

THE FIRST AMENDMENT: AN ESSAY ON FREEDOM OF BELIEF

In March 2001 when the Taliban's destruction of the giant, historic Buddhas in Bamiyan province came to the world's attention, among the many who value respect for diversity and history, a collective repulsion was felt. The Taliban Government rationalized this act of state power based on their interpretation of Islam. In their perception, the Buddhas were idolatrous and violated Islamic law. In Jerusalem, the city of peace, the land on the Temple Mount, upon which sits the Dome of the Rock, is sacred to three monotheistic religions: Judaism, Christianity, and Islam; this convergence of symbolic expression serves as a distressing example of how a sacred place can be a source of political conflict. Now after the recent atrocities on our own soil, the constitutional principles which create an environment of toleration for religious differences can be seen as even more fundamental to a harmonious society and individual freedom.

The definition of God and religious truth have long been philosophical subjects that have found a way into political disputes. One non-theological reason for this is that religious values can form the essence of self-identity. The interrelationship between diverse systems of belief and political organization is the challenge in governing a heterogeneous society. History is replete with examples of new or competing ideas being censored as a threat to the status quo. For example, Benedict de Spinoza was excommunicated from his religious community in the 1600s for departing from an anthropological view of God. In his "Ethica Ordine Geometrica Demonstrata" ("Universal Ethics Demonstrated Geometrically"), he developed the pantheistic view that everything that exists is God and that God can best be described as a divine, universal energy form.

E pluribus unum, which means, "out of many, one," is both a reference to the thirteen colonies being united into one nation, as well as a recognition that the nation was composed of citizens of different ethnic and religious origins. The First Amendment to the United States Constitution acts as a civilizing principle in the pursuit of democracy and freedom of belief in a pluralistic society. The First Amendment language reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The great American jurist, Oliver Wendell Holmes, recognized the ultimate value of the principles found in the First Amendment when he wrote:

"When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market." U.S. v. Abrams, 250 US 616 (1919).

Achieving a harmonious synthesis of freedom and diversity of beliefs may be a laudable goal for humanity, when achieved. However, a state of common mind may always be elusive. By definition, a synthesis of ideas will inherently be at variance during an evolutionary progression of concepts. Thus, a government which embraces the right of the individuals to assert ideas must be able also to manage and tolerate dissent and conflict. The struggle between dissenting viewpoints and prevailing authorities is a tension in a democratic society. John Stuart Mill, addressed the tension of competing religious ideas in his essay, "On Liberty", in which he wrote:

"It is accordingly on this battlefield, almost solely, that the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted. The great writers to whom the world owes what religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief. Yet so natural to mankind is intolerance in whatever they really care about, that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale. In the minds of almost all religious persons, even in the most tolerant countries, the duty of toleration is admitted with tacit reserves."

Why must a Government strive for neutrality in its relation to religion? The First Amendment clauses work together to restrict the Government from using its power to endorse a belief system or from passing laws that target a religious practice. The purpose is to prevent compelled religious views, prevent religious tyranny by the majority,

and allow for individual belief systems to flourish. Supreme Court Justice Harry A. Blackmun wrote:

"When the government puts its imprimatur on a particular religion it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some." Lee v. Weisman, 505 U.S. 577(1992)

As our nation undergoes the re-examination of the role of civil rights in an open society within a context of needing to detect activities of groups whose beliefs are both inimical and destructive to an open society, the principles elucidating the Constitution can provide a framework. This essay will address the first two clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause.

The Free Exercise Clause

The right to free exercise of religion is not an absolute, for if everything were permitted, there would be anarchy. The case law makes a distinction between thought and action; all actions, whether based in religious belief or not, have consequences which society can regulate. In Employment Division v. Smith, 494 U.S. 872 (1990), members of the Native American Church ingested peyote in order to induce hallucinations as part of religious ritual. The U.S. Supreme Court ruled that the Free Exercise Clause cannot exempt one from narcotics laws and ruled that no religious actions may violate general laws, but that laws aimed specifically at religions or a particular religious practice would be held unconstitutional. As members of a society, individuals do not cede their right of free reason and judgment, but in order to preserve peace, individuals must submit to the control of authority over their actions. When religious acts break the law, the Government has a right to preserve public order.

In the case of United States v. Ballard, 322 U.S. 78 (1944), the Supreme Court ruled that persons issuing religious teachings could not be prosecuted for criminal fraud. Guy W. Ballard, in accordance with his theories, and by reason of his high spiritual attainments and righteous conduct, had been selected as a divine messenger, through which the words of the "ascended masters" would be

communicated to mankind under the teachings known as the "I Am" movement. The beliefs of one person may seem unbelievable to another, but religious liberty demands Government toleration of unconventional views.

The Establishment Clause

The Supreme Court decisions interpreting the Establishment Clause are often criticized as unpredictable. The Establishment Clause comes into play when a Government act or expenditure is seen as an endorsement of a particular religion. Government-sponsored nativity displays are a frequent flash point of emotion. In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court ruled that a Government-owned nativity scene displayed on private land did not endorse a religion and therefore did not violate the Establishment Clause. In Allegheny County v. ACLU, 492 U.S. 573 (1989), the Court ruled that a nativity scene displayed inside a Government building violates the Establishment Clause. The logical inference to differentiate these cases is that a display on Government property creates the impression of endorsement.

Christmas is both a time of a religious holiday as well as a time for family gathering and gift giving. Because Christmas is a Christian celebration, one may ask, why is a religious holiday a Federal holiday? Does this violate the Establishment Clause? A 'citizen-grinch' sued the Government seeking to declare 5 USC 6103, the statute which declares ten public holidays, one of which is Christmas, a violation of the Establishment Clause. In this case, Ganulin v. U.S. , 71 F.Supp.2d 824 (1999) the plaintiff filed a lawsuit asking that the Federal government be required to stop declaring December 25 a holiday. He argued that Christmas is a religious holiday and the Congress is not constitutionally permitted to endorse or aid any religion, purposefully or otherwise, or promote entanglement between the Government and religious beliefs. In dismissing the suit, Judge Dlott decided "that Christmas can be observed as a federal holiday because non-Christians also mark the holiday by celebrating the arrival of Santa Claus." Since nonreligious people also observe the holiday, giving federal workers a day off for Christmas does not elevate one religion over another. The Government is acknowledging the secular and cultural aspects of Christmas by declaring Christmas to be a legal public holiday. In sum, a Government practice need not be

exclusively secular to survive. Judge Dlott poetically opined:

"The court will address plaintiff's seasonal confusion erroneously believing Christmas merely a religious intrusion Whatever the reason constitutional or other Christmas is not an act of Big Brother! The court will uphold seemingly contradictory causes decreeing "The Establishment" and "Santa" both worthwhile Claus(es)."

Education and Libraries

Not only does the First Amendment, in both the Free Expression Clause and the Establishment Clause, incorporate by implication the virtue of tolerance for diverse viewpoints, but also the idea that tolerance, as a value in and of itself, can act as a unifying force. Tolerance for others minimizes the effect of differences between people in interpersonal relations, which encourages civility. Tolerance as a virtue runs into a predicament when parents are concerned with their children's exposure to information in a public forum or in a Government-supported forum such as a school or a library. Parents are responsible for the upbringing of children and part of that entails instilling values. Modern culture bombards society with images, sensational information, controversies as well as facts, opinions and art. This 'information soup' is a part of Holmes' marketplace of ideas. Information technology makes it almost impossible for parents to isolate children from the views to which they do not want their children exposed. One family's values may conflict with another's values. Parents seek to protect children from what the parents deem as inaccurate, inappropriate or offensive information and parents may seek to influence what information is available to children. In this situation, what is the role of the state? The First Amendment limits what the Government can do, both in terms of endorsing a belief as well as limiting access to information.

The courts and Congress have played a role in the protection of the First Amendment rights of children. Because religious values can form the essence of self-identity, and because children are deemed impressionable, the rights of parents to protect their growing children's value systems are respected by the courts as are the rights of children to access information and express themselves. The rights of minors to form groups, express beliefs, and

have access to reading materials have been upheld by the courts.

The tension between school boards, parents and student groups is a crossroad of controversy. In 1943, the Supreme Court ruled that Jehovah's Witnesses' children could not be expelled for refusing to salute the flag in public schools. The Court stated:

"The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command."

Justice Jackson reasoned, "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. Here, however, we are dealing with a compulsion of students to declare a belief. Authority here is to be controlled by public opinion, not public opinion by authority." West Virginia v. Barnette, 319 US 624 (1943).

In Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), junior high students were suspended for wearing black armbands to school in protest of the Vietnam War. The court affirmed the right of the children to wear armbands as a right of symbolic expression and quoted the Barnette case: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Congress passed the Equal Access Act in 1984 to cover clubs in public secondary schools. A club can not be excluded from use of school facilities because the club has a religious purpose. Each club must have equal access to

meeting spaces, the public announcement system, school periodicals, and bulletin board space. Officials can require all clubs to follow a set of rules, including non-discrimination policies. In the case of Rosenberger v. Rectors of the University of Virginia, 515 US 819 (1995), the U.S. Supreme Court invalidated a policy which denied funds to a Christian student newspaper on both Free Exercise and Establishment Clause grounds. The Court found that once a public university chooses to fund some student viewpoints, it may not choose which viewpoints to fund. Democratic political participation invites all ideas and values; since religious values will necessarily intertwine with ideology, religious values must have equal access to the public forum.

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. In the case of Edwards v. Aquillard, 482 US 578 (1987), Louisiana's Creationism Act forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of creation science. The Act did not require the teaching of either theory unless the other was taught. It defined the theories as scientific evidence for creation or evolution. The U.S. Supreme Court invalidated the Creationism Act because the Act's primary purpose was to change the public school science curriculum to provide a persuasive advantage to a particular religious doctrine (creation science) that rejected the factual basis of evolution in its entirety. Thus, the Act was designed either to promote the theory of creation science, which embodied a particular religious tenet or to prohibit the teaching of a scientific theory disfavored by certain religious sects. Justice Scalia, in dissent, chided the majority for censoring a belief system and equated the theory of evolution to secular humanism, which is a court-acknowledged belief system. He stated:

"The censorship of creation science has at least two harmful effects. First, it deprives students of knowledge of one of the two scientific explanations for the origin of life and leads them to believe that evolution is proven fact; thus, their education suffers and they are wrongly taught that science has proven their religious beliefs false. Second, it violates the Establishment Clause. The

United States Supreme Court has held that secular humanism is a religion. Thus, by censoring creation science and instructing students that evolution is fact, public school teachers are now advancing religion in violation of the Establishment Clause."

The contents of public school libraries have engendered many lawsuits. Educational information can be part of a curriculum through text or lecture or available in a public school library. The removal of books from a library is subject to court scrutiny if the restriction on a minor's access to materials is motivated by discrimination

against a viewpoint. In the U.S. Supreme Court case of Board of Education v. Pico, 457 US 853 (1982), the Court ruled that school officials may not remove books from school libraries because they disagree with the ideas contained in the books. The case began when a parent group submitted a list of books to the school board and asked to have the books removed. The Board of Education agreed with the parent group, and the Board argued in court that the Board must be allowed unfettered discretion to "transmit community values" through the schools. The Court disagreed with this position and reasoned that access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, and that such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

In a similar case, Minarcini v. Strongsville City School District, 541 F.2d 577 (1976), the Strongsville City Board of Education rejected the faculty recommendations to purchase Joseph Heller's Catch-22 and Kurt Vonnegut's God Bless You, Mr. Rosewater and ordered the removal of Vonnegut's Cat's Cradle from the library. The U.S. Court of Appeals for the Sixth Circuit made a distinction between the right of the school board to be selective in attaining a book and the limitations on a school board to remove a book once a book is in the library. The Court ruled against the removal of books, citing the rights of the students to receive information. Justice Brennan declared in another school board case, "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in

politics, nationalism, religion or other matters of opinion."

A provision of the Federal Communications Decency Act (CDA) of 1996 sought to make it a crime to put indecent adult-oriented material on the Internet where a child may find it. In Reno v. ACLU, 117 S.Ct. 2329 (1997), the U.S. Supreme Court ruled parts of the CDA to be unconstitutional as too vague and trampling on the free-speech rights of adults. The rationale of the Court was that the interest in encouraging freedom of expression in a democratic society outweighs any theoretical, but unproven, benefit of censorship. The message that parents should take away from this decision is that it is the parents' responsibility to develop children's values and that the Government can not dictate content or appropriate beliefs; and, parents can not rely on the media or libraries to make moral decisions for individuals. Individuals decide what ideas are right and wrong and individuals must be free to express a belief. Government can regulate actions and conduct but must strive to be neutral in regulating contents of an expression of belief. This neutrality toward the expression of viewpoints is the key aspect of toleration.

The U.S. Constitution and its principles stand as a beacon of encouragement for mankind. On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, which is comparable to the Free Exercise clause. Article 18 proclaims:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The right to free thought, though not yet experienced by all, is a natural right essential to the human condition. Tolerance of different ideas is a virtue which results in increased mutual understanding of others and the flourishing of new ideas. The rule of law ensures this diversity in belief systems and the existence of a society where people can have a life which is civilized and free.