

Strengthening the Free Exercise of Religion

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Distinguished guests and fellow workers in the cause of religious freedom: I am profoundly grateful for the Canterbury Medal you have bestowed on me. Just to have my work associated with the Becket Fund for Religious Liberty is a great honor, which is magnified by this opportunity to speak to what is surely the most influential audience I have ever addressed on this subject.

I.

I begin with a truth that is increasingly challenged: Religious teachings and religious organizations are vital to our free society and therefore deserving of its special legal protection.

Our country's robust private sector of charitable works originated with and is still sponsored most significantly by religious organizations and religious impulses. This includes education, hospitals, care for the poor, and countless other charities of great value to our country.

Many of the most significant moral advances in Western society have been motivated by religious principles and persuaded to official adoption by pulpit-preaching. Examples include the abolition of the slave trade in England and the Emancipation Proclamation in this country. The same is true of the Civil Rights movement of the last half-century. These great advances were not motivated and moved by secular ethics or persons who believed in moral relativism. They were driven primarily by persons who had a clear religious vision of what was morally right.

Our society is not held together primarily by law and its enforcement, but most importantly by those who voluntarily obey the unenforceable because of their internalized norms of righteous or correct behavior. Religious belief in right and wrong is a vital influence to produce such voluntary compliance by a large number of our citizens. President George Washington spoke of this reality in his farewell address:

"Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports," he said. "Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."¹

Over 200 years later, in 1998, Congress enacted a law that formally declares: "The right to freedom of religion undergirds the very origin and existence of the United States."² That law

¹ *Washington's Farewell Address*, ed. Thomas Arkle Clark (1908), 14.

formally associates our nation with the truth voiced by Jonathan Sacks, Chief Rabbi of the United Hebrew Congregations of the Commonwealth:

“[Religion] remains the most powerful community builder the world has known. . . . Religion is the best antidote to the individualism of the consumer age. The idea that society can do without it flies in the face of history. . . .”³

In our nation’s founding and in our constitutional order the First Amendment guarantees of religious freedom and the freedoms of speech and press are the motivating and dominating civil liberties and civil rights. Appropriately, the guarantee of freedom of religion is the first expression in the Bill of Rights of the United States Constitution, and it is embodied in the constitutions of all 50 of our states. For many Americans, the free exercise of religion is the basic civil liberty because faith in God and His teachings and the active practice of religion are the most fundamental guiding realities of life.

The free “exercise” of religion obviously involves both (1) the right to choose religious beliefs and affiliations and (2) the right to “exercise” or practice those beliefs without government restraint. However, in a nation with citizens of many different religious beliefs the right of some to act upon their religious beliefs must sometimes be qualified by the government’s responsibility to further compelling public interests, such as the health and safety of all. Thoughtful authorities and scholars have wrestled with this tension for many years, and will continue to do so.

Another current debate over religious freedom is more easily resolved. The guarantee of free exercise of religion must give persons who act on religious grounds greater protection against government prohibitions than are already guaranteed to everyone else by other provisions of the constitution, like freedom of speech. Otherwise, we erase the significance of the separate guarantee of free exercise of *religion*. Religion must preserve its preferred status in our pluralistic society in order to make its unique contribution—its recognition and commitment to values that transcend the secular world.

This preferred status must include more than a believer’s right of conscience. The Second Vatican Council’s “Declaration on Religious Freedom” (1965) persuasively declares that “individuals do not practice their religion as a solitary act, but together with one another.” Our right to the free exercise of religion must apply when we act as a community. As elaborated by Matthew J. Franck of the Witherspoon Institute: “The vitality of faith comes in its communal character, in the individual’s fellowship with others whose views support, inform, and refine his own,” including the right to undertake “educational, cultural, charitable and social” efforts as they see fit.⁴

II.

² International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a).

³ Jonathan Sacks, “The Moral Animal,” *The New York Times*, Dec. 23, 2012 at <http://www.nytimes.com/2012/12/24/opinion/the-moral-animal>.

⁴ Matthew J. Franck (The Witherspoon Institute), “Individual, Community, and State: How to Think about Religious Freedom,” Hillsdale Publication, *Imprimis*, September 2012, 6.

Unfortunately, as scholars have observed, for about a half-century the role of religion in American life has been declining.⁵ In this same period, the guarantee of free exercise of religion seems to be weakening in public esteem. It is surely under siege by the forces of political correctness, which would replace it with other priorities.

When he was President of the U.S. Conference of Catholic Bishops, Cardinal Francis George referred to what he called “threats to religious freedom in America that are new in our history and to our tradition.”⁶ Legal commentator Hugh Hewitt described one of these threats:

“For three decades people of faith have watched a systematic and very effective effort waged in the courts and the media to drive them from the public square and to delegitimize their participation in politics as somehow threatening.”⁷

Powerful secular interests are challenging the way religious beliefs and the practices of faith-based organizations stand in the way of their secular aims. We are alarmed at the many—and increasing—circumstances in which actions based on the free exercise of religion are sought to be swept aside or subordinated to the asserted “civil rights” of officially favored classes. This conflict between religious freedom and anti-discrimination laws was the subject of a recent public hearing before the U.S. Commission on Civil Rights.

In the long run, the vitality of religious freedom must rely on public understanding and support. We are therefore troubled at the recent survey finding by the Barna Group that the population least concerned about religious liberty in America are adults under 30, only 20% of whom believe that restrictions on religious freedom will increase in the next five years.⁸

Related to this is the familiar fact that our rising generations are less religiously observant than their predecessors. Even though about 80% of our citizens report that they believe in God, the percent who have no denominational affiliation—the so-called “nones” (n-o-n-e-s)—is large and growing larger, especially among the young. The Putnam/Campbell book, *American Grace*, identifies these facts with scholarly precision. These authors put the proportion of “nones” in our population at 19 percent overall,⁹ solidly ahead of Mainline Protestants, and exceeded only by Evangelical Protestants and Catholics, who have about 30 and 24 percent, respectively.¹⁰ Even more significant is the fact that the “nones” are now 33 percent of the young adults,¹¹ and that about half of the increasing proportion of Americans who have no denominational affiliation—mostly young people—have “a genuine antipathy toward organized religion.”¹²

⁵ E.g., see Robert D. Putnam & David E. Campbell, *American Grace* (2012), p. 562.

⁶ Cardinal Francis George, “Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom,” Brigham Young Univ. (Feb. 23, 2010).

⁷ Hugh Hewitt, *A Mormon in the White House?*, 242-43 (2007).

⁸ “Many Americans worry about religious freedom,” *Deseret News*, January 30, 2013, p. A8.

⁹ Robert D. Putnam & David E. Campbell, *American Grace* (2012), pp. 7, 75-80, 588-61. This is also the finding of The Pew Forum on Religion and Public Life, Oct. 9, 2012.

¹⁰ Putnam & Campbell, p. 17.

¹¹ *Id.*, at pp. 558-61.

¹² *Id.*, at p. 566.

These facts are extremely important to our efforts to strengthen religious freedom. We must enlist the support of persons who have what is called “spirituality” but who lack denominational affiliation. Religious freedom must not be seen as something serving only the interests of churches and synagogues. It must be understood as a protection for religious *people*, whether or not their beliefs involve membership or behavior. Support for the First Amendment free exercise of religion should not be limited to those who intend to exercise it, individually or through denominational affiliation.

We must give greater attention to the education of the rising generation. If the foundation of religious liberty is weakening it must be because the role of religion and the contribution of religious organizations and religiously motivated people in our nation is not sufficiently understood.

The rising generation is not being taught these things. I believe that a study of the treatment of religion in elementary and secondary textbooks over the last half-century would show a significant decline in the description and stated importance of religion in the founding of our nation and the progress of our civilization.

A generation ago, an influential public education group joined others in calling for action by educators, textbook publishers, and civic leaders to halt what they called the “rigorous exclusion” of religion from school textbooks and curricula.¹³ Scholars of education advise me that the current problem is not so much the “exclusion” of religion, but its presentation in a critical or biased way that minimizes its influence. The American Textbook Council surveys the most widely used American and world history textbooks. Their 1995 report contained this description:

“The strength of religion in shaping human thought and action is not often explained, and its role as a motivating agent of culture, politics, and ethics often remains under examined. . . . Religion in the contemporary world is discussed by region, out of context, and often in oblique and misleading ways.”¹⁴

At the same time, some influential leaders and many educators have come to consider it bad taste or even illegal for public schools even to mention religious influences and motivations.

¹³ Report, “Religion in the Curriculum,” described in *Religious News Service*, week of July 6, 1987, p. 4; also see *Washington Post National Weekly Edition*, July 21, 1986, p. 23; and William J. Bennett’s Payne Lecture, “Religious Belief and the Constitutional Order,” University of Missouri, Sept. 17, 1986, pp. 12-14; Warren A. Nord, “Liberals Should Want Religion Taught in Public Schools,” *Washington Post National Weekly Edition*, July 21, 1986, p. 23; *Washington Post* editorial, Dec. 27, 1986; also see *Washington Post*, Oct. 22, 1988, p. A22.

¹⁴ Sewell, G. T., “Religion in the classroom: What the textbooks tell us, a report of the American Textbook Council,” p. 17 (1995), <http://www.historytextbooks.org/reports.htm>. Also see Romanowaki, M. H., “Addressing Christianity in American history: Are textbooks improving?,” *Mid-Western Educational Researcher*, 14(2), pp. 21, 23-24 (2001) (“They simply mention religion . . . creating the impression that religion and faith have little to do with the development of U.S. History.”)

A continuation of this trajectory of ignorance and advocacy of diminished religious freedom—inhibiting the free exercise of religion in favor of other (though often worthy) social goals—will fundamentally change the character of America, and not for the better.

The problem of educating the public, and especially the rising generation, needs to be addressed on a front wider than preaching, lobbying, and litigating. We must employ education to broaden the base of citizens who understand and are committed to defending religious freedom. This will require better information for our religious believers, and also the enlistment of other groups.

I conclude this recital of concerns for the current and future freedom of religion with what is essentially a legal point, but one of considerable significance. We must be sensitive to the definition of *religion*. We must resist two opposite tendencies. We must not define religion too narrowly—excluding those who do not believe as we do. Christians and Jews can make this mistake by arguments and practices that fail to extend religious freedom to beliefs outside the Judeo-Christian tradition.

The opposite tendency—to define religion too broadly—is more seductive and more dangerous. We already see the tendency to describe religious freedom as “freedom of conscience”—whatever its source. That definition can deny the protection of the free exercise guarantee to churches and the organizations through which believers exercise their faith. In addition, if we expand the definition of religion to systems of belief not based on a Divine Being, we incur the risk I once described as a judge in a lecture at DePaul University:

“The problem with a definition of religion that includes almost everything is that the practical effect of inclusion comes to mean almost nothing. Free exercise protections become diluted as their scope becomes more diffuse. When religion has no more right to free exercise than irreligion or any other secular philosophy, the whole newly expanded category of ‘religion’ is likely to diminish in significance.”¹⁵

III.

While there are serious challenges to the continued strength of the constitutional guarantee of free exercise of religion, there have been many encouraging developments during the last half-decade that make us optimistic about its future.

First, we have the marvelous work of the Becket Fund for Religious Liberty. We, of course, link them with the United States Supreme Court’s remarkable decision in the *Hosanna-Tabor* case—remarkable for its ruling, its opinion, and its unanimity. We salute the Becket Fund attorneys and all others involved in advocating this marvelous precedent, which we pray will be applied rigorously and persuasively for years to come. We also salute the Becket Fund for their

¹⁵ Dallin H. Oaks, Separation, Accommodation and the Future of Church and State, 35 DePaul L. Rev. 1, 8 (1985). More recently I have said that while I have “no concern with expanding comparable protections to non-religious belief systems, as is done in international norms that protect freedom of religion or belief” (International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, 999 U.N.T.S. 302), I object to doing so by “re-interpreting the First Amendment guarantee of free exercise of religion” (“Preserving Religious Freedom,” Chapman University School of Law, Feb. 4, 2011).

decisive role in Stanford Law School's recent creation of a clinic focusing on the religious liberty rights of believers of various faiths.

Of immense importance to the strengthening of religious freedom is the rising concern and vigorous advocacy of many influential religious leaders. The U.S. Conference of Catholic Bishops' creation of an Ad Hoc Committee for Religious Freedom is of pivotal importance. So are the influential voices of Protestant evangelical leaders, such as Pastor Rick Warren, who has stated his belief that "religious liberty is going to be the civil rights issue of the next decade."¹⁶

We all agree with Cardinal Francis George, who said:

"In the coming years, interreligious coalitions formed to defend the rights of conscience for individuals and for religious institutions should become a vital bulwark against the tide of forces at work in our government and society to reduce religion to a purely private reality."¹⁷

Religious leaders and believers must unite to strengthen our freedom to teach what we have in common, as well as to teach and exercise our very real religious differences. We must walk shoulder to shoulder on the same path in order to secure our freedom to pursue our separate ways when that is necessary according to our distinctive beliefs. We must also insist on our constitutional right to exercise our beliefs and to voice our consciences on issues in the public square and in the halls of justice. These are the rights of all citizens, including religious believers, leaders and organizations.

We are heartened by the formation and work of the American Religious Freedom Program, under the auspices of the respected Ethics and Public Policy Center, which seeks to organize a nation-wide non-partisan movement to strengthen religious freedom. Numerous legal challenges to various government impositions show the vigor of the free exercise of religion. Some of these involve individual choices based on the exercise of religious beliefs. A large and growing number of others are legal actions by religiously affiliated organizations challenging government actions inhibiting the exercise of religious beliefs in institutional activities.

We are also encouraged by the turning tide of scholarly support for the free exercise of religion as it applies to important social issues. For example, the Girgin, Anderson, and George book, *What is Marriage?*, states a powerful scholarly and philosophical case for the time-honored definition of marriage as between a man and a woman and its importance for the issue of religious freedom. If the defense of traditional marriage "comes to be seen as irrational," the authors write, "people's freedom to express and live by it will be curbed" and

¹⁶ "Church founder: Religious liberty the next rights issue," *Deseret News*, Dec. 3, 2012, p. A6.

¹⁷ Cardinal Francis George, "Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom," Brigham Young Univ., (Feb. 23, 2010).

“believing what virtually every human society once believed about marriage—that it is a male-female union—will be seen increasingly as a malicious prejudice, to be driven to the margins of culture.”¹⁸

There are encouraging signs that the American public is awakening to the importance of strengthening religious freedom. A recent study showed that one-fourth of all Americans consider religion to be the First Amendment freedom most threatened.¹⁹ Another recent study showed that significant majorities of all faith traditions—even including those not religious affiliated—said they support organizations that protect the religious freedom of all religions.²⁰

VI.

I conclude with a well-known image from the New Testament. Jesus used a coin to teach the principle that we have obligations to civil government as well as to divine authority (Mark 12:14-17). Similarly, a two-sided coin reminds us of our two-fold duties to truth and to tolerance. In our efforts to strengthen religious freedom, we must always remember that the truth of our cause does not free us from our duty of tolerance toward those who differ.

Jesus modeled this principle. When He faced the woman taken in adultery, He spoke the comforting words of tolerance: “Neither do I condemn thee.” Then, as He sent her away, He spoke the commanding words of truth: “Go, and sin no more” (John 8:11). We should follow this example, by kindness in communications but firmness in the truth.

The metaphor of the two-sided coin yields another lesson, with which I close. The coins of our country contain the declaration “In God We Trust.” I repeat that declaration as the concluding affirmation of this message, and invoke the blessings of Almighty God on our difficult task of preserving and strengthening the precious first freedom, the free exercise of religion.

¹⁸ Sherif Girgin, Ryan T. Anderson, Robert P. George, *What is Marriage?*, (2012), p. 9; see also pp. 62-64.

¹⁹ “Survey Fact Sheet: Americans’ Views on Religious Freedom,” American Religious Freedom, December 2, 2011 at <http://www.religiousfreedom.org/research/detail/survey-fact-sheet-americans-views-on-religious-freedom>.

²⁰ The Barna Group, “Most Americans are Concerned About Restrictions in Religious Freedom,” January 19, 2013, at <http://www.barna.org/culture-articles/600-most-americans-are-concerned-about-restriction-in-religious-freedom>.