

Religious Freedom and the Tension Within the Religion Clause of the First Amendment

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I'm honored to be part of this important conference, which has been bringing together scholars and public officials from around the globe to discuss religious freedom for almost 20 years. It is hard to imagine a more worthwhile enterprise. My gratitude to the organizers of this conference and especially to Cole Durham, an indefatigable advocate of religious liberty. I am especially pleased to be here this evening as we honor Dr. Mahmood.

I will speak about a tension that is ever-present in pluralistic societies: the tension between the need for government to allow freedom for religious belief and practice while avoiding the endorsement of a particular faith. This tension gives us reason to meet frequently and share ideas. Because I am a judge in the appeals courts of the United States, I will speak from an American perspective. That is not to suggest that this tension is a uniquely American phenomenon. It is not. But it has been an important feature of American history, and there is much that can be learned from the American experience.

I begin with a recent story that involves Abraham Lincoln, who is widely regarded as the greatest president of the United States, and his most famous speech, the Gettysburg Address, so named because it was delivered at the dedication of a cemetery for fallen soldiers at the site, in

Gettysburg, Pennsylvania, of one of the momentous battles of the American Civil War. Generations of American schoolchildren have memorized the Gettysburg Address. For many, it stands alongside the Declaration of Independence as the ultimate expression of universal ideals that should inform government. The speech is short; it was delivered in less than three minutes. But Lincoln's words changed America, a reminder to speechmakers across the ages that to say it longer is seldom to say it better. Although much could be said about this remarkable address, for my purposes, I highlight only that in his stirring conclusion, Lincoln referred expressly to God. Now, scholars have long debated Lincoln's religiosity. There is little doubt that he was not a church-goer, but some believe that over the course of his life, and especially as he confronted the crisis of the Civil War, he became a religious man.¹ One scholar writes that Lincoln's move to end slavery was, in fact, his part of a covenant he had made with God.² Whether these scholars are right or wrong, these were Lincoln's words at Gettysburg:

...we here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.

¹ See, e.g., MATTHEW S. HOLLAND, BOUNDS OF AFFECTION: CIVIL CHARITY AND THE MAKING OF AMERICA – WINTHROP JEFFERSON, AND LINCOLN (2007).

² See ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT (1999).

But that is only the background to the story I want to tell you. Here's the story. Several months ago, a prominent group of American lawyers, law professors, and law students hosted a conference at which they distributed pamphlets containing some of America's foundational documents—including the Gettysburg Address.

But unlike the version of Lincoln's speech with which Americans are most familiar, the pamphlet excluded the words "under God." As you might imagine, the omission of reference to God from this important speech by America's greatest president has spurred a lively discussion. The discussion raises important questions that reflect much about Americans' attitudes about the role of religion in public life. Questions like:

- To what extent is it proper for political leaders to publicly express their religious beliefs?
- Should religious convictions influence how we vote?
- Should we leave religious views at home when we go to work or school?
- Should government protect the religious expression of a minority that offends the values of the majority?

Americans disagree about the answers to these questions, and the recent tussle over Lincoln's words is, in part, a proxy for the disputes over these more fundamental matters. American law is not silent on these issues. The debate over these and related questions is carried on against

the backdrop of the Constitution of the United States, which holds religious expression in the highest regard and places much of it beyond the reach of government influence or interference.

The first clause of the First Amendment to the Constitution is called the Religion Clause. Some believe its position as the first right protected in the Bill of Rights underscores its importance. The Clause states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” With these words, the American Constitution singles out religious expression for special protection from government while imposing constraints on religious expression by government.

Why does the Constitution give religious speech this special status? I think at least part of the reason is that the Founders of the American republic believed that religious liberty is fundamental to the very idea of liberal democracy. Democracy requires free dialogue among citizens. Self-government is meaningful only to the extent that citizens are free to express their own beliefs and challenge the beliefs of others. The Framers of the Constitution thought that the free expression of religious belief was indispensable to a healthy democracy because religious belief often reflects the most important views of large segments of the citizenry. Father Richard John Neuhaus was a distinguished cleric and colleague of Martin Luther King, Jr., who wrote much about the role of religion in public life. Father Neuhaus explained, “Biblical religion is

undeniably public in character. It makes public claims and entails moral judgments that are pertinent to the ordering of our public life.”

According to Neuhaus, to “exclude religion and religiously based moral judgment” from public debate would undermine “the very idea of democratic governance.”³

The Religion Clause of the Constitution ensures the robust presence of religious expression in the public life of America by embracing two principles. The first is often described as the “separation of church and state.” Neutrality is its ideal: government must not take sides in arguments about God. The Framers of the American Constitution believed that government establishment of an official religion or preference for one sect over another “would,” in Neuhaus’s words, “violate the freedom of those who dissent from established belief.”⁴ As Thomas Jefferson—the author of the Declaration of Independence—wrote, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.”⁵ Indeed, the foremost scholar of religious liberty in America, former federal circuit judge Michael McConnell, writes that freedom from state-sponsored religion “is the most powerful

³ Richard John Neuhaus, Contending for the Future: Overcoming the Pfefferian Inversion, 8 J. OF LAW AND RELIGION 115, 120.

⁴ Neuhaus, *supra* note 2, at 119.

⁵ Thomas Jefferson, Bill 82 of the Revisal of the Laws of Virginia.

possible refutation of the notion that the political sphere is omnicompetent—that it has rightful authority over all life.”⁶

The Supreme Court has also identified another value that informs the separation of church and state. In *Engel v. Vitale*, the case that barred government-composed prayers from public schools, the Court wrote that “a union of government and religion tends to destroy government and to degrade religion.” In singling out this most important aspect of life as one over which the government may not exercise control or undue influence, the American Constitution places severe limitations on government’s rightful sphere of activity.

The second principle in the Religion Clause is the free exercise of religion: people are free to worship God as they choose. The United States Code – the statutory law created by Congress and the President – expresses a cardinal tenet of the American view of history. “Many of our Nation’s founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom.”⁷ John Leland, an 18th century Baptist minister, provides the best description of the value enshrined in the protection of the free exercise of religion. “When a man is a peaceable subject of [the] state, he should be protected in worshipping the Deity according to the dictates of his own conscience.”⁸

⁶ Michael McConnell, *Old Liberalism, New Liberalism, and People of Faith* in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT at 10.

⁷ 22 U.S.C. § 6401(a).

⁸ J. Leland, *The Yankee Spy*, in THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (L. Greene ed. 1845).

That the separation of church and state and the free exercise of religion are both important principles of American law is clear. But what are we to do when these principles come into conflict? Sometimes government neutrality burdens the free exercise of religion. An immigration law prevents an American congregation from hiring a British citizen as its pastor,⁹ compulsory public education threatens to prevent a close-knit religious sect from raising its children as it sees fit,¹⁰ and an Air Force regulation requiring removal of head wear indoors forces a Jewish officer to choose between his commission and his yarmulke.¹¹ Accommodating people of faith in these cases seems less than neutral (should they be given special favors?), and yet in each case neutral laws applied to all burden the free exercise of religious minorities.

These are the cases with which American judges struggle. Our struggle was on recent display at the Supreme Court in *Christian Legal Society v. Martinez*.¹² In that case, a state university in California required that officially recognized campus student groups open their membership to all students.

Although recognized by the university and thus permitted to receive university funds and use university property, the Christian Legal Society restricted its membership to those who publicly professed faith

⁹ Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

¹⁰ Wisconsin v. Yoder, 406 U.S. 205 (1972).

¹¹ Goldman v. Weinberger, 475 U.S. 503 (1986).

¹² No. 08-1371 (U.S. June 28, 2010).

in traditional Christian beliefs and adhered to traditional Christian standards of conduct. This latter condition precluded gays and lesbians who took issue with the Society's commitment to traditional Christian sexual morality from joining the group. The university's facially neutral policy that all campus groups must be open to all students forced this Christian student group to make a difficult choice. It could compromise its convictions and run the risk that its membership and leadership would come from those who did not embrace the faith that was the very reason for the group's being, or it could leave the campus altogether. The Society sued the university, arguing that putting the group to such a choice was an abridgement of the guarantee of freedom to practice religion.

A narrowly divided Supreme Court voted five-to-four to uphold the university's policy. Writing for the majority, Justice Ginsburg concluded that the university's policy was a reasonable attempt to ensure that social and leadership opportunities on campus were open to all students. Furthermore, the open membership requirement would help the university enforce its policy against discrimination by preventing the Christian group from excluding students based on their sexual orientation. Since the policy applied to all student groups and didn't target any particular group because of its viewpoint, the majority concluded that it was constitutional.

Dissenting, Justice Alito argued that the majority had mischaracterized the university's policy by suggesting that its effects were not intended to limit religious freedom. "There are religious groups that cannot in good conscience . . . admit persons who do not share their faith," Justice Alito argued, "and for these groups, the consequence of [the university's policy] is marginalization."¹³ In Justice Alito's view, the heavy burden the policy placed on the Christian Legal Society suggested that the university adopted the policy for this very purpose.

The dilemma the court faced in *Martinez* reflects the tension between the two principles of the Religion Clause. The majority saw a public university that was faithful to the principle of separation of church and state: it was neutral in applying the same policy to the Christian group that it applies to everyone else. No special favors for people of faith. They must follow the same rules as everyone else. In contrast, the dissent saw in the same policy an impermissible attempt to silence an unpopular religious minority by crafting a rule that forbade them from adhering to their faith as a condition of being a presence on campus. Both characterizations may be reasonable, and that demonstrates the nub of the problem.

While the tension between these two principles is as old as the First Amendment, it's worth noting how the larger role of government in

¹³ *Martinez*, slip op. at 36 (Alito, J., dissenting).

modern society brings these principles into increasing conflict. *Martinez* was a hard case because the university involved is publicly funded. A private, religious school like Brigham Young University has a much more limited relationship with the government, and the Religion Clause does not restrict what policies it can adopt. Government's role in American civil society greatly expanded with the emergence of public education and social welfare programs, and with this expansion came new situations in which a government dedicated to the separation of church and state may sometimes interfere with a person's right to freely worship. These hard cases are a fact of modern life. As government tries to do more and more, the challenge of preserving the needed space in which religious freedom can thrive will increase. And as the globe grows smaller and flatter such that we become increasingly interconnected with people from different backgrounds, traditions, and viewpoints, we will have more reasons to gather in places like this to discuss how to secure religious freedom. As Martin Luther King, Jr. foretold, "Our future lies in the interrelatedness of all communities and states, caught up in an inescapable network of mutuality, tied in a single garment of destiny." The role of religious liberty in contemporary legal systems is a problem that will be with us for the foreseeable future. It is all the more important, therefore, that we learn from each other's experiences.

It is an honor to be here with you today.