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# Religious freedom in the United States

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IT IS IMPOSSIBLE TO UNDERSTAND RELIGION IN AMERICA without understanding American religious freedom. That freedom is defined in large part by the first amendment to the United States constitution. The first amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .”

Let me begin by offering a very basic review of these clauses and their application. The first clause is the “establishment clause”; it prohibits the government from promoting a particular religion or religion in general. The second clause is the “free exercise clause”; it traditionally has prohibited the government from interfering with the religious practice of citizens and groups. The third clause is the “free speech clause,” a clause the United States supreme court has often relied on to protect citizens’ rights to express their faith. In a nutshell, these clauses prohibit the government from promoting religion, but they also oblige the government to protect the right of religious individuals and groups to practice their faith, both in private and in public spaces.<sup>1</sup>

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<sup>1</sup> See testimony of Melissa Rogers before the senate judiciary committee subcommittee on the constitution, civil rights, and property rights, 8 June 2004, 3, <http://judiciary.senate.gov>. The us supreme court generally uses the term “public” to refer to the government and “private” to describe everything else. Outside the strictly legal context, however, the term “public,” and certainly the terms “public life,” the “public square,” and “public affairs,” are generally defined much more

How do these constitutional principles apply in various settings? In public schools, for example, the US supreme court ruled in the 1960s that the ban on governmental promotion of religion prohibited school teachers from leading their classes in prayers and Bible readings. But these rulings leave room for students to pray and read the Bible at school as well as to form religious clubs in public secondary schools on the same basis as they form other non-curriculum-related clubs, such as chess clubs or scuba-diving clubs.<sup>2</sup>

Under our constitution, the government cannot erect or sponsor displays that lack a secular purpose and primary effect. To cite one prominent example, when an Alabama judge recently placed a several-ton monument featuring the ten commandments in a courthouse lobby, a court found the display unconstitutional. But the supreme court has held that, when groups of citizens are generally permitted access to government parks, citizens wishing to hold religious rallies or carry religious symbols also must be permitted such access as long as it is clear that the government is not endorsing religion. So, while it is sometimes suggested otherwise, the US constitution does not require or permit the public square to be stripped of religious influence.<sup>3</sup>

As for policy-making and politics, our constitution requires governmental action to have a non-religious purpose and primary effect but, within those parameters, religion may inform public policy. And religious organizations certainly enjoy the right to speak out on public issues, just as other non-governmental groups do.<sup>4</sup>

It also is generally agreed that our constitution affords government officials and political candidates a great deal of freedom to talk about their personal religious convictions. At the same time, many Americans would say that, while there is great freedom under the law to bring religious talk into the political realm, there are also serious ethical and religious responsibilities when one does so. A favorite admonition of mine is one offered by the late Barbara Jordan, an African-American congresswoman, who said that, when we speak of religion in

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broadly in American discourse to include any activity or sphere that is not removed from public view. In these remarks, I use these terms in this more expansive sense.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Melissa Rogers, "Religion, policy and politics: the rules of engagement," 9 June 2004, [www.americanprogress.org](http://www.americanprogress.org).

the public square, we should remember that we are “God’s servants,” *not* “God’s spokespeople.”<sup>5</sup> Humility is an essential ingredient when mixing religion and public affairs.

Legal restrictions in the area of American policy-making and politics flow not only from our constitution, but also from our tax code. For example, tax-exempt groups organized under Section 501(c)(3) of our tax code, including churches and many other religious organizations, are prohibited from endorsing candidates for elective public office if they intend to maintain that tax-exempt status.<sup>6</sup>

What about government funding and religious institutions? This area of the law is complex, evolving, and controversial, so it is difficult to describe simply or briefly. Instead, let me comment on one aspect of the controversy—the debate over President Bush’s faith-based initiative. This initiative is a signature program of the Bush administration that endeavours to increase the number of small, religious, and community organizations that provide government-funded social services. At the outset, I should note that the debate over aspects of the initiative does not break neatly along party lines or religious lines: Republicans and Democrats, as well as religious people, are on all sides of this debate.

The faith-based initiative has challenged some traditional rules in this area. For example, in the past, government agencies had often required congregations to create separate religious affiliates to receive government funds. This basic rule was devised in an attempt to ensure that the government did not subsidize religion, on the one hand, or become excessively entangled with it, on the other. The new rules, however, do not require congregations to form a separate religious affiliate; they allow the government to direct public funds to houses of worship. In the past, the government also had usually required programs funded by government grants and contracts to be entirely non-religious. Under the faith-based initiative, however, the rules for programs funded with direct aid are more lenient and allow religion to play a role in some cases.<sup>7</sup>

Finally, let me touch on the issue of protection for the free exercise of religion. As currently interpreted by the US supreme court, our

5 *Ibid.*

6 *Ibid.*

7 See Melissa Rogers, “Traditions of church-state separation: some ways they have protected religion and advanced religious freedom and how they are threatened today,” *University of Virginia Journal of Law and Politics* 18 (2002): 277.

constitution provides less than adequate protection for this right, in my opinion. A higher degree of protection has been provided through various other means, however, including some strong traditions of protecting free exercise.

The best of these American traditions ensure that people don't have to break the law in order to practice their faith peacefully. There are limits to this freedom, to be sure. The state does not, and should not, permit even the most sincere religious exercise to endanger people's health and safety, for example. But there has been a tradition of exempting religious practices from certain generally applicable laws where possible, and in many cases this tradition endures despite the fact that it usually is no longer mandated by current federal constitutional interpretation.<sup>8</sup>

For example, the Bush administration recently intervened in an Oklahoma case to ensure that a young Muslim girl would be permitted to wear a headscarf to school.<sup>9</sup> I believe this was the right result. Indeed, I was profoundly disturbed by the picture shown during an earlier session of the conference of the Turkish police removing a Muslim girl's headscarf. In my opinion, this kind of expression is sacred, and the state needs to keep its hands off, both literally and figuratively. Further, I believe the state usually does much more harm than good when it prevents religious exercise in this way. While we may make some more comfortable when we decide that individuals cannot wear religious garb in public, we run the real risk of driving others to resentment and rage.

#### SOME RISKS FOR AMERICAN RELIGIOUS FREEDOM

The basic American system of religious freedom is sound and generally does a very good job of protecting the religious freedom for all, including those who reject faith. But, in my opinion, our system is threatened in certain ways.

I am troubled by claims that our constitutional prohibition on government promotion of religion reflects hostility to religion. These claims are often transparent attempts to de-legitimate some church-state rules in order to privilege some faiths over others and use the machinery of

<sup>8</sup> See also Rogers and Alan E. Brownstein, "The religious freedom restoration act," in Brian K. Landsberg, ed., *Major Acts of Congress* (New York: Macmillan, 2003), 4.

<sup>9</sup> See testimony, *ibid.*

government to pressure people to embrace religion. But these traditional church-state rules have produced robust religious freedom in our country and an incredibly vital religious landscape. If the prohibition on government-endorsed religion were abandoned, government could endorse Christianity and thereby sacrifice precious rights of conscience, corrupt religion, create bitter divisions, and weaken our country as a whole.<sup>10</sup>

Religious freedom also is threatened when we normalize government funding for and close regulation of the activities of houses of worship. Let me be clear: it is quite appropriate for the government to regulate what it funds. It is especially important for the government to ensure that direct public aid is not used for religious activities. Under our system, these are duties the government owes the taxpayer. These duties suggest, however, that the government should not direct funds to houses of worship. I believe that religion in the United States is vital in large part because it is independent from government, and that religious freedom is strong in part because citizens have a high degree of confidence that their taxes won't be used to subsidize religion. In other words, American religion traditionally has been largely self-supporting and self-regulating, and I believe it should stay that way.

For related reasons, I also am concerned about a specific proposal linked to the faith-based initiative that would allow religious groups to discriminate on the basis of religion with regard to government-funded jobs. It is well-established as a legal matter in our country that religious organizations may make religion-based employment decisions with regard to job positions they fund with their own money. This simply embodies the common-sense proposition that a Jewish synagogue may hire a rabbi as its leader rather than a Baptist preacher. But the faith-based initiative allows a religious organization to make religion-based employment decisions regarding government-funded jobs.<sup>11</sup> In my

<sup>10</sup> Indeed, history reveals that the first amendment was framed and supported by many who were quite sympathetic to religion, most prominently James Madison and Baptist preachers who respected the rights of conscience and believed that government-sponsored religion corrupted faith. See, for example, James Madison, "Memorial and remonstrance against religious assessments," 1785, which may be found at <http://religiousfreedom.lib.virginia.edu>. See also Rogers, "Traditions of church-state separation," *ibid*.

<sup>11</sup> See Rogers, "Religion-based employment decisions and federally funded jobs: congressional debate, law and policy," in David K. Ryden and Jeffrey Polet, eds., *The Constitution in Context: Case Studies and Commentary on Government/Religious Sector Collaboration*, (Boulder, CO: Lynn Reinner, forthcoming 2005).

opinion, permitting direct aid to be used in this way violates the constitutional ban on government support for religion and improperly allows the government to make religion relevant to one's standing in the political community. Furthermore, it is simply wrong to tell taxpayers that they are ineligible for a job they help to fund because they aren't the "right" religion.<sup>12</sup>

I also am concerned that, under the faith-based initiative, there may not be adequate secular alternatives for social service beneficiaries who choose not to go to a faith-based provider. In other words, I do not see evidence that adequate steps are being taken so that no one is forced or pressured by the government to attend religious institutions.

I believe religious freedom is threatened as well when religious communities become closely identified with political parties, and yet it seems that such connections are increasingly tight these days. Religious people can and should be involved in the debate of important public issues. Whether it is genocide in the Sudan, the AIDS pandemic, or debt-relief for third-world countries, religious communities can make a real difference by speaking out. I believe that one of the primary reasons religious communities can make such a difference, however, is that they are still perceived by many to be above the political fray, rather than shills for the Republican or Democratic parties. When religious communities become identified with one party or another, they lose that independence and prophetic power that can help us to change people's lives for the better. For this reason, among others, American religious communities should resist the temptation to link themselves with a political party.

I also want to say that I understand that our commitment to principles of religious freedom is sometimes questioned abroad. It creates suspicion when some of the loudest critics of church-state separation in the United States are some of the most ardent proponents of separation of mosque and state abroad. And, as a religious person, I recognize that, no matter what we have meant to say in all of our "God blessing" of America after the attacks of September 11th, the message that has often been heard is that God somehow cares about national boundaries and has looked with particular favour on Americans, rather than loving the whole precious world equally, as of course God does.

<sup>12</sup> Ibid.

My hope is that religious people will be among those who lead in the call for a more compassionate and just world-view. In particular, I hope that people of all nations and faiths can find an increasing number of ways to communicate that aren't defined by government officials and confined by political boundaries. Recently, a group of American clergy filmed a commercial for broadcast in Iraq apologizing for the abuses that occurred in the Abu Ghraib prison. I read that some Iraqis were unwilling to listen to the apologies of our government, but that the apologies of the American clergy were heard and appreciated. For that, I am grateful.

#### HOW DO WE LIVE TOGETHER WITH OUR RADICAL DIFFERENCES?

A recurring question of this conference is: How do we live together with our radical differences?

It's a daunting question. I certainly don't have all the answers, but I'd like to offer a few modest suggestions for the sake of our conversation. I offer them with the usual caveats about the fact that my vision, experience, and perspective are limited.

First, I believe that we need to encourage more academic study and discussion about religion in our schools, universities, and beyond. Let me stress that I mean teaching about religion in an academic and civic way, rather than devotional teaching of religion. There was a time not so long ago when many believed that serious-minded discussions of public issues could completely avoid the topic of religion. As the events of 9/11 proved in such a tragic way, however, we can't understand our world without understanding religion. Teaching about religion is not easy; it raises a number of complex and sensitive issues. But we can and should work toward greater understanding in this area.

Second, I believe we should endeavour to find ways for people with radical differences to work on selected issues together. In Washington, DC, I have often worked with coalitions that are organized around a single policy issue. The most recent single-issue coalition with which I have worked is a coalition dedicated to encouraging humanitarian intervention in Darfur, Sudan. That coalition and others are stunningly diverse. A coalition on another particular legislative effort not only included Methodists, Mormons, and Muslims, but also organizations ranging from the American Civil Liberties Union (a group many

consider to be on the far political left) to an organization associated with televangelist Pat Robertson (a group many consider to be on the far political right).

The organizing principle of these single-issue coalitions isn't that members modify their beliefs in some way or even affirm one another's faith traditions or philosophies. Further, it isn't that members agree on any other group of issues or any other single policy issue. Instead, the organizing principle is that members agree on the desired outcome of a single policy issue, period. In the process of working through these coalitions, we begin to see those across the divide as people with at least one shared commitment. I think this humanization is a simple but great good.

Finally, we must recommit ourselves to support religious freedom in a variety of forms worldwide. We should not only encourage laws that recognize this basic human right, but we also should make efforts to recover the theologies that create and sustain religious freedom within a wide variety of religious traditions.

I believe we must do all we can to discourage theocracy, government-established faith, and any other form of government that makes some people second-class citizens solely because of their religion or lack thereof. As was noted earlier in this conference, church-state separation does not in and of itself produce a good society. But it can eliminate some very bad possibilities, such as state rule by a religion that has turned violent and oppressive. When the institutions of church and state maintain distinct and independent spheres, it not only demonstrates due regard for the rights of conscience, but it also lessens tensions and builds solidarity among people as citizens.

Ensuring that the government does not promote religion, therefore, is a crucial part of religious freedom. At the same time, I believe another key aspect of religious freedom is making room for individuals and groups to express their faith in our public squares. Some people, including many religious people, believe that religion is a private matter, but many others believe that religion is a public as well as a private matter. Much as some might wish this would change, wishing will not make it so. Rather than trying to push this kind of religion behind the line that separates private from public space (an explosive task, I might add), we should find ways to allow religious expression by individuals in public places. Thus, in my opinion, governments do a good and



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pragmatic thing when they strive to ensure that everyone has a voice in the public square and when they make certain exceptions so that people do not have to break the law in order to peacefully practice their faith.

In sum, I believe that part of the answer to the challenges that confront us is to protect human dignity and promote the common good by striving to create and maintain societies in which one's religious beliefs, or lack thereof, is irrelevant to the value of one's citizenship; in which civic space is open to a diversity of non-religious and religious expression; and in which all people are protected in the peaceful practice of their faiths.