religious-freedom guarantees enacted into law after the Revolution as a "fair" and "novel" experiment. Similarly, it was the confident hope of James Madison that America's bold experiment in religious liberty—one that rejected both mere "toleration" and Jacobin anti-clericalism alike—"promised a lustre to our country." Madison believed that a specifically "American model" of religious freedom was emerging, and that it would distinguish us, shape us, and strengthen us. He and other leaders among the founding generation were keenly aware that they were attempting something new and great, something that would change—indeed, remake—the world. At the same time, they felt the weight of great responsibility. John Adams revealed as much when he wrote that "the People in America have now the best opportunity and the greatest trust in their hands, that Providence has ever committed to so small a number, since the transgression of the first pair; if they betray their trust, their guilt will merit . . . the indignation of Heaven."

Fortunately we have not—not yet, anyway—betrayed this trust. Today the American experiment in religious liberty is both vital and vulnerable. Our religious-freedom protections are robust, but incomplete. Our church-state arrangement is exemplary, yet confused. This much, though, seems clear: what was true at the founding remains true today, namely, that there are at work several different models, or ways of thinking about, the freedom of religion under and through law. Indeed, to quote John Witte, the various competing models of Adams's day—and it should be emphasized that there were competing models—have "born ample progeny, and the great rivalries among them are fought out in the courts, legislatures, and academies throughout the land."

That said, it is possible to identify an American model of "healthy secularism" that our Constitution and laws do, and should, reflect and protect.

The freedom of religion is seen not as a quaint relic from a simpler past, or as an anachronistic, even dangerous, threat to democracy. It is embraced whole-heartedly as a fundamental, natural human right, one that is intimately connected to human dignity and flourishing. This right and its protection can and should co-exist with the political community's obligation to secure public order and safety. In the "American model," the law does not purport to exclude religious believers and values from public life and the civic conversation. Instead, it protects everyone—believers and non-believers alike—against coercion in religious matters. It leaves to the voluntary associations of civil society the responsibility of religious education and evangelization, but it protects their right to carry out this responsibility. The right to "public" religion is protected, as is the freedom of "private" religion. "Church" and "state" are separate, not in the sense that faith is excluded from politics—such exclusion, after all, is impossible—but in the healthy, "positive" sense that the institutions and authorities of government are separate from, and prevented from interfering with, the proper independence of the institutions and authorities of religion.

The model is "secular" in the sense that laws and policies are not supplied directly by religious authority; it is "positive," though, in that the understanding of human flourishing that it is designed to promote includes the search for religious truth and the sanctity of religious conscience. The American experiment should be seen as an attempt to secure religious liberty and authentic human flourishing through constitutional limits on interference by government with religion, and constitutional protection of the profession and practice of faith.

These are the features of the American model at its best. At the same time, it is not the only one that is, or has been, at work in the United States. Nor is it the case that American courts, judges, and officials always act in accord with this model. Indeed, it is easy to find stories—in the media and in the law books—involving public officials who have neglected the model's fundamental premises, even turning them upside-down, treating citizens' public religious expression with suspicion, rather than with evenhandedness and respect. In some quarters, the view persists—not only among government regulators, but also among commentators, scholars, judges, politicians, and many of our fellow citizens—that our Constitution calls for the exclusion of religious expression and argument from the public square of civil society. Why? Why do so many seem to think that religious-inspired arguments are inappropriate, even unwelcome, in political discourse?

I do not believe that most public officials harbor ugly prejudices or deep hostility toward religious believers. Nor do I believe that they are willfully neglecting their obligations under the Constitution. Instead, I am convinced that these officials—

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and also, unfortunately, many well-meaning Americans today—fail to understand and appreciate the "American model" of positive secularism. This misunderstanding is revealing. It reflects the competition, and the tension, between at least three different approaches to religious freedom in America today. The "American model," then, is not static, but dynamic; not fixed, but in flux. And again, it is vulnerable.

These three approaches can usefully be characterized as "freedom from religion," "freedom of religion," and "freedom for religion." (There is, I should note, a fourth possibility—"theocracy," or direct rule by religious authority—but this is not a live option in America, and has not been for centuries, despite what you may have heard from some hysterical commentators.)

The first approach—"freedom from religion"—accepts religion as a social reality, but regards it primarily as a danger to the common good, and regards it as a practice that should be confined to the private, personal realm. On this view, it is "bad taste"—or worse!—"to bring religion into discussions of public policy." Under this approach, as Professor Stephen Carter memorably put it, religion is "like building model airplanes, just another hobby: something quiet, something trivial—not really a fit activity for intelligent . . . adults." Religious belief is protected, but the permissible implications and expressions of those beliefs are limited. The dominant concern is the domestication of religion, and its assimilation to the often-relativistic ideology of the state. The role of law and government is to maintain the boundary between private religion and public life; it is certainly not to support, and only rarely to accommodate, religious practice and formation.

This "freedom from" approach has found some expression in American law and policy, both in the past and—in some instances—today. It is not, however, true to the Constitution, to religious liberty properly understood, or to the nature of the human person, who is hard-wired and by nature drawn to search for truth and to cling to it when it is found. It is a good thing, then, that this approach's influence seems more pronounced among academics and a few political activists, than among Americans generally.

The second approach—"freedom of religion"—tends to emphasize toleration, neutrality, and equal-treatment. Religion, on this view, is something that matters to many people, and so the law does not permit it to be singled out for special hostility or discrimination. It is recognized and accepted that religious believers and institutions are at work in society, and the stance of the law is even-handedness. Because we are all entitled to express our views and to live in accord with our consciences, religious believers are so entitled, too. The law, it is thought, should be "religion-blind."

Although this approach is not hostile to religion, it is also reluctant to regard religion as something special. Religious liberty is just "liberty," and liberty is something to which we all have an "equal" right. Religion is not something to be "singled out," for accommodations and privileges, or for burdens and disadvantages. Again, religious commitment, expression, and motivation are all, in the end, matters of taste and private preference.

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

Finally, a third approach: "freedom for religion." This approach, in my view, represents the American experiment in "healthy secularism" at its best; it is the one that we should be rooting for. Under this approach, the search for religious truth is acknowledged as an important human activity. Religion, as religion, is special; its exercise is seen as valuable and good, and worthy of accommodation, even support. The idea is not, to be clear, that the public authority should demand religious observances or establish religious orthodoxy; it is, instead, that a political community committed to positive secularity can and should still take note of the fact that people long for the transcendent and are, by nature, called to search for the truth, and for God.

The appropriately secular and limited state will not prescribe the path this search should take, but it will take steps—positive steps—to make sure that "freedom for" religion and the conditions necessary for the exercise of religious freedom are nurtured. The government, under this approach, will not only refrain from discriminating against religion, it will take special care to accommodate and facilitate it—though always in a way that respects the distinction between "church" and "state" and the liberty of individual conscience. It not only avoids imposing unnecessary burdens on religion, it also looks for ways to lift such burdens where they exist.

It is often observed, and regretted, that American law and constitutional doctrine dealing with religious liberty is not entirely coherent. Given the discussion so far, though, this fact should not come as a surprise. Instead, it reflects the tensions between and among the three approaches I have identified. Indeed, it is precisely this ongoing competition that allows for the "American model," one that—while not perfect—provides good reason to share the Pope's hopes for it.

There is no denying that the relevant case-law and judicial opinions are riddled with clichés, unhelpful "tests," bad history, and clunky rhetoric. Still, things could be worse. And, in my view, they have improved markedly in recent years, as we have been moving away from "freedom from" and toward "freedom of" and "freedom for." (My former employer, the late Chief Justice William Rehnquist, deserves much of the credit for this development.) Again: the American experiment in religious liberty is both vital and vulnerable. Our religious-freedom protections are robust, but incomplete. Our church-state arrangement is exemplary, yet confused.