

## 2002 Religious Liberty Summit U.S. Supreme Court Justice Samuel, Alito

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<https://reason.com/volokh/2022/07/28/justice-alito-speaks-on-religious-liberty/>

### Thanking organizers of summit on religious liberty.

Thank you very much. Thank Thank you very much. Professor Glendon stole my Hubert Humphrey line. But I would, I would say the same thing my mother would believe that nobody else would. But I'm appreciative. Anyway, it's a real honor and a pleasure to attend this summit and to have the opportunity to say a few words to you all here tonight about religious liberty. But before I do that, some personal thanks, commendations, and congratulations are in order. First of all, I want to thank Dean Cole for inviting me and for the warm hospitality that has been extended to Martha and me during our visit. I also want to commend Dean Cole for launching the religious liberty initiative. It was truly an inspired decision, and is already making a great contribution to the furtherance of this important right. We should also thank the dean and Stephanie Barkley and everybody else who worked hard to put together this truly impressive program. And we should thank the all star cast that they somehow managed to recruit to come here in the maybe the hottest summer that Rome has had for a while and it gets pretty hot here in Rome almost every summer. And finally, I want to extend my personal congratulations to this year's Prize recipients, Professor Stephen Smith and Professor Maryann Glendon they are truly among the leading scholars in this field in the entire world. I have learned so much from their work, and I'm sure that many others here today would say the same thing.

### US has struggled but finally achieved a free society that protects diverse beliefs.

As this summit makes clear, religious liberty is an international problem. But I do think that we Americans can take special pride in our country's contribution to the development of a global consensus, at least on the level of international agreements, in support of this fundamental right here in Rome, history is all around us. The hotel in which my wife and I are staying looks out over the Roman Forum. And as a result, I find myself thinking about the proud civilization that was centered here two millennia ago. And as I think back, I also think ahead, and I wonder what historians may say centuries from now about the contribution of the United States to world civilization. One thing I hope, they will say, is that our country after a lot of fits and starts and ups and downs eventually showed the world that it is possible to have a stable and successful society in which people of diverse faiths live and work together harmoniously and productively while still retaining their own beliefs. This has been truly an historic accomplishment.

### History of Rome shows that human advances, such as religious liberty, are fragile.

But as the remnants of the classical past incessantly, tell us here in Rome, no human achievement is ever permanent. And therefore we can't lightly assume that the religious liberty enjoyed today in the United States, in Europe, and in many other places will always endure. Religious liberty is fragile, and religious intolerance and persecution have been recurring features of human history. We can't escape thinking about that here in Rome either.

### Romans had Christians torn by wild beasts in the Colosseum, among many other atrocities.

This, after all is where St. Peter and St. Paul and countless other early Christians were martyred. If we look at the Colosseum today, we see a tourist attraction we might see men dressed up as gladiators prancing around outside the Colosseum, but in its day, it was the killing place. It was the place where hundreds who knows who knows how many Christians were torn apart by wild beasts, to the delight of spectators, citizens of a rich, powerful and technologically advanced state, with little regard for the inherent worth of human life. Near the Colosseum, we can see the place where Nero was said to have used Christians as human tortures to light up his garden parties. I think

we're all aware of the persecution of the early Christians. But as Pope Francis has reminded us, more Christians are killed for their faith in our time. Then in the bloody days of the Roman Empire,

### **Religion is under attack today by Muslims, Hindus, Communists, and others.**

and of course, Christians have by no means been the only victims of religious persecution. Rome reminds us of that as well. On October 16 1943, German police and soldiers raided the old Jewish ghetto they rounded up 1000 Jews and sent them off to Auschwitz, where almost all of them perished. On October 9 1982, terrorists attack the Great Synagogue with hand grenades and machine gunfire. If we look around the world today, we see that people of many different faiths face persecution because of religion. When ISIS occupied in northern Iraq, 1000s of Yazidi men and boys were slaughtered, and 1000s of women and girls were raped and forced into marriage with ISIS fighters. In Nigeria, Christians have been under conscious constant constant attack. In Egypt, numerous Coptic churches have been attacked, and many worshippers have been killed. In India, Hindu and Muslim groups have brutally assaulted each other since independence. And in China. Of course, there is the unspeakable treatment of the Uyghurs. These are just a few examples, pardon me for leaving others out. But I think you'd get the point. religious persecution is alive and well in the world. And in many places, it is a violent life and death thing.

### **Religious persecution probably comes from mistrust of the Other...**

Religious liberty is under attack in many places, because it is dangerous to those who want to hold complete power. It also probably grows out of something dark and deep in the human DNA a tendency to distrust and dislike people who are not like ourselves.

### **...but I don't know that much about poor countries.**

I'm not very well positioned to talk about religious liberty outside the United States, Europe, and other economically advanced countries.

### **Religious liberty in rich countries threatened by ignorance of, and hostility to, religion.**

But in those places, religious liberty is facing a different challenge. And Professor Glendon has referred to that. This challenge stems from a turn away from religion, polls show a significant increase in the percentage of the population that rejects religion or thinks it's just not all that important. And this has a very important impact on religious liberty because it is hard to convince people that religious liberty is worth defending, if they don't think that religion is a good thing that deserves protection. I'm reminded of an experience I had a number of years ago in a museum in, in Berlin, one of the exhibits was a rustic wooden cross, a young, an affluent woman, a well dressed woman and the young boy, we're looking at this exhibit. And the young boy turns to the woman, presumably his mother, and said, Who is that man? That memory has stuck in my mind as a harbinger of what may lie ahead for our culture. And the problem that looms is not just indifference to religion, it's not just ignorance about religion. There's also growing hostility to religion, or at least the traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors. The challenge for those who want to protect religious liberty in the United States, Europe and other similar places, is to convince people who are not religious, that religious liberty is worth special protection. And that will not be easy to do.

### **Most legal academics think religion shouldn't have more protection than a hobby.**

As most of you know, I think a dominant view among legal academics is that religion doesn't merit special protection. It doesn't merit special treatment. A liberal society they say should be value neutral, and therefore it should treat religion, just like any other passionate personal attachment, say rooting for a favorite sports team, pursuing a hobby or following a popular artist or group. Now, I think we would all agree that in a free society, people should be free to pursue those avocations. But do they really merit the same protection as the exercise of religion?

### **Let's compare freedom of sports fandom to freedom of religion.**

The support for a sports team, for example, really merit the same protection as religious devotion. In posing that question, I put aside the question of support for the Notre Dame football team, which I understand has a quasi religious significance. I'm talking about an ordinary sports team, say an NFL team. And in deference to Dean Cole, I am not going to pick on the Pittsburgh Steelers. I'm going to pick on another team, the Green Bay Packers and the Packers fans here. I don't see any Well, if you I'm going to do it anyway. All right. There are lots and lots of law professors here. I'm not a law professor. Never have been but I'm going to pretend I am one right now and pose a hypothetical question. So let's say that a court has a rule that categorically prohibits the wearing of headgear in the courtroom. On a Monday morning, three attorneys are scheduled to appear in court. I'm going to give them imaginative names. I'm going to call them attorneys A, B and C.

### **Suppose someone whose life revolves around sports fandom wants to wear his team hat to court, where it is not allowed.**

Attorney A is a cheese heads everybody know where the cheese head is. It's a rabid Green Bay Packers fan. And they show their devotion to their team by wearing some sort of headgear that looks like a big chunk of Swiss cheese. So attorney A is a cheesehead his form of worship on Sunday morning is to bundle up, pack up his tailgating supplies, and head out for Lambeau Field, which for him is sacred ground. For 20 years. He's never missed the home game. He's incurred frostbite. His wife grew tired of his obsession and left him but nothing will stop him. The walls of his home are adorned with icons. There is an icon of St. Vincent Lombardi. There is an icon of St. Paul Horning Notre Dame class of 1956. And others. One Monday morning he is ecstatic about a Packers victory he can't contain himself and he insists on wearing a green and gold cap when he appears in court. He feels he's being restrained. He's not wearing the big cheese on his head but he wants to wear a Packers hat.

### **1<sup>st</sup> Amendment protects a religious insistence on a head covering, but not the fan, despite my colleagues not being so sure.**

That's attorney A attorney B is an Orthodox Jewish man who always wears a kippah attorney C is a Muslim woman who covers her head in public for religious reasons. If a can't wear his packers hat, is it still possible to accommodate attorneys B and C? Well, for me, the Constitution of the United States provides a clear answer. Some of my colleagues are not so sure. But for me, the text tells the story. Constitution protects the free exercise of religion, it does not protect the free exercise of support for the Packers. And for judges like me who think to the belief that it matters what the Constitution says and what it does not say that is enough.

### **But what is the basis for this Constitutional freedom?**

But is that the only thing that Americans who support religious liberty can say for people who are skeptical? It's the law and don't ask me why. Now, can we say something more?

### **Declaration of Independence traces rights to our Creator, but that won't impress atheists.**

Well, perhaps we can turn to our Declaration of Independence, which of course proclaims that we are all endowed by our Creator with certain unalienable rights. But that too may not be convincing to someone who is skeptical about whether we really have a creator.

### **Same problem exists in justifying freedom of religion proclaimed in international law.**

A similar problem exists on the international level. Article 18 of the Universal Declaration of Human Rights boldly proclaims, quote, everyone has the freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching practice, worship, and observance. The adoption of the Universal Declaration without dissent was an impressive political achievement, and Americans can take pride for the role we played in bringing that about. The chair of the commission, responsible for drafting the Universal Declaration was former First Lady Eleanor Roosevelt. So the declaration was important. It is important it paved the way for other multilateral treaties that protect religious freedom, including what became the European

Convention on Human Rights and the European Union's Charter of Fundamental Rights. So those who respect international law can point to the charter and other international agreements. But such agreements still don't answer the deeper question why religious liberty should get special protection?

2

### **International rights not based on particular revelation, philosophy, or tradition.**

After all, they are positive law. And so the same question arises with respect to positive law, whether it is international, or national. The process by which the original Declaration was drafted, did little to answer that deeper question. The selection of the rights protected by the declaration was not based on revelation or philosophy, or the traditions of any particular people. If the drafters had taken that approach, they would have had a tough time rounding up signatories.

### **International rights based on survey of various national constitutions.**

Instead, they use the process that was very similar to the one that was used by the American Law Institute, when it drafted the various restatements of the law, the restatement of contracts Restatement of Torts, et cetera. And indeed, the AI allies recommendation to the Commission turned out to be quite influential. The reporter for The commission said that his draft was not based on any particular belief system. He took a more humdrum tack, he surveyed quote all the rights mentioned in various national constitutions, and in the various suggestions that had been submitted to the commission and he selected the rights that appeared most frequently and were most prominently promoted. A short time later, when the Council of Europe drafted what ultimately became the European Convention on Human Rights it proceeded in a similar fashion. Piggybacking on the work of the UN Commission, the principal draftsman explained that the rights protected represented, quote, the common denominator of our political institutions. And on that basis, the Commission included Article Nine, which protects religious liberty, and is worded similarly to article 18 of the Universal Declaration.

### **Religious liberty is not absolute; child sacrifice would not be protected.**

But this of course, is still positive law and positive law can always be changed and perhaps more important, it has to be interpreted. And any judge who wants to shrink religious liberty will not find it very difficult to do so. No constitution or international agreement provides unqualified protection for religious liberty, nor should it suppose a group wanted to revive the worship of Moloch. And the associated practice of child sacrifice. No, society would tolerate that today. So religious liberty must have its limits. And all constitutions and charters and the case law of various countries impose limits on religious liberty.

### **European Convention lists values that might take precedence over religious liberty.**

Here's an example the European Convention provides that religious liberty is subject to quote such limitations as are prescribed by law, and are necessary in a democratic society, in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. What sort of judge could not take language like that.

### **A judge could use such values to shrink religious liberty to only include private worship.**

And my point is not to criticize that particular language, but what sort of judge cannot take a limitation like that, and shrink religious liberty as much as that judge wants. And if the judge does not highly esteem, religious liberty, it can be shrunk all the way down to what people often talk about today. And that is freedom of worship. freedom of worship means freedom to do these things that you like to do in the privacy of your home, or in your church or your synagogue or your mosque or your temple. But when you step outside into the public square, in the light of day, you had better behave yourself like a good secular citizen. That's the problem that we face.

## **Some countries have narrowed liberty of religious speech, but I don't want to interfere in affairs of other national legal systems.**

And I think we can see this sort of narrowing particularly in the area of religious speech in the jurisprudence of some countries that profess to be dedicated to freedom of speech, freedom of religion, and freedom of conscience. Now, when I was putting these remarks together I was tempted at this point to provide some examples. I am not a diplomat, like Professor Glendon. I wouldn't be very bad about it. But it was unusual for me to this sort of a diplomatic impulse came upon me. And I said to myself, you're an American judge, and with businesses that have yours to criticize decisions that are handed down by foreign courts. I had a few second thoughts.

## **Even though lots of international leaders have been criticizing my abortion decision.**

Over the last few weeks since I had the honor this term of writing, I think, the only Supreme Court decision in the history of that institution that has been lambasted by a whole string of foreign leaders who felt perfectly fine commenting on American law. One of these was former Prime Minister Boris Johnson, but he paid the price. Post hoc ergo propter hoc right. But others are still in office, President Macron and Prime Minister Trudeau I believe are two. But what really wounded me what really wounded me was when the Duke of Sussex address the United Nations and seem to compare the decision whose names may not be spoken with the Russian attack on Ukraine.

## **How do we protect religious liberty from indifference and hostility of unreligious?**

Well, despite this temptation, I'm not going to talk about cases from other countries. All I'm going to say is that ultimately, if we are going to win the battle to protect religious freedom, in an increasingly secular society, we will need more than positive law. Think again of the 10 year old boy I saw in the Berlin Museum. Think of the increasing number of young Americans whose response when asked to name their religion, say none. Think of those who proclaim that religion is bad. What can we say to such people, to convince them that religious liberty is worth protecting? That is the challenge. And it is a challenge that will not be met by federal judges for whom the Constitution should be enough. And it certainly will not be met by people of my generation. So my primary point tonight is to pose that challenge to others not to offer anything like a full answer, which I certainly don't have. Nevertheless, I'm going to offer a few brief thoughts.

## **Religious liberty promotes domestic tranquility, as America has proven once we stopped discriminating against Mormons, Catholics, and Jews.**

The first concerns a lesson that I think we can learn from American history. And that is that religious liberty promotes domestic tranquility. It provides a way for religiously diverse people to hold together and to flourish. As I said at the outset, I think that the American experience illustrates that well. We all know, of course, that there has been a lot of religious discrimination against a variety of groups throughout the history of this country. At his talk at lunch the other day, President Oakes reminded us of the treatment of the members of the Church of Latter Day Saints during the 19th century. He also reminded us of the discrimination that Catholics felt especially after waves of poor Catholic immigrants came to this country during the 19th century. And of course, anti semitism has been a feature an unfortunate feature of American history. And there is prejudice today, against members of other religions. But although we live in an era where people tend to dwell on what is bad about American history, I think in the issue in the case of religious liberty, if we draw back and we see what we achieved, after all of these missteps, it is something that we can be proud of. And it's an example I think, that we can give to the rest of the world.

## **Non-religious people may also appreciate the charitable work of religions.**

A second point is also something that President oak said at lunch the other day, and that is to talk about the enormous charitable work that is done by religious groups and people of faith. He detailed the things that had been done by his church in recent years. And the same is certainly true of the Catholic Church.

### **Philadelphia tried to hobble Catholic foster care even though Catholics invented orphanages.**

Two terms ago, I wrote an opinion and a case called *Fulton* which concerned an effort by the city of Philadelphia to expel Catholic social services from the foster care program. And as part of that opinion, I recalled the history of providing help for orphaned and abandoned children. The first orphanages thought to be one that was founded by St. Basil the Great in the fourth century, the first orphanage in the United States, was founded by nuns in New Orleans in 1729. Long before governments began to institute programs to care for orphaned and abandoned children, for people who are sick for the poor for other people who are in need churches were there. They have a long history of doing this, they continue to do it today. And it's something that I think we can remind our fellow citizens who may not be religious themselves about.

### **Social reform often accomplished by religious leaders such as MLK.**

Another important point that can be made concerns social reform. Religious Liberty has always fostered social reform. Social has often fueled social reform. It's not an accident. I think that leaders of the movement to abolish slavery, both in Europe and in the United States, were very often men and women of faith. Nor is it an accident that the most prominent leader of the American civil rights movement in the 1960s was the Reverend Martin Luther King, Jr, an ordained minister. By drawing on his faith, Dr. King was able to speak to all Americans regardless of race, and make a powerful case for equal treatment for all people. If religious liberty is protected, religious leaders and other men and women of faith will be able to speak out on social issues, and people with deep religious convictions may be less likely to, to succumb to dominating ideologies or trends, and more prone to act in accordance with what they see as true and right. Civil society can count on them as engines of reform.

### **Religious liberty helps protect other freedoms such as speech and assembly.**

And this brings me to a related argument we can make to those who are not themselves. Religious son. It's a point that has already been brought out this evening, but it deserves emphasis. And that is the relationship between religious liberty and other rights. Consider the relationship between freedom of religion and freedom of speech. The exercise of religion very often involves speech, a spoken or written prayer, the recitation of Scripture, a homily, a religious book or article these are all forms of speech they are also forms of religious exercise. If this sort of speech can be suppressed or punished, what is to stop the state from crushing other forms of expression? Work consider the relationship between freedom of speech and freedom of assembly. A religious service in the church, synagogue, mosque or temple is a form of assembly. If a government can ban those assemblies, will it hesitate to outlaw others. On the other hand, if religious liberty is allowed, it will be harder for the state to restrict other speech and other assemblies. Thus, as a practical matter, religious liberty and other fundamental rights tend to go together.

### **Liberal ideology of limited government comes from Catholic Church's fight for freedom.**

And many have seen the rise of limited government often attributed to liberal ideology as an outgrowth of the freedom for which the Church has always fought.

### **For instance, Pope John Paul II helped bring down the Soviet Union.**

So powerful is religious liberty that it even helped to bring down what once seemed an indomitable totalitarian state. As George Weigel wrote in his biography of St. Pope John Paul the Second, a regime that honors religious liberty, quote, by definition ceases to be totalitarian. And the life and work of John Paul the second dramatically illustrate that point. John Paul, the second had personal experience with totalitarian regimes and religious, religious oppression. His years in seminary coincided with the Nazi occupation of Poland, and his early priesthood was under the thumb of the Soviets. Throughout those years he worshipped and ministered at risks to his life, and saw friends and fellow priests martyred. But he was undeterred. And he was savvy as Archbishop of Krakow, he carefully used his authority to resist the state where he could and expand opportunities for religious practice. Later, when he made his first papal visit to his homeland in May 1979, he drew enormous ecstatic crowds, the Polish government and its Soviet masters could see that here was a force to be reckoned with. And sure enough,

the next year, the Solidarity movement with connections to the church brought about the strike at the Gdansk shipyard, which in turn, led to the fall of the Polish communist government and contributed to the fall of communist governments throughout what was once known as the Warsaw Pact, as Mikhail Gorbachev admitted, and as historians like John, like Paul Johnson had shown, John Paul the second played a big role in the Soviet Empire's demise.

### **In 1960s, Church boldly proclaimed freedom of conscience based on dignity of the human person.**

In making these observations about the case that can be made for religious liberty, I must recall another event that occurred here in Rome, and that is the promulgation 57 years ago of the encyclical *Dignitatis Humanae* in which the church boldly proclaimed that no person should be, quote, forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within do limits. As the title of the encyclical reveals, in English, it is, of course, on the dignity of the human person. The foundation for this liberty is the dignity that is owed to every single human. When the state signs on to protect religious liberty, it necessarily signs on to a particular conception of what it means to be human. And that conception entails a respect for a panoply of rights.

### **Religious liberty will only endure if people value it.**

These are just a few thoughts about what may be said to a skeptical culture, about the protection of liberty. And make no mistake about it unless the people can be convinced that robust religious liberty is worth protecting, it will not endure. I want to quote something that was said, by the judge who is the namesake for Professor Glendon chair, I'm sure you've heard this, but it too is worth repeating, Learned Hand wrote Liberty lies in the hearts of men and women, when it dies there no constitution, no law, no court can do much to help us help it.

### **Optimistic story: despite government repression, Christianity is growing in China.**

I had originally thought that I would end my talk at this point. But it struck me that is a pretty gloomy note. And I don't want to end on a gloomy note, I don't think we should be gloomy, about religious liberty. So I'm going to add another reminiscence. That goes along with my reminiscence about the 10 year old boy, in Berlin, this one relates to a trip I took to China in 2016. during my lifetime, the People's Republic of China did its best to eradicate religion completely. And yet it failed. Just as the Roman emperors who spent centuries trying to destroy Christianity failed. In China, there are now more Christians than there are in France or Germany. And if trends continue, the number of Christians in China may surpass those in the United States. I know the situation has changed since 2016. But I doubt that this trend can be personally stopped. During a visit I had a conversation with a Beijing University student that I will never forget. I was engaging in small talk with this young woman and she told me that she had an older brother and I passed over this I didn't make much of it and she stopped me and she said I don't think you understand the importance of what I just told you. I have an older brother. She had been born during the time when the People's Republic was strictly enforcing its one child policy. Her mother was a physician. Her mother arranged for her to be born outside I have a hospital. So there would be no record of her birth. And after she was born, her parents paid a succession of childless couple couples to raise her in their home and pretend that she was their daughter. Her real parents had only intermittent contact with her during all that time, up to the point where she scored very high on an exam and was admitted to Beijing University. She told me something very important. She, I found very interesting, she said that she had grown up in a town in China, where, for historic reasons, there were a number of churches. And she said that the Catholic Church there was known as the church that gave reasons that really, that really struck me.

### **Humans need religion, so religion will always prevail.**

The Cultural Revolution did its best to destroy religion, but it was not successful. It was not able to extinguish the religious impulse. Our hearts are restless until we rest in God, and therefore the champions of religious liberty,

who go out as wise as serpents and as harmless as doves can expect to find hearts that are open to their message.  
Thank you very much.



## Summary of entire speech

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Religious persecution probably comes from mistrust of the Other...

...but I don't know that much about poor countries where these abuses now occur.

Religious liberty in rich countries threatened by ignorance of, and hostility to, religion.

Most legal academics think religion shouldn't have more protection than a hobby.

Let's compare freedom of sports fandom to freedom of religion.

Suppose someone whose life revolves around sports fandom wants to wear his team hat to court, where it is not allowed.

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But what is the basis for this Constitutional freedom?

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Same problem exists in justifying freedom of religion proclaimed in international law.

International rights not based on particular revelation, philosophy, or tradition.

International rights based on survey of various national constitutions.

Religious liberty is not absolute; child sacrifice would not be protected.

European Convention lists values that might take precedence over religious liberty.

A judge could use such values to shrink religious liberty to only include private worship.

Some countries have narrowed liberty of religious speech, but I don't want to interfere in affairs of other national legal systems...

...even though lots of international leaders have been criticizing my abortion decision.

How do we protect religious liberty from indifference and hostility of unreligious?

Religious liberty promotes domestic tranquility, as America has proven once we stopped discriminating against Mormons, Catholics, and Jews.

Non-religious people may also appreciate the charitable work of religions.

Philadelphia tried to hobble Catholic foster care even though Catholics invented orphanages.

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