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DON'T USE FIRST AMENDMENT TO ERASE DIVISIONS

Forum Column

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Visit the local bookstore, turn on talk radio, or click on a favorite blog, and two claims are everywhere: America is divided, and religion is divisive. Every day, the news seems to confirm Justice David H. Souter's claim, in one of the Supreme Court's recent Ten Commandments cases, that "the divisiveness of religion in current public life is inescapable." Perhaps it's no surprise, then, that 9th Circuit Judge Lawrence K. Karlton has had enough.

In *Faith Center Church v. Glover*, 2006 DJDAR 12755 (Sept. 20, 2006), Karlton agreed with his colleague, Judge Richard Paez, that the First Amendment's Free Speech Clause does not require Contra Costa County to allow religious services in the meeting rooms of the county's public libraries. He wrote separately, though - and forcefully - to warn us about "social unrest" and religious "passions," and to insist that it is both a purpose of the Constitution and a job of judges to "insulat[e] civil society from the excesses of the zealous." Was he right?

The facts of the case are relatively straightforward: The county allows the public to use its public library space for "meetings, programs, or activities of educational, cultural, or community interest," such as gatherings by the Sierra Club, Narcotics Anonymous, the East Contra Costa Democratic Club. The county does not permit its meeting rooms to be used for religious services. And this refusal is what got the county sued by Faith Center Church Evangelistic Ministries.

The church reaches out to people who might not be comfortable with traditional church buildings and services, and so it often organizes meetings and worship in nonchurch buildings. They applied to use a room in one of the county's libraries for, among other things, a "Praise and Worship" service. The county, citing its no-religious-services rule, cancelled a scheduled Faith Center meeting. The church, in response, challenged that rule as a violation of the First Amendment. A federal trial court agreed with Faith Center, and enjoined the county's policy. The 9th Circuit reversed.

In a nutshell, the government is permitted to limit private speakers' access to public property - courthouses, parks, City Hall, etc. - to safeguard the public functions to which that property is dedicated. But it may not discriminate against speech - even on government-owned property - on the basis of the speaker's viewpoint. And so, the First Amendment permits a city to exclude concert fundraisers from a public library, but not to exclude only concert fundraisers for Green Party candidates. The government could ban demonstrations inside courthouses, but could not ban only anti-war demonstrations. And so on.

Writing for the majority, Paez agreed with the church that prayer, praise, and worship are protected speech, but he concluded that it was reasonable for the county to decide that religious worship in libraries could "alienate patrons" and undermine a library's "primary function as a venue for reading, writing, and quiet contemplation." The exclusion of "religious services" - or, as he put it, of "purely religious worship" - did not amount to discrimination against religious viewpoints. The county had targeted a particular, potentially disruptive activity, not an unpopular opinion or disfavored perspective.

Paez acknowledged the Supreme Court's warnings of the dangers of government officials enforcing lines between religious expression and worship. These risks are especially present in a pluralistic and religiously diverse society like ours. After all, courts are neither authorized nor competent to make theological judgments. How is a judge to know whether a particular act or utterance, by a particular religious believer or community, is "worship" or just "speech"?

The 9th Circuit found a narrow way out. The church itself - not the government - had identified its activities as praise and worship. Therefore, Paez concluded, the religious services rule could be applied without tangling secular officials or courts in religious questions.

Karlton's concurrence, though, was both striking and sweeping. In his view, the case was not about the freedom of speech but about the forced public subsidization of a religious group seeking a "free place to worship." Our constitutional law, he lamented, is in a "sorry state" because the Supreme Court fails to understand what even a "quick reading" of the First Amendment shows: "religious speech is categorically different than secular speech and is subject to analysis under the Establishment Clause and the Free Exercise Clause, without regard to the jurisprudence of free speech."

Most judges and legal scholars would raise an eyebrow at the suggestion that a "quick reading" of the First Amendment tells us much of anything, let alone how a free-speech or religious-liberty case should be decided. True, the Supreme Court's First Amendment jurisprudence can be frustrating, and it does not always track precisely what we know about the text's original meaning. It is also true, most religious believers would contend, that religion is not reducible to speech or expression.

Still, Karlton's breezy confidence that the Free Speech Clause affords no protection to religious speech is unwarranted. Our Constitution singles out the free exercise of religion

for special protection, but this should not and does not mean that religious speech is invisible to the Free Speech Clause. As Justice Antonin Scalia put it, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

Karlton insisted that "[t]hose, like myself, who advocate adherence to the strictures of the Establishment Clause, do so not out of hostility towards religion. Rather, we are motivated by recognition of the passions that deeply-held religious views engender, and the serious threat of marrying those passions to government power[.]" Karlton is right to remind us that the Constitution's ban on established churches, like the separation of church and state more generally, is about respecting and protecting religion, not hostility towards faith.

But to say that the institutions of religion and government should be separate is not to say that religious groups should be run off public property. The separation of church and state is not to confine religious belief or silence religious expression, but to curb the reach of governments.

Next, Karlton broke out the big, if overused, rhetorical guns. If we permit community groups to engage in religious activities in public libraries, he suggested, we are not far from Northern Ireland, where Protestants and Catholics "kill each other in an effort to establish governmental power," or Israel, "where Jews and Muslims do the same." He warned: "[w]here government plays a role in the religious life of a pluralist society, there is the danger that government will favor the majority religion and seek to control or prohibit the rites of minority religions. Such favor can only lead to alienation and social unrest."

Putting aside the question whether a worship service in a public library brings us anywhere near suicide bombings, Karlton ignored the alienation and unrest caused by excessive insistence on a religion-free public square. The church did not ask the government to play a role in or to interfere with the religious life of a pluralist society but rather to respect it.

Finally, Karlton asserted that the "wall of separation between church and state that Thomas Jefferson thought the First Amendment raised, in no way prejudices the practice of anyone's religion." True enough. The separation of church and state is crucial to any clear vision of religious freedom. He continued, however: "Instead, it serves the salutary purpose of insulating civil society from the excesses of the zealous." This claim - that the First Amendment should be applied by judges to safeguard a tranquil, God-free public square - is badly misguided.

Religion matters, and people care about it. The excesses of religious believers does not mean that judges should be particularly suspicious of the zealous. Those who crafted our Constitution knew better. They believed that both authentic freedom and effective government should be secured through checks and balances rather than standardization.

It is both mistaken and quixotic to employ the First Amendment to smooth out the divisions that are an unavoidable part of the political life of a diverse people.