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# Should Public Buildings Be Used for Worship

Stephen Wermiel

# Should Public Buildings Be Used for Worship?

**By Stephen J. Wermiel**

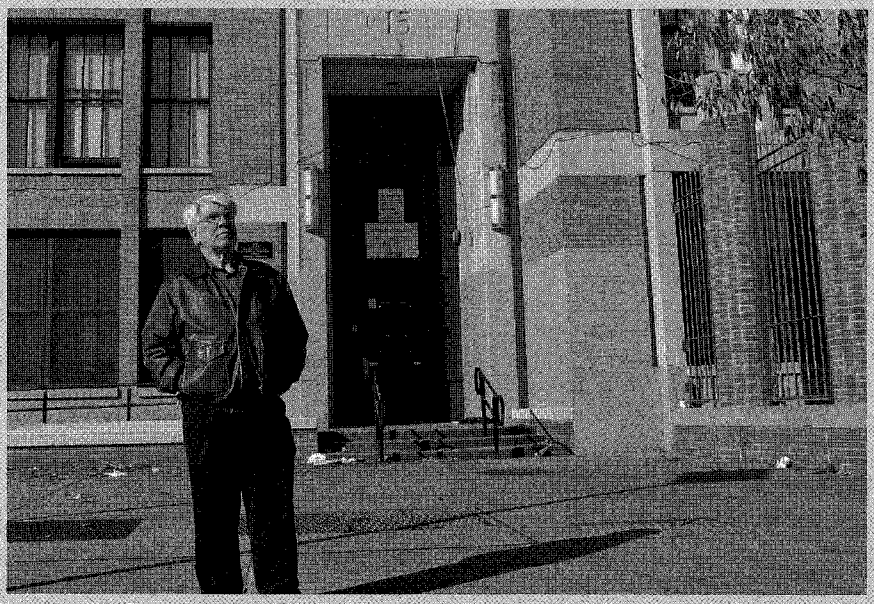
Should public school buildings be home to weekend worship services?

This question sits at the increasingly well-traveled but difficult-to-navigate intersection of freedom of speech and freedom of religion. The answer is important for New York City and other school districts that have wrestled with the issue and, more broadly, for defining the extent to which public officials must treat religious speech in the same manner as other expression.

To understand this issue and its importance, it is helpful to trace the circumstances of what is surely the longest-running dispute over holding worship services in public school buildings. The case pits the New York City Board of Education against a small Christian church, Bronx Household of Faith, which first applied to use school buildings in 1994 and has held Sunday worship services since 2002 at a Bronx, New York, public school that serves kindergarten through eighth grade on school days.

School officials rejected the Bronx Household application, and the church sued, setting off a legal battle that has produced some five federal district court decisions, four rulings by the U.S. Court of Appeals for the Second Circuit, and two denials of review by the Supreme Court. Most recently, in June 2012, U.S. District Judge Loretta Preska ordered New York officials to allow Bronx Household to continue meeting at Public School 15.

The fight might sound like a dispute over the dimensions of religious freedom under the First Amendment to the U.S. Constitution: whether the church has a right under the guarantee of "free exercise" to use public buildings, and whether allowing that use would violate the prohibition on "establishment" of religion. But the case is made more difficult by the overlay of freedom of speech under the First Amendment, or, more precisely, freedom of speech about religion.



Associated Press, AP

Robert Hall, co-pastor for the Bronx Household of Faith, poses before P.S. 15, where the congregation currently holds services.

The New York schools adopted a rule that made public school buildings open outside of school hours for social, civic, and recreational meetings. This policy turned the school buildings into what courts call a limited public forum, a space that is open to a range of speakers and activities that are consistent with the stated usage policy. But if there is one inviolate free speech principle in a limited public forum, it is that government officials may not engage in viewpoint discrimination—that is, favoring one point of view and disallowing another.

In a 2001 ruling, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the U.S. Supreme Court found that it was impermissible viewpoint discrimination when a school system excluded a Christian group from after-school use of the building for a club in which students prayed, sang religious songs, and read and memorized Bible verses. The Court found that the school generally allowed outside groups to teach about morality and character but prohibited such teaching from a religious perspective. The Court said this was discrimination against speech with a religious viewpoint and violated the First Amendment.

After the *Good News Club* ruling, the issue of allowing worship services in school buildings grew more complicated, dividing federal judges in the *Bronx Household* case.

Bronx Household maintains, and Judge Preska agreed, that it was being denied access to school buildings because of discrimination against its religious viewpoint. Bronx Household also argued, and Judge Preska agreed in the most recent round of court proceedings, that the city was interfering with the First Amendment free exercise

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## Introduction

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religious magazines, debates, party and outside PAC advertising, and other information sources allow voters to hear about candidate positions on fundamental questions of First Amendment thinking. These include state and federal financial aid that ends up in religious schools through vouchers or tuition tax credits, displays of religious icons on public property, prayer and religious ablations in public schools, academic treatment of evolution and history, and whether, or under what circumstances, "partnerships" between governments and private "faith-based" charities are wise and constitutional.

The differences between major parties are never absolute, but there are consistent patterns. The 2012 Republican Party platform endorses school vouchers, including those that would subsidize religious schools, in spite of mounting evidence that the concept is fatally flawed and generates no appreciable academic improvement. This same platform supports the public display of religious symbols on government property. Although the Democratic platform is unlikely to even mention this latter topic, congressional votes on such subjects as selling property to groups that intend to erect religious icons or, recently, affirming support for "In God We Trust" as America's national motto (as if there were a surge to erase it from its places of current usage) are likely to garner nearly unanimous bipartisan support.

Battleground imagery is employed by both sides. These issues are, as presidential candidate Pat Buchanan famously put it, part of "a culture war for the soul of America." Supporters of the incumbent president spoke of a Republican "war on women" because of religious opposition to birth control, while the president's opponents asserted that he has declared a "war on religion" (or at least on certain forms of Christianity).

Much of this rhetoric merely drafts religion into the cause of politics. Conservative religious groups have been vocal opponents of virtually every action taken by the Obama administration on any issue it deems "religious," which is to say, almost any policy on any topic. The movement has excoriated Obama over his Supreme Court nominees, most of his policies on reproductive freedom, and his support of LGBTQ rights—even before his personal affirmation of marriage equality. Obama critics ignored the growth of public support to "faith-based" institutions and criticized him for suggesting, during the 2012 National Prayer Breakfast, that Jesus would approve of his budget.

**Many ordinary Americans are left standing dazed and confused at the intersection of religion and politics.**

In addition to Protestant efforts, there has been an extraordinary rise in lobbying by the U.S. Conference of Catholic Bishops over government support of religious missions and ministries, including a new understanding of the concept of "religious freedom." In every election cycle, churches—left, right, and otherwise—sometimes engage in conduct that violates federal law regarding partisan support of candidates. Several notable incidents have occurred recently in which constitutionally protected speech has devolved into actual candidate "opposition" that is forbidden for all 501(c)(3) charities. In Peoria, Illinois, a Catholic bishop compared the president to Hitler and Stalin and stated that no serious Catholic could vote for him. In an even more offensive incident, a North Carolina pastor outlined his "final solution" for gay and lesbian Americans: All gay men should be put in one compound and all lesbians in another. After some period of food drops, the groups would die out because they "can't reproduce." Repugnant as this analysis is, he bluntly told parishioners that neither he nor they should be supporting some "baby killer and a homosexual lover" for president. It is on this latter point that he ran afoul of federal tax law.

On the other hand, staunch church-state separationists have often been discouraged by what they see as the Obama administration's failure to act aggressively to preserve the "wall" or its undermining of the "wall" directly through positions taken in Supreme Court cases.

Perhaps the most significant example of this was the creation of a Council on Faith Based and Community Partnerships, which consisted of twenty-five primarily religious members including high-ranking officials of two major Roman Catholic groups, World Vision (which has received hundreds of millions of tax dollars), and a man once offered the presidency of Pat Robertson's Christian Coalition. Some advocates of church-state separation were included, but the overall makeup was clearly designed so that recommendations on the faith-based initiative would not migrate too far in the direction of separation.

The group was told not to make any recommendation regarding the key question of whether recipients of government grants or contracts could maintain practices of hiring only persons in the federally subsidized programs who shared the group's religious affiliation or beliefs. In other words, they could not ask, "Can a Baptist homeless shelter seeking a cook hang up a 'No Jews or Atheists Need Apply'

sign?" As a candidate, Obama said he would not allow that. Once in office, his position softened. The way to deal with this thorny issue, the administration decided, was not to deal with it at all. At best, Attorney General Eric Holder claimed that discrimination issues were being addressed on a "case-by-case" basis but offered no examples of decisions made or any standards used by federal agencies. Case-by-case reviews without any standards are best characterized as "doing whatever the decision-maker feels like doing."

Modest reform proposals on other matters emerged from the Council, including greater transparency in grant-making and maintaining a clearer distinction between religious and secular services at subsidized institutions, but a majority of the Council would not require removal of religious iconography or scripture in rooms providing government services (even where such action was "practicable") nor insist that government funds be placed in a separate bank account for accounting purposes. Final regulations issued nearly two years later watered down the positive recommendations even more.

Pro-choice groups and representatives of the LGBTQ communities also found some deficiencies in the administration's church-state approach. As one illustration, because religious groups claimed it would lead to promiscuity, Secretary of Health and Human Services Kathleen Sebelius rejected the conclusion of a Food and Drug Administration scientific panel that Plan B, the so-called morning-after contraceptive, should be made available over the counter to young women under age seventeen. Although conservatives applauded this decision, Sebelius did nothing substantively to mollify their harsh assessment of the administration. Enter the debate over regulations for the modest health insurance plan labeled "Obamacare."

Although some Catholic groups ultimately supported the Affordable Care Act, there was considerable battle over how to avoid any mandated coverage of abortion. In its final form, the Act called for general coverage of contraception in health plans of companies with over fifty employees.

The first proposed regulation to cover the contraception mandate clearly exempted all pervasively sectarian institutions, like churches and seminaries, with moral objections to family planning. Most religiously affiliated entities, like Christian colleges or Catholic hospitals, had the coverage put on hold for a year to do more analysis of alternatives. A second set of draft regulations, however, caused a major furor in conservative circles by suggesting that third parties (perhaps a designated insurance provider unconnected to the institution's own insurer) could provide any contraceptive coverage desired by a student or employee. Most reproductive justice advocates reluctantly agreed to this compromise.

It clearly seems like the right wing has now adopted a full "take no prisoners" approach. Even having a religious entity notify employees through an e-mail of ways to obtain coverage is seen as complicity in immorality and sin. It is alleged to be a kind of violation of a "corporate conscience." In addition, the chief attorney for the Catholic bishops told *USA Today* that merely exempting religious institutions was itself insufficient. He claimed that, as a Catholic, if he decided to open a Taco Bell, he would want to reject coverage of any procedure he deemed immoral and be granted an exemption. Indeed, a Colorado federal court in July 2012 granted a temporary injunction against requiring an air-conditioning company owned by a Roman Catholic to cover birth control in its employee insurance plan.

While this issue (and others) seem destined to be resolved in the judicial system, many ordinary Americans are left standing dazed and confused at the intersection of religion and politics.

These days, most Supreme Court decisions are barely covered in the media. In recent years, the Court has cut back on the ability of taxpayers to raise First Amendment issues about public support of religion and has given broad latitude to religious entities to define their missions broadly and control the conduct of their employees, even when they use public funds to do so.

Whether through legislative initiatives or legal decisions, it is important to recognize that the principle of separation of church and state has served this nation well. Religious liberty is vitally important to the American people. But a misunderstood right can never be properly exercised. Religious liberty does *not* mean being handed state sanctions to force your theology on other people. It does *not* mean being given a free pass from laws you do not like. It does *not* mean your faith gets a little help from the state.

And for you politicians out there, a little reminder: You represent lots of people, from the deeply devout to the highly heretical. Strive to work for them all. Laboring to make one religion's dogma the basis of laws that we all must follow is not the way to do that.

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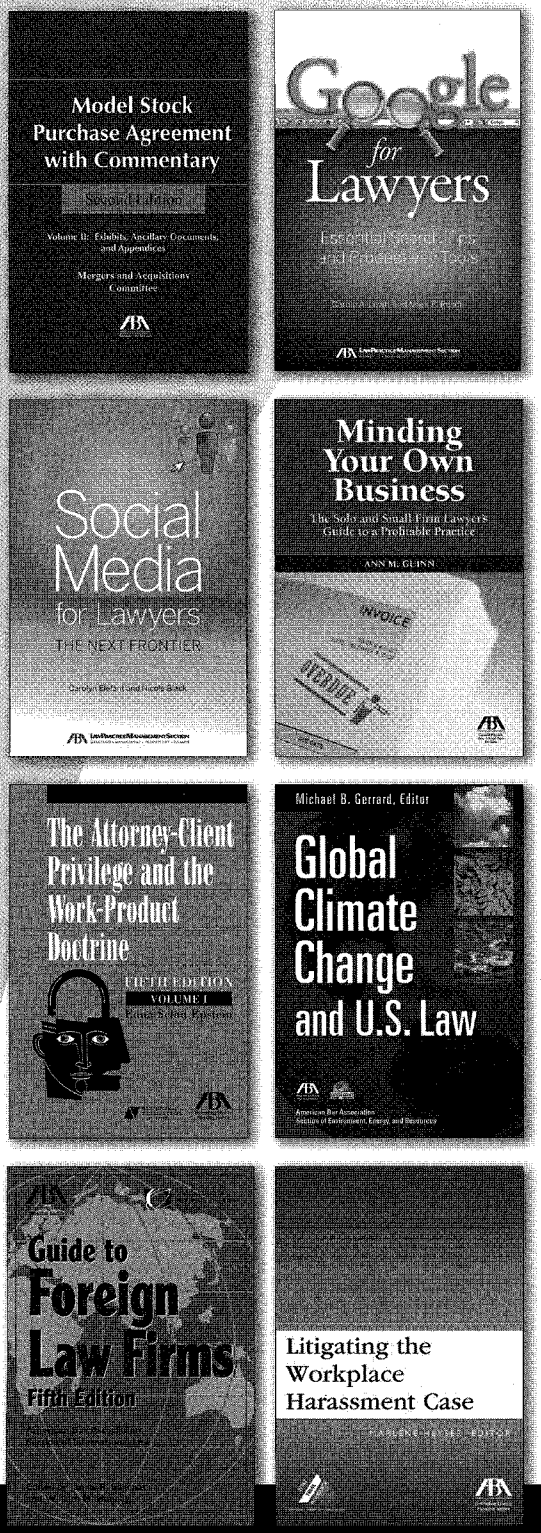


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rights of the church to practice its religion by denying the church access to the only meeting space it can afford to rent. The church argues that it cannot afford to rent commercial space and, thus, will not be able to hold worship services without access to the school space.

The city argued, and the Second Circuit agreed, that prohibiting worship services was barring a form of content, not a particular viewpoint. Public officials may restrict content if they have legitimate reasons. In this case, the city argued, and the Second Circuit agreed, that prohibiting a specific content—worship services—was necessary to avoid violating the First Amendment establishment clause, which has been interpreted by the Supreme Court to require some degree of separation between religion and government.

In the latest rounds of the New York struggle, the case took a somewhat different twist that put the spotlight on the question of what constitutes a worship service. After the Second Circuit found a valid distinction between a worship service, which was prohibited, and the activities of singing hymns, praying, and chanting, which the *Good News Club* ruling said should be permitted, Bronx Household applied for a new permit that listed these activities and did not mention worship services. When New York officials said they would continue to enforce their policy to bar Bronx Household, Judge Preska issued the June 2012 injunction allowing the church to use the school building. At present, Judge Preska has the last word. In this new twist, Judge Preska said that the policy that allowed the city to decide between worship services and other religious practices was, itself, a violation of the Establishment Clause because the city became too entangled in evaluating religious practices.

The twists and turns of this story may be unique to the lawsuit between Bronx Household of Faith and New York City, but the struggle to define the contours of First Amendment interplay of free speech and religious freedom is an important one for public officials and religious institutions throughout the country.

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## humanrights hero

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Today, Americans United's docket includes cases ranging from efforts to prevent public schools from holding commencements in churches, to ensuring that government bodies do not include prayers in public meetings, to opposition to public funding for activities endorsing religion, such as the state-funded repair of a giant cross in Illinois. When it comes to the principles and precedents of church-state litigation, no case or issue related to the protection of religious liberty is too minor for the organization's focus and advocacy.

But Americans United's efforts go beyond the courtroom. The legislative arm of the organization plays an important role in influencing public policy at the federal, state, and local levels, providing knowledgeable testimony and other resources to legislators across the nation on key issues implicating religious freedom. To this end, Americans United is engaged on a wide range of questions, from challenges by religious employers to the provision of a federal health care law requiring contraception for employees, to the prospective rule by USAID concerning possible use of federal funds for religious organizations and buildings overseas, to the legitimacy of a proposed state amendment in Oklahoma that would have barred the use of Islamic law in the state.

Complementing its legislative and legal activities is the public education component of Americans United, designed to create a more informed and more active public for defending religious freedom. It is yet another reason why Americans United for Separation of Church and State, through its zealous advocacy on behalf of religious liberty, serves as a model for civil libertarians, religious advocates, and the nation.

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*Alexander Wohl is a former Supreme Court Judicial fellow and an adjunct professor at American University Law School. His dual biography* Father, Son and Constitution: How Justice Tom Clark and Attorney General Ramsey Clark Shaped American Democracy *is due out in early 2013 from the University Press of Kansas. Wohl is also a member of the* Human Rights *editorial board.*