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## REPORT from the Capital

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## End-of-year giving

If you're like many people, at this time of year, you begin to think about making contributions to the causes and organizations that are important to you. As a reader of *Report from the Capital*, you are aware of the ongoing challenges and opportunities that the Baptist Joint Committee has in the fight to extend and defend religious liberty for all.

To those who have responded to BJC Executive Director Brent Walker's recent letter with a gift, thank you. Your gifts sustain vital work at the church-state intersection. For others still considering an end-of-year gift, we need your voice and investment in our cause as we head toward a new year with new challenges.

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In the upcoming year, we are already scheduled to be in Florida, North Carolina, South Dakota and many places in between. We cannot bring our message to people across the country without your financial support.

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**Thank you for your support!**





# REPORT from the Capital

## Obama order sidesteps controversies over faith-based programs

WASHINGTON — President Barack Obama issued a long-awaited executive order Nov. 17 amending the government’s regulations regarding partnerships with faith-based groups. The order was met with generally positive reviews, but some religious liberty advocates expressed disappointment that it avoided addressing the most controversial parts of the faith-based office.

“These are important, substantive changes that are directly responsive to the recommendations of church-state experts across the ideological spectrum,” said Joshua DuBois, who directs the White House Office of Faith-Based and Neighborhood Partnerships. “With this executive order, we are strengthening and clarifying the legal footing of the government’s relationship with faith-based organizations and underscoring the important role of these organizations in serving individuals, families and communities in need.”

The six-page order implements many recommendations made earlier this year by the White House Advisory Council on Faith-Based and Neighborhood Partnerships. The Council and several associated task forces were composed of prominent religious and community leaders — including several Baptists.

Among other actions, the order strengthens the guidance given to religious groups that receive government funding to ensure they do not violate the First Amendment’s ban on government promotion of religion. It also requires religious charities receiving government funds to make clients they serve as fully aware as possible of their rights — including the right to ask for a non-religious service provider as an



alternative.

“The president’s executive order makes major strides in more clearly identifying how government and religious organizations can work together effectively while honoring constitutional protections for religious liberty,” said J. Brent Walker, executive director of the Baptist Joint Committee for Religious Liberty and a member of one of the task forces that advised the Council.

But, Walker and other advocates of church-state separation noted Obama’s order did not implement one of the Council’s most consequential recommendations — that churches and other religious organizations wanting to perform secular social services using government funds create separate non-profit organizations to do so, thereby avoiding church-state entanglements.

The order also did not address what may be the most contentious part of the debate over government funding for faith-based charities: whether religious groups that receive federal dollars to perform secular social services may discriminate on the basis of religion when hiring employees for those programs.

As a candidate in 2008, Obama promised to reverse President George W. Bush’s policy of allowing govern-

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# At congressional hearing, Democratic and Republican critics blast Obama on faith-based hiring rules

WASHINGTON — Three witnesses and a panel of lawmakers at a Nov. 18 House subcommittee hearing on the Faith-based Initiative could not agree on whether religious organizations should be able to hire and fire based on religion in federally-funded jobs, but they were in full agreement about the lack of clarity from President Barack Obama on the issue.

Appearing before the U.S. House of Representatives Subcommittee on the Constitution, Civil Rights & Civil Liberties were Melissa Rogers, former BJC general counsel, director of Wake Forest University Divinity School's Center for Religion and Public Affairs and chair of the White House Advisory Council on Faith-Based and Neighborhood Partnerships; Doug Laycock, professor of law and religious studies at the University of Virginia; and Barry Lynn, executive director of Americans United for the Separation of Church and State.

The subcommittee hearing — the first oversight hearing on the Faith-based Initiative since President Obama assumed office — was held one day after Obama issued an executive order instituting a host of changes to federal policy regarding government partnerships with faith-based organizations (see page 1). The order, which was generally welcomed for clarifying the rights of people who receive services from federally-funded groups and for promising greater transparency about who receives such grants and the rules they

must follow, was based on recommendations from a blue-ribbon advisory council whose charge excluded the hiring question. Much of the hearing, however, was focused on the hiring issue, which has been a primary target of criticism of the faith-based plan going back to former President George W. Bush's administration, whose policies permitted religious organizations to engage in federally-funded religious discrimination.

While some, such as Rep. Bobby Scott, D-Va., characterized the practice as discrimination and urged its prohibition, others, such as Rep. Jim Sensenbrenner, R-Wis., defended it as essential for the religious organizations to "preserve their religious character." In addition, members on both sides of the aisle sharply criticized the president's refusal to substantively address the issue.

The Obama administration announced early on that such questions will be handled on a case-by-case basis by the Justice Department, but it has provided no further public explanation of its policy.

"The administration looks forward to continuing to work with Congress and organizations from across the spectrum to ensure that federal faith-based initiatives are grounded in sound law and policy," said White House spokesman Shin Inouye on the day of the hearing.

Rogers testified that while the recent executive order was "a great achievement," it is wrong to "place a religious test on a

job that's funded by a government grant." Lynn agreed, and he observed that "a Baptist does not ladle out rice in a soup kitchen differently than does a Buddhist."

Laycock, however, said the changes advocated by Lynn and others would tie the hands of religious groups.

"It uses the power of the purse to coerce religious organizations to become less religious and more secular," he told lawmakers. "This committee should not try to force the administration into doing it."

House Judiciary Committee Chairman John Conyers, D-Mich., voiced frustration that no administration officials attended the hearing, and he observed that "[t]he president explicitly campaigned and made many remarks about this ... and we don't propose to wait any longer."

The day after the hearing, Conyers, Sensenbrenner and Reps. Jerrold Nadler, D-N.Y., and Lamar Smith, R-Texas, sent a letter to U.S. Attorney General Eric Holder requesting that he or his representative appear at a follow-up hearing to address the hiring issue. The letter stated, "It is unacceptable — and flatly inconsistent with the President's pledge of greater transparency — that the Department of Justice has not made its position clear to the Congress or to agencies and partnering organizations who must understand and comply with the law."

At press time, the letter had not received a response.

—*Religion News Service & Staff Reports*

ORDER CONTINUED FROM PAGE 1

ment-funded religious groups to take faith into account when hiring for positions funded with government money. But, since taking office, White House officials have taken a more cautious approach to the question. While church-state watchdog groups have pressed Obama to overturn the policy in one fell swoop, administration officials have instead said federal agencies would address concerns over discrimination in hiring on a case-by-case basis.

"This admittedly divisive issue cannot be kicked down the road forever," Walker said. "The president missed an opportunity on this point. It's simply wrong for the government to subsidize religious discrimination."

Groups that have, in the past, supported the right of

religious charities to discriminate on the basis of faith in hiring for government-funded positions, praised Obama's order.

"The government is right to partner with faith-based organizations that have expertise in solving community problems, such as hunger, poverty, homelessness and drug addiction," said Galen Carey, director of government affairs for the National Association of Evangelicals, in a press release. "We welcome the president's order, which builds on policies and good practices developed over three administrations of both political parties."

For an analysis of the executive order, see page 4 of this edition of *Report from the Capital*.

— *Rob Marus, Associated Baptist Press*

# REFLECTIONS

## Context is key in the public debate

In a time of rampant misconceptions about our president's faith and a plethora of religious pandering, I am reminded that concerns about a leader's faith are nothing new. It has been 50 years since presidential candidate John F. Kennedy gave a speech to the Greater Houston Ministerial Association addressing the widespread contention of many Protestants that Kennedy was unfit for the presidency because of his Catholicism. That landmark address was the topic of our 2010 Religious Liberty Essay Contest, and it continues to create political fodder.

Much has been written by public figures over the past several years sharply criticizing Kennedy's speech. This year alone, we have had diatribes issued by Catholic Archbishop Charles J. Chaput, former U.S. Senator Rick Santorum and Sarah Palin (in her new book, "America by Heart"). These and other critics variously argue that Kennedy was either opposed to expressing religious ethics in the political process or bent on secularizing the American public square.

These allegations are, in my view, historical revisionism and belied by a careful examination of Kennedy's speech to that crowd of Texas preachers. I think the address remains a classic in political rhetoric going to the very heart of the constitutional recipe for an appropriate relationship between religion and politics.

These allegations are, in my view, historical revisionism and belied by a careful examination of Kennedy's speech to that crowd of Texas preachers. I think the address remains a classic in political rhetoric going to the very heart of the constitutional recipe for an appropriate relationship between religion and politics.

Kennedy's points were trenchant: (1) He believed in an America that is officially neither Catholic, Protestant nor Jewish (a quaintly limited notion of American religious pluralism by today's standards) and where one's religion would not be an impediment to holding public office. (2) No one asked Kennedy about his religion when he fought in the South Pacific and when his brother, Joseph Kennedy, died in Europe in World War II. (3) Kennedy's public decisions would be determined by the U.S. Constitution, not by the Pope or any other prelate, and if ever his religious conscience were violated while serving in office, he would resign. (4) Kennedy demonstrated his willingness to take public policy positions that were antithetical to the official line of the Vatican, including opposing the appointment of an ambassador to the Holy See and public aid to parochial schools.

Two main criticisms were leveled against Kennedy. First, Kennedy said in his speech that his religion "should be important only to me" and that it was his "own private affair." These statements have been interpreted to mean that Kennedy embraced a privatized religion and opposed the expression of religion in the public square and in government service. A fair reading of these words in the context of the speech shows this is not the case. Rather, Kennedy was giving a full-throated affirmation of the no religious test principle in Article VI of the Constitution. He was saying that his religion is no one else's business; he was not saying that his religion cannot inform his policy stances. Indeed, JFK speechwriter and

aide, Ted Sorensen (who had a major hand in writing the speech), agreed. In his memoirs, titled "Counselor," Sorensen wrote:

Church-state separation does not mean — nor did JFK and I favor — totally excluding or disregarding the moral issues involved in public controversies. Our country is not so rich in intellectual and inspirational leadership, or so certain of its course in the world, that it can afford the suppression or repression of any thoughtful view or voice, and that includes the views and voices of our clergy. (pp.165-166)

So Kennedy was not shunning religion; he was embracing religious *liberty* and the principle that practical, *de facto* religious tests are not a legitimate part of American political culture.

The second criticism stems from Kennedy's statement "the separation of church and state is absolute." Here I would agree the word "absolute" is, shall we say, a bit too absolute. It does hint at a certain dogmatism that ignores the complexity of our constitutional arrangement and the need for, in the words of the Supreme Court, "room for play in the joints" — a balancing between the two clauses in the First Amendment ensuring religious liberty.

However, we must remember the context in which this was said. It was a different day. I can assure you that the conservative Baptist preachers that heard Kennedy deliver those words a half century ago were heartened, not put off, by it. That was how many spoke back then, including Baptists and other people of faith. In fact, Justice Hugo Black, a Southern Baptist, wrote the majority opinion in *Everson v. Board of Education* (1947), which said that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." Although the Court voted 5-4 to allow taxpayer support for transportation to parochial schools, all nine justices — unanimously — embraced a rigorous separation principle! One might be able to forgive a bit of hyperbole in his rhetoric given the language of the times and the threat to his candidacy based on religious bigotry.

Kennedy concluded his speech not with the now-obligatory nod to American civil religion ("God bless you and God bless America"), but rather with the constitutional oath solemnly swearing to "faithfully execute the office of President of the United States, and ... to the best of my ability preserve, protect, and defend the Constitution — so help me God." Politicians today could take a lesson from Kennedy and Sorensen. Separating church and state does not mean dismissing religion from public life but prevents it from becoming a political litmus test. Keeping these points in mind would markedly elevate our understanding of church and state and greatly enrich the quality of our public debate.



J. Brent Walker  
Executive Director



K. Hollyn Hollman  
General Counsel

## Obama clarifies religious liberty protections

It was not fast and it did not finish the job, but the Obama administration's executive order clarifying policies on government partnerships with faith-based organizations is important. Everyone who cares about social services and respects the First Amendment's religious liberty protections should be thankful for this development.

The Obama amendments were primarily designed to shore up the legal basis of the existing federal policy, which was created by an executive order of George W. Bush. These amendments seem likely to reduce the risk that government money will be used to promote religion. While the Bush order stated that federal programs had to comply with the First Amendment's Establishment Clause and Free Exercise Clause, its language failed to sufficiently capture the prohibition of government-funded religion. Worse, the weak regulatory scheme was often overshadowed by reckless rhetoric highlighting religious programs and the unsubstantiated claim that religious organizations were better at addressing social ills than their secular counterparts.

The Obama amendments make notable changes that sharpen distinctions about what is and is not allowed in a government-funded program. We are hopeful that these changes will lead to greater compliance.

First, organizations are forbidden from engaging in "explicitly religious" activities in the course of a program that receives direct federal financial assistance. The executive order maintains protection of the character of faith-based organizations, allowing them to compete and participate in federal funding programs without changing their name or impairing their independence but notes that their religious expression is protected *outside* the government-funded program. In other words, and consistent with long-standing standards, an organization is not prevented from competing for or receiving federal money just for being religious. The government-funded program, however, must not include religious content.

Second, the Obama amendments highlight the fundamental nature of this distinction by adding provisions for monitoring, transparency and uniformity. Throughout the order, the amendments make it clear that the rules follow the money, closing a loophole that appeared to leave those organizations that received money through "intermediaries" free from the constitutional safeguards or at least at great risk of missing important regulatory guidance.

Third, while these changes should protect against

any direct government funding of religious activity, additional protection is offered for beneficiaries of government-funded social services programs. Each agency that administers such programs must ensure that beneficiaries are given notice of their rights to receive social services from an alternative provider if they have objections to the religious character of the participating organization that provides services.

Last, the order creates an intergovernmental working group that will meet periodically to review and evaluate regulations, compose effective guidance documents, and generally ensure that policies government-wide are both uniform and consistent with the fundamental principles — something that has previously not been the case. Taken as a whole, the president's amendments demonstrate that prohibiting federal financial assistance from being used to pursue religious endeavors is not just a suggestion but an essential aspect of the policy.

Many of the changes reflect reform efforts advocated by the BJC and others for the past decade. Those efforts are grounded in respect for the constitution and other laws and in the religious belief that individual consciences should be protected from interference by government. We will continue to seek protections beyond the new improved legal floor that the Obama administration has installed. We will advocate that houses of worship do not enter into financial partnerships with government without forming separate 501(c)(3) organizations designed to comply with the rules in the executive order and as a way to avoid commingling federal dollars with financial gifts from parishioners. We will also advocate for changes to prohibit religious discrimination in federally funded jobs.

Though it was not unexpected, the Obama amendments did not address the contentious issue of whether a religious organization that hires only those who adhere to its religious teachings (which is permissible with private money) can also discriminate in positions funded by the government. The issue, which was not part of the Advisory Council's charge, will continue to be debated in the context of specific federal spending statutes, which vary widely in their treatment of the issue. Until then, denying someone a federally funded job based on religion remains a flawed part of federal policy.

It is not too much to ask our government to provide social services based on efficiency and effectiveness, as well as in compliance with constitutional principles that protect our fundamental freedoms. President Obama has taken some important steps in that direction, and we should continue to press onward.

*A version of this column ran in The Huffington Post.*

"Taken as a whole, the president's amendments demonstrate that prohibiting federal financial assistance from being used to pursue religious endeavors is not just a suggestion but an essential aspect of the policy."

# Harrell church-state collection opens at University of S.C.

J. Brent Walker, executive director of the Baptist Joint Committee for Religious Liberty, was the keynote speaker at the Nov. 10 dedication of a collection of materials on the separation of church and state donated by and named for long-time BJC supporter Flynn T. Harrell at the University of South Carolina.

The Harrell collection, housed in the University Libraries' South Carolina Political Collections, consists of journals, correspondence, audio-visual files and more than 100 books documenting the history and debate of church-state issues. The collection was gathered from a variety of sources and organizations over the past 45 years, and it reflects Harrell's extensive involvement with the Baptist Joint Committee.

Walker commended Harrell for his service as a lifelong advocate for religious freedom and for helping to dispel misconceptions about the First Amendment.

"Indeed, this generous library gift

memorializes [Harrell's] energy and dedication and will serve to debunk these myths for generations to come,"

Walker said. Walker's speech focused on five common myths concerning the separation of church and state in the United States, including misconceptions that the United States is a Christian nation, that citizens have freedom of religion but not freedom from religion, that church-state separation only keeps government

from setting up a single national church and that God has been kicked out of the public square.

Harrell served as an executive assistant to Attorney General Travis Medlock for 11 years and for 21 years as the first business/financial officer of the South Carolina Baptist Convention. He was elected president of the convention for 1987. Harrell is a former member of the Board of Visitors of the Wake Forest University Divinity School and the advisory council of the Center on Religion in the South at the Lutheran Theological



Harrell



J. Brent Walker delivers the keynote speech at the Nov. 10 dedication of the Flynn T. Harrell Collection on the Separation of Church and State at the University of South Carolina.

Read a sample of Walker's speech on pages 8-9 of this edition of *Report from the Capital*.

Southern Seminary. He has authored several church-state articles and delivered speeches on the subject on more than 100 occasions to churches, schools, civic clubs and other groups.

Raised as a Baptist in Colombia, S.C., Harrell learned about religious liberty at an early age. He has been collecting newspaper clippings, books and resources relating to the constitutional guarantee for most of his adult life.

—Staff Reports

The Religious Liberty Council of the Baptist Joint Committee announces the 6th annual

## Religious Liberty Essay Scholarship Contest

Open to all high school students in the classes of 2011 & 2012

**Topic:** The right to freely exercise your religion is guaranteed by the First Amendment, but that right is not absolute and it sometimes clashes with the rights of others. For example, public school students have legal rights that protect their freedom of religion, but a student's right to free speech or the free exercise of religion can conflict with school policies.

**Using a single example or multiple examples, write an essay explaining how religious rights clash with other rights or laws in America and how you would determine an appropriate outcome.**

**Grand Prize:** \$1,000 scholarship & trip to Washington, D.C.

**Second prize:** \$500 **Third prize:** \$100

**Deadline:** March 15, 2011

For entry forms and more examples, visit

**[www.BJConline.org/contest](http://www.BJConline.org/contest)**

# RELIGIOUS LIBERTY: YEAR IN REVIEW

BJC Blogger Don Byrd looks back at the top stories of 2010

My usual year-in-review piece is a countdown of the top stories of the year in religious liberty. And to be sure, 2010 had its share of good ones, including the most recent news that President Barack Obama finally issued an executive order implementing many of the constitutional safeguards recommended by the Advisory Council on Faith-Based and Neighborhood Partnerships.

And there were other important developments:

The State Board of Education in Texas overhauled the Social Studies curriculum in a move that could impact history textbooks nationwide. The new guidelines elevate the role of Christianity in the story of America's founding and suggest to students that "the separation of church and state" might be in contrast with the religious liberty protections provided by the First Amendment.

In separate 5-4 rulings, the U.S. Supreme Court upheld a public university's policy requiring all student groups to accept all students regardless of religious beliefs and ruled that the government did not act improperly when it transferred federal land containing a memorial cross to private owners.

Meanwhile, the 10th U.S. Circuit Court of Appeals ruled unconstitutional the Utah Highway Patrol's practice of memorializing fallen troopers with large roadside crosses bearing the UHP insignia.

The U.S. Senate confirmed as the newest Supreme Court Justice former Solicitor General Elena Kagan, who in her confirmation hearings attested to the difficulty of church-state questions. Unsuccessful candidates for the U.S. Senate in Nevada and Delaware went a different direction, arguing that the separation of church and state is nowhere guaranteed in the Constitution.

But one story dominated the religious liberty landscape this year in a way few have in recent memory. Public outcry over a proposed Islamic community center in New York City topped the headlines for weeks after detractors argued that its proximity to Ground Zero somehow made the proposal an offensive project that should not be allowed.

Religious liberty concerns were front and center in the national conversation as Americans — who, according to polls, were largely against what came to be known as the "Ground Zero mosque" — debated the issue all across the country, leading to the airing of some truly disturbing, even outrageous sentiments. Sarah Palin referred to the proposal as a "provocation." Former House Speaker Newt Gingrich argued that no more mosques should be built anywhere in America until churches and synagogues were allowed in Saudi Arabia.

Pervading the entire discussion was the mostly unspoke-

ken suggestion that the atrocities of September 11 were perpetrated by Islam itself rather than by a band of violent extremists who killed Americans of many faiths on that day.

In many ways, 2010 was 2001 all over again, as the national spotlight turned toward Muslim-Americans, questioning their patriotism, their basic civil rights and the legitimacy of their faith. As has become typical in sensationalized controversies like the one surrounding the proposed Islamic community center for much of this year, the media's focus was on the frenzy rather than an informed exploration of the underlying issue. Their preferred constant question — "Should the Ground Zero mosque be allowed?" — ignored the reality that the proposed building was not just a mosque, and the proposed site was not, in fact, *at* Ground Zero. The media also declined to consider the relevant laws that fairly clearly provided the answer.

In a dream world then, 2010 would have been the Year of the Religious Land Use and Institutionalized Persons Act (RLUIPA). It is a federal law (which happened to celebrate its 10th birthday this year) protecting the religious freedom of prisoners and other persons in government custody and prohibiting local governments from unduly burdening religious freedom in the context of zoning and landmark laws. Among other good things it does, RLUIPA keeps zoning decisions from being subject to discriminatory attitudes with regard to religion. In short, it is precisely the law that makes clear a building project like the Islamic community center may not be stopped simply because some residents or local officials do not

like the idea of it.

Rather than educating the public, though, on the relevant statute that would determine such a dispute, most coverage went with fanning public outrage instead. Indeed, you could have watched days and days of cable news on this story — trust me — without ever hearing of RLUIPA. Not only hard to pronounce, I suppose, but bad for ratings, too.

There were some bright spots in the story. For one thing, New York City officials never gave



Kagan



A man walks past the site of the proposed Islamic community center and mosque in lower Manhattan. (Religion News Service photo)



# FROM THE MIXED-UP FILES OF RELIGIOUS LIBERTY

Here is Don Byrd's file of the **good**, the **bad** and the **surprising** stories of 2010.

For more on this list of stories and others in this article, visit the Baptist Joint Committee's blog at [www.BJConline.org/blog](http://www.BJConline.org/blog).

**I didn't see that coming:**  
A federal judge in Wisconsin ruled the National Day of Prayer statute unconstitutional.

**I did see that coming:**  
Yet another appeals court rejected Michael Newdow's argument that "Under God" in various government settings is unconstitutional.

**The case that just won't end:**  
A Ten Commandments monument in McCreary County, Ky., ruled unconstitutional and sent back down to lower courts by the U.S. Supreme Court in 2005, is back, winding its way back up the appeals court ladder.

**Who thought this was a good idea to begin with?**  
Weapons manufacturer Trijicon agreed to stop its practice of inscribing Scripture references on the rifle sights being used in war by U.S. military personnel.

**Fashion files**  
France outlawed the Islamic full veil in public places while Oregon reversed a policy that barred teachers from wearing religious clothing.

**Feel-good story of the year**  
Thanks to a historic accommodation by the U.S. Army for his beard and turban, Capt. Tejdeep Singh Rattan became the first Sikh in decades to graduate from basic training.

in to public pressure to deny the Islamic community center its building permit, maintaining throughout that the request was properly filed and properly approved. Mayor Michael Bloomberg and President Obama were especially adamant that precious First Amendment principles are at stake in this discussion, painting the edges of an even more powerful argument that — as articulated by Baptist Joint Committee Executive Director Brent Walker on MSNBC's "Hardball with Chris Matthews" — "building the mosque in Manhattan would be a monument to American democracy, to religious liberty that we treasure in this country."

Overall, though, the Islamic community center controversy in New York helped make the year a sad and concerning one for the cause of equality and freedom for Americans of all faiths. Highlighted by that dramatic story, but evidenced in many others throughout the year, 2010 raised some alarming questions for me about our nation's commitment to religious diversity.

Nine years after the continued assurances of both Democratic and Republican presidents that we are not at war with Islam, and that it is a religion of peace, why are we still debating the equal rights of Muslim-Americans to practice their faith? Why are the murderous actions of terrorists still being ascribed to an entire religion and all of its peaceful followers? Why would a U.S. Attorney in the year 2010 need to file a brief to explain to a Tennessee court that Islam is, in fact, a bona fide religion?

Is it merely the mania of an election year that has an entire state like Oklahoma voting to amend their constitution for fear of their courtrooms being overtaken by Sharia law? The fearful projections of a nation in economic distress that have resulted in an increase in workplace religious discrimination claims on the rise among Muslim-Americans? Or has this year revealed a deepening cultural rupture between America's religious pluralism and the constitutional principles that protect it?



### Questions to consider as we enter 2011:

- Will charter schools with religious affiliations receive increased church-state scrutiny?
- Will the Supreme Court expand access to school voucher and similar programs in its Arizona tuition tax credit decision?
- Will the IRS take the bait and prompt a showdown lawsuit over the agency's prohibition on pulpit endorsements delivered in tax-exempt churches?
- Will President Obama clarify the administration's position on faith-based discrimination in hiring using federal funds?



# Debunking the top 5 myths of the separation of church and state

The United States of America is one of the most religious and certainly the most religiously diverse nation on the face of the earth. Despite our country's religiosity, many of us were surprised by a recent poll released by the Pew Forum on Religion & Public Life about how little we know about other religions and even our own religion. What's more, despite pride in our democracy, the Constitution and Bill of Rights that guarantee our fundamental liberties, we are similarly misinformed about our rights under the First Amendment generally and religious liberty in particular.

## 1 Myth #1: We don't have separation of church and state in America because those words are not in the Constitution.

True, the words are not there, but the principle surely is. It is much too glib an argument to say that constitutional principles depend on the use of certain words. Who would deny that "federalism," "separation of powers" and the "right to a fair trial" are constitutional principles? But those words do not appear in the Constitution either. The separation of church and state, or the "wall of separation," is simply a metaphor, a shorthand way of expressing a deeper truth that religious liberty is best protected when church and state are institutionally separated and neither tries to perform or interfere with the essential mission and work of the other.

We Baptists often hold up Roger Williams' "hedge or wall of separation between the garden of the church and the wilderness of the world," and point to Thomas Jefferson's 1802 Letter to the Danbury Connecticut Baptist Association where he talked about his "sovereign reverence" for the "wall of separation."

But we sometimes overlook the writings of the father of our Constitution, James Madison, who observed that "the number, the industry and the morality of the priesthood and the devotion of the people have been manifestly increased by the total separation of church and state."<sup>1</sup>

Even Alexis de Tocqueville, in his famed 19th-century "Democracy in America," a work often cited by those who would disparage separation, writes favorably of it:

"In France, I had seen the spirits of religion and freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land ... [A]ll thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that."<sup>2</sup>

The Constitution may not have those words — church-state separation — in it, but those who wrote the Constitution and other early observers had the words in *them*.

## 2 Myth #2: We do not need or want separation of church and state because the United States is a Christian nation.

Depending upon the poll, a little more than half the

By

**BJC Executive Director J. Brent Walker**

This an excerpt from Walker's speech at the dedication of the Harrell church-state archives (see p. 5).

American people agree with this statement. But it is not true. The United States of America is not a Christian nation, legally and constitutionally.

Yes, most of our founders were religious folk of some ilk, but they did not want to impose their own religion by law on others. And they certainly thought that a religious citizenry was important to good government; but they did not intend to set up a Christian regime under our founding documents. Our civil compact, the Constitution, is a decidedly secular document. It never mentions "Christianity." Even the word "religious" is used only once in Article VI to ban religious tests for public office. And then two years later the Bill of Rights starts off "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This language dispelled any lingering doubt whether America was intended to be a Christian nation when it prevented the federal government from advancing or inhibiting any religious tradition.

Today, no one can deny that Americans are a very religious people. A 2007 Pew Forum poll showed that about 75 percent claims to be Christian. So, yes, demographically speaking, we may be Christian, but we do not have anything approaching a theocracy, Christian or otherwise. We have a constitutional democracy in which all religious beliefs are protected. The same Constitution that refuses to privilege any religion, including Christianity, protects all religions and the right of other American citizens to claim no religious beliefs at all. As a result, we are a nation of Christians sociologically because we are not a Christian nation constitutionally.

## 3 Myth #3: We have freedom of religion but not freedom from religion.

No, this is not true. We have freedom of *and* from. If we don't have both, then we have neither. Forced religion is simply a violation of conscience, not a voluntary response to God.

To be sure, one does not have freedom from religion in the sense of insisting that your neighbor not preach a sermon on the street corner, or that religious programming be banned from television or the radio, or that our culture secularize itself to suit one's worldview. But one most certainly has the right to insist upon freedom from *state-sponsored* religion.

That's what the First Amendment is all about. Freedom from religion and freedom of religion parallel the two religion clauses: no establishment (freedom from religion), and free exercise (freedom of religion). It also parallels the coming together in history of Enlightenment thought and religious piety conspiring in colonial times to ensconce protections for religious liberty in the Constitution. Forrest Church writes:

"The revolution was powered by two very different engines: one driven by eighteenth-century Enlightenment values, the other guided by Christian imperatives that grew out of the Great Awakening. ... The former movement, emphasizing freedom of conscience ... stressed freedom from the dictates of organized religion. The latter, stemming from a devout reading

of the Gospels ... demanded freedom for religion. ... Together, these seemingly opposite world-views collaborated brilliantly and effectively to establish the separation of church and state in America.”<sup>3</sup>

We must have both, or else we have neither!

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**Myth # 4: Church-state separation only keeps the government from setting up a single national church or showing preference among faith groups, but not from aiding all religions equally.**

If all the founders wanted to do was simply to ban a single, official national church, they did not do a very good job of saying so in the First Amendment. An early draft of the Amendment read in part: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established ....” This draft was passed over. And the founders had ample opportunity to state that the government should be allowed to promote all religion on an even-handed, non-preferential basis.

But the Congress repeatedly rejected versions of the First Amendment that would have explicitly permitted such non-preferential aid. For example, the Senate rejected this proposed language: “Congress shall make no law establishing one religious sect or society in preference to others ....” It rejected two more proposals with provisions embodying similar language.

No, the Founders approved much more expansive language to keep the new federal government from making laws even “respecting an establishment of religion.” Religion generally — not a religion or a national religion, but no religion at all, period. They did not merely want to keep the federal government from setting up an official national church or to ban denominational discrimination.

In addition to constitutional history, there are practical reasons to reject the attempts of government to aid all religion on a non-preferential basis. In our pluralistic country with its amazing diversity, it would be impossible to aid all religions evenhandedly. Inevitably, government will pick and choose a preferred religion, and it almost always will select the majority, politically-powerful religious tradition for preferred treatment.

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**Myth # 5: The separation of church and state has resulted in God being kicked out of the public schools and banished from the public square.**

What a thing to say — to presume that God can be kicked out of anywhere. No, as James Dunn has said, “God Almighty has a perfect attendance record.” It is only state-sponsored religion that has been banned from the public schools. Voluntary student religious expression is not only not prohibited, it is protected — as long as it does not disrupt the educational process and respects other students’ rights not to participate.

A partial listing of the religious activities that are permitted in the public schools — voluntary prayer, teaching about religion, studying religious holidays, Bible clubs before and after school, wearing religious garb — proves the point. There are numerous national consensus statements by religious and education organizations that outline the avenues of permissible religious expression.

Yes, educators still get it wrong sometimes. Some principals want to return to the “sacred public schools” of yesteryear and others are ready to overreact and create “naked public schools” where every vestige of religion is stripped away. But

the model that most are using, consistent with constitutional standards, is the “civil public schools” where the government does not promote religion but takes religion seriously in the curriculum and, where possible, accommodates the free exercise needs of students.

To say God has been banished from the public square is also a huge misconception. The institutional separation of church and state does not mean the segregation of religion from politics or God from government or strip the right of people of faith to speak forcefully in the public square. It only means government cannot pass laws that have the primary purpose or effect that advances religion.

Religious speech in public places is common place. From bumper stickers, to billboards, to post-football-game prayer huddles, and on and on. It seems like every month new cover stories on religion and religious themes appear in national news magazines in addition to religious programming on television, radio and the Internet. Religious themes pervade movies. Some seminaries nowadays even have courses on theology in the cinema. John Grisham’s new novel, “The Confession,” has religion in it at every twist and turn. (He is a Baptist, you know.) “God Bless America” is sung during the seventh inning stretch in almost every major league baseball park and is an obligatory conclusion to the speeches of every politician who wants to keep on being a politician.

“Civil religion” in public places is alive and well. In a culture as religious as ours, we should not be surprised that references to God pop up in our pledge, our mottos, our songs and our civil ceremonies and public rituals. These brief governmental expressions of religion (sometimes called “ceremonial deism”) will usually pass constitutional muster as long as they do not mandate religious worship, single out a particular religion for favored treatment or compel religious conformity. Some of us may have theological concerns about civil religion because it can be abused for political gain, morph into an idolatry of nationalism or result in the trivialization of religion. But the constitutional doctrine of church-state separation does not prohibit various expressions of civil religion.

Before retiring, Justice Sandra Day O’Connor’s last church-state opinion reminds us why we should defeat the myths:

“[T]he goal of the [Religion] Clauses is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. ... Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”<sup>4</sup>

Justice O’Connor is right. The separation of church and state is good for both!

1. Madison’s letter to Robert Walsh in 1819.

2. p. 295, Geo. Laurence trans., J.P. Meyer ed., 1969. Cited, John Witte, “That Serpentine Wall” Vol. 101 U.Mich. L. Rev. 1898, May 2003

3. Church, Forrest. *Separation of Church and State*, p. x-xi.

4. McCreary County, Ky., et al. v. ACLU of Ky. et al., 545 U.S. 844, 882 [2005] [O’Connor, J., concurring]

# Supreme Court wrestles over religious scholarship program

WASHINGTON — Is a state law that allows tax credits for donations to scholarship programs for private primary and secondary schools unconstitutional if most of the recipients attend religious schools?

That's the question the U.S. Supreme Court wrestled with Nov. 3, as it considered a challenge to an Arizona program where two of the largest scholarship groups require recipients to attend Catholic or evangelical schools.

Lawyers representing Arizona and the U.S. Department of Justice argued that the decision on where to use the scholarships is made by parents and students, not the government, and does not violate the First Amendment.

The tax credit, enacted in 1997, is one of some two dozen tax credits offered to Arizona taxpayers. Participants receive dollar-for-dollar tax credits for donations to student tuition organizations, or STOs, of up to \$500 for individuals and \$1,000 for married couples.

Acting U.S. Solicitor General Neal Katyal told the court that taxpayers who oppose the program should not have legal standing to sue because "not a cent" of their money funds reli-

gion.

The Baptist Joint Committee joined a brief in this case, asking the Court to protect the right of taxpaying citizens to bring the suit. While the constitutionality of the tax credit program requires a distinct analysis incorporating several factors, the brief says that, for purposes of taxpayer standing, tax credits have the same economic impact on the government and should be treated the same as legislative expenditures.

The 9th U.S. Circuit Court of Appeals ruled last year that the critics of the program had the legal standing to question whether the program was unconstitutional.

Paul Bender, representing the American Civil Liberties Union of Arizona, said the program violates the First Amendment's Establishment Clause because some STOs require the scholarship money be used at religious schools and some STOs require that the recipients be a particular religion.

Justice Elena Kagan asked Paula Bickett, Arizona's chief counsel for civil appeals, why a state would set up an intermediary organization "that can say, sorry, if you are a Catholic



BJC General Counsel K. Hollyn Hollman speaks to the media about the BJC brief in the case of *Arizona Christian School Tuition Organization v. Wimm, et al.* on the steps of the U.S. Supreme Court. Behind her are BJC Staff Counsel James Gibson (left) and Executive Director J. Brent Walker.

you don't get scholarships out of our STO."

Bickett responded that such decisions are not made by the state. "It's private organizations," she said. "And anyone can set up a school tuition organization."

The ACLU's Bender, answering a query from Justice Antonin Scalia on why he thought the program runs afoul of the First Amendment, said "the Constitution prohibits organizations that distribute government funds as part of a government spending program to do it on the basis of religion."

But Scalia appeared skeptical that the case actually involves state money, claiming that the funds are from individuals and not the government.

—Religion News Service & Staff Reports

## Supreme Court hears RLUIPA case



BJC General Counsel K. Hollyn Hollman, Executive Director J. Brent Walker and Staff Counsel James Gibson discuss the oral arguments in the case of *Sossamon v. Texas*.

WASHINGTON — On Nov. 2, the U.S. Supreme Court heard oral arguments in *Sossamon v. Texas*, a case that will decide whether states can be sued for monetary damages under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

The case involves the claim of a prisoner, Harvey Leroy Sossamon, who was denied participation in worship services and access to a room with symbols and furnishings that have a special significance to his Christian religion. Sossamon challenged the prison's restrictions under RLUIPA, a law designed to protect the religious freedom of prisoners and other persons in government custody. He sought monetary damages, among other relief, but was denied. That decision was affirmed by the 5th U.S. Circuit Court of Appeals.

The Baptist Joint Committee joined a friend-of-the-court brief in the case, saying that RLUIPA should be construed to allow monetary compensation for the violation. Otherwise, the religious freedom of prisoners may be reduced "to an indulgence, not a right." Eight organizations signed the brief.

—Staff Reports

## Rogers to deliver 2011 Shurden Lectures

Melissa Rogers, the director of Wake Forest University Divinity School's Center for Religion and Public Affairs and a non-resident senior fellow at the Brookings Institution, will deliver the 2011 Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State. The lectures will be held April 4-5, 2011, on the campus of Georgetown College in Georgetown, Ky.



Rogers

In 2009, President Obama named Rogers as chair of his Advisory Council on Faith-Based and Neighborhood Partnerships. She was the first executive director of the Pew Forum on Religion and Public Life, and she is a former Baptist Joint Committee general counsel.

In 2004, the Shurdens made a gift to the BJC to establish an annual lectureship on the issues of religious liberty and the separation of church and state. The Shurden Lecturer is someone who can inspire and call others to understanding and protecting our first freedom.

The lectures are free and open to the public. For more information, watch upcoming editions of *Report from the Capital* or visit the website at [www.BJConline.org/lectures](http://www.BJConline.org/lectures).

## Blasphemy resolution passes U.N. committee

A resolution combating the "vilification of religions" was adopted Nov. 23 by a United Nations committee, but religious freedom advocates who oppose the measure say support for it continues to diminish.

The resolution by Islamic countries is scheduled to be considered by the U.N. General Assembly in December.

The vote — 76 yes, 64 no, and 42 abstentions — received fewer affirmative votes than last year, said Freedom House, a human rights group that has worked against the resolution.

"We are disappointed that this pernicious resolution has

## Mark these important dates on your 2011 calendar

**March 15:** Deadline for Religious Liberty Essay Scholarship Contest



**April 4-5:** 2011 Shurden Lectures at Georgetown College in Georgetown, Ky.

For more events, visit [www.BJConline.org](http://www.BJConline.org)

**June 24:** Religious Liberty Council Luncheon in Tampa, Fla.

passed yet again, despite strong evidence that legal measures to restrict speech are both ineffective and a direct violation of freedom of expression," said Paula Schriefer, director of advocacy at Freedom House.

The U.S. Commission on International Religious Freedom, an independent bipartisan panel, said the measure's diminished support shows some countries think the resolution can do more harm than good.

"Religious intolerance is best fought through efforts to encourage respect for every individual's human rights, not through national or international anti-blasphemy laws," said USCIRF Chair Leonard Leo.

Days before its passage, the Organization of the Islamic Conference relabeled the resolution as condemning "vilification of religions" instead of "defamation of religions," but U.S. officials and advocates continued to oppose it.

"We are disappointed to see that despite our efforts and discussions on this resolution, the text once again seems to take us farther apart, rather than helping to bridge the historical divides," said John F. Sammis, an official of the U.S. Mission to the U.N., to the committee considering the resolution. "Most importantly, the resolution still seeks to curtail and penalize speech."

—Adelle M. Banks, *Religion News Service*



## State updates

If you have a question about a religious liberty issue in your state, the Baptist Joint Committee is a resource for you.

### Oklahoma:

#### Judge keeps Sharia law restriction out of constitution

On Nov. 29, a federal judge issued a preliminary injunction to stop a state constitutional amendment. The amendment, approved by voters on Nov. 2, forbids state courts from using international law or Sharia law, described as Islamic law based on the Quran. The state Election Board asked the attorney general to appeal.

### Texas:

#### New Ten Commandments bill

A state lawmaker filed House Bill 79, which would protect public school teachers who want to display the Ten Commandments in their classrooms. He called the display a "patriotic exercise." The Texas legislative session begins January 2011.