

## THE PERILS OF RELIGIOUS PASSION: A RESPONSE TO PROFESSOR SAMUEL CALHOUN

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Professor Samuel Calhoun insists that my thesis is “wrong,” that I “overstate” the evidence, present “a misleading view,” “distort” the authorities, argue by “assertion,” offer “no convincing corroborating evidence,” “mislead my readers,” and defend a “historically indefensible” position. In short, Professor Calhoun accuses me of failing to meet the “no distortion” standard.<sup>1</sup> Whew!

Revealing my gracious side for just a moment, I must acknowledge that some of Professor Calhoun’s observations are both constructive and interesting. For example, some of his insights about American deism, the decline of Christianity, the Declaration of Independence, and George Washington identify useful points of historical uncertainty and disagreement. Too often, though, Professor Calhoun’s criticisms miss the mark, not only because he exaggerates their significance, but also because he seems not to have noticed that he was critiquing a lecture, rather than a formal scholarly article. A lecture, to succeed, must be clear, concise, easy to follow, and readily accessible to a general audience. It will not do for a lecturer to inflict upon his audience too many subtle qualifications, complex asides, and convoluted clarifications. Professor Calhoun’s criticisms are primarily of the dotted-i and crossed-t variety, though he obviously thinks they add up to something more. I think not.<sup>2</sup>

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1. Samuel W. Calhoun, *Getting the Framers Wrong: A Response to Professor Geoffrey Stone*, 57 UCLA L. REV. DISCOURSE 1, 13 (2009).

2. Professor Calhoun’s characterizations of my lecture are sometimes confounding. For example, he criticizes me for describing the Declaration of Independence as “a statement . . . of American deism.” Calhoun, *supra* note 1, at 5. But what I actually said was that the Declaration of Independence was “a statement that deeply and intentionally invoked the *language* of American deism.” Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 13 (2008) (emphasis added). The alteration might seem minor, but his use of ellipses to enhance the apparent force of his critique is annoyingly inconsistent with the insistently precise nature of most of his criticisms. Similarly, I describe George Washington as a “partial deist[ ],” clearly distinguishing him from Thomas Paine, Thomas Jefferson, and Benjamin Franklin, whom I describe as “flat-out deists.” Stone, *supra*, at 7. I expressly note that, unlike the “flat-out deists,” Washington “believed that an unseen but benevolent power guided both the universe and human affairs.” *Id.* at 17. Nonetheless, as if offering a devastating rebuttal to my characterization of Washington, Professor Calhoun invokes Washington’s 1789 Thanksgiving Proclamation, in which Washington refers to “Almighty God” and

In reading Professor Calhoun's response, I was struck not only by his determination to refute almost every statement, but also by his sharply accusatory tone. (I should note that, in a rare moment of magnanimity, Professor Calhoun generously acquits me of being "shrill,"<sup>3</sup> though I'm not at all sure I can return the compliment.) I have often challenged the work of scholars with whom I disagree, and they have often challenged me. But rarely have I seen so uncivil a tone as that evidenced by Professor Calhoun. Don't get me wrong. I am a big fan of free speech and I would defend to the death Professor Calhoun's right to be as uncivil as he likes. Indeed, if he truly believes that I "distorted" the evidence in order to "mislead" my audience, then he is certainly right to take me to the woodshed. But why would he accuse me of intentionally distorting the evidence and attempting to mislead my audience? Whatever happened to honest error (if error there be) and collegial disagreement? Professor Calhoun seems like a perfectly decent fellow, so what is going on here? Why in God's name is he so overwrought?

My puzzlement goes well beyond Professor Calhoun's litany of quibbles and un-Christian tone. More substantively, he attacks me repeatedly for claims I never made. This is vexing. I was quite careful in my lecture to state precisely what I was claiming. I made three claims that seem most relevant to this discussion: First, and most importantly, I claimed that the Framers did not intend to establish a Christian nation. Second, I claimed that the Framers believed that religion "should play a role in helping 'to preserve the civil morality necessary to democracy,'" but that they also thought that "in the 'public business of the nation'" it was "essential for the government to speak of religion 'in a way that was unifying, not divisive.'"<sup>4</sup> And third, I claimed that when we consider what the Constitution "allows" in the realm of religion, "it helps to know the truth" about what the Framers believed and "what they aspired to when they created this nation."<sup>5</sup>

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urges that "prayers" be offered. Calhoun, *supra* note 1, at 5 (quoting Thanksgiving Proclamation (Oct. 3, 1789), in THE WASHINGTON PAPERS 302, 302-03 (Saul K. Padover ed., 1955)). But none of this contradicts my portrayal of Washington in any way. The phrase "Almighty God" is consistent with the softer forms of deism, and Washington's call for "prayers" is consistent with what I said about Washington's belief in a "benevolent power" who guides "human affairs." There is no "gotcha!" here. Of course, these are merely nit-picky quibbles with nit-picky quibbles, but that is exactly my point.

3. Calhoun, *supra* note 1, at 17.

4. Stone, *supra* note 2, at 24 (quoting ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 24 (1996), and JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 23 (2006)).

5. *Id.* at 25-26.

With respect to my first claim, Professor Calhoun concedes the point.<sup>6</sup> Thus, we can put aside the Christian nation issue. Ironically, in light of the fury of his attack, this was the primary point of my lecture, as was evident from its title—*The World of the Framers: A Christian Nation?*

With respect to my second claim, Professor Calhoun berates me for asserting that the Framers believed that “religion should be prohibited from influencing public policy.”<sup>7</sup> I am “wrong,” he insists, “for arguing that the Framers sought to bar religious influence from public policy disputes.”<sup>8</sup> But this is neither what I said, nor what I believe. What I said, in perfectly clear English, was that the Framers believed that religion could be helpful in preserving “the civil morality necessary to democracy,” but that the government should deal with “religion ‘in a way that was unifying, not divisive.’” I did not claim what Professor Calhoun accuses me of claiming. This is mystifying.

Similarly, Professor Calhoun also takes me to task for not explaining more precisely what the Framers meant by the idea that government should treat religion “in a way that was unifying, not divisive.” But, of course, the Framers often had no concrete idea of what their aspirations might mean in practice. For the most part, they were making it up as they went along, and this was true of most of the Bill of Rights. In any event, I did explain what the Framers had in mind. I noted quite clearly that the Framers believed that “a republican form of government presupposes certain qualities of civic virtue among the people” and that religion can help to promote those “qualities of civic virtue.”<sup>9</sup> Moreover, I offered specific illustrations of the nature of those “qualities.” I noted, for example, that Benjamin Franklin believed that civic virtue requires people “to treat others with kindness and respect.”<sup>10</sup> In Franklin’s view, this precept reflected “the fundamental Principles of all sound Religion.”<sup>11</sup> Similarly, I noted that John Adams maintained that religion could play a positive role in helping to shape the “people’s . . . ideas about justice, decency, duty, and responsibility.”<sup>12</sup> As Adams wrote Thomas Jefferson, the essence of sound religious belief is captured in the phrase, “[b]e just and

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6. See Calhoun, *supra* note 1, at 11.

7. *Id.* at 3–4.

8. *Id.* at 4.

9. Stone, *supra* note 2, at 22.

10. *Id.* at 9.

11. *Id.* (quoting Letter From Benjamin Franklin to Ezra Stiles (Mar. 9, 1790), in 3 THE LITERARY DIARY OF EZRA STILES 387, 387 (Franklin B. Dexter ed., Charles Scribner’s Sons 1901)).

12. *Id.* at 17 (quoting MEACHAM, *supra* note 4, at 27–28).

good.”<sup>13</sup> This, I suggested, was the general view of the Framers about the contribution religion could legitimately make in the realm of public affairs. It was this most elemental teaching of virtually all faiths—“be just and good”—that the Framers believed could help to promote the general sense of civic virtue that is essential to a free society. In this sense, religion could be unifying rather than divisive.

My third claim was that, regardless of one’s theory of constitutional interpretation, when one considers “whether the Constitution allows the government to have faith-based initiatives, deny homosexuals the right to marry, prohibit abortions,” etc., “it helps to know the truth about the Framers, about what they believed, and about what they aspired to when they created the nation.” Read that carefully. What it says, and what it was intended to say, is that “it helps to know” the history I presented in my lecture. (Of course, it goes without saying that if Professor Calhoun is right that what I said in my lecture was “misleading,” “distorted,” and “wrong,” then it does not help to know it.)

This claim was, by its own terms, a very modest one. But Professor Calhoun once again finds it necessary to tweak what I said in order to attack me for what I did not say. Specifically, he accuses me of arguing that the Framers believed that “religion should be prohibited from influencing public policy,” of maintaining that the Framers “sought to bar religious influence from public policy disputes,” and of advocating that the Constitution embodies a “categorical objection to religious influence in public policy disputes.”<sup>14</sup> But that simply is not what I said, or what I believe.

Not content to rest there, Professor Calhoun goes one step further and asserts that the Supreme Court has definitively rejected the position he erroneously attributes to me, suggesting that (God forbid!) I might disagree with the Court. (As we shall see, he is quite happy to disagree with the Supreme Court when it suits him, as on the issue of abortion.) He states that the Court “has repeatedly said that no constitutional violation occurs from the fact that a government action implements a policy *that coincides with* a religious belief.”<sup>15</sup> This happens to be a correct statement of the law. But nothing I said in my lecture in any way, shape, or form contradicts that doctrine. Indeed, I wholeheartedly endorse that proposition not only as a matter of precedent, but as a matter of constitutional interpretation.

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13. *Id.* (quoting Letter From John Adams to Thomas Jefferson (Dec. 12, 1816), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 499, 499 (Lester J. Cappon ed., 1987)).

14. Calhoun, *supra* note 1, at 3, 13.

15. *Id.* at 18 (emphasis added).

What I said, or could reasonably be understood to have implied, is that it violates the Constitution for the government to enact a particular religion's specific beliefs into law for the purpose of imposing those beliefs upon citizens who do not share them. Ironically, this is precisely what the Supreme Court itself declared to be the law in one of the very decisions Professor Calhoun so eagerly cites. As the Court declared in its 1961 decision in *McGowan v. Maryland*,<sup>16</sup> a law violates the First Amendment if its purpose, "evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."<sup>17</sup>

Adding insult to injury (and I mean the word "insult" quite literally), Professor Calhoun next accuses me of being a hypocrite because I "have only a selective aversion to religious influence in public affairs."<sup>18</sup> He asserts that I criticize the "influence" of religion to support politically conservative causes, such as pro-life and anti-gay positions, but fail to criticize the "influence" of religion to support politically liberal causes, such as pro-environment and pro-animal rights positions. This is sheer nonsense. In contemporary America, the most aggressive, the most visible, and the most politically powerful efforts of religious groups to use "the State's coercive power to aid religion" are politically conservative. That is the reason—the only reason—why I offered the particular examples I offered, such as faith-based initiatives, abortion, and same-sex marriage. I would equally object to the legal enforcement of specific religious doctrines for the purpose of promoting liberal causes. It is odd that Professor Calhoun would even think to suggest otherwise.

What explains all this? The answer, I think, has to do with religious passion. If I am right about this, then it tells us something not only about Professor Calhoun's response (which, I want to emphasize, does score some good points), but also about why the Framers were so concerned about the potential divisiveness of religion and the perils that religious passion poses to public discourse in a free society.

I knew nothing about Professor Calhoun before receiving his response from the editors of the *UCLA Law Review*. After puzzling over his response, I decided to look him up. What I learned is interesting. Among his publications, I discovered a 1995 essay in the *Journal of Legal Education*, entitled "Impartiality in the Classroom: A Personal Account of a Struggle to Be Evenhanded in Teaching

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16. 366 U.S. 420 (1961).

17. *Id.* at 453.

18. Calhoun, *supra* note 1, at 17.

About Abortion.”<sup>19</sup> It is an admirable and revealing account of Professor Calhoun’s personal struggle to teach a seminar on “The Abortion Controversy.”

As he confesses in the essay, because of his “known prolife sympathies,” he worried a great deal that students might see the seminar “as a soapbox for me to proselytize about abortion.”<sup>20</sup> As the first session of the seminar drew near, Professor Calhoun’s “anxieties ran rampant.” He was especially uneasy about his “interaction with prochoice students.”<sup>21</sup> In his class on *Roe v. Wade*, he focused his teaching almost exclusively “on the weaknesses of *Roe*.” He later recognized that he had felt an overriding need to control this discussion, because he was “afraid to let the class develop in whatever direction the students might take it.” “What if the students brought out points that I had not considered?”<sup>22</sup>

To deal with these anxieties, Professor Calhoun chose to present only the pro-life side of the issue. A colleague who was advising him about the seminar criticized him quite harshly for letting “prolife students off the hook,” for answering on their behalf when they faced difficult questions from pro-choice students, and for getting angry with pro-choice students when they argued that “legal abortion is safe for women,” even though he admittedly “did not know the specific statistics on the health risks of legal abortion.”<sup>23</sup> I applaud Professor Calhoun for offering this seminar, for struggling with this issue, and for sharing his experience so candidly in public. As he noted, the “education came at a cost, . . . not only because the subject matter was so upsetting, but also because of the energy needed to exercise restraint.”<sup>24</sup>

Professor Calhoun’s experience with this seminar reveals something important not only about the nature of his response to my lecture, but also about why the Framers were concerned about the potential divisiveness of religion. Clearly, Professor Calhoun’s deeply held pro-life views made it difficult for him to talk about this issue calmly and rationally, even with his own students. As in Professor Calhoun’s seminar, when religious passion is injected into legal and political discourse it can be profoundly divisive and destructive of free and open debate. Noting “the horrors of religious wars, crusades, inquisitions, and pogroms,” John Adams warned that mixing the

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19. Samuel W. Calhoun, *Impartiality in the Classroom: A Personal Account of a Struggle to Be Evenhanded in Teaching About Abortion*, 45 J. LEGAL EDUC. 99 (1995).

20. *Id.* at 101.

21. *Id.* at 101–02.

22. *Id.* at 106.

23. *Id.* at 110, 112.

24. *Id.* at 111.

religious with the political “is not attended with any good effects.”<sup>25</sup> Professor Calhoun’s seminar is a fine illustration of Adams’ point.

The seminar experience is relevant in another way, as well. In his response, Professor Calhoun opines that it “is completely unrealistic to think that a religious person’s sense of right and wrong could ever be completely cabined within the private sphere.”<sup>26</sup> For this reason, he argues, it is absurd to suggest that religious people should check their religious beliefs at the entrance to the polling booth. In his view, religious people have no choice but to vote according to their faith. After reading Professor Calhoun’s account of his seminar, it is easy to see why he believes this. But he is wrong. Indeed, in the seminar itself he struggled, ultimately with some success, to separate his personal religious views from his responsibilities as a teacher.

For example, Professor Calhoun clearly understood that, as a teacher, he could not responsibly argue to his students that they should accept the Word of God, as understood by his religion, as a legitimate reason for prohibiting abortion. Although it was difficult for him to leave his religious beliefs at the seminar room door and to focus instead on the policy considerations that are legitimately relevant to legal and political discourse, he managed to do so, at least on the surface. The next challenge for Professor Calhoun is to try to put his personal religious beliefs aside not only to teach a seminar, but also to consider in a rational and detached manner whether, viewing the world from the perspective of someone who does not share his religious beliefs, there is a sufficient nonreligious justification to forbid abortion. The answer, of course, might well be “yes” or “no.” But the inquiry is not impossible.

Indeed, it is quite striking and deeply gratifying that many religious Americans have succeeded in recent years in separating their religious convictions about homosexuality from their political positions on such controversial issues as “Don’t Ask, Don’t Tell,” civil unions, and even same-sex marriage. In a recent op-ed in the *New York Times*, for example, Tom Suozzi, who ran for governor of New York in 2006 against Eliot Spitzer, described his own journey. As a practicing Catholic, he argued then that civil unions are acceptable, but that same-sex marriage is not, because the legal recognition of same-sex marriage would “infringe on religious institutions’ right to view marriage in accordance with their own traditions.” He now acknowledges,

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25. Stone, *supra* note 2, at 15 (quoting John Witte, Jr., “A Most Mild and Equitable Establishment of Religion”: John Adams and the Massachusetts Experiment, in RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 1, 19 (James H. Hutson ed., 2000), and Letter From John Adams to Abigail Adams (Sept. 17, 1775), in THE LETTERS OF JOHN AND ABIGAIL ADAMS 97 (Frank Shuffelton ed., 2004)).

26. Calhoun, *supra* note 1, at 16.

however, that he “was wrong.” After listening “to many well-reasoned and well-intentioned arguments both for and against same-sex marriage,” and after talking to many gays and lesbians and hearing “their stories of pain, discrimination and love,” he has come to recognize that his “platitudes” about same-sex marriage “ring hollow.” He now supports same-sex marriage.<sup>27</sup>

Finally, I should say a word about the Constitution. Despite Professor Calhoun’s assertions to the contrary, I did not state any specific position in my lecture about what the Constitution “allows” in this context. My goal instead was to encourage the audience to think about that question in the light of the history I presented. But I do have a position. Essentially, it is this: As the Supreme Court declared in *McGowan*, it is unconstitutional for the government to enact a law for the purpose of imposing one group’s specific religious beliefs on individuals who do not share them. Individuals are, of course, free to follow their own beliefs in their own lives, and they are free to try to persuade others to embrace their beliefs, but they are not free to use the power of the state to compel others to live their lives in accord with their specific religious beliefs—that is, those beliefs that go beyond promoting the general attributes of civic virtue.

For example, if a predominantly Evangelical community enacts a law declaring it a crime for any person “to engage in same-sex sex because such conduct is a sin in the eyes of God,” I would invalidate that law. I would do so not because the law “coincides with a religious belief,” but because, in this example, the law was clearly enacted for the express purpose of enforcing a specific religious belief. This is precisely what the Supreme Court proclaimed in *McGowan*, and I assume that Professor Calhoun would agree with the Supreme Court, and with me, on this proposition.

Alas, this proposition does not take us very far, because religious groups know that it would be unconstitutional (and unseemly) for them to enact laws that candidly admit that their purpose is to impose their religious beliefs on others. Like other political actors who want to enact laws for constitutionally impermissible purposes—for example, to disadvantage people because of their race, gender, religion, or political views—they will inevitably be tempted to mask their true motives under cover of purportedly legitimate purposes.

For example, suppose a predominantly Muslim community enacts a law prohibiting the sale or consumption of alcohol. Because the Muslim majority knows that it cannot legitimately defend this law on the ground that the drinking of alcohol is forbidden by Islam, it will likely argue that the law is

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27. Tom Suozzi, *Why I Now Support Gay Marriage*, N.Y. TIMES, June 13, 2009, at A17.

justified because of the negative effects of alcohol. In this situation, the law “coincides with a religious belief,” but it purports not to be motivated by religious considerations. In such circumstances, we have essentially two alternatives. First, we can ignore the possibility of a constitutionally impermissible motivation and uphold the law as long as we can conceive of some rational justification. Second, we can inquire directly into whether there was in fact an impermissible motivation. Because courts are reluctant to inquire directly into actual legislative motivation, they ordinarily will uphold this law as long as the government can explain it in terms of some plausibly legitimate interest.<sup>28</sup> The law can only do so much.

But that courts have difficulty ferreting out and candidly naming a constitutionally impermissible purpose does not mean that the impermissible purpose is permissible or that the law is constitutional. All it means is that courts cannot solve the problem. But there is a deeper and more fundamental remedy, a remedy that rests ultimately in the People themselves. Ironically, it rests in large measure on whether the People are truly committed to precisely the sort of civic virtue that the Framers hoped religion would help instill.

As responsible citizens, we know we should not support laws because they advance our discriminatory biases about race, religion, politics, or gender, even if we could get away with it. As responsible citizens, we know we should strive to be tolerant, self-critical, and introspective about our own values, beliefs, and motives. As responsible citizens, we know we should honor our nation’s aspirations. Any effort to smuggle constitutionally impermissible motivations into the law is dishonorable and fundamentally incompatible with our ideal of civic virtue—even if we could get away with it. In my view, it is just as immoral to use the power of the state to impose one’s specific religious beliefs on those who do not share them as it is to use the power of the state to implement one’s discriminatory prejudices about race, religion, politics, or gender.<sup>29</sup>

It is, to be sure, difficult for some, perhaps many, individuals to see the difference between legitimate disagreements about public policy, on the one hand, and their deeply held religious beliefs, on the other. But just as we would expect a predominantly Muslim community to strive to know the difference

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28. See, e.g., *United States v. O’Brien*, 391 U.S. 367 (1968).

29. This is not to say that the Framers themselves were clear even in their own minds about all the implications of their own aspirations. As with the freedom of speech, the free exercise of religion, cruel and unusual punishment, and other constitutional guarantees, they did not have all the details worked out. The fact that there are instances in which the Framers did not object to or even supported some laws and practices that were inconsistent with their broader aspirations does not mean that we should not strive to live up to them. This is no different from the way in which we’ve construed other constitutional guarantees over time.

between their religious beliefs about alcohol and public policy concerns about alcohol, so too should we expect such respect for the law from our predominantly Christian nation. This is, in part, what it means to say that this is not a Christian nation.