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The Tension Within the Religion Clause of the First Amendment*

*Thomas B. Griffith***

I am honored to be part of this conference, which has been bringing together scholars and public officials from around the globe for almost 20 years to discuss religious freedom. It is hard to imagine a more worthwhile enterprise. I express my gratitude to the organizers and especially to Cole Durham, an indefatigable advocate of religious liberty. I am also pleased to join in honoring Dr. Tahir Mahmood, whose example of erudition, grace, and kindness is an inspiration to all.

Religious freedom is a constant source of a dynamic tension in pluralistic societies as people of goodwill, and sometimes of not-so-much goodwill, struggle to identify the limits of majority rule and individual expression. This tension gives us reason to meet frequently and share ideas. Because I am a judge on an appeals court 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 is an important feature of American life, and there is much that can be learned from the American experience.

I begin with a recent story that involves Abraham Lincoln and his most famous speech, the Gettysburg Address. Generations of American schoolchildren have memorized this speech, given at the dedication of a cemetery for those who died at a decisive battle of the American Civil War. For Americans, Lincoln's speech stands alongside the Declaration of Independence as an expression of universal ideals that should inform democratic government. The speech is short; it was delivered in less than five minutes. But Lincoln's words changed the arc of American history—a reminder to speechmakers 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 its stirring conclusion, in which Lincoln referred expressly to God with these words: “[W]e here highly resolve that these dead shall not have died in vain—that this nation,

* This speech was given at the 17th Annual International Law and Religion Symposium on Oct. 3, 2010 at Brigham Young University.

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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

As an aside, I note that scholars have long debated Lincoln’s religiosity. He was not what some would call a “churchgoer,” but many believe that he became a deeply spiritual man over the course of his adult life, especially as he confronted the crisis of the Civil War.² In fact, one scholar writes that Lincoln’s move to end slavery was his part of a covenant with God.³

Several months ago, the organizers of a conference that gathered together a prominent group of American lawyers, law professors, and law students distributed pamphlets to those in attendance that contained some of America’s charter documents, including the Gettysburg Address. But unlike the version of Lincoln’s speech with which Americans are most familiar, the pamphlet left out the words “under God” from the passage I just read to you.⁴ As you might imagine, this omission has spurred a lively discussion that raises important questions about the role of religion in American public life.⁵ Questions like:

- To what extent is it proper for political leaders to publicly express their religious beliefs?
- Should religious convictions influence how citizens and politicians vote?
- Should we leave religious views at home when we go to work or school?

1. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 17, 23 (Roy P. Basler ed., 1953) (emphasis added).

2. See, e.g., MATTHEW S. HOLLAND, BONDS OF AFFECTION: CIVIL CHARITY AND THE MAKING OF AMERICA—WINTHROP, JEFFERSON, AND LINCOLN 200–04 (2007).

3. See ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 339–42 (1999) (explaining that Lincoln promised to issue the Emancipation Proclamation if God granted the Union victory at the Battle of Antietam).

4. Robert P. George, *God and Gettysburg*, FIRST THINGS, Aug./Sept. 2010, at 15.

5. See *id.*; Caroline Fredrickson, *Debate or Distraction: Why Some Are Fretting over the ACS Pocket Constitution*, ACSBLOG (July 20, 2010, 5:50 PM), <http://www.acslaw.org/node/16548>.

- Should government protect the religious expression of a minority that offends the values of the majority? If so, should there be limits to that protection?

Americans disagree about the answers to such questions,⁶ and the recent tussle over Lincoln's words is, in part, a proxy for the disputes over these fundamental matters.

Significantly, President Obama, who has been public about the role his Christian faith plays in his personal and public life,⁷ has sided with those who think religion should have an important role in our public discourse. He has argued that:

[S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square. Frederick Douglass, Abraham Lincoln, William Jennings Bryant [sic], Dorothy Day, Martin Luther King—indeed, the majority of great reformers in American history—were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.⁸

President Obama's words recognize that, as a matter of history, American law has not been silent over the proper role of religion in public life. This discussion 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. In fact, the First Amendment to the Constitution—the initial, and some would argue the primary, right among the Bill of Rights⁹—opens with the Religion Clause, which

6. See Noah Feldman, Professor of Law, Harvard Law School, *Few Are Chosen: Comparative Religion and the Public Sphere*, Address Given at BYU Forum (Nov. 17, 2009), available at <http://speeches.byu.edu> (discussing the various approaches politicians have taken to these issues throughout American history).

7. Barack Obama, Remarks by the President at National Prayer Breakfast (Feb. 3, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/03/remarks-president-national-prayer-breakfast>.

8. Barack Obama, Call to Renewal Keynote Address (June 28, 2006), available at <http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html>.

9. See Burt Neuborne, *The House was Quiet and the World Was Calm / The Reader Became*

provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁰ Please note that there are two sides to this constitutional coin. On the one side, religious expression merits protection from government interference that other forms of expression may not.¹¹ On the other side, the government itself is limited in its expression of religious belief. The Religion Clause ensures the robust presence of religious expression in American public life by embracing the principle of “free exercise” of religion: people are free to worship God as they choose. As expressed in the United States Code, a defining feature of the American view of history is the belief that “[m]any of our Nation’s founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom.”¹² John Leland, an eighteenth-century Baptist minister, summed up the American view of religious freedom this way: “[W]hen 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.”¹³ The Framers of the First Amendment gave religious freedom special status because they believed that religious liberty is fundamental to the very idea of democracy. Democracy requires free and spirited dialogue. Self-government is meaningful only to the extent that people are able to express their own beliefs and vigorously challenge the beliefs of others. As the Framers knew, religious belief often reflects the most important and deeply held views of large segments of the population. Richard John Neuhaus, the distinguished cleric, public intellectual, and colleague of Martin Luther King, Jr., explained, “[B]iblical religion . . . is undeniably public in character. It makes public claims and entails moral judgments that are pertinent to the ordering of our public life.”¹⁴ To “exclude religion and religiously based moral judgment” from public debate would undermine “the very idea of democratic governance.”¹⁵

the Book, 57 VAND. L. REV. 2007, 2019, 2022–23 (2004).

10. U.S. CONST. amend. I.

11. See Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–1500 (1990); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

12. 22 U.S.C. § 6401(a) (2006).

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

14. Richard John Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J.L. & RELIGION 115, 120 (1990).

15. *Id.*

But, as I said, there is another side to this coin—the side that forbids “establishment of religion” embraces a principle often described as the “separation of church and state.” This metaphor comes from a letter Thomas Jefferson wrote in 1802¹⁶ and is somewhat imperfect,¹⁷ but it captures an important facet of the Religion Clause: government must not take sides in arguments about God or become entangled with a particular faith. The Framers of the Religion Clause believed that federal establishment of an official religion or even a preference for a particular sect would, in Neuhaus’s words, “violate the freedom of those who dissent from the established belief.”¹⁸ Likewise, Harvard law professor Noah Feldman, whose observations about the role of religion in American public life I commend to you, has argued that the purpose of the prohibition on the “establishment of religion” “was to protect the liberty of conscience of religious dissenters from the coercive power of government.”¹⁹ As Thomas Jefferson wrote, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”²⁰

The Supreme Court has identified another value that informs the principle that government must not become entangled with a particular faith. In *Engel v. Vitale*, the case that famously barred the recitation of government-composed prayers from public schools, the Supreme Court wrote that “a union of government and religion tends to destroy government and to degrade religion.”²¹ In singling out religion as a part

16. Letter from Thomas Jefferson to Danbury Baptist Assoc. (Jan. 1, 1802), *reprinted in* DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 148 (2002) (describing the Religion Clause as establishing “a wall of separation between church and State”).

17. *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (describing Jefferson’s metaphor as “misleading” and emphasizing that the letter to the Danbury Baptist Association “was a short note of courtesy, written 14 years after the [First Amendment was] passed by Congress”); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1379, 1381 (1981) (characterizing the metaphor as “not very helpful in deciding real cases” and noting that it has led some to take the mistaken view that “churches and religiously motivated citizens have no right to engage in political speech”).

18. Neuhaus, *supra* note 14, at 119.

19. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002).

20. Thomas Jefferson, *Bill 82 of the Revision of the Laws of Virginia (1777)* (codified at VA. CODE ANN. § 57-1 (2010)).

21. 370 U.S. 421, 431 (1962).

of life over which the government may not exercise undue influence, the Constitution places severe limitations on government's rightful sphere of activity. Indeed, the foremost American scholar of religious liberty, Stanford law professor and former federal circuit judge Michael W. McConnell, writes that freedom from state-sponsored religion "is the most powerful possible refutation of the notion that the political sphere is omniscient—that it has rightful authority over all of life."²²

So what to do when these principles from the sides of this coin come into conflict, when their demands clash? Sometimes the notion that government should not entangle itself with any particular faith may seem to burden the free exercise of religion. An immigration law prevents an American congregation from hiring a British citizen as its pastor,²³ compulsory public education threatens to prevent a close-knit religious sect from raising its children as it sees fit,²⁴ and an Air Force regulation requiring removal of headwear indoors forces a Jewish officer to choose between his commission and his yarmulke.²⁵ Accommodating people of faith in these cases seems to take sides in religious disputes. Should the religious people in these cases be given special favors not available to others?

These are the issues with which American judges struggle as we seek to give life and force to the sometimes competing principles of the Religion Clause. How have we dealt with the tension inherent in a government that is committed to protecting religious freedom but that is limited in the ways it can do so? Our struggle was on recent display at the Supreme Court in *Christian Legal Society v. Martinez*.²⁶ In that case, a California state university required that campus groups that received its funds and were allowed to use its facilities open their membership to all university students.²⁷ The Christian Legal Society restricted its membership to those students who publicly professed faith in traditional Christian beliefs and adhered to traditional Christian standards of conduct, including a rejection of homosexual behavior.²⁸ This latter condition barred students committed to gay or lesbian relationships from

22. Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 10 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001).

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

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

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

26. 130 S. Ct. 2971 (2010).

27. *Id.* at 2979.

28. *Id.* at 2980.

joining the group. The university's policy of open membership put the Christian student group to a difficult choice. It could submit to the university's policy, 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 group sued, arguing that a public university abridges the "free exercise of religion" when it forces a student group to make such a choice.²⁹

The Supreme Court voted five-to-four to uphold the university's policy. Writing for a majority that has been described as an "uneasy five-member coalition,"³⁰ Justice Ruth Bader Ginsburg concluded that the university's policy was a reasonable attempt to facilitate the worthy goal of making available to all students social and leadership opportunities in groups allowed on campus.³¹ The open membership requirement would also help the university enforce its policy against discrimination based on sexual orientation. Otherwise, the majority worried that the Christian Legal Society could use its restrictive membership requirements to evade the university's anti-discrimination policy.³²

In dissent, Justice Samuel Alito, writing for himself and three other justices, argued that the university's policy abridged the group's 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."³³ In Justice Alito's view, the heavy burden the university's policy placed on the Christian Legal Society suggested that the policy had been adopted for this very purpose, a purpose that violates the Religion Clause's principle of free exercise of religion.

The differing approaches taken by the majority and the dissent in *Martinez* reflect the tension between the two principles of the Religion Clause. The majority saw a public university that was faithful to the prohibition on excessive governmental entanglement with religion: it applied the same policy to the Christian group that it applied to everyone else. No special favors were granted to people of faith. In contrast, the

29. *Id.* at 2981.

30. Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, in *CATO SUPREME COURT REVIEW 2009–2010*, at 105, 106 (Ilya Shapiro ed., 2010).

31. *Martinez*, 130 S. Ct. at 2989.

32. *Id.* at 2990.

33. *Id.* at 3019 (Alito, J., dissenting).

dissent saw in the same policy an impermissible attempt to silence an unpopular religious minority.

The tension between these two principles is as old as the First Amendment, but it is worth noting how the growth of the role of government in modern American society brings with it the potential that these principles will come increasingly into conflict. Government's role in American society greatly expanded with the emergence of public education and social welfare programs, and this expansion brought new situations in which a government trying to avoid entanglement with religion may find itself impeding what many would view as a person's right to worship freely. As government tries to do more and more, it will be increasingly difficult to preserve the needed space in which religious freedom can thrive. 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 learn from each other's experiences how best to secure religious liberty.