

# RECONSIDERING THE FIRST FREEDOM

## SECOND THOUGHTS

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RELIGIOUS LIBERTY, WHY NOW?: DEFENDING AN EM-BATTLED HUMAN RIGHT, by *The Task Force on International Religious Freedom of the Witherspoon Institute* (Princeton, NJ: *The Witherspoon Institute* 2012)

In a class I teach at Baylor University, “Law and Religion in the United States,” I begin the semester by asking my students this question: If you were writing the Constitution from scratch in this day and age, would you include the religious free exercise and dis-establishment clauses? As you would guess, the students enthusiastically affirm their commitment to these principles. But then I follow up with these queries, “But why? What is so special about religion, its beliefs, and its practices, that require that your Constitution protect those of its citizens that embrace them? On the other hand, if religion, its beliefs, and its practices are of such importance to the political community, why would your Constitution at the same time prohibit the establishment of religion?”

That’s when the fun begins. For the students now have to provide a justification for what they want their new Constitution to include. They cannot merely appeal to our present Constitution to ground their claims, since the whole point of the exercise is to force them to provide an account of why our present Constitution’s religion clauses are justified.

Because we have largely taken these principles for granted, most of us, like my students, have never thought seriously about how we

would defend these principles if we were asked by skeptics, theocrats, or secularists to provide an account of them.

Most skeptics and secularists, for instance, do not believe that religious belief is rational. So for them, religious liberty must be subsumed under a citizen's more general right to hold private beliefs that are akin to personal preferences and matters of taste. Under this account, religious belief is no more entitled to be singled out for special protection than is the right to attend a Rolling Stones concert, consume pornography, believe in the tooth fairy, or play chess, though all these activities are permissible under a general right to acquire satisfaction for one's preferences. So, for the skeptic or secularist, a religious group that is engaged in what the state declares as "secular" activities, such as owning and running a university, hospital, or charitable organization, has no right to withhold from its employees and clients whatever the state requires that it must provide to them, even if the requirement violates the moral beliefs of the religious group.

Consistent with this understanding, in 2012 the U.S. Secretary of Health and Human Services (HHS), while claiming to uphold religious liberty, issued a mandate as part of the Affordable Care Act ("Obamacare") that requires all employers, even Catholic ones, to provide contraceptive and abortifacient services in their employee health plans. Because religion is private, like other preferences and tastes, and has only to do with liturgy and ecclesiology, the skeptic and the secularist see nothing untoward in this arrangement.

The theocrat, on the other hand, diminishes religious liberty as well, but for entirely different reasons. Because he believes that one religion is true, that particular faith should be the state's established religion, and thus disbelievers in that faith should not be accorded the same liberties and privileges as those who practice the true faith. Consequently, the state may, without violating any principles of justice, punish and persecute those who dissent from the state's religious orthodoxy.

**T**he difficulty in defending religious liberty is two-fold. On the one hand, if religion and religious belief is a special activity integral to the human condition and human happiness, then, like other unique activities, like speech, intellectual flourishing, friendship, etc., there are good and bad versions of it. That is, some

religions are truer than others. On the other hand, if that is the case, then why shouldn't the government give pride of place, if not its imprimatur, to that (or those) religion (or religions) that is (or are) good?

*Religious Liberty, Why Now?: Defending an Embattled Human Right* convincingly shows that this two-fold difficulty is not merely a theoretical exercise for legal philosophers and undergraduates studying Constitutional Law. How this difficulty is resolved has real-world implications. If the "religious liberty" of skeptics and secularists wins out, then religion and its deliverances—moral, doctrinal, philosophical, ecclesial, and social—are marginalized as sub-rational and unworthy of serious respect, without regard for whether the individual religious believer has epistemic warrant in holding his beliefs. "Religious liberty," therefore, becomes a metaphysical exclusionary rule that cannot be waived without a secular warrant. Hence, we have seen over the past decade in many Western nations a notable increase of government hostility toward religious beliefs as they are manifested in a variety of public issues, such as the HHS mandate, the right to speak critically of homosexual conduct, and child adoption policy.

If the "religious liberty" of the theocrat is victorious, then the right of the individual citizen to sincerely and conscientiously pursue questions of ultimate concern is not honored as a basic good. We see this, for example, in many nations throughout the Middle East, including Saudi Arabia, Iran, Jordan, and Afghanistan, which are, not coincidentally, the places in which many prospective terrorists are recruited and trained.

*Religious Liberty, Why Now?* is authored by the Task Force on International Religious Freedom of the Witherspoon Institute, a Princeton, New Jersey based think-tank. The Task Force consists of several scholars with differing specialties. Led by its Chairman, Thomas F. Farr (Georgetown University), along with Timothy Samuel Shah (Georgetown University) and Matthew Franck (Witherspoon Institute), the book's principal author and editor-in-chief respectively, the Task Force offers in this book a brief, though powerful, case for religious liberty. It provides a convincing answer to the two-fold difficulty that arises from the positions of the skeptics, the secularists, and the theocrats.

In May 2011 the Task Force invited more than thirty scholars from a wider range of academic disciplines to discuss, evaluate, and offer

policy recommendations concerning the diminishing of religious liberty both at home and abroad. This book is the fruit of that labor.

It is divided into two parts. Part One concerns the ground of religious freedom. The Task Force provides anthropological (chapter 1), political (chapter 2), moral (chapter 3), religious (chapter 4), and legal (chapter 5) cases for religious freedom. Chapter 4 includes individual essays by scholars representing the Jewish (David Novak), Christian (Nicholas Wolterstorff), and Islamic (Abdullah Saeed) traditions. Part Two concerns religious freedom and international affairs. Here the Task Force makes a strategic case for religious freedom (chapter 6) and then offers several policy recommendations (chapter 7).

Although it is a small book (86 pages) produced by a committee, it is not what I expected. What I found was a rigorous argument rich with insights and practical suggestions. Instead of starting with some highly theoretical understanding of what constitutes religion or the human good, the Task Force begins with the “facts on the ground.” This is why its first chapters concern anthropology, politics, and morality, discussing what in fact religion is and its place in the life of the individual and his community. It does not begin with some artificial and caricatured view of religion, such as the one offered by the University of Chicago law professor Brian Leiter (emphasis his): “[B]eliefs that *conjoin categorical commands with insulation from evidence.*” It takes religion and the personal and corporate search for religious truth seriously as it actually takes place in real religious traditions practiced and believed by real people.

The threats to religious freedom are real and growing. Many in the West are having second thoughts about its meaning and importance. In other parts of the world, many who reside in theocratic regimes are beginning to have their first thoughts. This book answers the doubts of the first and provides a blueprint for the longings of the second.

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