ISSUES IN PERSPECTIVE

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First Amendment Freedoms under Stress

Perhaps the most important rights enumerated in the Bill of Rights (the Constitution's first Ten Amendments) are two of the four listed in the First Amendment—the freedom of speech and the freedom of religion ("the free exercise" of religious beliefs and conscience). Both of these precious freedoms are under significant stress today and in fact are threatened by the realities of this Postmodern, post-Christian era in which we live. Both need rigorous defense and protection, and, according to the Constitution, it is the state that is to offer the foremost protection of these two rights. Let's examine the nature of this stress.

- First of all, let's think about the free exercise of religious expression and practice. The United States has always protected the free exercise of religious expression and practice—the free exercise of conscience. It is most fascinating that even in the 1960s and 1970s during the Warren and Burger Supreme Court years, it was the "progressives" (then known as liberals) who were most passionate about protecting the freedom of religious expression. For example, in 1963 Adell Sherbert, a Seventh-Day Adventist, lost her job in a textile mill because she refused to work on Saturday. When Sherbert was denied unemployment compensation, she sued. The Supreme Court found that South Carolina had interfered with her religious liberty ("free exercise thereof"), while lacking a compelling reason for doing so. Under what became known as the "Sherbert test," the Court went on to vindicate Amish and Jehovah's Witness litigants, decisions that liberals praised "as much-needed judicial protection of vulnerable religious minorities."

  In 1990 the Supreme Court modified the "Sherbert test," in *Employment Division v. Smith,* in which two Native-Americans were denied unemployment compensation when they were fired because they ingested peyote as a part of their religious observance. Congress responded to that decision by passing the Religious Freedom Restoration Act (RFRA) in 1993, which restored the principle that the government may not interfere on a right unless it has an exceptionally good reason for doing so and "uses a narrowly tailored means to accomplish this goal." Subsequently, the Court held that RFRA applied only to federal, not state laws. In challenges to the Obamacare provision concerning contraception products and in cases dealing with freedom of religious expression as it relates to laws/decisions granting same-sex marriage and now transgender rights, at the state level, RFRA does not apply. Further, in such instances, liberals (now calling themselves "progressives") regard religious accommodation and freedom of religious expression with suspicion and often scorn. Abortion rights (as interpreted and applied from the 1973 *Roe v. Wade* decision) and same-sex marriage

rights (as interpreted and applied from the 2015 *Obergefell v. Hodges* decision), for the progressive, always trump free exercise of religious expression rights.

- Second, in the state of California a bill is being considered that fundamentally alters the "free exercise" rights of faith-based colleges and universities. This legislation, entitled Equity in Higher Education Act, and subsequent proposals offered as compromises would seriously harm faith-based higher educational institutions. The legislation's goal is to protect students from discrimination, with the primary focus being students who embrace the LGBT lifestyle. At this point, it seems that the legislation will not pass the California legislature, but it shows once again how vulnerable free exercise rights are for faith-based institutions. Students who attend faith-based higher educational institutions do so because they embrace the rules, policies and aspirations of that institution. These institutions do not hide their community standards and policies, which are available online and in print. The free exercise clause of the First Amendment means that US citizens should make religious decisions for themselves—(as Michael A. Helfand of Pepperdine School of Law argues) "free from government compulsion. People who choose to join a religious institution agree to accept the rules that come with membership. The state should recognize that. Conversely, Americans should be skeptical if legislators try to interfere with internal religious rules without an extremely pressing justification, such as protecting the safety of vulnerable citizens."

- Finally, freedom of speech is under significant stress, especially on US college campuses. This is somewhat ironic because this is the "golden age of free speech. Your smartphone can call up newspapers from the other side of the world in seconds. More than a billion tweets, Facebook post and blog updates are published every single day. Anyone with access to the Internet can be a publisher, and anyone who can reach Wikipedia enters a digital haven where America's First Amendment reigns" (*The Economist*, 4 June 2016). Despite this "golden age," freedom of speech is genuinely threatened by those who argue that people and groups have a right not to be offended. The challenge of this newly articulated right is that if I have the right not to be offended, then someone must police what you say about me, or "about the things I hold dear, such as my ethnic group, religious or even political beliefs. Such offense is subjective; the power of the police is both vast and arbitrary." And freedom of speech is the best defense against bad government. Freedom of speech fosters free debate, which sorts out good ideas from bad ideas. Freedom of speech is challenged by laws against hate speech for they are unworkably subjective and widely abused. "Banning words or arguments which one group finds offensive does not lead to social harmony. On the contrary, it gives everyone an incentive to take offense—a fact that opportunistic politicians with ethnic-based support are quick to exploit." On US campuses "new-wave feminists and sexuality campaigners" are traumatizing these campuses insisting that everyone (faculty and students) adhere to their views. Often "pluralistic curriculums, cultural-awareness training for staff, more diverse faculties and extra facilities for minorities" characterize the demands of these various groups. Thuggish tactics are often used to enforce these demands, even to the extent of enforcing rules for

> Halloween costumes on college campuses so that they do not offend! Under pressure from students and some faculty, administrators have been forced to disinvite commencement speakers because they could offend some group (e.g., Condoleezza Rice, former secretary of state, Ayaan Hirsi Ali, a former Muslim, and Jason Riley, an African-American journalist, whose book, *Please Stop Helping Us: How Liberals Make it Harder For Blacks to Succeed* some considered offensive). Finally, college campuses are now characterized by "trigger warnings," whereby students are warned about potentially upsetting passages in novels, books and essays. There are now "safe spaces," dedicated "sanctuaries" for those who feel offended or hurt by what someone has said. As *The Economist* so wisely observes, "What really distinguishes them [today's student activists] from their predecessors . . . is not solipsism, impatience, or a certainty that can slide from admirable passion into self-righteousness, but the expectation that all their problems should be magicked away. Whereas, as Dr. [Nicholas] Christakis [of Yale University] says, universities 'cannot readily deliver utopia, much as we might want to.'"

Within American culture there are genuine threats to the priceless freedoms of religious expression and speech. These threats are real and formidable.

See *The Economist* (9 July 2016), p. 24 and (4 June 2016), pp. 9, 55-60 and Michael A. Helfand in the *Wall Street Journal* (15 July 2016).