

# **The ACLU and Freedom of Religion and Belief**

## **November 2006**

Religious freedom is a fundamental human right that is guaranteed by the First Amendment's Free Exercise and Establishment clauses.[1] It encompasses not only the right to believe (or not to believe), but also the right to express and to manifest religious beliefs. These rights are fundamental and should not be subject to political process and majority votes. Thus the ACLU, along with almost every religious and civil rights group in America that has taken a position on the subject, rejects the Supreme Court's notorious decision of *Employment Division v. Smith*. In *Smith*, Justice Scalia wrote that the accommodation of religion should be left "to the political process" where government officials and political majorities may abridge the rights of free exercise of religion.[2]

While most religious and civil liberties groups have rightly criticized the *Smith* decision's leaving the free exercise of religion "to the political process," the ACLU is in a select group that has (more consistently) argued that other issues involving government endorsement and sponsorship of religion also should not be left to government officials and political majorities (under the Establishment Clause). The question whether a religious monument should be erected on public property or whether religious activities should be subsidized is not one to be made by the politically influential or by local majorities. The Constitution does not endorse any religious creed, and it does not recognize any power of government to decide theological questions. Beliefs about the nature of God is a proper subject for individuals, families, religious communities, and theologians, but not for government bodies such as the U.S. Congress or a local school board.

### **Religion in the Public Square**

Religion is pervasive in the public square in the United States - and it is constitutionally protected. The ACLU has long defended individuals, families, and religious communities who wish to manifest their religion in public. (Learn More) Particularly when compared to other industrialized democracies, religion plays a prominent role in American public life. Churches, synagogues, mosques, temples, cathedrals, and Gurdwaras are plainly visible in the public sphere and their right to display religious symbols and to construct religious edifices is protected by the Constitution and by statutes.[3] The ACLU has supported the right of people to preach their religion in public places and to go door-to-door to spread their religious messages. The Constitution properly protects the right of religious figures to preach their messages over the public airwaves. Religious books, magazines, and newspapers are freely published and delivered through the U.S. Postal System. No other industrialized democracy has as much religion in the public square as does the United States.

Some people, however, mistakenly use the word "public" when they really mean "governmental." This can be seen, for example, with Ten Commandments monuments. The right of churches and families to erect such monuments on their own property is constitutionally protected, regardless of whether it is public or private and regardless of whether someone is offended or not. A Christian cross that is fully visible from a public sidewalk is constitutionally protected when placed in front of a church. But if that same cross were moved across the street and placed in front of city hall, it would violate the Constitution. The issue is not "religion in the public square" - as the rhetoric misleadingly suggests - but whether the government should be deciding whose sacred texts and symbols should be placed on government property and whose should be rejected.

### **Religion in the Public Schools**

One of the most hotly disputed - and most frequently misunderstood - issues involving religion in America is the role of religion in public schools. The airwaves are filled with rhetoric suggesting that the Supreme

Court (or secular humanists!) took prayer, God, or religion out of the public schools. To clear up some of this confusion we should start with identifying what is constitutionally protected, and then look at what is constitutionally suspect.

First, children are free to pray in public schools either as individuals or in groups. In addition, whenever a teacher opens up an assignment topic for the children's choice (such as which book to read, what to discuss in a talk to the class, or which song to sing), students may choose religious themes - and the ACLU has protected their right to do so. (Learn More) In addition, schools may offer courses about religion or about the Bible or other religious works.

There are, however, two difficulties to which all should be aware. First, public schools themselves should not be in the business of promoting particular religious beliefs or religious activities. While it is permissible for public schools to teach about religion, it is not permissible to promote particular religious beliefs. Although public schools should not be leading children in prayers or religious ceremonies, they should also be respectful of the religious beliefs of students. Second, public schools should protect children from being coerced by others to accept religious (or anti-religious!) beliefs. Public schools should seek to create an environment conducive to learning by all students and not act as vehicles proselytizing for religious or anti-religious beliefs.

The ACLU believes that the religious education of children should be directed primarily by parents, families, and religious communities - and not the public schools. They are, in fact, public schools and not Sunday schools.

## **American History and Government-Funded Religion**

Some of the early European settlers in America came in pursuit of religious freedom. But many others came to create their own religious establishments that were designed to link religion and the state and to exclude those whose religious beliefs differed from the majority. The seventeenth and eighteenth centuries witnessed several different approaches to religion. In retrospect, we look back to the early experiments in the colonies of Rhode Island (led by the Baptist Roger Williams who had been expelled from Massachusetts) and Pennsylvania (by the Quaker William Penn) as promoting what would ultimately become the American model of separating religion and the state. In the American model it was believed that both religion and the political community prospered best when the state refrained from involving itself in religious matters and where religions did not vie with each other for government revenues and support. The early experiments in Rhode Island and Pennsylvania were revolutionary at the time, and a far cry from Europe where both religions and governments struggled to control the other.

One of the most important developments in American religious liberty came in response to a draft law proposed in the Virginia House of Delegates in 1785. "A Bill Establishing a Provision for Teachers of the Christian Religion" would have taxed Virginia landowners to pay for Christian pastors. After meeting with the Baptists of Virginia, who were strongly opposed to the bill, James Madison led the fight against Henry's state-funded religion bill. In his famous Memorial and Remonstrance, Madison criticized the funding bill, which he repeatedly decried for its "establishing" religion and for interfering with freedom of conscience. (Learn More) The Memorial and Remonstrance is now recognized as one of the great classics in religious freedom and the American approach to protecting this right. Madison argued that religion prospers best when it relies on its own ingenuity and does not attempt to use the state to support

its activities. Many of the heated religious conflicts in Europe, according to Madison, came from the church seeking political power at the same time that the state sought to manipulate religious believers by offering them money.[4] Madison brought those same insights and sentiments into his work as the principal drafter and legislative sponsor of the First Amendment to the Constitution.

Time has shown the wisdom of Madison's analysis. There is more religious freedom in the United States than in the European countries that continue to mix religion, money, and government far more pervasively than does the United States. In France, the state subsidizes private religious instruction. Do we wish to adopt the French approach of having the state pay for private religious instruction? In Germany and Spain, the state is involved in promoting sectarian religious education in public schools. Is this what we want? The Church of England in the United Kingdom has symbolic if not actual primacy. In Scandinavian countries, the state has long been involved in financing religious activities. (They are now moving to disestablish their churches, just as Americans did 200 years ago.) In all of these countries, religion receives more financial support from the state than it does in the United States and, at the same time, religious activity is much lower. Does government funding of religion make religion lazier? Madison thought so and the European experience would seem to bear this out. It is difficult to understand why people might want to replace the successful American approach that has fostered religious freedom and adopt instead European models that appear to have been far less successful.

Curiously, in most areas of the economy, the trend in the United States has been to reduce government subsidies and involvement in matters such as utilities, the postal service, telecommunications, and private enterprise. Increasingly the trend has been to "privatize" prisons, public education, and other public services. There is one startling exception to this general rule: many Americans are increasingly urging the government to invest its money in - of all things - religion. While people sharply disagree about whether privatization generally is a good idea, there is no apparent reason to have government funding of religion be a major exception.

## **A Final Thought**

The first great Supreme Court freedom of religion case was decided in the middle of World War II in *West Virginia v. Barnette*. In one of the Court's most frequently quoted passages it said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[5]

In the *Barnette* decision, the Jehovah's Witnesses asserted that it was against their religious beliefs to pledge allegiance to a flag; they believed that their allegiance should be pledged solely to God. Because of their deeply held religious beliefs, Jehovah's Witnesses children who declined to recite the pledge in unison with others were expelled from schools. Their parents were thrown in jail and attacked and beaten on the streets in America. In the *Barnette* case, the Supreme Court finally sided with the ACLU and came down squarely in support of religious freedom and the freedom of conscience of religious believers.[6]

Whether we think of Madison's Memorial, or the Supreme Court's *Barnette* decision, we should constantly remind ourselves that religion is a fundamental right that needs to be protected for individuals, families, and religious communities. The government has no business telling any American what to believe in religious matters or deciding which side to support - symbolically or financially - in religious questions.

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[1] The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." Article VI of the Constitution contains another provision that also is of particular importance: that there shall be no religious test for public office.

[2] *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). The majority opinion was written by Justice Scalia and joined by Chief Justice Rehnquist and by justices White, Stevens, and Kennedy. The Court held that a neutral law of general applicability may constitutionally result in incidental restrictions on free exercise where there was no contention that the government intended to target religious activity with the law. (The ACLU filed an amicus brief before the Court arguing that the free-exercise right should prevail.) The national opposition to the Smith case and its reasoning was overwhelming. The ACLU joined with a broad coalition of religious and civil liberties groups, including People for the American Way, the National Association of Evangelicals, the Southern Baptists' Ethics Religious Liberty Commission, and by many other groups to urge Congress to reinstitute the rule that religious freedom could be constrained solely if the government had a "compelling interest" in doing so. The Congress agreed overwhelmingly with the ACLU's position (that was rejected by Justices Scalia, Rehnquist, White, Stevens and Kennedy), and adopted the Religious Freedom Restoration Act of 1993 unanimously in the House and by a vote of 97-3 in the Senate.

[3] After the Supreme Court struck down parts of the Religious Freedom Restoration Act (*City of Boerne v. Flores*, 521 U.S. 507 (1997)), the ACLU worked with a broad coalition of religious groups and civil rights groups - across the political spectrum - to help enact the Religious Land Use and Institutionalized Persons Act which, among other important protections for religious liberty, gives religious groups added protections for erecting religious buildings.

[4] For a contemporary illustration of this very problem, read David Kuo, *Tempting Faith* (2006), especially pages 140-41, 160, 166, 168-69, 199-200, 213-16.

[5] *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[6] Incidentally, the American Legion, which recently has been critical of the ACLU on freedom of religion grounds, was on the wrong side of the law in the Barnette case. In its amicus brief, the American Legion argued against allowing a religious exemption for the Jehovah's Witnesses.