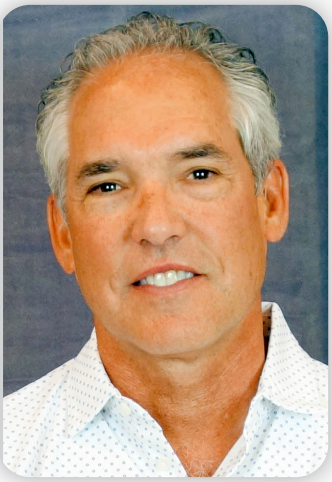
PRESIDENT'S MESSAGE



Coexisting: Looking Back at Religious Freedoms in America

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With each of us seeking comfort while celebrating holidays and seeking to heal our country from a difficult year, I thought I would look back at the history of religious freedom for a source of comfort. The U.S. Supreme Court recently decided to block New York from enforcing limits on attendance at churches and synagogues. With the pandemic having killed more than 1.5 million people, many of us have turned to faith to help cope with all that has occurred. Each of us are blessed to be alive and have the freedom to exercise our beliefs without interference.

With a new justice on the Supreme Court, our highest court was able to reach a majority opinion (5-4) in *Roman Catholic Diocese of Brooklyn v. Cuomo* (slip Opinion 20A87, 2020), which moved away from the decision earlier in the year by a 5-4 decision in *South Bay United Pentecostal Church v. Newsom*, 590 U.S. _____(2020), which left in place capacity restrictions on churches in California and Nevada.

Our country was founded by pilgrims escaping religious persecution. Religious freedom was such an important right to our founders that they decided to make it a part of our Bill of Rights. Freedom of religion was first applied as a principle of government in the Maryland colony. The idea from Roger Williams – the founder of Rhode Island – stated, "as faith is the free work of the Holy Spirit it cannot be forced on a person. Therefore, strict separation of church and state has to be kept." This principle was picked up by Thomas Jefferson and carried into the First Amendment.

In 1961, the court – in an unanimous decision – held a Maryland requirement that a candidate for public office must declare a belief in God to be eligible for the position violated the Establishment Clause of the First Amendment by giving preferences to candidates who believed in God. *Torcaso v. Watkins*, 367 U.S. 488 (1961). In 1962, the court held in a 6-1 decision that a state-composed nondenominational prayer in school also violated the Establishment Clause. *Engel v. Vitale*, 370 U.S. 421 (1962). This issue was further examined in *School District of Abington Township Pennsylvania v. Schempp*, 374 U.S. 203 (1963) when the court held that daily Bible verse reading violated students' religious freedoms.

When the issue of teaching evolution appeared as a challenge in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the court unanimously held that prohibiting the teaching of evolution violated the Establishment Clause, as the First Amendment does not permit a state to require teaching and learning to be tailored to the principles or prohibitions of any religious sect or dogma.

In 1971, the court – in an 8-0 decision – established a three-prong test for the constitutionality of a statute if (1) it has a primarily secular purpose, (2) its principal effect neither aids nor inhibits religion and (3) government and religion are not excessively entangled. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Up until the 1980s, it appeared the justices were on the same page when interpreting our founding documents. Then in *Stone v. Graham*, 449 U.S. 39 (1980), in a split decision 5-4, the court ruled a Kentucky law mandating the display of the Ten Commandments in public schools violated the Establishment Clause. Applying the three-prong test, the law was found to be unconstitutional, because it had no secular legislative purpose. The court also found that by mandating posting of the commandments, the state was providing official support of religion, which was a violation of the Establishment Clause.

In 1984, the court held that a city could display a nativity scene in a public park. *Lynch v. Donnelly*, 465 U.S. 38 (1984). The court applied the three-pronged test in a 5-4 decision, when it held that "notwithstanding the religious significance of the creche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment." The principal purpose of the nativity scene was to celebrate and depict the origins of a national holiday, and in that, it passed the three-pronged test. Then a year later, the court swung the other direction in a 6-3 decision when the court struck down an Alabama law authorizing a period of silence for "meditation or voluntary prayer." The court held the law violated the Establishment Clause, because it had no secular purpose.

The court also looked at whether officially approved, clergy-led prayer at public school graduations in Providence, Rhode Island, violated the Establishment Clause. The court applied the three-pronged test, and in a 5-4 decision, held the practice to be a violation. *Lee v. Weisman*, 505 US 577 (1992).

In 1993, Congress responded by passing the Religious Freedom Restoration Act (RFRA), requiring strict scrutiny when a neutral law of general applicability "substantially burden[s] a person's[c] exercise of religion." The RFRA was amended in 2000 by the Religious Land Use and Institutionalized Persons Act (RLUIPA) to redefine exercise of religion as any exercise of religion. The court upheld the constitutionality of the RFRA as applied to federal statutes in *Gonzales v. O Centro Espirita*, 546 U.S. 418 (2006).

The court looked at whether taxpayers have standing to bring an

Establishment Clause challenge against executive branch actions funded by general appropriations rather than by specific congressional grants. The George W. Bush administration issued executive orders creating an Office of Faith-Based and Community Initiatives for the purposes of allowing religious charity organizations to gain federal funding and hold conferences to promote those initiatives. The Freedom from Religion Foundation sued, asserting this to be a violation of the Establishment Clause, because the conferences would favor religious organizations over nonreligious ones. The court ruled 5-4 to uphold the lower court's ruling that taxpayers do not have standing to bring Establishment Clause challenges against programs funded by the executive branch. *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007).

In 2014, Kamala Harris, who was the attorney general of California at the time, joined in a brief submitted to the court in the case of *Hobby Lobby v. Sebelius*. In the brief, she argued that "Rights to the free exercise of religious beliefs […] protect the development and expression of an 'inner sanctum' of personal religious faith. Free exercise rights have thus also been understood as personal, relating only to individual believers and to a limited class of associations comprising or representing them." The U.S. Supreme Court ruled in favor of Hobby Lobby in a 5-4 decision that held to strike down the Affordable Care Act mandate requiring employers to cover certain contraceptives for their female employees. The court argued that federal courts should not answer religious questions because they would in effect be deciding whether certain beliefs are flawed. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

As part of our goals as leaders in the legal profession, we need to promote diversity and inclusion for all types of issues. The hope for the future is to allow all of us to express our voice and religion freely, to have tolerance for one another, and to see the many things that we have in common, as opposed to judging the differences we each have. If we would look to promote religious tolerance, then we can more wisely coexist and have harmony in society.