

# THE TABLE BRIEFING: RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY

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THE VALUE A SOCIETY PLACES on religious liberty suggests the value a society places on liberty in general. Even in a pluralistic society, it seems that the freedom to exercise one's religious convictions and conscience must be legally valued in order to maintain a free society where a diverse population can work together for the common good.

But what is religious liberty? How does religious freedom relate to the nonreligious? Furthermore, how does the law allow citizens to live out their beliefs about matters of conscience in a pluralistic society?

At the Hendricks Center for Christian Leadership, Liberty Institute President and CEO Kelly Shackelford and General Counsel Jeff Mateer joined Darrell Bock to discuss recent legal cases and the importance of religious liberty in a pluralistic society. This article highlights three key points made during these Table Podcast conversations: First, religious liberty is a civil right ultimately derived from God. Second, religious liberty upholds the freedom of conscience enjoyed by both religious and nonreligious people. Third, the law must find a way to balance the compelling interests of the state with the sincerely held religious beliefs of a diverse population.

## WHAT IS RELIGIOUS LIBERTY?

Religious liberty has long been recognized as the first of all human rights, sourced in a solemn duty to the Creator. As such, religious liberty is a civil right that is not ultimately derived from the government. Indeed, the founders of the United States simply recognized the rights God had already granted human beings. In order to protect these intrinsic rights from being infringed upon by the

federal government, they wrote the First Amendment to the United States Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

On an episode of the Table Podcast called “Religious Liberty in a Pluralistic Society,” Jeff Mateer explains how the founders greatly valued civil rights as sourced in God:

*Mateer:* Our foundation in this country is the Constitution. And the founders, when they adopted the Constitution, at first didn’t have a Bill of Rights. But in their wisdom, a few years later they decided . . . to articulate, originally in ten amendments, what are the particular protections. And really, out of those amendments come our civil rights from the federal perspective. Of course, the founders would say, “We are not granting the rights. We are recognizing rights that God has already granted.” And so they wrote them down. So there are certain things that the Constitution provides and gives us the right to. The First Amendment talks about some of those, which include freedom of religion, freedom of the press, freedom of association—core fundamental rights.

*Bock:* Freedom of speech is in that group.

*Mateer:* [Yes,] freedom of speech. And then later, of course, we had a Civil War, and out of the Civil War came the Thirteenth, Fourteenth, Fifteenth Amendments abolishing slavery and giving rights that you cannot discriminate on the basis of, originally race, and . . . out of that we’ve expanded to include sex, and all those are sort of a group of rights that we would refer to as civil rights. So it’s the right to speak, the right to believe, the right to be free from discrimination, because of your race, because of your sex. All those would be considered civil rights.

Thomas Jefferson and James Madison both agreed that the Creator of the universe also created the human mind to be free. Beyond this, however, religious freedom includes the right not only to hold religious beliefs, but to act freely on these matters of conscience—to live out one’s convictions in the world. Mateer and Bock discuss this idea:

*Mateer:* The first phrase of the First Amendment is to protect religious freedom and prohibits the federal government from the establishment of religion. It prohibits the federal government from prohibiting the free exercise thereof, and that became the foundational freedom.

So what is that? The founders were extremely intelligent men who debated . . . [and] understood these issues. They could have said, “Freedom of worship.” They didn’t say, “Freedom of worship.” They wanted something so much more. And I think that’s important because freedom of worship really talks about what we do on Sunday mornings and the view of what happens inside our church, inside the synagogue, inside the place of worship. And it’s that believing there and speaking there, not going outside that. The founders rejected that notion. Now they certainly wanted to protect freedom of worship, but they chose words that were beyond that.

*Bock:* So you’re saying [it’s] a bigger concept?

*Mateer:* A lot bigger concept. And the concept they used is free exercise. And free exercise is not just simply believing something. It’s acting on those beliefs, and that’s at its core—that’s religious liberty.

Religious liberty is being able to believe and then to act on those beliefs. It’s not just believing. It’s being able to act on those beliefs . . . religious freedom implicates speech. It implicates association, other things that the founders also put down in the First Amendment. But it’s that right to believe, it’s that right to act on those beliefs that is at its core what religious liberty is.

*Bock:* If you were to secularize this concept at all you’d be talking about [how] the state doesn’t have a right to ask someone to violate their conscience in some ways. Is that a good synonym?

*Mateer:* The founders would have been comfortable with that because they interchangeably would use “religion” and “conscience” because it came from the same thing. And that’s exactly what it is: freedom of conscience. And it’s to act on that and to be able to not just believe it. I mean, think of conscience and think of the best—when I think of conscience, the first thing that comes to mind is conscientious objectors’ right—the people who didn’t want to go to Vietnam. Well, think if the

government said, “Jeff . . . you can believe you don’t have to go to Vietnam, but—”

*Bock:* But you’re going! [Laughs]

*Mateer:* “But you’re going anyways. But we’re not invading your right to believe. You can believe whatever you want.”

*Bock:* That’s not what it means.

*Mateer:* That’s not what it means, and that’s never what it meant.

Religious freedom, then, is a civil right derived from God that includes not only the right to hold to specific truth claims but to freely discuss and exercise one’s beliefs in the public square. Indeed, the founders believed that no government had the right to take this liberty away. Their perspective is expressed in the opening section of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The idea that God, not the government, grants liberty is one of the core truths upon which the American system of government was built.

Still, some suggest that such religious freedom may sometimes infringe upon the civil rights of those who do not hold to any religious tradition. How might the law relate to the liberties of non-religious people who are exposed to diverse views while living in a diverse society?

## HOW DOES RELIGIOUS FREEDOM RELATE TO THE NONRELIGIOUS?

Religious freedom is important in a pluralistic culture because people from a variety of religious traditions and people with no religious affiliation must be free to live out their beliefs in matters of conscience. This seems to relate to freedom of speech as well, because hearing opposing views in public square conversations is pivotal to a free society. During another Table Podcast series on religious liberty, Darrell Bock discussed this point with Kelly Shackelford:

*Bock:* If someone’s an atheist, I’m not inherently offended by that. That’s their choice. And hopefully they’ll recognize the same thing for me for being a religious person. It seems to me

that that is how [the law] was designed to function, versus some other way.

*Shackelford:* Absolutely. And so you provide freedom for everybody, to their own beliefs, to their own expression. But there's this new sort of intolerance . . . there's a group that calls themselves the Freedom from Religion Foundation. And they run around the country, filing letters and trying really [to] change the country. As somebody who practices in this area, it's just such a foolish phrase. There's no freedom from religion if there's freedom of religion. There's no freedom from speech if there's freedom of speech.

The whole point of living in a free society is you hear things that you disagree with. And that's okay that people have a right to express things you disagree with. And that includes religious things that you disagree with. So to have freedom of religion means citizens don't have some sort of right to be free from hearing about other people's religion. They're going to in a free society where the exchange of ideas occurs.

Despite this, some have demanded the removal of all religious content from areas in which the government presides, citing a need to maintain a separation of church and state. But doing so would seem to remove the many benefits that virtue and religion bring to free societies, as the founders recognized. Furthermore, this would be detrimental to a free and flourishing society because it would result in the government exercising an unjust power over the consciences of its citizens. Shackelford responds to a common argument for the removal of religious content from public life and explains why everyone should value religious freedom:

*Shackelford:* One of the favorites is the use of the term which, of course, is not in the Constitution, but rather the concept of "separation of church and state." But then they read that in a really wooden, kind of bizarre way, to mean that everywhere the government is, religion can't be there. Well, the government's everywhere. So what that would essentially mean is, religion goes into the corners of society, and religious expression into the corners of society. And that is what some people really want. They want religious freedom to mean, "You have the right to your religion in your church, in your synagogue, and in your home, and that's it." And so things like being able to exercise your faith in your workplace [are at risk.] We're representing people as Christians who are losing their jobs because

they're living their faith out in their workplace . . . We have laws protecting against that. But this is this whole philosophy . . . some think the country would be better if religion was removed from public society.

*Bock:* There's a very famous citation from George Washington in his farewell address, talking about how important virtue and religion is to the stability of a society. You've got John Adams making this same point as one of the founders. Thomas Jefferson makes the same point even though he . . . isn't necessarily an orthodox Christian. People see the value of the pursuit of virtue as a stabilizing force in the culture. And yet we've got this push to kind of almost have "anything goes," which actually . . . undermines the society.

*Shackelford:* If these folks ever got what they wanted, what they'd really have is the government having power over people's conscience: Freedom from religion. If the government could tell us that we [could not] talk about religion in public, we [would have] given incredible power to the government over the marketplace of ideas and people's conscience and expression . . . for the atheist, they lose freedom, too . . . so, we really all should be for full, vibrant religious freedom—for those of faith—and those who don't have faith at all.

Now, as Christians, we believe that we don't need an unfair advantage, because all we need is freedom to speak the truth . . . You think especially [of] some of the Muslim countries where there's just a complete meshing of government and religion. And certainly there's not religious freedom in those places. That's a very different idea from ours and . . . what they do when they infuse [religion] with the government is they take away people's freedoms. I think the Judeo-Christian mindset and philosophy . . . is behind giving freedom to everybody, no matter what their faith is, or even if they have no faith at all.

*Bock:* I think that if you learn to equate freedom of religion and freedom of conscience and recognize that those two things very much go together, then there shouldn't be any sense of feeling threatened about the fact that this right exists, and that it's a very important part of the way our country is structured.

So religious freedom is an important part of a pluralistic culture because religious people and nonreligious people must all be

free to live out their beliefs in matters of conscience. A society in which all expressed views must conform to the position of the government or the majority perspective is no free society at all. Still, the American model also sees the possibility that an individual's sincerely held belief may pose a threat to the common good. How does our justice system seek to balance both the compelling interests of the government and the freedom of conscience possessed by each individual?

### HOW DOES THE LAW PROTECT THE LIBERTIES OF RELIGIOUS AND NONRELIGIOUS PEOPLE IN A PLURALISTIC SOCIETY?

An inevitable tension arises in a society that allows for freedom of religion. At some point, people may suggest that a specific policy or law discriminates against their religious views. Meanwhile, the categories of unlawful discrimination have expanded beyond race and gender since 1964. Mateer explains:

*Mateer:* The word “discrimination” itself, that’s not changing. It’s who and who is protected. This really comes out primarily from race in 1964 . . . It was signed by President Johnson after President Kennedy’s assassination. We were going to outlaw discrimination and so the question becomes “Discrimination against who and in what areas?” In 1964, they had a vision of what that was, and again, it was primarily race. . . . That got expanded to sex, and now the push is to expand it even more. . . .

Can the federal government discriminate on the basis of religion? Can the federal Government discriminate on the basis of race? Those things were taken care of through amendments to the Constitution.

*Bock:* So that’s your Fourteenth—

*Mateer:* That’s the Fourteenth Amendment incorporating the First Amendment and other parts of the Constitution . . . So whether it be the federal government, the state government, local governments, there’s a prohibition against discrimination [against] religion, race, sex . . . We’re not going to allow discrimination based upon religion [in the] public and private [sectors.]

When an allegation of unlawful discrimination arises, the court reviews each situation on a case-by-case basis. The goal of

such analysis is to determine whether or not a given policy or law substantially burdens a certain person's sincerely held religious belief. In this, what must be assessed is the balance between the government's compelling interests, such as public safety, and an individual's religion. For example, converting to the Mayan religion would not allow a person exemption from existing laws against murder and unlawful killing in cases of ritual human sacrifice. Mateer discusses this in a conversation on Indiana Senate Bill 101, or the Religious Freedom Restoration Act (RFRA):

*Mateer:* The law in Indiana, the law in Texas, [and] the law in 20 states says the first thing that courts look at when someone feels their religious liberty is being somehow infringed [is]: "Is this substantially burdening a sincerely held religious belief?" That's the first thing. And so the person who is arguing that my rights are being somehow violated has to demonstrate that it's a substantial burden.

And even when they do that doesn't mean they win. Then the government comes forward and says—and in the case of human sacrifice we would use that—but in the case of any public safety sort of situation, would say, "All right does the government have a compelling interest?" Now again, that's a legal term that has been in the legal vernacular for over one hundred years. What it really means is Does the government have a really good reason? It's not made up reason. It's a good reason. There are some tests in the law that are called "rational basis." That just means that the government has a reason. It doesn't have to be really good. Just a reason and then that's good enough. Here, it's a little more than that.

*Bock:* It's a higher standard.

*Mateer:* Yeah. It's a higher standard . . . that's the standard that the court looked at in the Hobby Lobby case . . . That's all Indiana at its core. When you look at the core parts, that's all the Indiana law does.

*Bock:* It says to the person who feels that their rights are violated, You get the right to assert that your rights are violated, and then we go through this standard practice of determining whether the state has a compelling interest

*Mateer:* That's right. . . . So vaccinations, for instance. . . . I tell people, "Look, I don't know how the court would handle that



case, but I know what the analysis would be. First it would be Do you have a sincerely held religious belief that's being substantially burdened?" So it can't be just I wake up one morning and I don't like vaccinations. You have to be part of a religious belief system that—and there are and I recognize that—but you couldn't be just willy-nilly. And then from that, Does the government have a compelling interest to substantially burden that? Well, I could see a lot of judges and ultimately the Supreme Court saying that they do have a compelling interest and there's no other way.

*Bock:* Because of the public health threat?

*Mateer:* Because of the public health threat. And you know the court gets to make that determination.

*Bock:* Let me give you another one that you mentioned to me when we were off the air that I think is interesting and it's the Amish right to use the public thoroughfares, because your human sacrifice example is kind of out there.

*Mateer:* Yeah. That's a little out there. I haven't met too many Mayans or Aztecs lately. [Laughs]

*Bock:* That's right. Okay. But the Amish one if you live in Pennsylvania, that's a real one.

*Mateer:* Yeah. I was just there.

*Bock:* So what does that one look like?

*Mateer:* The Amish want to use buggies on public highways. And originally the Amish said, "Well, we don't want to put reflectors on our buggies. We don't want to do that." So they argued that, and the government said, "No. We have a compelling interest for safety. Now we're going to let you on the roads, but you're going to have to do certain things to be on the roads. You're going to have to put reflectors on there. You're going to put the lights [on]. You're not going to drive at night. There are going to be certain restrictions." And courts have said that that's fine . . . You can't use religious liberty as a trump card.

When the interests of the government seem to conflict with the

free exercise of a person's conscience, the court reviews the claim via the compelling state interest/least restrictive alternative test. Here, the person alleging discrimination carries the burden of proof and must demonstrate that he or she has a sincerely held religious belief that is being substantially burdened by the law or policy under discussion. If this is sufficiently proven, the State must then carry the burden of demonstrating that the law is based on a compelling government interest, such as public safety, that cannot be accommodated by a less restrictive law or policy than the one under discussion.

One of the most recent legal developments that will increase the number of claimants is the Supreme Court ruling in *United States v. Windsor*, which struck down the key provision of the Defense of Marriage Act (DOMA)—the national law that recognized marriage as a union between a biological man and a biological woman. While the full impact of this and related rulings has yet to be seen, a number of alleged discrimination cases surrounding religious freedom and same-sex marriage have already emerged. Even before the landmark ruling, Bock and Mateer reflected on such cases in a pluralistic society:

*Mateer:* If the Supreme Court . . . find[s] that in the Fourteenth Amendment there is a right to same-sex marriage, then county clerks are going to be asked to issue [marriage] licenses [to same-sex couples]. They're going to be faced with, "Do I resign or do I follow the law?" . . . Again it goes back to [having] to demonstrate this is your sincerely held religious belief . . . The majority of Americans believe in traditional marriage . . . for thousands of years, the three main faith traditions all believe in marriage between one man and one woman.

*Bock:* I don't think you're going to have difficulty saying this is a controversial area.

*Mateer:* But . . . in cases right now on my docket, I've got men and women who've lost their jobs in the private sector because of their beliefs concerning traditional marriage.

*Bock:* Well, the famous case in that regard is what, the Atlanta police?

*Mateer:* The Atlanta police chief. And we've got four others. I mean Craig James, which people in the Dallas area will know . . . fired [from] Fox Sports because his views. I've got a PhD,

MD doctor of public health, Eric Walsh, fired from the State of Georgia because . . . Dr. Walsh is a lay minister. And lo and behold, he had preached about traditional marriage. That makes him unqualified to work for the State of Georgia, apparently. And so these issues are coming up. And what we've been talking about at Liberty Institute [is] we see the clash; it's a clash of absolutes. You've got religious freedom, which for over 200 years . . . we've respected as a core foundational freedom versus this new sexual orthodoxy. . . .

The person who is now in charge of the Equal Opportunity Employment Commission, the EEOC, is a former professor named Chai Feldblum. Recognizing this clash, she was saying, "When there's a clash between religious liberty and sexual orthodoxy, this new sexual orthodoxy, can you imagine a time ever where religious freedom would win?" And she answered honestly and said, "No, I can't imagine a situation."

*Bock:* I even think the language is poor because the issue's not an issue of one side winning or the other . . . We're back to the principle of—we're talking about a diverse society—in which there are differences of views and we're trying to figure out how can we live together. I like the legal language: How can we "accommodate" one another to a certain degree? Then it's not going to be a matter of me getting everything I want and you getting everything you want. It's going to be a matter of trying to sort out how we can co-exist with one another despite the differences in worldview that we have. And trying to figure out what impinges on everybody the least, if I can say it that way, might be a better path to seek than for each side to seek absolute victory.

For the government to require a person to hold a specific view in relation to a nationally controversial topic like same-sex marriage seems to be a violation of core amendment rights. Still, members of a diverse society all have a stake in balancing the interests of the state with personal freedoms. Therefore, stakeholders on both sides of a given issue must make efforts to balance the tensions of living in a diverse society, respecting the way the law has been crafted in order to better coexist. The value American society places on religious freedom says much about the value society sees in human freedom in general. In a pluralistic society, one must value the right to live out one's conscience in order to maintain a free society where a diverse population can work together for the common good.

To access the complete transcripts and view the Table Podcast series on Religious Liberty in a Pluralistic Society or other episodes on a variety of relevant topics, visit <http://www.dts.edu/thetable>.

Suggested podcasts:

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- Religious Liberty, Hobby Lobby, and Wheaton College
- Supreme Court Rulings
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