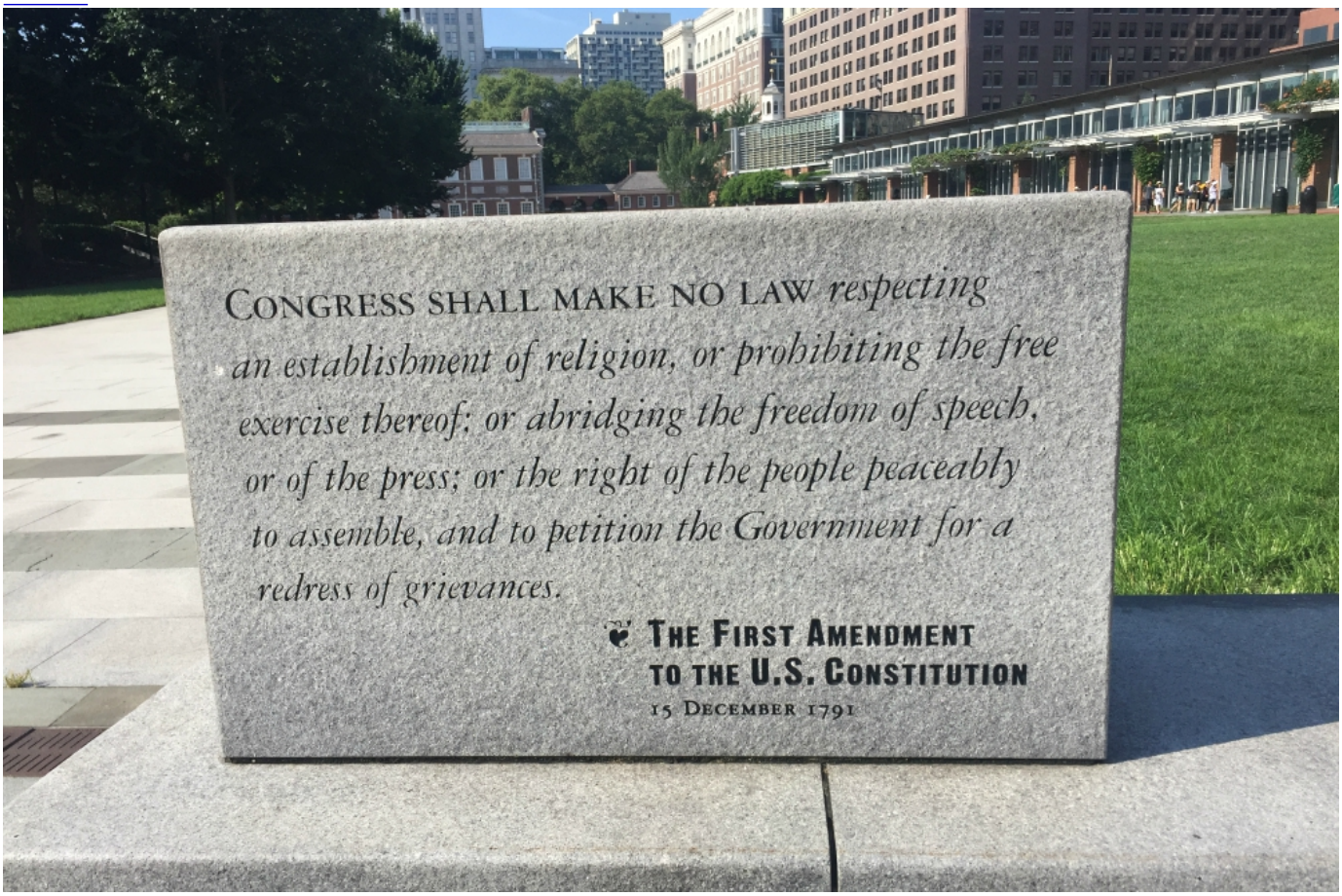
Opinion

News



A monument to the First Amendment to the U.S. Constitution stands outside Independence Hall in Philadelphia. (Wikimedia Commons/Zakarie Faibis)



by Michael Sean Winters

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August 26, 2019

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Last week, my colleague Peter Feuerherd published an article about Katie Boller Gosewisch, a woman in Minnesota who resigned "under pressure" from her job as a director of faith formation at her parish. "Boller Gosewisch wanted to sue for her old job back, an effort thwarted by a legal doctrine referred to as the ministerial exception," Feuerherd wrote.

We can thank our Founding Fathers for the ministerial exception, and we should. It is undoubtedly the case that employees who are fired or who resign "under pressure" feel that an injustice has been done to them. Sometimes, that may be the case. But should we sacrifice the First Amendment to right any such wrong, perceived or real?

The most recent Supreme Court case to deal with a ministerial exception was *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*. The 2012 decision was unanimous, which should give any critics pause, seeing as unanimous decisions on culture-war issues from this court are about as rare as unicorns.

That unanimity had a source: Centuries of entanglement between religion and government had, at different times and in different ways, distorted both church and state, harming one or both. Along came the Enlightenment with its commitment to the rights of conscience, the foremost of liberal rights, and that commitment profoundly affected the drafters of the Constitution, who were familiar with an established religion.

Their remedy came in three parts, the prohibition against religious tests for office contained in the original Constitution, and the separation of church and state and guarantee of free exercise of religion, enshrined in the First Amendment. These provisions, the founders believed, would protect the rights of conscience of the citizens of the United States.

So did the court. "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices," wrote Chief Justice John Roberts in the unanimous decision. "The

Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

In the years since the founding, when religious conscience has clashed with government objectives, our legislators tend to craft, and courts tend to insist upon, carving out the necessary exemptions for religious organizations and their members.

These exemptions extend beyond employment law. So, for example, a Quaker can conscientiously abstain from service in the military, even if the draft extends to all others. A Baptist school can prefer to hire Baptists as teachers, even though the restaurant down the street is legally barred from discriminating against a job applicant on account of their religion. A bank may have a dress code that prevents its tellers from wearing any head coverings, but a Muslim woman is permitted to wear the hijab and a Jewish man his yarmulke.

Sometimes such exemptions are political and legal hot potatoes. We saw this with the Obama administration's inclusion of contraception among the things all health insurance plans must cover. Originally, the administration exempted only those who worked directly for churches, synagogues and other houses of worship, but then crafted a compromise for religiously affiliated institutions like schools and hospitals. The compromise did not satisfy many and the Supreme Court basically told the parties to work it out or, to use a Solomonic expression, to figure out how to cut the baby in two.

In a diverse society such as ours, these kinds of accommodations help keep the civil peace. They do more than that. They protect the rights of conscience. Anyone who advocates against the ministerial exception must acknowledge that they wish to involve the government in the business of foisting an unwanted minister on a congregation, that they admit the possibility of the government selecting ministers and bishops — as is done in England today. And they should remember that at this moment in our nation's history, the government is not some abstract monolith, but Donald Trump and William Barr, neither of whom seems disinclined to run roughshod over democratic norms if it suits their interest.

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This is no slippery slope argument. Former United Kingdom Prime Minister David Cameron really did select the current archbishop of Canterbury because British law permits — actually requires — that he make the choice. Cross the ministerial exception Rubicon and government is in the business of deciding who can and can't be a minister.

The Supreme Court acknowledged in *Hosanna-Tabor* that not all church employees would qualify for the ministerial exception from labor laws. They declined to set a hard and fast rule about other occupations. It is impossible to imagine how a director of faith formation could be seen as anything but a ministerial position, and the same goes for teachers in a religious school.

My liberal and absolute commitment to the ministerial exception does not prevent me from wishing today's leaders of the Catholic Church would stop firing teachers or other ministers simply because they are gay. Each case is different, and I think most fair-minded people would agree that a church has the right to fire someone who actively undermined that church's teachings. But, in most of the cases I have seen, the teachers are discreet and keep their private life far from the school.

I recall when the Lepanto Institute outed an employee at Catholic Relief Services. The man was not even out to his family. Such behavior paints us as bigots. Just because the church has the right to fire someone, doesn't mean it must or should exercise that right. And if the leaders of the church do persist in this course, they should not be surprised that other Americans will value religious liberty less.

There are those who think opposition to gay marriage is the hill on which the Catholic Church should stand and die. They are wrong. The church's teaching on homosexuality is manifestly inadequate, as even conservative theologians will allow.

The better way is illustrated from a conversation I had with a bishop the day the Supreme Court issued its ruling in favor of same-sex marriage. "We will continue to teach what we have always taught about marriage," the bishop said. "But if you think I am going to spend millions of dollars in legal fees trying to keep Catholic Charities from providing dental insurance to the partner of a gay accountant, you are wrong."

The shoe of tolerance can fit the other foot as well. With University of Virginia scholar Douglas Laycock, I do not see why a gay couple getting married can't find a

different baker from the evangelical Christian one who doesn't want to bake them a wedding cake. The litigiousness of American society may be long-standing but it is not our finest attribute.

I am sorry Boller Gosewisch lost her "dream job" and I am glad to know she has landed on her feet. But if it is a choice of her dream job or the First Amendment, anyone whose liberalism is more than skin deep will stand for the rights of conscience embodied in that amendment.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

Editor's note: *Don't miss out on Michael Sean Winters' latest. Sign up and we'll let you know when he publishes new Distinctly Catholic columns.*

A version of this story appeared in the **Sept 20-Oct 3, 2019** print issue under the headline: Ministerial exception safeguards rights of conscience.