THE MOVEMENT FOR RELIGIOUS RIGHTS

by **Michael W. McConnell**

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In the past few decades, there has been an extraordinary secularization of American public life, especially in the schools. Religious and traditionalist parents are finding that their viewpoints and concerns are ruled out-of-order, while at the same time the schools can be used to promote ideas and values that are sometimes offensive and hostile to their own.

This has inspired many conservative Christian groups to propose legislation, or even a constitutional amendment, to guarantee equal treatment for religious speakers, groups, and ideas in the public sphere. This would end the double standard that currently denies religious speech and practice the protections offered all other kinds of expression. The proposals include two principles:

First, when private persons (including students in public schools) are permitted to engage in speech reflecting a secular viewpoint, then speech reflecting a religious viewpoint should be permitted on the same basis.

Second, when the government provides benefits to private activities, such as charitable work, health care, education, or art, there should be no discrimination or exclusion on the basis of religious expression, character, or motivation. Religious citizens should not be required to engage in self-censorship as a precondition to participation in public programs. (This idea was incorporated in the Senate welfare reform bill.)

Most people agree that government should be neutral toward religion, but the beginning of wisdom in this contentious area of law is to recognize that neutrality and secularism are not the same thing. In the marketplace of ideas, secular viewpoints and ideologies compete with religious viewpoints and ideologies. It is no more neutral to favor the secular over the religious than it is to favor the religious over the secular. It is time to reorient constitutional law away from the false neutrality of the secular state, and toward a genuine equality of rights.

The demand for religious equality is often denounced as a tactic of the so-called "religious right," but it was Justice William Brennan, the leading liberal on the Court in this generation, who wrote that "religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The establishment clause...may not be used as a sword to justify repression of religion or its adherents from any aspect of public life" *(McDaniel v. Paty, 1978).*

Unfortunately, Justice Brennan's words now serve more as a description of needed reforms than as a description of prevailing law. Whether because of mistaken views of constitutional law, fear of lawsuits, or actual hostility to traditional religion, school officials and other government functionaries frequently deny the rights of religious citizens with impunity. Usually the victims of these violations lack the courage, resources, or inclination to sue. With surprising frequency, these official acts are upheld by the courts. Even when they are not upheld, the officials suffer no penalty and have no incentive to change their ways.

In thousands of cases, valedictory speeches have been censored because of religious content, student research topics have been selectively curtailed, distribution of religious leaflets has been limited, and public employees have been ordered to hide their Bibles. (See sidebar.) Some of this discrimination is blatantly unconstitutional; some of it has been upheld under current constitutional doctrine; all of it thrives on the uncertainty and confusion of Supreme Court decisions.

Interpretation of the establishment clause of the First Amendment during the past 40 years has wavered between two fundamentally inconsistent visions of the relation between religion and government. Under one vision, known as "strict separation," there is a high and impregnable wall dividing government and religion. Religion is permitted—indeed it is constitutionally protected—as long as it is confined to the private sphere of home, family, church, and synagogue. But the public sphere must be strictly secular. Laws must be based on strictly secular premises, public education must be strictly secular, public programs must be administered in a strictly secular manner, and public monies must be channeled only to strictly secular activities.

In the public schools, this means that religious references in the curriculum have been comprehensively eliminated and religious students are forced to shed their constitutional rights at the schoolhouse gate, while advocates of various "progressive" ideologies are free to use the schools to advance their ideas of public morality, even when these ideas contradict the convictions of religious parents. It is no wonder that many parents have come to believe that the First Amendment is stacked against them.

This "separationist" model may be contrasted with what I think is the authentic vision of church-state relations in America: one of equality of rights. Under this vision, no individuals, groups, or ideas are given special status on the basis of their religion or philosophy. All are treated equally. The result is not a secular public sphere, but a pluralistic public sphere, in which every viewpoint and worldview is free to participate and "to flourish according to the zeal of its adherents and the appeal of its dogma," as Justice William O. Douglas observed in *Zorach v. Clawson* (1952).

Under this view, the First Amendment protects the religious lives of the people from unnecessary intrusions of government, either in the form of promoting religion (the "establishment" clause) or of hindering it (the "free exercise" clause). This approach will foster a regime of religious pluralism, not one of secularism or majoritarian religion, and preserves what James Madison called the "full and equal rights" of religious believers and communities to define their own way of life, so long as they do not interfere with the rights of others. It allows religious Americans to participate fully and equally with their fellow citizens in public life, without being forced to shed or disguise their religious convictions and character.

History shows clearly that the establishment clause of the First Amendment was designed to ensure that no religion is given a privileged status in American public life. It was certainly not intended to require the secularization of society. The First Amendment has been turned on its head today: from a guarantee of freedom for religion, to an excuse for official hostility to religion. It is time that the equal rights of religious citizens to speak and participate in public life be clearly recognized and protected in the law.

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THE CASE FOR A RELIGIOUS LIBERTY AMENDMENT

Conservative spokesman William Bennett describes religious discrimination as "the last respectable form of bigotry in America." Yale law professor and self-described liberal Stephen Carter says religious people are unfairly excluded from public affairs today. Both blame twisted interpretations of the U.S. Constitution.

The First Amendment was drafted to protect religious liberties by forbidding government interference in religion. Many modern politicians and judges have used it to forbid public expressions of faith, however. This, warns Stephen Carter, is exactly backwards: "The danger the separation of church and state guards against is not religion," he says. "It is the state."

Below are some recent examples of how the state now interferes with American religious practice. Many observers believe cases like these collectively call for strengthened Constitutional protections for religious freedoms.

Guidry v. Broussard (1990) A high school valedictorian planned to devote a portion of her graduation speech to the importance of Jesus Christ in her life. The principal ordered her to remove the offending portion; she refused and was eliminated from the graduation program. The district court and the court of appeals upheld the principal's action.

Bishop v. Aronov (1991) A tenure-track professor of exercise physiology at the University of Alabama made occasional references in class to his religious beliefs and offered an optional, after-class lecture entitled "Evidences of God in Human Physiology." The dean ordered him to cease these activities even though professors at the university were guaranteed academic freedom to make personal remarks during class so long as they were not excessive, disruptive, or coercive. The court of appeals affirmed the dean's order.

Settle v. Dickson County School Board (1995) Students were asked to choose a topic for a research paper that was "interesting, researchable, and decent." Among the subjects approved were "spiritualism," "reincarnation," and "magic throughout history." One student, who asked to write on "the life of Jesus Christ," was refused permission, however, and ultimately received a grade of "zero" on the paper. The teacher stated that "the law says we are not to deal with religious issues in the classroom." The Sixth Circuit Court of Appeals upheld the grade she awarded to the student.

Lee v. Weisman (1992) The principal of Nathan Bishop Middle School in Providence, Rhode Island, invited Rabbi Leslie Gutterman to deliver non-sectarian prayers at its graduation ceremony. Student Deborah Weisman and her father Daniel filed suit, objecting to being subjected to any prayer as part of the public ceremony, even though Weisman did not have to attend the ceremony to receive her diploma, was not required to stand when the prayer was spoken, and was not even required to maintain respectful silence. The U.S. Supreme Court, in a close decision with numerous separate opinions, held that the Weismans' constitutional rights under the First Amendment had been violated by the delivery of this prayer and that the school officials should be enjoined from sponsoring a prayer during future graduation ceremonies.

Perumal v. Saddleback Valley School District (1988) Students at a southern California public high school were forbidden to distribute leaflets inviting other students to their Bible study group, despite a California statute specifically permitting students to distribute petitions and other printed materials. The state appellate court upheld the school's action.

Roberts v. Madigan (1990) A fifth-grade public school teacher was ordered by the assistant principal to remove a Bible from the surface of his desk, to refrain from reading the Bible during the class silent reading period, and to remove two illustrated books of Bible stories from a classroom library of over 350 volumes. The court of appeals upheld the principal's action, holding that the teacher's conduct violated the establishment clause.

Kaplan v. City of Birmingham (1989) and *Smith v. County of Albemarle* (1990) Citizens sought to erect religious symbols on public property where display of nonreligious symbols was permitted, but were refused on the basis of their religious message. In both cases, the courts of appeals in effect agreed that the establishment clause overrides the free speech clause. (Other federal appellate decisions have gone the other way on the same issue. The Supreme Court may resolve the matter this term in *Capitol Square Review and Advisory Board v. Pinette.)*

Hedges v. Wauconda Community School District (1993) An eighth grader attempted to hand out a religious leaflet to her fellow students before school. The principal retrieved the leaflets and ordered her not to distribute such literature again. The school's written policy prohibited distribution of material that was obscene, pornographic, pervasively indecent, invasive of the privacy of others, disruptive, or religious. This was struck down by the district court, but the school board later issued a new policy that is equally discriminatory against religious material.

Loehner v. O'Brien (1994) In Florida, a principal confiscated and destroyed invitations distributed by an elementary school student to her friends inviting them to a church-based alternative to a Halloween party. In this case the courts intervened on behalf of the student.

Garnett v. Renton School District (1993) After passage of the Equal Access Act in 1984, high school students in Renton, Washington, who wanted to form a prayer and Bible study club after school asked permission and were denied. The case took nine years and involved three trips to the district court, four trips to the court of appeals, and two trips to the Supreme Court before the students ultimately won vindication of their rights. At the end, the ACLU and the American Jewish Committee made the extraordinary argument that the school district should shut down its entire extracurricular program rather than allow the students to meet.

Fordham University v. Brown (1994) The Department of Commerce rejected the application of the public radio station operated by Fordham University for federal funding for construction of a new radio tower under the Public Telecommunications Facilities Program, solely because for the past 47 years the station has broadcast a Catholic mass from the Fordham University chapel for one hour each Sunday morning. The district court upheld the decision.

Rosenberger v. Rector and Visitors of the University of Virginia (1995) To provide a public forum for their ideas, a group of Christian students at the University of Virginia founded a publication called *Wide Awake.* Although they met all eligibility requirements for school funding, they were excluded because their editorial perspective was "religious." The university funds many publications expressing controversial viewpoints of a secular nature, including gay rights, racist, pro-choice, and Marxist journals, but disallows all publications addressing issues from a religious perspective. In a 5–4 decision, the U.S. Supreme Court overruled the university's decision.

Witters v. Department of Services for the Blind (1989) The state of Washington had a voucher program to pay for vocational education of the blind. Larry Witters, an eligible individual, wished to use these benefits to study for a career in the clergy. Because of the religious nature of his proposed field of study, the Washington Supreme Court held that funding would violate the establishment clause. The U.S. Supreme Court unanimously rejected that position, holding that state assistance for religious training does not violate the First Amendment so long as the aid is made without sectarian preference.

Beverly Schnell v. Labor and Industry Review Commission (1991) Beverly Schnell placed a classified housing ad for a "Christian handyman." She wanted a tenant who could help her remodel her home in exchange for low rent. As a Christian, she sought other Christians first, although she stated she would not discriminate against non-Christian applicants. Schnell was penalized $8,000 by a Wisconsin administrative law agency.

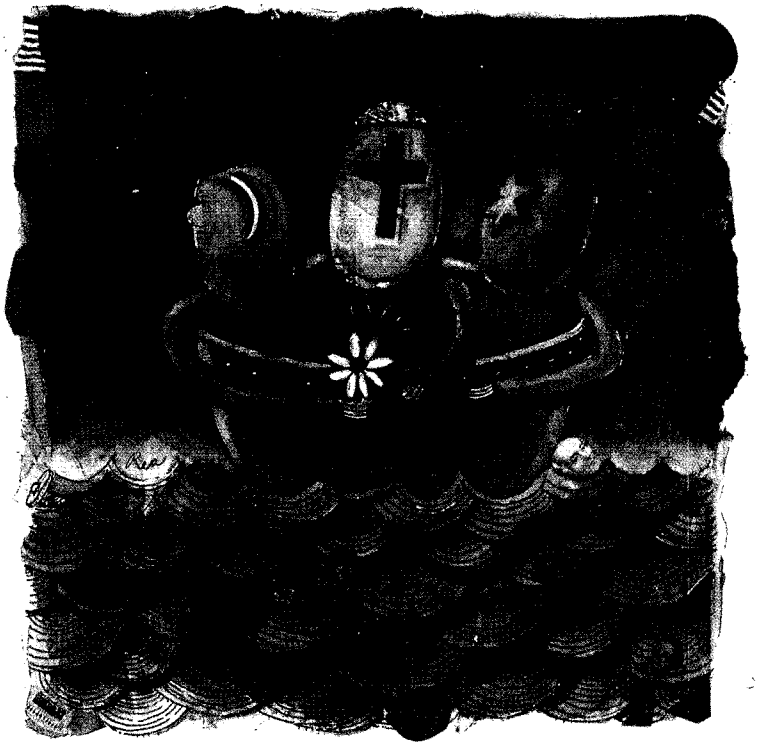
Miller v. Benson (1995) A federal district court ruled that the state of Wisconsin may not extend its school choice plan to religious schools. A student qualifying for the program in Milwaukee can attend progressive, Afrocentric, or other schools, but not one where the philosophical orientation is religious.

Daniel Lopez v. Tarrant County Junior College District (1994) Student Daniel Lopez was ordered by administrators of his junior college in Texas to stop distributing pamphlets containing Bible verses. College officials threatened him with disciplinary sanctions if he continued to hand out pamphlets on campus, stating that "the campuses of Tarrant County Junior College are not public fora for purposes of free speech activities."

Raines v. Cleveland Young (1994) Raymond Raines, an elementary school student in St. Louis, Missouri, was placed in a week-long detention for bowing his head over his lunch. School officials interrupted the fourth grader on at least three separate occasions when he attempted to say a private prayer over his lunch in the Waring School cafeteria. On each occasion, Raines was taken to the principal's office and told to stop praying over his lunch.

FEMA Disaster Aid (1995) After the Oklahoma City bombing, the Federal Emergency Management Agency refused to provide aid to damaged churches (though they provided much aid during the crisis). Bars, restaurants, bookstores, and other privately owned buildings were eligible for funds, however.

The Orthodox Alliance



by Fred Barnes

The head table at the Christian Coalition's "Road to Victory" conference in early September was a mosaic of ecumenism. Seated in front of the podium was Rabbi Daniel Lapin, an Orthodox Jew from Seattle and founder of Toward Tradition, a conservative group. Nearby was the Reverend E. V. Hill, a black Baptist preacher from Los Angeles. Not far away was the Reverend Michael Goodyear, a Roman Catholic priest from Washington, D.C. And of course Pat Robertson, the Christian Broadcasting Network executive and chief honcho of the Christian Coalition, was there. Robertson and his sidekick, Ralph Reed, have long been eager to reach beyond evangelical Protestants and create what might be called the Interfaith Coalition. The demographics of the head table showed they're making headway.

And Robertson and Reed aren't the only religious conservatives bent on transcending centuries of distrust, fighting, bigotry, and anti-Semitism to embrace allies of radically different theology. When Orthodox Rabbi Yechiel Eckstein, president of the International Fellowship of Christians and Jews, began exploring the idea of opening a Washington office, he called on Bill Bennett, the former drug czar and a Roman Catholic, for advice.

When James Dobson, an evangelical Christian, wanted to bolster his attacks on "moral decline," he invited movie critic Michael Medved, an Orthodox Jew, on his popular "Focus on the Family" radio show to talk about Hollywood and films. When Bennett gathered a group in Washington to discuss ways to halt cultural decay, he invited, among others, Catholics (George Weigel of the Ethics and Public Policy Center and Russell Hittinger of Catholic University and the American Enterprise Institute) and Jews (Lapin and Bill Galston, a former Clinton White House aide) and Protestant evangelicals (Chuck Colson of the Prison Fellowship and Lou Sheldon of the Traditional Values Coalition).

"These things are happening all the time and there's an explanation for it," says Michael Cromartie of the Ethics and Public Policy Center. "There's a new ecumenism. Divisions that separate Catholics and Jews and Protestants are breaking down because of the culture war. These people are so concerned about the moral decline of the country that they're willing to bracket aside their doctrinal differences in order to rebuild a culture."

This is a rapidly congealing movement with extraordinary potential. It represents an historic breakthrough, uniting conservative religious groups that bitterly scorned each other until recently. And it may emerge as a majority coalition in American politics. Pollster Fred Steeper of Market Strategies concluded after the 1994 election that the agenda of religious conservatives is shared by most Americans. Reed says when he was hired in 1989 to run the Christian Coalition, Robertson declared: "If you can get the evangelical Christians and the pro-family Roman Catholics to work together, there isn't any bill you couldn't pass in Congress or in any state legislature in the country."

Robertson still believes that. One result is the founding of a new offshoot of the Christian Coalition, the Catholic Alliance. (In studying the demographics of its 1.7 million membership, the coalition had discovered it was already 16 percent Catholic and nearly 2 percent Jewish.) Hired to run the alliance was Maureen Roselli, a former staffer of the National Right to Life Committee. "We're not trying to get the bishops involved in politics," says Reed. "We want to provide a vehicle for lay Catholics who are pro-family and pro-life." The Christian Coalition's Washington office is already such a vehicle: the staff consists of four Catholics and one Jew.

There's a backdrop to this union of Catholics and evangelicals: the pro-life movement. It was predominantly Catholic until the 1980s, when Protestant evangelicals swept in. Still, the

Illustration by Brian Alan Rea