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California Three Rs

Rights, Responsibility, and Respect

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Religious Liberty in a Divided (and Confused) America

Charles C. Haynes, Director Religious Freedom Education Project

If you aren't worried about the future of the American experiment in religious liberty, perhaps you should be.

Consider the alarming fact that 53% of the American people mistakenly believe that "the U.S. Constitution establishes a Christian nation," according to a poll released by the First Amendment Center in September 2010.

The Constitution, of course, does no such thing. Even apart from the First Amendment, the "no religious test" for public office provision of Article VI would bar any attempt to establish Christian rule. And contrary to culture-war myth, the First Amendment does separate church from state — at first on the federal level in 1791, and then on all levels of government through the 14th Amendment (as interpreted by the U.S. Supreme Court in the 20th century).

For Thomas Jefferson and James Madison, the two Founders most frequently quoted by the modern Court on the meaning of the religion clauses of the First Amendment, full religious liberty is possible only in a society committed to both church-state separation and robust protection for the right to practice one's faith openly and freely. In other words, two principles — "no establishment" and "free exercise" — guard one freedom: religious liberty, or freedom of conscience, as an inalienable right for people of all faiths and none.

Establishment-clause Confusion

But how much separation does "no establishment" actually mandate under the First Amendment? Ongoing conflicts over where to draw the line on church-state relations — from petty fights over holiday displays to high-stakes litigation over state funding of religion — contribute to widespread public confusion about how the establishment clause is supposed to work.

In 2010, people on both sides of the "separation" argument had plenty to argue about — and these conflicts have left the wider public more confused than ever.

On one end of the spectrum, many conservative religious people have become more convinced than ever that "separation of church and state" has become code for "hostility to religion." Many were disappointed, for example, by the Supreme Court's refusal in March 2010 to hear an appeal of *Nurre v. Whitehead*, a lower court decision upholding a school district that prohibited students from playing an instrumental version of "Ave Maria" at graduation.

And in May, conservative Christian groups were outraged when a federal judge declared the National Day of Prayer unconstitutional (*Freedom from Religion Foundation v. President Barack Obama*). Although the prayer-day ruling will most likely be overturned, it provides fresh ammunition for those who claim that "separation" is used as weapon to keep religion out of the public square.

Meanwhile, on the other end of the debate, many strict separationists have continued to sound an alarm over what they perceive as a blurring of church-state lines because of the

influence of religious groups on public policy (especially in the current fights over legalization of same-sex marriage). In the courtroom, separationist groups filed lawsuits in 2010 to combat state entanglement with religion in cases involving everything from holiday displays in buildings to sectarian prayers at city council meetings.

In 2011, the Supreme Court has an opportunity to clear up some of the confusion — or, depending on where you stand, make matters worse. In *Arizona Christian School Tuition Organization v. Winn*, the Court will rule on whether a state program that gives parents tax credits for tuition at religious schools violates the establishment clause. If Arizona wins (as appears likely given the current makeup of the Court), the victory will continue the trend in the high court of lowering the “wall of separation” by allowing more government involvement with religion, including arrangements in which tax money reaches religious organizations through various forms of indirect funding.

Free Exercise Imperiled?

On the “free exercise” front, most Americans would be surprised to learn just how little protection the First Amendment provides for religious-freedom claims under current law. That’s because the U.S. Supreme Court seriously weakened the reach of the free-exercise clause in 1990 (*Employment Division v. Smith*) by ruling that government no longer must show a “compelling state interest” before denying a religious exemption to an otherwise neutral, generally applicable law.

To date, 14 states — Texas, Pennsylvania, Illinois, Florida, Arizona, Connecticut, Rhode Island, South Carolina, Alabama, Idaho, New Mexico, Oklahoma, Missouri and Virginia — have passed laws to restore the compelling-interest test.

In July 2010, we saw how such restoration works when the 5th U.S. Circuit Court of Appeals invoked the Texas Religious Freedom Restoration Act to uphold Adriel Arocha’s right to wear his hair in traditional braids in public school (contrary to the school’s dress code) — a practice his family believes expresses their faith as members of the Liban Apache tribe.

Under the Supreme Court’s current interpretation of the First Amendment, the Arocha family’s appeal for accommodation would likely fail. The school would need only to demonstrate that it treats Adriel like other students and has reasonable grounds for requiring short hair (e.g., hygiene, discipline). But those 14 states, through laws like the one in Texas, give back what the Supreme Court took away in 1990, affording religious claims a high level of protection.

Lack of accommodation by government, however, is not the only current threat to free exercise of religion. For some minority religious groups, religious liberty is undermined by a society increasingly infected with intolerance and hate. Strictly speaking, most anti-Semitism in America, for example, is not a First Amendment issue because it rarely involves government action against Jews. Nevertheless, anti-Semitism remains a serious problem in the United States, with 72% of the recorded 1,575 anti-religious hate crimes directed against Jews in 2009, according to an FBI report released in November 2010.

Since 9/11, demonization of Islam has become a cottage industry in the U.S., with widespread propaganda conflating Islam and terrorism. In 2010, Islamophobia came out of the shadows, injecting anger and fear into the debate over the so-called “ground zero mosque” in New York and triggering widespread anti-mosque protests from California to Connecticut.

Much like the anti-Catholic hysteria of the 19th and early 20th centuries in America, the current fear and loathing of Islam and Muslims inspired attacks on Muslims and Islamic institutions in 2010 — and more of the same is likely in 2011. Some political leaders have tried to speak up for the religious-liberty rights of Muslim Americans, but, as we saw in the midterm elections, those who do are often attacked for “supporting the terrorists.”

The challenge

Despite the ignorance and contention surrounding the religion clauses of the First Amendment, the United States remains the world’s most successful experiment in living with religious differences. The challenge in the years ahead will be not only to sustain this extraordinary arrangement, but also to expand the First Amendment principles of religious liberty more justly and fairly to all citizens. This will be no easy task in the increasingly crowded and often hostile public square of America.

Reprint of Religion Commentary, March 7, 2011 by Charles C. Haynes, First Amendment Center at Vanderbilt University and the Newseum. <<http://www.firstamendmentcenter.org/religious-liberty-in-a-divided-and-confused-america>>. The First Amendment Center is a co-sponsor of the California Three Rs Project. Find other Commentaries by Dr. Haynes at <http://www.firstamendmentcenter.com/%5Ccollection.aspx?item=charles_haynes_commentaries>.

San Joaquin County Office of Education, One Nation Many Faiths Institute TAH Project,
Constitutional Rights Foundation, and California We the People...Citizen and the Constitution

Invite K-12 teachers and administrators



Taking Liberties

A Celebration of America's Constitutional Freedoms

**Constitution Day
in Your Classroom**

Special Sessions for HS Civics Teachers

On Friday, September 16, 2011, schools throughout America will honor and celebrate our nation's commitment to freedom at their Constitution and Citizenship Day celebrations. The Taking Liberties Conference will inspire and offer ideas to educators for celebrating the oldest constitution in the world, the ideals it has set for our nation, and its power to protect the common good and individual freedom. In addition to the sessions' printed materials, a CD of resources for implementing Constitution Day lessons in your own schools and classrooms will be provided to participants. Kick off the morning with a terrific scholar presentation by David Richmond about the role federalism has played in protecting American rights. After attending breakout sessions for all grade levels, including an online Citizen Action Project activity for High School civics teachers, enjoy the participatory culminating activity on the Bill of Rights with Damon Huss of Constitutional Rights Foundation.

Keynote

**David Richmond – State Coordinator, We the People...Citizen and the Constitution
“Federalism – The Little Understood Protector of American Liberties”**

Date: Saturday, August 27, 2011

Time: 8:00 a.m. – 2:00 p.m.

Location: San Joaquin County Office of Education, 2707 Transworld Drive, Stockton

Benefits: A great no cost day. Free CD of K-12 Constitution Day lessons & activities. Lunch.

Questions: 209-468-9021 or vwickham@sjcoe.net **Register Online** <http://formbuilder.sjcoe.org/form.aspx?f=224>

Registration Coupon

Name _____ School _____

Address _____ City _____ Zip _____

Phone () _____ Email _____ Grade _____ HS Civics Teacher _____

Send registration to Connie Schaffer, San Joaquin COE, P.O. Box 213030 Stockton, CA 95213

Fax 209.468.9232 **Register Online** <http://formbuilder.sjcoe.org/form.aspx?f=224>

REGISTRATION DEADLINE: August 22, 2011

Common Ground Resources:

Finding Common Ground: A Guide to Religious Liberty in Public Schools by Charles C. Haynes and Oliver Thomas. First Amendment Center, 2007.

This book has guidelines on how to handle a wide range of issues related to religious liberty and public schools.

First Amendment Center: Religious Liberty http://www.firstamendmentcenter.org/rel_liberty/index.aspx

This is an up-to-the-minute resource with current issues and court cases. A PDF version of *Finding Common Ground* is available here.

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For information on teaching about world religions, contact...

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