

Lecture at McAfee School of Theology
"Answering the Top 10 Lies About Church and State"
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I want to talk to you today about the Top 10 Lies that we hear about church and state. There are a lot more than 10, depending upon how you count, but the number 10 has a certain ring to it— from the Commandments of God to the shenanigans of Letterman.

And there are a lot of different kinds of "lies." Was it Mark Twain who said there are three types, "Lies, damn lies and statistics?" The lies I want to talk about are particularly insidious because, like statistics, most of them have at least a grain of truth in them. That's what makes them so hard to answer with a sound bite or a clever slogan. These are lies that are intentionally perpetrated by some people who know better. But there are other, well-intentioned souls who simply have been misled and are repeating them with a pure heart and the best of motives. For these I have some sympathy, and these are the folks I think can be educated by the facts.

1. Our nation's Founders were born-again, Bible-believing evangelical Christians, or our Founders were Enlightenment rationalists who worshipped the "goddess of reason," or our Founders were Deists who posited a watch-maker God and were suspicious of religious "enthusiasms."

It is difficult and dangerous to generalize about our Founders, both in terms of finding some pervasive "original intent" or ascertaining their degree of religious fervor. We cannot speak in monolithic terms here. There were many "original intents" and there were many views about religion. Some were orthodox Christians, some were rationalists, yes some were Deists, and even an atheist or two were thrown in.

Even for those Founders we know a lot about, the determination of faith is dicey. As David Kirkpatrick has observed, George Washington is often held up as an Orthodox churchman, but he almost always spoke in terms of the deistic "Providence" instead of God and never wrote about Jesus. Thomas Jefferson, on the other hand, is often seen as a consummate anti-clerical skeptic, but even he could speak warmly of Jesus and is reported to have shed a tear upon hearing a familiar hymn. (Mapp, *Faiths of Our Fathers*, p. 3) Benjamin Rush, a hero to many Christian conservatives because he insisted that education must rest on instruction in Christian religion, became critical of organized religion and wound up a Unitarian. Thomas Paine, author of *Common Sense* who attacked Christianity as filled with superstition, later turned against French schools for teaching science without emphasizing the role of a divine "creator." Some point to Abraham Lincoln's Second Inaugural Address as the greatest sermon in history, but Lincoln was never baptized, nor a church member. (David Kirkpatrick, "Putting God Back Into American History," *New York Times*, 2/27/05)

How dangerous it is to skip over more than two centuries of history and try to force our Founders into our favorite 21st century post-denominational religious category. These were complicated, multifaceted men of the 18th century. Alf Mapp's recent book *The Faiths of our Fathers*, is aptly named.

We must acknowledge that, although most of them came out of a Christian heritage and tradition, our Founders were a mixed lot when it came to their religion. But, we can say with confidence that they were committed to ensuring religious liberty rather than enshrining their own particular religious stances.

2. We don't have a separation of church and state in America because those words are not even in the Constitution.

True, the words are not there, but the principle surely is. It is much too glib a proposition to say that constitutional principles depend on the use of particular words. Who would deny that federalism, the separation of powers and the right to a fair trial are constitutional principles? But those words do not appear in the Constitution either. The separation of church and state, or the "wall of separation" talked about by Roger Williams, Thomas Jefferson and the United States Supreme Court, is simply a shorthand metaphor for expressing a deeper truth that religious liberty is best protected when church and state are institutionally separated and neither tries to perform or interfere with the essential mission and work of the other.

We Baptists often hold up Roger Williams' "hedge or wall of separation" and point to Jefferson's 1802 Letter to the Danbury Connecticut Baptist Association where he talked about his "sovereign reverence" for the wall of separation. But we often forget about the writings of the father of our Constitution, James Madison, who, in a letter to Robert Walsh in 1819, observed that "the number, the industry and the morality of the priesthood and the devotion of the people have been manifestly increased by the total separation of church and state."

Moreover, even Alexis de Tocqueville, in *Democracy in America*, a work often cited by those who would disparage separation, writes favorably of it:

In France, I had seen the spirits of religion and freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival. As a practicing Catholic I was particularly close to the Catholic priest, with some of whom I established a certain intimacy. I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that. (emphasis added) p. 295, Geo. Laurence trans., J.P.

Meyer ed., 1969. Cited, John Witte, "That Serpentine Wall," Vol. 101, U.Mich. L., Rev. 1898 (May 2003).

The Constitution may not have those words in it, but those who wrote the Constitution and the Bill of Rights and other early observers certainly had the words in them.

3. The separation of church and state comes from mid-19th century anti-Catholic bigotry and 20th century secularism.

This is a thesis peddled by Philip Hamburger in a book mis-titled Separation of Church and State. Hamburger denies that the concept of separation was known, understood or intended by either our Founders or early Baptists. He says that it got started as a 19th century anti-Catholic polemic in which some, enjoying a de facto Protestant establishment, sought to banish Catholics from entering the public square and from invading public fisc to support their religious schools.

This is simply not the case. The concept of church-state separation preceded the 19th century. Even though some may have used it to support reprehensible bigotry against Catholics, many—including our Baptist ancestors—insisted upon separation to protect religion, all religion, from the coercive and corrosive influences of government.

The validity of the concept should not be diminished because of the strange bedfellows who supported it. Some may have come at it with less than honorable motives. But champions of religious liberty long have argued for the separation of church and state for reasons having nothing to do with anti-Catholicism. Of course, separationists have opposed the Catholic Church when it has sought to tap into the public till to support its parochial schools. But that principled debate on the issues does not support a charge of religious bigotry.

Hamburger further argues that Catholic bigotry coalesced with anti-religious secularism of the 20th century resulting in hostility to religion and those who possess a strong religious faith. This is wrong, too.

As we well know, along with the Enlightenment rationalists—who followed the teachings of John Locke and wanted separation for political or philosophical reasons—were Baptists, like John Leland and Isaac Backus, who worked for separation for reasons having everything to do with religion and religious liberty. As William Estep has so ably told us in his book *Revolution Within the Revolution*, the First Amendment's protection for religious liberty was adopted because of the support of the so-called "twice born" evangelical dissenters of the late 18th century—Baptists, Presbyterians and Quakers. As Forrest Church has written, this confluence of the secular and sacred parallels the ideas of freedom from religion and freedom for religion as well as the No Establishment Clause and the Free Exercise Clause themselves. (Church, *Separation of Church and State*, p. x)

I also want to say a good word about the word "secular." Here I am not talking about what Noah Feldman, in his new book *Divided by God*, calls "strong secularism"—the

anti-religious, often atheistic form of secularism that would banish religion to the backwaters of privatized faith that we saw in the late 19th and early 20th centuries with the likes of Clarence Darrow, Robert Ingersoll and H.L. Mencken. Rather, what I am talking about is what Feldman calls "legal secularism." This is a more friendly form of secularism embraced by people of faith who simply believe that government and our legal institutions should be non-religious. Government should not take sides in matters of religion but adopt a policy of neutrality toward religion— sometimes accommodating religion but never advancing it, sometimes protecting religion but never promoting it. The first executive director of the Baptist Joint Committee, J. M. Dawson, wrote in his autobiography over 40 years ago: "When one says ours is a secular state or that public schools form a secular system, he simply means they are outside church control, simply that." (Dawson, *A Thousand Months to Remember*, p. 7)

4. The U.S.A. is a Christian nation.

This is a whopper! The United States is not a Christian nation— in law or in fact.

As we have seen, most of our Founders were religious folks of some ilk. They certainly thought that religion was important to good government. But they did not intend to set up a Christian nation in a legal or constitutional sense. No one can deny that Americans are a very religious people, as Justice William O. Douglas famously observed in one of his church-state opinions. But our civil compact, the Constitution, is a decidedly secular document. It never mentions "Christianity." Even the word "religious" is used only once, and then to disallow a religious test for public office. Two years later the Bill of Rights again dispelled any lingering doubt about whether America is a Christian nation when it prevented the federal government from establishing or privileging any religious tradition.

No, we do not have a Christian theocracy in a legal sense. We have a constitutional democracy in which all religious beliefs are protected. And that's good. The same Constitution that refuses to privilege any religion, including Christianity, protects the right of Christians to proclaim the Gospel to all who will listen. As a result, paradoxically enough, and as David Currie has reminded us, "We are a nation of Christians because we are not a Christian nation."

I agree with Rob Bell who, in his book *Velvet Elvis*, says we should think twice about using "Christian" as an adjective. There are no Christian songs, Christian movies, Christian radio stations, Christian parties or Christian nations. Christian is a noun identifying followers of Jesus Christ.

And it doesn't take long to understand that the United States is not a Christian nation in fact either. Just read the Sermon on the Mount and then pick up a history book and a daily newspaper. Nuff said.

5. Church-state separation only keeps the government from setting up a single national church or showing preference among denominations or faith groups, but not from aiding all religions on a non-preferential basis.

If the Founders wanted simply to ban a single, official national church, they did not do a very good job of saying so in the First Amendment. An early draft of the First Amendment read in part: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established... ." This draft was passed over. And, the Founders had ample opportunity to state that the government should be allowed to promote all religion on an even-handed, non-preferential basis. But the first Congress repeatedly rejected versions of the First Amendment that would have explicitly permitted such non-preferential aid. For example, the Senate rejected the proposed language, "Congress shall make no law establishing one religious sect or society in preference to others... ." And they did it two more times with provisions embodying similar non-preferential language, such as "Congress shall make no law establishing any particular denomination of religion in preference to another... ."

No, the Founders adopted a more expansive amendment to keep the new federal government from making laws even "respecting an establishment of religion." Religion generally, not a religion, or a national religion, but no religion at all, period. They did not merely want to keep the federal government from setting up an official national church or to ban denominational discrimination.

In addition to constitutional history, there are practical reasons to reject the ability of government to aid all religion on a non-preferential basis. In our pluralistic country with its dizzying religious diversity, it is practically impossible to aid all religions evenhandedly. Inevitably, government will pick and choose a preferred religion, and it almost always will pick the majority, politically powerful, religious tradition for preferred treatment.

6. The First Amendment only applies to the federal government, not to the states.

It is true that the Bill of Rights in 1791 applied only to the federal government, not to the states. The Bill of Rights was simply a further limitation on the already limited powers that the states had delegated to the new federal government. Thus, state establishments and other preferences for religion continued even after the Bill of Rights was adopted. In fact, Massachusetts did not abolish its Congregationalist establishment until 1832.

However, the 14th Amendment, passed after the Civil War, prevents the states from abridging the privileges and immunities of citizenship of the United States or depriving citizens of due process and equal protection under the law. The Supreme Court later interpreted these provisions to "incorporate" most of the Bill of Rights and apply those provisions to the states. The Free Exercise Clause was incorporated in 1940 and the Establishment Clause in 1947.

Thus, the religion clauses and therefore the concept of church-state separation apply to the states as matter of federal constitutional law.

A related argument has been advanced, most recently and most visibly by Justice Clarence Thomas. He sees the Establishment Clause primarily, if not exclusively, as a federalism provision. That is, he believes the Clause carries little if any substantive protection against government advancement of religion; all it does is prevent the federal government from interfering with state establishments. In both the Texas Ten Commandments case and in the Pledge of Allegiance case, when pressed he acknowledges that the Establishment Clause might limit the federal government's ability to set up a "national religion" and forbid acts of "actual legal coercion." But mostly it would serve as a federalism cleaver to cut the states free from any strictures embodied in the federal Establishment Clause. Thus, under Justice Thomas' view, we could have 50 different state establishments as far as the federal Establishment Clause is concerned.

7. The Ten Commandments form the basis of our legal system.

In an effort to justify the posting of the Ten Commandments, many have asserted that they are not just Holy Scripture but actually the basis for our legal system. Thus, the argument goes, there is sufficient secular justification for government to endorse them. This misses the mark completely.

Although there is a sense in which religious ethics underpins our legal system, the connection is too attenuated to justify government officially endorsing one religion's sacred text. Only three of the Commandments— killing, stealing and bearing false witness— are the proper subjects of secular law. The others are religious. Remember American law is based on the common law of England. But these prohibitions were already a part of Anglo-Saxon jurisprudence before England was Christianized. The fundamental notions that it is wrong to murder, steal another's property or bear false witness were already well ensconced among the Saxons before they ever heard of the Ten Commandments.

Moreover, documents that have directly influenced our legal system— the Magna Carta, English Bill of Rights, Mayflower Compact, Declaration of Independence, Federalist Papers— say very little about religion and nothing about the Ten Commandments. Most importantly, our Constitution— the civil compact that governs our public life together— mentions religion only once, as we have said, and then to disallow a religious test for public office. And the First Amendment makes clear that the federal government is not permitted to advance or inhibit religion. In sum, although the Ten Commandments— along with many other ancient secular and sacred legal codes— stand in the backdrop to American law, that alone does not justify government officials endorsing this one distant precursor.

8. God has been kicked out of the public schools.

What a thing to say— to presume that Almighty God can be kicked out of anywhere. No, as James Dunn is wont to say, "God has a perfect attendance record."

It is only state-sponsored religion that has been banned from the public schools. Voluntary student religious expression is not only not prohibited, it is protected as long as it does not disrupt the educational process and respects other students' rights not to participate.

Time does not permit a full listing of all of the religious activities from voluntary prayer, to teaching about religion, to studying religious holidays, to Bible clubs before and after school, to religious attire that are permitted in the public schools. There are numerous national consensus statements by religious and education organizations from the left to the right, that outline these various avenues of permissible religious expression. Check the Baptist Joint Committee Web site (www.BJConline.org) and also that of the Freedom Forum's FirstAmendmentCenter at www.FirstAmendmentCenter.org.

Yes, educators still get it wrong sometimes. Every now and then some principal wants to return to the "sacred public schools" of yesteryear and others are ready to overreact and create "naked public schools" where every vestige of religion is stripped away. But the paradigm that most are perusing is the "civil public school" where the government does not promote religion but takes religion seriously in the curriculum and, where possible, accommodates the free exercise needs of students.

9. God has been kicked out of the public square.

This is also a big lie. The separation of church and state does not mean a segregation of religion from politics or God from government or the right of people of faith to speak forcefully in the public square.

Religious speech in public places is commonplace. From bumper stickers, to billboards, to messages on the side of trucks, to John 3:16 banners at football games, to post-game prayer huddles and on and on. The Ten Commandments, for example, can be displayed in full public view at the edge of every church's and synagogue's property in the land. It seems like every month new cover stories addressing religion appear in the national news magazines, and religious programming on television and radio is ubiquitous. "God Bless America" is sung during the seventh inning stretch in many major league ballparks.

People of faith who run for office can talk freely about their religious beliefs and allow them to influence their stance on public policy, as long as the policy outcomes or government regulations have some secular justification or broader cultural support.

Finally, civil religion is alive and well. In a culture as religious as ours, we should not be surprised that references to God pervade in our pledge, our mottos, our songs, our civil ceremonies and public rituals. These benign expressions of religion will usually pass constitutional muster as long as they do not involve religious exercises, worship or prayer, single out a particular religion for favored treatment or compel religious conformity. Now, some of us may have theological concerns about civil religion because its various forms can quickly morph into an idolatry of nationalism or result in the

trivialization of religion. But the constitutional doctrine of church-state separation does not prohibit its various expressions.

No, we do not have a "naked public square" as some have suggested. I'd say it's dressed to the nines.

10. The Baptist Joint Committee cares more about No Establishment than it does Free Exercise.

This is not true. For 70 years the Baptist Joint Committee has pursued what most think is a balanced, sensibly centrist position on church-state issues affirming both clauses in the First Amendment as essential to guarantee our God-given religious freedom. It is just that Establishment Clause issues seem to get most of the public attention.

Let me highlight a few recent free exercise examples. We chaired a broad coalition to seek passage of the historic Religious Land Use and Institutionalized Persons Act of 2000 to strengthen the hand of churches in dealing with unreasonable zoning laws and to protect the rights of prisoners to freely exercise their religion. We filed a brief with the Supreme Court defending its constitutionality and prevailed. We defended the right in the Supreme Court for the Good News Club to meet in elementary schools after class to provide children with religious instruction. We will soon file a brief arguing for the expansive interpretation and constitutionality of the Religious Freedom Restoration Act to protect the right to worship without governmental interference. We are supporting passage of the Workplace Religious Freedom Act to help strengthen the rights of employees to exercise their religion in the workplace and to require employers to have a substantial hardship before they can be excused from accommodating religious needs of employees.

I could go on and on, but hostile to Free Exercise? Hardly. Full-blown, complete, well-rounded religious liberty depends on the enforcement of both of these clauses, and that's what we try to do every day.

Now, there are the ten. I'm not sure I've picked the right ten, and I am sure that you can think of others. Maybe you would like offer another one or two now. We no longer have the luxury of remaining politely silent. When we hear them, we must respond. Yes, be kind, but speak the truth.