

Imprimis

April 2013 • Volume 42, Number 4
A Publication of Hillsdale College

Religion and Public Life in America

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The following is adapted from a speech delivered on February 20, 2013, at a Hillsdale College National Leadership Seminar in Bonita Springs, Florida.

Religious liberty is being redefined in America, or at least many would like it to be. Our secular establishment wants to reduce the autonomy of religious institutions and limit the influence of faith in the public square. The reason is not hard to grasp. In America, “religion” largely means Christianity, and today our secular culture views orthodox Christian churches as troublesome, retrograde, and reactionary forces. They’re seen as anti-science, anti-gay, and anti-women—which is to say anti-progress as the Left defines progress. Not surprisingly, then, the Left believes society will be best served if Christians are limited in their influence on public life. And in the short run this view is likely to succeed. There will be many arguments urging Christians to keep their religion strictly religious rather than “political.” And there won’t just be arguments; there will be laws as well. We’re in the midst of climate change—one that’s getting colder and colder toward religion.

Recent court cases and controversies suggest trends unfriendly to religion in public life. In 2005, a former teacher at Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan, filed an employment lawsuit claiming discrimination based on disability. The school fired her for violating St. Paul’s teaching that Christians should not bring their disputes before secular judges. The subsequent lawsuit revolved around the question of whether a religious school could invoke a religious principle to justify firing an employee. The school said it could, drawing on a legal doctrine known as the ministerial exception, which allows religious institutions wide latitude in hiring and firing their religious leaders. It’s in the nature of legal arguments to be complex and multi-layered, but in this case the Obama administration’s lawyers made a shockingly blunt argument: Their brief claimed that there should be no ministerial exception.

The Supreme Court rejected this argument in a unanimous 9-0 vote. But it’s telling nonetheless that lawyers in the Justice Department wanted to eliminate this exception. Their argument was straightforward: Government needs to have broad powers to address the problem of discrimination—in this case disability—as well as other injustices. Conceding too

much to religious institutions limits those powers. Why should the theological doctrines of the Lutheran Church—Missouri Synod, or of any other church, trump the legal doctrines of the United States when the important principle of nondiscrimination is at stake? It is an arresting question, to say the least—especially when we remember that the Left is currently pushing to add gay marriage to the list of civil rights.

Concerns about the autonomy of religious institutions are also at work in the Obama administration's tussle with the Catholic Church and her religious allies over the mandate to provide free contraceptives, sterilization, and abortion-inducing drugs. After the initial public outcry, the administration announced a supposed compromise, which has been recently revised and re-proposed. The Obama administration allows that churches and organizations directly under the control of those churches are religious employers and can opt out of the morally controversial coverage. But religious colleges and charities are not and cannot. To them, the administration offers a so-called accommodation.

The details are complex, but a recent statement issued by Cardinal Dolan of New York identifies the key issue: Who counts as a religious employer? It's a question closely related to the issue in the Hosanna-Tabor case, which asks who counts as a religious employee. Once again the Obama administration seeks a narrow definition, "accommodating" others in an act of *lèse majesté*, as it were. The Catholic Church and her allies want a broad definition that includes Catholic health care, Catholic universities, and Catholic charities. The Church knows that it cannot count on accommodations—after all, when various states such as Illinois passed laws allowing gay adoptions, they did not "accommodate" Catholic charities, but instead demanded compliance with principles of non-discrimination, forcing the Church to shut down her adoption agencies in those jurisdictions.

Cardinal Dolan's statement went still further. For-profit companies are not religious in the way that Notre Dame University is religious. Nonetheless, the religious beliefs of those who own and run businesses in America should be accorded some protection. This idea the Obama administration flatly rejects. By their progressive way of thinking, economic life should be under the full and unlimited control of the federal government.

Religious liberty is undermined in a third and different way as well. For a long time, political theorists like John Rawls have argued that our laws must be based on so-called public reason, which is in fact an ambiguous, ill-defined concept that gives privileged status to liberalism. In 2010, Federal District Court Judge Vaughn Walker overturned Proposition 8—the ballot measure that reversed the California Supreme Court's 2006 decision that homosexuals have a right to marry—citing the lack of a rational basis for thinking that only men and women can marry. "The evidence shows conclusively," he wrote, "that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples." He continues by observing that many supporters of Proposition 8 were motivated by their religious convictions, which—following Rawls—he presumes should not be allowed to govern public law.

This line of thinking is not unique to Judge Walker. The influence of Rawls has been extensive, leading to restrictions on the use of religious reasons or even religiously-

influenced reasons in public debate. In striking down Texas sodomy laws, Supreme Court Justice Anthony Kennedy noted that moral censure of homosexuality has “been shaped by religious beliefs.” The idea seems to be that moral views historically supported by religion—which of course means all moral views other than modern secular ones—are constitutionally suspect.

Here we come to the unifying feature of contemporary challenges to religious freedom—the desire to limit the influence of religion over public life. In the world envisioned by Obama administration lawyers, churches will have freedom as “houses of worship,” but unless they accept the secular consensus they can’t inspire their adherents to form institutions to educate and serve society in accordance with the principles of their faith. Under a legal regime influenced by the concept of public reason, religious people are free to speak—but when their voices contradict the secular consensus, they’re not allowed into our legislative chambers or courtrooms.

Thus our present clashes over religious liberty. The Constitution protects religious liberty in two ways. First, it prohibits laws establishing a religion. This prevents the dominant religion from using the political power of majority rule to privilege its own doctrines to the disadvantage of others. Second, it prohibits laws that limit the free exercise of religion. What we’re seeing today is a secular liberalism that wants to expand the prohibition of establishment to silence articulate religious voices and disenfranchise religiously motivated voters, and at the same time to narrow the scope of free exercise so that the new secular morality can reign over American society unimpeded.

Rise of the Nones

This shift in legal thinking on the Left reflects underlying religious trends. As the religious character of our society changes, so do our assumptions about religious freedom. The main change has been the rise of the Nones. In the 1950s, around three percent of Americans checked the “none” box when asked about their religious affiliation. That number has grown, especially in the last decade, to 20 percent of the population. And Nones are heavily represented in elite culture. A great deal of higher education is dominated by Nones, as are important cultural institutions, the media, and Hollywood. They are conscious of their power, and they feel the momentum of their growth.

At the same time, the number of Americans who say they go to church every week has remained strikingly constant over the last 50 years, at around 35 percent. Sociologists of religion think this self-reported number is higher than the actual one, which may be closer to 25 percent. In any event, the social reality is the same. As the Nones have emerged as a significant cohort, the committed core of religious people has not declined and in fact has become unified and increasingly battle tested. Protestants and Catholics alike know they’re up against an often hostile secular culture—and although a far smaller portion of the population, the same holds for Jews and Muslims as well.

These two trends—the rise of the Nones and the consolidation of the committed core of believers—have led to friction in public life. The Nones and religious Americans collide culturally and politically, not just theologically.

For a long time, the press has reported on the influence of religious voters, especially Evangelicals. Polling data shows that religiosity has become increasingly reliable as a predictor of political loyalties. But what's far less commonly reported is that this goes *both* ways. In their recent book, *American Grace: How Religion Divides and Unites Us*, Robert Putnam and William Campbell focused on the practice of saying grace before meals as an indication of religious commitment and found a striking correlation. Seventy percent of those who never say grace before meals identify as Democrats, compared to slightly more than 20 percent who identify as Republicans. Nones are extremely ideological. Meanwhile, among those who say grace daily, 40 percent identify as Democrats and 50 percent as Republicans. Religious people are more diverse, but they trend to the political right, and the more religious they are the more likely they are to vote Republican.

Other data also suggests a growing divide between the irreligious and religious. A recent Pew study confirms that Nones are the single most ideologically committed cohort of white Americans, rivaled only by Evangelical Protestants. They overwhelmingly support abortion and gay marriage. Seventy-five percent of them voted for Barack Obama in 2008, and they played a decisive role in his victory in 2012. In Ohio, Obama lost the Protestant vote by three percent and the Catholic vote by eleven percent—and both numbers rise if we isolate Protestants and Catholics who say they go to church every week. But he won the Nones, who make up 12 percent of the electorate in Ohio, by an astounding 47 percent.

I think it's fair to say that Obama ran a values campaign last fall that gambled that the Nones would cast the decisive votes. For the first time in American political history, the winning party deliberately attacked religion. Its national convention famously struck God from the platform, only to have it restored by anxious party leaders in a comical session characterized by the kind of frivolity that comes when people recognize that it doesn't really matter. Democratic talking points included the "war on women" and other well-crafted slogans that rallied *their* base, the Nones, who at 24 percent of all Democrat and Democratic-leaning voters have become the single largest identifiable cohort in the liberal coalition.

This presents the deepest threat to religious liberty today. It's not good when the most numerous and powerful constituency in the Democratic Party has no time for religion. This is all the more true when its ideology has the effect of encouraging the rest of the party to view religion—especially Christianity—as the enemy; and when law professors provide reasons why the Constitution doesn't protect religious people.

Religious Liberty Under the Gun

From the end of the Civil War until the 1960s, the wealthiest, best educated, and most powerful Americans remained largely loyal to Christianity. That's changed. There were warning signs. William F. Buckley, Jr. chronicled how Yale in the early '50s could no longer support even the bland religiosity of liberal Protestantism. Today, Yale and other elite institutions can be relied upon to provide anti-Christian propaganda. Stephen Pinker and Stephen Greenblatt at Harvard publish books that show how Christianity pretty much ruins everything, as Christopher Hitchens put it so bluntly. The major presses publish book after book by scholars like Elaine Pagels at Princeton, who argues that Christianity is for the most

part an invention of power hungry bishops who suppressed the genuine diversity and spiritual richness of early followers of Jesus.

One can dispute the accuracy of the books, articles, and lectures of these and other authors. This is necessary, but unlikely to be effective. Experts savaged Greenblatt's book on Lucretius, *The Swerve*, but it won the National Book Award for non-fiction. That's not an accident. Greenblatt and others at elite universities are serving an important ideological purpose by using their academic authority to discredit

Christianity, whose adherents are obstacles not only to abortion and gay rights, but to medical research unrestricted by moral concerns about the use of fetal tissue, to new reproductive technologies, to doctor-assisted suicide, and in general to liquefying traditional moral limits so that they can be reconstructed according to the desires of the Nones. Books by these elite academics reassure the Nones and their fellow travelers that they are not opposed to anything good or even respectable, but rather to historic forms of oppression, ignorance, and prejudice.

I cannot overstate the importance of these ideological attacks on Christianity. Our Constitution accords us rights, and the courts cannot void these rights willy-nilly. But history shows that the Constitution is a plastic document. When our elite culture thinks something is bad for society as a whole, judges find ways to suppress it. The First Amendment offered no protection to Bob Jones University, which lost its tax-exempt status because of a policy that prohibited inter-racial dating. As the Supreme Court majority in 1983 wrote in that case: "Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . which substantially outweighs whatever burden denial of tax benefits places on [the University's] exercise of their religious beliefs."

In recent years the Supreme Court has been largely solicitous of religious freedom, sensing perhaps that our cultural conflicts over religion and morality need to be kept within bounds. But the law professors are preparing the way for changes. Martha Nussbaum, who teaches at the University of Chicago Law School, has opined that the colleges and universities run by Catholic religious orders that require their presidents or other leaders to be members of the order should lose their tax exempt status, because they discriminate against women. She allows that current interpretations of the First Amendment don't support her view, but that's not much comfort. All Nussbaum is doing is applying the logic of the Bob Jones case to the feminist project of eradicating discrimination based on sex.

Former Georgetown law professor Chai Feldblum—who is also a current Obama appointee to the Equal Employment Opportunity Commission—has written about the coming conflicts between gay rights and religious liberty. With an admirable frankness she admits, "I'm having a hard time coming up with any case in which religious liberty should win." Again, the Bob Jones case is in the background, as are other aspects of civil rights law designed to stamp out racial discrimination. For someone like Feldblum, when religious individuals and institutions don't conform to the new consensus about sexual morality, their freedoms should be limited.

It is precisely the possibilities evoked by Nussbaum and Feldblum that now motivate the Obama administration's intransigence about allowing places like Notre Dame to be classified as religious employers. In the Bob Jones case, the justices were very careful to stipulate that "churches or other purely religious institutions" remain protected by the First Amendment's principle of free exercise. By "accommodating" rather than counting Notre Dame and other educational and charitable organizations as religious employers, secular liberalism can target them in the future, as they have done to Catholic adoption agencies that won't place children with homosexual couples.

A recent book by University of Chicago professor of philosophy and law Brian Leiter outlines what I believe will become the theoretical consensus that does away with religious liberty in spirit if not in letter. "There is no principled reason," he writes, "for legal or constitutional regimes to single out religion for protection." Leiter describes religious belief as a uniquely bad combination of moral fervor and mental blindness, serving no public good that justifies special protection. More significantly—and this is Leiter's main thesis—it is patently unfair to afford religion such protection. Why should a Catholic or a Baptist have a special right while Peter Singer, a committed utilitarian, does not? Evoking the principle of fairness, Leiter argues that everybody's conscience should be accorded the same legal protections. Thus he proposes to replace religious liberty with a plenary "liberty of conscience."

Leiter's argument is libertarian. He wants to get the government out of the business of deciding whose conscience is worth protecting. This mentality seems to expand freedom, but that's an illusion. In practice it will lead to diminished freedom, as is always the case with any thoroughgoing libertarianism.

Let me give an example. The urban high school my son attended strictly prohibits hats and headgear. It does so in order to keep gang-related symbols and regalia out of the school. However, the school recognizes a special right of religious freedom, and my son, whose mother is Jewish and who was raised as a Jew, was permitted to wear a yarmulke. Leiter's argument prohibits this special right, but his alternative is unworkable. The gang members could claim that their deep commitments of loyalty to each other create a conscientious duty to wear gang regalia. If everybody's conscience must be respected, then nobody's will be, for order and safety must be preserved.

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The Arabic word *dhimmi* means non-Muslim. Under Muslim rule, non-Muslims were allowed to survive only insofar as they accepted Muslim dominance. Our times are not those times, and the secularism of the Nones is not Islam. Nevertheless, I think many powerful forces in America would like to impose a soft but real *dhimmitude*. The liberal and libertarian Nones will quarrel, as do the Shi'a and Sunni, but they will, I think, largely unify against the public influence of religion.

What can be done to prevent them from succeeding?

First and most obvious—defend religious liberty in the courts. Although I have depicted deep cultural pressures that work against religious liberty, we live in a society governed by the rule of law. Precedent matters, and good lawyering can make a substantive difference.

Second—fight against the emerging legal theories that threaten to undermine religious liberty. This is a battle to be carried out in the law schools and among political theorists. For decades, legal activists on the Left have been subsidized by legal clinics and special programs run in law schools. Defenders of religious liberty need to push back.

Third—fight the cultural battle. Legal theory flexes and bends in accord with the dominant consensus. This Brian Leiter knows, which is why he does not much worry about the current state of constitutional law. He goes directly to the underlying issues, which concern the role of religion in public life.

We must meet the challenge by showing that religion is indeed special. Religious people are the most likely Americans to be involved in civic life, and the most generous in their charitable contributions. This needs to be highlighted again and again. Moreover, we need to draw a contrast with the Nones, who tend to outsource their civic responsibilities and charitable obligations to government in the form of expanded government programs and higher taxes.

There is another, deeper argument that must be made in defense of religion: It is the most secure guarantee of freedom. America's Founders, some of them Christian and others not, agreed as a matter of principle that the law of God trumps the law of men. This has obvious political implications: The Declaration of Independence appeals to the unalienable rights given by our Creator that cannot be overridden or taken away. In this sense, religion is especially beneficial. As Popes John Paul II and Benedict XVI both emphasized, it gives transcendent substance to the rights of man that limit government. Put somewhat differently, religion gives us a place to stand outside politics, and without it we're vulnerable to a system in which the state defines everything, which is the essence of tyranny. This is why gay marriage, which is sold as an expansion of freedom, is in fact a profound threat to liberty.

Finally, we must not accept a mentality of *dhimmitude*. The church, synagogue, and mosque have a tremendous solidity born of a communion of wills fused together in obedience to God. This gives people of faith the ability to fight with white fury for what they perceive to be a divine cause, which is of course a great force for righteousness—but also a dangerous threat to social peace, as early modern Europe knew only too well.

In conclusion, I want to focus not on fury but on the remarkable capacity for communities of faith to endure. My wife's ancestors lived for generations in the contested borderlands of Poland and Russia. As Jews they were tremendously vulnerable, and yet through their children and their children's children they endured in spite of discrimination, violence, and attempted genocide. Where now, I ask, are the Russian and Polish aristocrats who dominated them for centuries? Where now is the Thousand Year Reich? Where now is the Soviet worker's paradise? They have gone to dust. The Torah is still read in the synagogue.

The same holds for Christianity. The Church did not need constitutional protections in order to take root in a hostile pagan culture two thousand years ago. Right now the Nones seem to have the upper hand in America. But what seems powerful is not always so. If I had to bet on Harvard or the Catholic Church, Yale or the Mennonites in Goshen, Indiana, the *New York Times* or yeshivas in Brooklyn, I wouldn't hesitate. Over the long haul, religious faith has proven itself the most powerful and enduring force in human history.

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