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I bring greetings from the Baptist Joint Committee for Religious Liberty —your agency on Capitol Hill defending and extending religious liberty for all, not just for Baptists. We like to think that what Roger Williams started nearly 400 years ago we have carried forward for the past 77 years as we file briefs in the U.S. Supreme Court, pressure Congress, advocate in the agencies, advise the White House, give commentary to the media and provide a variety of education opportunities in colleges, seminaries, churches and the various forms of social media.

I so much appreciate the opportunity to speak with you this evening on the topic "Directing Traffic at the Intersection of Church and State: An Update from the Nation's Capital." (Dope from Washington)

We believe, as a matter of theological conviction, that religious liberty is a gift from God, not the result of any act of concession or toleration on the part of government. But, our political institutions and constitutional constructs do serve to protect —not give, but protect —that freedom that we all enjoy.

I want to talk to you tonight about four issues that have been and continue to be on our front burner and that, conveniently enough, reflect four different protections or principles that are pillars in our constitutional architecture that ensure our religious freedom and uphold the wall of separation between church and state.

The four constitutional protections are these:

1. The First Amendment's clause against the establishment of religion that keeps government from promoting religion or giving religion a helping hand.
2. The Free Exercise Clause, the First Amendment companion that keeps government from trying to put down burden or hurt religion.
3. The church autonomy doctrine which emerges from both of these clauses to keep government from trying to micromanage the internal operations of houses of worship.
4. The provision in Article VI of the Constitution that bans a religious test for public office.

Let me address these in reverse order.

First the relationship between religion and politics. The separation of church and state does not require a complete segregation of religion from politics or strip the

public square of religious discourse. People of faith have the same rights as anybody else to seek to vend their views in the marketplace of ideas and (with some limits) to convert their religious ethics into public policy by speaking out, voting, and and serving in office. The metaphorical wall of separation does not block metaphysical assumptions from influencing public life.

So, a conversation about religion— and religion itself— can be a positive force in politics —not only in lobbying for needed reform, but also when running for/ serving in office. When candidates talk about their faith it can help us know who they are, learn what makes them tick, and examine their moral core. The free and fluid discussion of candidates' faith carries the promise of improving the electorate's ability to make an informed decision in the voting booth.

All of that said, we must proceed with caution here. Danger always lurks when we try to combine religion and politics— two things it is said you don't want to discuss in polite company. I want to mention a couple overarching limitations to guide our thinking and behavior about how we put those two things together: religion and politics. And then reflect a few minutes about how we did in 2012.

First, Article VI of the U.S. Constitution bans religious tests for public office. Most of the American colonies had a variety of religious tests for public office. But the wise architects of our republic had a different vision in mind. They would tolerate no

religious tests for the new Federal government. Although that provision technically only bans legal disabilities for qualifications for office and constrains only government, we should make every effort, as good citizens, to live up to the *spirit* as well as the letter of Article VI.

This means that a discussion of candidates' religion ought to be permissible but never mandatory. Non-believers— atheists, agnostics, humanists, those who are unaffiliated, "nones" (19% of the population)— should not be prejudiced in the political arena. Openly professed atheism (6%) is perhaps the most significant electoral liability in American political culture. The most religious candidate is not necessarily the best qualified leader of our secular, religiously plural country and culture.

Second, when religion **is** discussed, it is essential to ask about how candidates' religious views will impact public policy positions and leadership competence. Along with any discussion of a candidate's faith we must always ask the follow up, "so what?" question: what difference will a theological position make on the candidate's ability to be president or vice president? A couple examples: an observant orthodox Jew ran for vice president in the year 2000. It was quite appropriate to inquire of Senator Joe Lieberman what would happen if national emergency occurred on his Sabbath. Would he be able to discharge the duties of office despite the restrictions on his activity on that day of the week? What if a Quaker, Mennonite, or someone from the BPF, were to run for president? It would be entirely appropriate to inquire about how his or her

pacifism would affect defense policy. If elected, could the candidate use force of arms to defend the country? How about conservative Protestants? Might their eschatology or view of the end times affect their foreign policy, particularly with regard to the Middle East?

A good example of what I'm talking about actually happened during the vice presidential debates. You may remember that Martha Radditz asked both Vice President Biden and Rep. Ryan, both observant Catholics, about their position on abortion and how their Catholic beliefs impacted that decision. This was an entirely appropriate question to ask. A blatant example of a breach of this principle was when Rev. Robert Jeffress openly dismissed Gov. Romney's candidacy simply because he is a Mormon without drawing any connection to his fitness for office. [Actually that may not be the most blatant example. On a trip to Texas last fall I saw, and it was on Facebook and the Internet as well, a sign at a church saying, "Vote for the Mormon, not the Muslim: the capitalist, not the communist." It goes without saying that, in addition to needing to draw a tight fit between religious belief and an issue that matters, you shouldn't lie.]

Properly understood, separation of church and state does not ban, but in a sense makes possible, the free discussion of religion and religious themes in the public square and in electoral campaigns. And with the no religious test principle in mind and

the "so what?" question constantly on our lips, I think a robust conversation in the public square is good for religion and good for the body politic.

Now, looking more specifically at the 2012 elections, for all of the talk among evangelical Christians that they would never vote for a Mormon, there is no evidence to suggest that Gov. Romney's defeat was related to his Mormonism. True, there may be some who refused to vote for him because of his religion, but President Obama's margin of victory far exceeded any disability suffered by Gov. Romney because of his religion.

It also seems we did a pretty good job of talking about religion in the public square in a responsible way. With a few exceptions, we did a commendable job in balancing the pertinence of religion to public life with the prohibition on religious tests!

In addition to the unprecedented religious makeup of both the presidential tickets (no WASP) and the Supreme Court (no Protestant) and treating religion responsibly in the public square, the outcome in congressional races also gives cause for optimism.

Two Muslim members of the House of Representatives, Keith Ellison, D-Minn., and Andre Carson, D-Ind, were re-elected. After serving in the House, Mazie Hirono, D-

Hawii, became the first Buddhist ever to be elected to the Senate. Tulsi Gabbard, D-Hawaii, became the first Hindu to be elected to the House. Finally, Kyrsten Sinema, D-Ariz, was elected to the House as the only self-confessed "religiously unaffiliated" member.

Moreover, we appear to have come to terms with members of Congress who are neither Christian nor Jewish taking oaths of office on their own holy books. When Rep. Ellison was first elected in 2006 and opted to take his oath of office on the Quran, a great out cry arose. Many insisted he use the Bible even though he is a Muslim. None of that appeared to happen this year. Rep. Gabbard affirmed her oath on the Bhagavad-Gita; Sen. Hirono opted against placing her hand on any book; and Rep. Sinema chose, appropriately enough, to place her hand on a copy of the U.S. Constitution. Hardly a peep of protest could be heard in opposition to these conscientious practices of these members of Congress.

I recognize we continue to have a long way to go. Many still think that we are and should be a "Christian nation," legally and constitutionally not just demographically. A recent Huffington Post/YouGov Poll reveals 34% favor establishing Christianity as official religion in their state. Islamophobia and anti-Mormon prejudice prevail in many quarters. However, the fact that an overwhelming Christian majority is willing to elect

candidates who reflect America's plush religious pluralism and astonishing diversity and give them permission to solemnize their investiture without protest suggests to me that we are making some progress.

I want to talk now about an area of church-state law that is called the church autonomy doctrine.

Basically, it says that government, particularly the courts, must defer to religious organizations to make their own decisions about matters of doctrine, internal governance, polity and administration. This rule of judicial deference typically comes up in cases arising out of employment disputes within religious organizations and property ownership issues surrounding church splits. This doctrine also means that courts are supposed to define "religion" expansively and generously, but are absolutely barred from judging the truth, validity, reasonableness, consistency or orthodoxy of beliefs.

This is an important part of U.S. law that protects the integrity and autonomy of religious bodies. A case in the U.S. Supreme Court last year dealt with this principle. (*Hosanna-Tabor*)

In this landmark decision, the high court upheld the so-called "ministerial exception" – a specific application of the church autonomy doctrine that prohibits courts from intervening in employment discrimination disputes between churches and their ordained ministers. When dealing with the local church and its ministers, this rule is pretty clear-cut and makes a lot of sense. Far more problematic in this case was the fact that it dealt with a religious *school* (not a local church), and with a *teacher* who had secular as well as religious duties at the school. In addition to secular subjects, the "commissioned" (similar to ordained) teacher taught a religion class, led her students in daily prayer and devotional exercises, and participated in school-wide chapel services.

The Court, in an unanimous opinion and adopting the position advanced by the BJC, held that she was a ministerial employee based on the circumstances of her employment and, as such, she could not file a discrimination suit against the school when it fired her for reasons that might have otherwise violated the American's with Disabilities Act. Writing for the Court, Chief Justice John Roberts observed that "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." Chief Justice

Roberts concluded that "a church must be free to choose those who will guide it on its way."

The church autonomy doctrine is important! Keeping courts from deciding theological and ecclesiological matters is crucial to protecting religious liberty.

The most controversial free exercise issue these days has to do with the Affordable Care Act, the new healthcare law, and contraception. That law requires employers with at least 50 employees to provide insurance for women employees who desire contraception coverage. The law initially exempted churches and other houses of worship with conscience-based objections to contraception. It did not exempt religiously affiliated employers like religious hospitals, colleges and faith-based social service charities.

Many religious liberty advocates, including the Baptist Joint Committee, criticized the Administration's failure to offer broader accommodation. Later, to its credit, the Administration announced a modified policy that sought to strike a balance between the conscience rights of religiously affiliated employers who object to forms of contraception and the public interest of ensuring all women have access to preventative health care. Under the revised rules, those employers will not be required

to offer or pay for employees' health care plans to cover contraception, but insurance providers must make such coverage available to all employees whose employers choose not to provide it. And a one year safe harbor provision is currently in effect exempting religious affiliated employers with objections to contraception coverage from complying.

In February, the Administration also announced additional rules to clarify and expand the definition of religious employer and detail the process by which self-insured employers would be required to allow a third party administrator to work with health insurers to extend that coverage providing further distance between the objecting employer and the employee desiring contraception coverage.

The Baptist Joint Committee has taken the position that these accommodations are certainly permissible and perhaps required, and were a politically reasonable effort seeking to balance the rights of employees who desire coverage. Many religious affiliates, including some Baptist colleges and agencies, have sued claiming these accommodations are insufficient. These cases are working their way through the courts.

In addition to the accommodation for churches and religious affiliates, some want to go even further. Some owners of **for-profit, commercial businesses,** often doing business

as corporations, have taken the position that they too should be accorded an exemption, on equal footing with religiously-affiliated nonprofits. Here, litigation also has broken out, and I think that the U.S. Supreme Court will eventually have to decide this issue.

As a general rule, individuals should not have to choose between their conscience and their chosen profession or business activity. The Free Exercise Clause and various Federal statutes (RFRA and Title VII) can sometimes be asserted to obtain an accommodation even in an otherwise secular setting. However, the argument here against extending accommodation to for-profit, commercial enterprises is that any burden visited on the conscience of those owners is at best remote and tenuous, and not "substantial" as required for relief under the Constitution or federal law. Having to **pay money** to an insurance company who will then cover a **full range** of medical services, with the **employee (who was hired without regard to religion)** making her own **independent** determination about whether to use contraception is simply too attenuated a connection to substantially burden the **owner's** exercise of religion.

This law and issue highlight a very important concept. Many accommodations of religion —whether permissible or mandatory — visit no harm whatsoever on third parties. These include, for example, exempting members of the Native American

church from laws banning the use of peyote, allowing the Amish to be exempt from compulsory education laws, excusing some religious groups (Hmongs) from participating in autopsies otherwise required by law, and so forth. These are the easy accommodations to make. Far more difficult are ones where, as with the Affordable Care Act, the rights and well-being of **third parties** are directly affected by the requested accommodation. These have often been denied as the courts try to balance free exercise rights of the claimant with the rights of those detrimentally affected. Even where there is a substantial burden in the first place, courts may find that government has a compelling interest in protecting for the welfare of those third parties and, sometimes, would actually violate the Establishment Clause.

And finally, the Supreme Court recently granted review of a case dealing with the permissibility of legislative prayer under the First Amendment's Establishment Clause.

The practice of opening government meeting with a prayer has been around for a long time. This new case, coming from the town of Greece, NY, involved prayers before the city council meeting which, overtime, were predominately and explicitly Christian in nature. The prayer was listed in the meetings official minutes, but there was no formal policy regarding who was invited to give the prayer or even the content of the prayer.

Two residence of the town sued claiming that the practice promoted Christianity and thereby established religion. The lower court found the practice unconstitutional because, among other reasons, it "contained uniquely Christian language."

The Supreme Court, thirty years ago, in *Marsh v. Chambers,* upheld the Nebraska legislature's practice of opening with a prayer offered by a state employed chaplain. It relied exclusively on historical practice —the fact that legislative prayer was "deeply embedded in the history and tradition of this country," rather than relying on more familiar establishment clause principles. The Court also noted that the chaplains' prayers were characterized as "non-sectarian," "Judeo-Christian," and with "elements of the American civil religion." The Court ruled that the words of the prayer in *Marsh* were "simply a tolerable acknowledgment of beliefs widely held among the people of this country."

The Baptist Joint Committee has long said, and we will file a brief in the Supreme Court along these lines, that says that, applying familiar principles, legislative prayer generally will violate the letter and spirit of the establishment clause. (That's why the *Marsh* Court didn't apply them, but relied instead on history.) It is always dangerous and dicey when government tries to get into the prayer business. Certainly we don't want government writing our prayers, nor do we want government to endorse a

preponderance of Christian prayers. It is terribly difficult to negotiate the vast religious pluralism that we see in this country. How does government mandate a "non-sectarian" prayer. Prayer, however inclusive and considerate of the rights of others, will always come out of someone's religious tradition.

The BJC has taken the position that all of these difficulties can be eliminated very easily by simply having a moment of silence. That way people can pray or not as they see fit.

But, *Marsh* has been the law for three decades and we are prepared to live with it. But because it is an exception to the general rule prohibiting governmental sponsorship of religious exercises, it ought to be narrowly construed. We will be suggesting that assuming legislative prayer continues: 1) There should not be any coercion, proselytizing or affirmative disparagement of other religions involved prayers delivered before legislative bodies. 2) The governmental body must take all comers. There should be no excluding of disfavored religious traditions. Government cannot be allowed to pick and choose. But there ought not be any governmental censorship or prayer-writing beyond ensuring that these two things take place.

Prognostication when it comes to the Supreme Court is always difficult. I don't foresee the Court overruling *Marsh*. I do foresee some risk, however, that the court might

expand it and allow basically a devotional free-for-all that, I think would be very unfortunate if it were to take place.

Well, there you have a primer and an update on four issues that we are working on that, conveniently, come out of the four areas of constitutional principles that have served to ensure our religious liberty in this country in a way that is the envy of the world.