

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
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From: A. Eric Johnston
Re: The Changing War on Religious Freedom

Religious freedom in America has been under attack since the 1950s. It is a war with battles for different objectives. The culmination of 1960s' lawsuits removing Bible reading and prayer from public schools began the efforts to marginalize religious activity in public places. Today is a different battle with potential worse results than the court decisions that we had in the 1960s and 1970s.

Changing values after World War II resulted in the first attacks on religion by the United States Supreme Court ("SCOTUS") in *Engle v. Vitale*, 370 U.S. 421 (1962) and *Abington School Dist. V. Schempp*, 374 U.S. 203 (1963), removing daily prayer and Bible reading from public schools. These were based on two earlier cases, *Cantwell v. Connecticut*, 310 U.S.296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947), which were not directed at religious freedom, as such, but laid a "court made" foundation to declare a constitutionally unbased separation of church and state. Yet, SCOTUS precedent is binding and in spite of better reasoned dissents in many cases through the years, these cases have not been reversed.

Lemon v. Kurtzman, 403 U.S. 602 (1971), has been very destructive and still used today. It created a strict judicial test that is applied to any activity related to the government or on government property. If any of the three prongs of the test are not satisfied, it is a prohibited establishment of religion. The prongs are: does the activity (1) have a secular purpose; (2) does it inhibit or promote religion; or (3) does it excessively entangle government with religion? These are very subjective and when applied by a federal judge make most every religious activity a violation of the Constitution.

The rise of the ACLU and similar groups as advocates for sanitizing the public square of religion was opposed by religious liberty groups, such as Southeast Law Institute. While they wanted everything as a prohibited establishment of religion, we wanted proper respect for individual rights of the free exercise of religion. We prevailed in important areas and restored strength to the Free Exercise Clause resulting in cases like *Chandler v. State of Alabama*, 248 F.3d 1032 (11th Cir. 2001), which clearly articulated religious rights of public school students. One of the most important protections we achieved was the SLI authored Alabama Religious Freedom Amendment, Ala. 622, Art. I, § 3.01, Alabama Constitution, which requires a strict judicial test before the government burdens any religious right.

Underlying all of this was the continued retreat from religious values. While many church leaders like Jerry Falwell, Pat Robertson and D. James Kennedy became more engaged in the public square, some even politically, most churches and pastors were not and observed an incorrect view of separation of church and state. That is, they left legislative and legal arenas to secular minded missionaries who made profound changes in the Zeitgeist of America.

In 1954, Representative Lyndon Johnson got a law passed that churches could not be involved in political activities. Only when President Trump recently ordered no enforcement of that law by government (see October 2017 Educational Update) has the question been renewed about to what extent may the church be involved in the affairs of the public square. A lot will be written about that, but little is likely to be done. In recent years, we are seeing the decline of church membership. Like Western Europe, we are becoming more secular.

America is not a Christian nation. As U.S. Supreme Court Justice Story (1811-1845) observed, you do not have to be a Christian to live here but we are Christian in our principles. The Free Exercise Clause is the key to America's success for individual freedom. As our first freedom, it creates the principle of individual freedom for each of us to believe and act as our own consciences direct. By the same token, if we restrict the first freedom, then we do the same to the others as well.

We can recite many quotes from our founding fathers, early preachers and latter-day politicians, including President Trump, on the religious nature of America. But this does not make us a Christian nation by law, only by belief and practice protected by the Constitution.

We the people are the law, but if the people do not have America's historic values, then our history of religious speech by our leaders is nothing more than meaningless religious platitudes and we have a threat to religious freedom like we have not seen before. The ACLU, People for the American Way and others will still want to remove religion from the public square. However, their job is becoming much easier. Court challenges are becoming increasingly unnecessary. The Freedom from Religious Foundation constantly threatens lawsuits to remove crosses, stop legislative prayers, *etcetera*, which as often as not accomplishes their goals without filing lawsuits. In addition to using the courts and liberal judges, opponents use public policy (legislative, administrative, *etcetera*) to diminish religious freedom,

which the public accepts. Though court action remains a viable and useful option, it has become a tool to enforce public policy, not just declare it.

Like Western Europe, the attitudes of the millennials and those who follow are libertarian, agnostic or atheist. They do not believe they have a need for religion. If they maintain this attitude, church membership and its customary activities decline and the need for religious freedom diminishes. As that need diminishes, so do its rights.

The secular thinkers of the culture take advantage of this and none do it better than the LGBTQ community. A decade ago, same sex marriage was unthinkable and not even contemplated by the average citizen. When Alabama passed its Marriage Amendment recognizing man-woman marriage in 2006, it was by 81%. A recent Gallup poll showed 64% of Americans support same sex marriage, while in 1996 68% opposed it.

Theologian Francis Schaeffer wrote compellingly of what happens when we turn from our values in *How Should We Then Live* and *A Christian Manifesto*. While these awakened many in the 1970s, we failed to see the real need was not just to litigate and legislate, but recognize these activities were not the end in and of themselves, but were merely a means to permit those values to exist and to continue as a way of life for western culture. Since then, our values have changed. The growing predominant attitude is that they do not matter.

Recently, a British political leader was forced to resign due to “his mildly conservative views on homosexuality and abortion.” Bernie Sanders attacked one of President Trump’s agency nominees because he wrote that Muslims “do not know God, because they have rejected Jesus Christ, His son, and they stand condemned.” Sanders said the views were “Islamophobic” and “hateful,” which disqualified the nominee from office. In both of these instances, the fact that someone held conservative Christian views makes them unacceptable to the norm.

In September, Senator Dianne Feinstein (D. CA) condemned a federal judge nominee because her Catholic faith “lives loudly.” In a letter to the Wall Street Journal, Notre Dame University President Rev. John I. Jenkins said:

“It is chilling to hear from a United States Senator that this might now disqualify someone from service as a federal judge. I ask you and your colleagues to respect those in whom ‘dogma lives loudly’ – which is a condition we call faith. For the attempt to live such faith while one upholds the law should command respect not evoke concern.”

When SLI recently testified on the Alabama Child Placing Agency Inclusion Act, the gay rights lobbying group, Human Rights Campaign, testified in committee and Representative Patricia Todd, an openly gay legislator, stated on the floor of the House that the bill and its supporters were discriminatory, intolerant and hateful. In reality, the bill only protected church and religious adoption agencies from having to make same sex adoption placements, while 70% of adoptions are being done by secular agencies which have no religious objections or beliefs on marriage. There was no discrimination. It was for protection of religious belief.

Similarly, we were attacked by media during that legislative session for our beliefs and positions on issues like religious freedom, abortion and other traditional positions, not just on the merits of a particular bill. In other words, your values were meaningless and subject to ridicule. Religious freedom must be secondary to the interests of the secular culture.

We hope courts will hold to precedent for protecting religious freedom. The recent SCOTUS decision permitting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) to participate in state funding of playground materials was a favorable indication. The new SCOTUS justice, Neal Gorsuch, made conservatives happy by his separate opinion in that case. However, the case was not the real test for religious freedom. That will come in the October term when SCOTUS will hear religious freedom arguments from a Colorado baker who was penalized for not baking a same sex marriage cake. *Charlie Craig and David Mullins v. Masterpiece Cake Shop, Inc. and Jack C. Phillips* (see November 2017 Educational Update) will be argued early in December and a decision issued by next June.

Court precedent should carry us forward, but ultimately the values of American culture will define us. The Christian worldview is at odds with all others, particularly in America. As a Christian nation, we have experienced the Christian worldview as a catalyst for change and continuation for the public good. Of course, this is all within God’s providence and the ultimate need for revival.

It is not so much what the ACLU and others demand and their accosting of America’s heritage, but a collective overt and aggressive disregard for it. In the public mind, it does not matter anymore.

We have the legislative and legal tools for protecting religious freedom. But, like the wheelwright’s and farrier’s tools in the past, they have limited value in the new age. The struggle does not center in the courts, but merely trying to get people to, at a minimum, respect the rights and values of others.

We will not see an immediate decrease in religious freedom litigation. That will continue. We will see, however, in the media, in politics, and in other places in the public square marginalizing of religious values while emphasizing the need for the sanitized secular public square. This will pretty much allow anything, except the right of religious freedom to hold fast to your values and disagree with the changing culture.