

# JOURNAL *of* CHRISTIAN LEGAL THOUGHT

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**The Institute for Christian Legal Studies (ICLS)**,  
a Cooperative Ministry of Trinity Law School and Christian  
Legal Society.

**The Mission of ICLS** is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

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## WHAT'S THE USE OF RELIGIOUS FREEDOM?

ANDREW R. DELOACH

What does religious freedom look like during a global pandemic? The most recent U.S. Supreme Court term ended with several significant “wins” for religious liberty. These cases, however, began before the outbreak of the COVID-19 pandemic.<sup>1</sup> To get a more accurate picture, we ought to look instead at the “shutdown order” cases—challenges to state orders putting attendance restrictions on public gatherings, including places of worship, in order to limit the spread of COVID-19. When, in May 2020, the Supreme Court upheld California’s shutdown of religious services because it placed similar restrictions on “comparable secular gatherings,” the ruling was regrettable, debatable, though not wholly unreasonable.<sup>2</sup> But when the Court upheld Nevada’s shutdown order in July, the decision was a shock. The Nevada Governor’s order limits houses of worship—regardless of size—to services of no more than fifty persons, but casinos and several other facilities are permitted to admit fifty percent of their maximum occupancy. Half occupancy of a Las Vegas casino is considerably more than many churches, and certainly more than fifty percent. Render to Caesar, indeed.

The majority issued no opinion in upholding Nevada’s shutdown order, but the dissenting justices were unmistakable in their disagreement. Nevada’s law, Justice Kavanaugh explained, divides up organizations into

favored and disfavored categories: “Nevada’s 50-person attendance cap on religious worship services puts praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion.”<sup>3</sup> Life in a pandemic appears to mean “the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.”<sup>4</sup> COVID-19 has provided “a blank check for a State to discriminate against religious people, religious organizations, and religious services.”<sup>5</sup> If that’s the way religious freedom works, what’s the use of religious freedom?

For those who care about religion and the liberty to be religious, such moments tend to induce anxious reflection: *Is religious freedom under threat?* The question is not as novel as coronavirus. In 2012, the Witherspoon Institute’s Task Force on International Religious Freedom published a short but rich book titled, *Religious Freedom: Why Now? Defending an Embattled Human Right*, responding to a “worldwide erosion of religious freedom.”<sup>6</sup> Constitutional scholar Richard Garnett warned, in 2016, that there are “troubling signs” that certain commitments to religious freedom in America are “falling out of favor and even being squarely rejected.”<sup>7</sup> Harvard Law professor (and former member of the U.S. Commission on International Religious Freedom) Mary Ann Glendon

<sup>1</sup> *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020) (holding a state tuition-assistance program to allow students to attend private schools cannot exclude religious schools); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (holding religious schools are protected from judicial review of the manner in which they select and supervise teachers in accord with their mission); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (holding employers with religious and conscientious objections are exempt from providing contraceptive coverage to employees).

<sup>2</sup> *South Bay United Pentecostal Church v. Newsom*, 590 U. S. \_\_\_\_ (2020).

<sup>3</sup> *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. \_\_\_\_ (2020) (slip op. at 5, 12) (Kavanaugh, J., dissenting), [https://www.supremecourt.gov/opinions/19pdf/19a1070\\_0811.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1070_0811.pdf).

<sup>4</sup> *Id.* (slip op. at 1) (Gorsuch, J., dissenting).

<sup>5</sup> *Id.* (slip op. at 10) (Kavanaugh, J., dissenting).

<sup>6</sup> The Task Force on International Religious Freedom of the Witherspoon Institute, *RELIGIOUS FREEDOM: WHY NOW? DEFENDING AN EMBATTLED HUMAN RIGHT*, v (2012). This monograph was principally authored by Timothy Samuel Shah, whose article appears in this issue of the *Journal of Christian Legal Thought*.

<sup>7</sup> Richard Garnett, *Symposium: The future of accommodation*, SCOTUSBLOG (May 17, 2016), <https://www.scotusblog.com/2016/05/symposium-the-future-of-accommodation>.

has lectured at least three times in the last ten years on the domestic and global threat to religious freedom.<sup>8</sup>

And then came coronavirus. The pandemic clearly re-ordered priorities for most Americans, and the shutdown cases led some to sound the alarm, declaring that religious freedom in the United States is under siege like no other time.<sup>9</sup> Quickly, fear spread that government would ban worship services on the assumption that “people can always watch online or pray at home.”<sup>10</sup> But considering the victories this past term and pointing to key statutory protections of religion, others have claimed religious freedom is thriving. The “Religious Liberty Court” is actually extending, rather than restricting, protections for religion and religious believers.<sup>11</sup> Or it could be that all of this creates the impression that religious freedom is “more controversial than it really is”—after all, are we fighting for religious liberty or *using it* to fight the “substantive moral debates” in a divisive culture war?<sup>12</sup>

Globally, the picture is no less confusing but far more dire. Despite the fact that religious freedom is recognized in UN declarations, resolutions, mandates, and nearly every human rights treaty, domestic practice frequently falls short of honoring that recognition. Violations of religious liberty are not merely burdensome but “violent and systematic” in many parts of the world.<sup>13</sup> A 2009 study by the Pew Forum on Religion and Public Life found that nearly 70% of the world’s population live in

countries with high restrictions on religion.<sup>14</sup> In the decade since, restrictions and hostilities have risen markedly around the world.<sup>15</sup> Common forms of religious discrimination have taken on increasing prominence, as with the rise of Islamist anti-Semitism in Germany.<sup>16</sup> Violent extremism and persecution targeting religious minorities continue to be a serious problem, but the health crisis has provided new opportunities for government repression of religion in authoritarian and non-authoritarian states alike.<sup>17</sup> The pandemic seems to have exacerbated religious restrictions and hostilities, weakening already tenuous protections.

The truth is that religious freedom is *always* under threat. Indeed, “[o]ne of the greatest threats to religious freedom at home and abroad,” Glendon explains, “is the widely held opinion that it is not under threat.”<sup>18</sup> Arguably that opinion is based, at least in part, on deepening indifference toward religion in the U.S. and the West. Fewer and fewer Americans describe themselves as Christians, and the religiously unaffiliated “describe their religious identity as atheist, agnostic or ‘nothing in particular.’”<sup>19</sup> Seemingly passive (and occasionally defeatist) Christianity in Europe has been in steady retreat in the face of Islam’s impact and intensity. Journalist Christopher Caldwell has explained that because Muslims in Europe are more passionate than European Christians, so long as the Christian world is more free than the Muslim one,

<sup>8</sup> Mary Ann Glendon, *Making the Case for Religious Freedom in Secular Societies*, 33 J. L. & Religion 329, n.1 (2018). Glendon is also the current Chair of the U.S. State Department Commission on Unalienable Rights.

<sup>9</sup> See, e.g., Kelly Shackelford, *Religious Freedom is Under Attack Like Never Before*, NEWSWEEK (Aug. 5, 2020), <https://www.newsweek.com/religious-freedom-under-attack-like-never-before-opinion-1523094>.

<sup>10</sup> Mark Movsesian, *Religious Liberty in COVID-19’s Wake*, LAW & LIBERTY (May 12, 2020), <https://lawliberty.org/religious-liberty-in-covid-19s-wake/>.

<sup>11</sup> Carrie Campbell Severino, *The Religious Liberty Court*, NATIONAL REVIEW: BENCH MEMOS (July 13, 2020), <https://www.nationalreview.com/bench-memos/the-religious-liberty-court/>; see also David French, *The True Extent of Religious Liberty in America, Explained*, THE DISPATCH: THE FRENCH PRESS (June 21, 2020), <https://frenchpress.thedispatch.com/p/the-true-extent-of-religious-liberty>.

<sup>12</sup> Ryan T. Anderson, *Proxy Wars over Religious Liberty*, NATIONAL AFFAIRS, Spring 2020, at 152. <https://nationalaffairs.com/publications/detail/proxy-wars-over-religious-liberty>.

<sup>13</sup> Glendon, *supra* note 8, at 330.

<sup>14</sup> Pew Forum on Religion & Public Life, *Global Restrictions on Religion* (Dec. 2009), <https://www.pewforum.org/2009/12/17/global-restrictions-on-religion/>. See also Brian J. Grim, *Restrictions on Religion in the World: Measures and Implications*, in THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES 86 (Allen D. Hertzke ed., Oxford Univ. Press 2013).

<sup>15</sup> Pew Research Center, *A Closer Look at How Religious Restrictions Have Risen Around the World* (July 15, 2019), [https://www.pewforum.org/wp-content/uploads/sites/7/2019/07/Restrictions\\_X\\_WEB\\_7-15\\_FULL-VERSION-1.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2019/07/Restrictions_X_WEB_7-15_FULL-VERSION-1.pdf).

<sup>16</sup> See Hudson Institute, *Anti-Semitism Among Islamists in Germany* (Jennifer S. Bryson trans., June 2019), <https://s3.amazonaws.com/media.hudson.org/Anti-Semitism%20Among%20Islamists%20in%20Germany%20FINAL.pdf>.

<sup>17</sup> Zsuzsa Anna Ferenczy, *Missed Opportunities for Religious Freedom in the Time of Corona*, PROVIDENCE (June 18, 2020), <https://providencemag.com/2020/06/missed-opportunities-religious-freedom-coronavirus-covid-19/>.

<sup>18</sup> Glendon, *supra* note 8, at 330.

<sup>19</sup> Pew Research Center, *In U.S., Decline of Christianity Continues at Rapid Pace* (Oct. 17, 2019), <https://www.pewforum.org/wp-content/uploads/sites/7/2019/10/Trends-in-Religious-Identity-and-Attendance-FOR-WEB-1.pdf>.

Islam will fill the spiritual vacuum left by Christianity.<sup>20</sup> Caldwell thus illustrates that religious freedom can be lost through indifference and non-use: “Since atheists, agnostics, and Christians don’t use freedom of religion in Europe nowadays, freedom of religion comes to mean freedom of Islam.”<sup>21</sup> We should not be surprised that apathy about religion weakens concern for its protection. If Christians don’t use freedom of religion in the United States, freedom of religion may come to mean something else. Perhaps another way of thinking about the issue is to ask: If we didn’t have freedom of religion, what *would* we have? “Nothing in particular”?

### THE DRIFT TO SECULARISM, OR: LAÏCITÉ IN THE U.S.A.?

Nature abhors a vacuum. Far more likely than the replacement of Christianity by passionate religious “nones” is its diminishment by the subtle drift toward secularism. In essence, secularism is the rigid separation and strictly neutral relationship of state and religion. That may sound to some ears like religious liberty in America, but the resemblance is superficial. Today it is increasingly concealed under the Rawlsian guise of shared “public reason,” which excludes “comprehensive doctrines”—the moral, metaphysical, and religious beliefs that define our lives—in order to ensure cooperation in pluralistic societies.<sup>22</sup> Yet a more suitable comparison is the overt secularism in the French principle of *laïcité*.

*Laïcité* is difficult to define or translate, but the idea behind it is sufficiently certain. Typically describing the

separation of religion and state, it aspires to maintain social order by preventing disrespect of the diversity of beliefs. It is the foundation of the French spirit of tolerance and common identity and, as such, is the definitive French value.<sup>23</sup> Though foreign to many Americans, it is a seemingly ideal model for those who wish to reinforce the proverbial wall of separation and inculcate the values of a secular civil religion. “At first glance, French *laïcité* proposes a neutral stance towards religion and for this reason offers an appropriate way out to the difficult question of defining the place of religion in post-modern pluralist societies.”<sup>24</sup> To some observers, the apparent omnipresence of religion in American society conceals the fact that the United States is “perfectly secular.”<sup>25</sup> Thus, the Constitution’s religion clauses (including the No Religious Test clause in Art. VI) are seen as equivalent to *laïcité*.<sup>26</sup> And, we are told, secularism is not simply about state and religion; it is really about “the (correct) response of the democratic state to diversity.”<sup>27</sup> As “truly secular states,” France and the United States must “compel religion to exist purely in the private sphere.”<sup>28</sup> As modern democracies, they must obligate religion to be “a personal affair, distinct and separate from public affairs ... [and] drive religion out of the sphere reserved for politics in the city: that is to say, the public sphere.”<sup>29</sup>

This comes across as attempting to respect the place of religion in a pluralistic society. But secularism is less concerned with the welfare of religion and religious believers than it is with “the constitutional translation of distrust towards religion.”<sup>30</sup> Translate *pluralistic* and

<sup>20</sup> Christopher Caldwell, *REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM AND THE WEST* 147 (Anchor Books 2010).

<sup>21</sup> *Id.* at 164.

<sup>22</sup> See John Rawls, *POLITICAL LIBERALISM* 13 (Columbia Univ. Press 2016).

<sup>23</sup> See, e.g., T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 *BYU L. Rev.* 419, 428-29 (2004).

<sup>24</sup> Marta Cartabia, *The Challenges of ‘New Rights’ and Militant Secularism*, in *UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY: THE CASE OF RELIGIOUS FREEDOM* 443 (Mary Ann Glendon & Hans F. Zacher eds., Pontifical Academy of Social Sciences 2012).

<sup>25</sup> Elisabeth Zoller, *Laïcité in the United States or The Separation of Church and State in a Pluralist Society*, 13 *Ind. J. Global Legal Stud.* 561, 566 (2006).

<sup>26</sup> *Id.* at 563-64. Although Zoller claims these clauses “can be read as a mirror” of French statements of *laïcité*, the images are not clear reflections—as when she states that *free exercise* is equivalent to *respect for all beliefs*. Of course, the latter is only a part of the meaning of the former.

<sup>27</sup> Charles Taylor, *Why We Need a Radical Redefinition of Secularism*, in *THE POWER OF RELIGION IN THE PUBLIC SPHERE* 36 (Eduardo Mendietta & Jonathan Vanantwerpen eds., Columbia Univ. Press 2011).

<sup>28</sup> Zoller, *supra* note 25, at 562.

<sup>29</sup> *Id.* at 564.

<sup>30</sup> Cartabia, *supra* note 24, at 453. See also Jurgen Habermas, *Pre-political Foundations of the Democratic Constitutional State?*, in JOSEPH RATZINGER & JURGEN HABERMAS, *THE DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION* 29 (Brian McNeil trans., Ignatius Press 2006) (arguing that a constitution in a democratic society can only be justified “independent of religious and metaphysical traditions.”).

what results is something like *post-Christian*. For some time, a common assumption in mainstream European culture (and law) has been that religious freedom in a multicultural society requires strict state neutrality—treating *religious freedom* and *secularism* as synonyms.<sup>31</sup> Historical secularism in Europe worked to restrain Christianity “while taking it as a sociological given,” whereas a more modern ideological secularism “aims to break every link between religion and public life, shepherding people out of religion altogether”<sup>32</sup>—treating *secularism* and *atheism* as synonyms. *Laïcité* claims to be neutral but in reality aims to neutralize religion.<sup>33</sup> And within that secular framework, the state’s role is only nominally to protect religion. The primary task is to instill the values of *laïcité* and shield citizens from competing religious values.<sup>34</sup>

At the international level the secular drift is most evident in persistent efforts to rewrite the history and meaning of human rights and erase all religious influence. One might be misled into thinking the Universal Declaration of Human Rights explicitly references the Christian God, the resurrection of Jesus, and holy baptism, so obstinate are some critics in their hostility to religious foundations. Feminist legal scholar Frances Raday maintains that

*One might be misled into thinking the Universal Declaration of Human Rights explicitly references the Christian God, the resurrection of Jesus, and holy baptism, so obstinate are some critics in their hostility to religious foundations.*

human rights are the product of rationalist secularism, deracinated and freed from “transcendentalist premises” and “the jurisdiction of religious authority.”<sup>35</sup> In this alternate reality, international law protects the right to freedom *from* religion. Indeed, “deference to religious values in constitutions implants violation of universal human rights at the core of the constitutional system;” to prevent the exclusion of other rights, freedom from religion must be secured by secular constitutions and the relegation of religion to the private sphere.<sup>36</sup> David Pollock, something of a professional humanist, likewise argues for a constitutional secularism of extensive freedom from religion (exemplified by *laïcité*). This “stronger form of neutrality,” he suggests, “is founded on a view of religion as a potentially divisive force that might threaten the stability, peace, and good order of the state to the general detriment.”<sup>37</sup> Ponder the

euphemism of “stronger neutrality” and the secularist mindset becomes clearer. As for motivation, Pollock explains that “the inheritance from the Christian past still weighs heavily on the secular present” and “laws that originate in religious doctrine ... should be discarded.”<sup>38</sup> Modern ideological secularism is haunted by its transcendent past.

<sup>31</sup> Cartabia, *supra* note 24, at 445.

<sup>32</sup> Caldwell, *supra* note 20, at 161; see also Daniel J. Mahoney, *Introduction*, in PIERRE MANENT, *BEYOND RADICAL SECULARISM*, xiii (St. Augustine’s Press 2016).

<sup>33</sup> Cartabia, *supra* note 24, at 446-47 (concluding that with “neutral secularism” religion is “always quarantined, marginalized or privatized.”).

<sup>34</sup> See PETER BERGER, GRACE DAVIE & EFFIE FOKAS, *RELIGIOUS AMERICA, SECULAR EUROPE? A THEME AND VARIATIONS* 76 (Routledge 2016).

<sup>35</sup> Frances Raday, *Freedom from religion in international human rights law*, in *RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION* 56 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., Routledge 2019). For an excellent refutation explaining the significant influence of Christianity on the Universal Declaration—and specifically of two Christian thinkers involved in its drafting, Charles Malik and Jacques Maritain—see Chapter 1 in LINDE LINDKVIST, *RELIGIOUS FREEDOM AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Cambridge Univ. Press 2020).

<sup>36</sup> Raday, *supra* note 35, at 61.

<sup>37</sup> David Pollock, *Is there a right to freedom from religion?*, in *RELIGIOUS FREEDOM AND THE LAW*, *supra* note 35, at 74-75.

Elsewhere (at 69), Pollock is more forthright about his fear of “an increasingly well-organized international coalition of reactionary religious agents.”

<sup>38</sup> *Id.* at 69. That task is a monumental one: as Sir Matthew Hale said, “Christianity is a part of the common law.” See *Taylor’s Case* (1676) 86 Eng. Rep. 189, quoted in John Witte Jr., *From Establishment to Freedom of Public Religion*, 32 *CAP. U. L. REV.* 499, 508 (2004).

In the United States, the secular drift is more subtle and, therefore, more diverse. There is no history of secularism comparable to the one in France, no common grammar or doctrine of *laïcité*. Instead, it is a general watering down of religion from special to unremarkable (and even to irrational and intolerant). What was once seen as unique and paramount in the lives of most Americans is now ripe for replacement by any one or more of the innumerable life-defining options. Philosophers Jocelyn Maclure and Charles Taylor observe that “[w]ithin the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs that allow individuals to structure their moral identity.”<sup>39</sup> But this shift is no explicit part of any government policy or program, nor our courts’ jurisprudence. The “long process of secular change,” Al Mohler explains, “has been driven by cultural forces that are increasingly committed to secularism as an ideology.”<sup>40</sup> If law is downstream from the driving force of culture, it nonetheless contributes to the drift in significant ways. Three features stand out.

### *Religious freedom isn’t necessary.*

Some scholars maintain that religious freedom is an unnecessary right because everything worth protecting is covered by another right or group of rights. The alternatives commonly proposed are freedom of association and freedom of expression—though the shortcoming

of each is fairly obvious. Brian Leiter’s *Why Tolerate Religion?* suggests that religious conscience is no more important than secular conscience, and thus religious beliefs are entitled to only those protections available to nonreligious beliefs.<sup>41</sup> Micah Schwartzman likewise insists that “religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment.”<sup>42</sup> Leora Batnitzky and Hanoch Dagan suggest that religious freedom has “crucial significance to people’s identity” much like the right to conscience and the right to culture, which “raises difficult conceptual and normative questions concerning the value added (if any) of freedom of religion...”<sup>43</sup> In other words, a general freedom of conscience is enough. But such a freedom is a mile wide and an inch deep. Coerced nonreligious conscience cannot extinguish religious practice, worship, observance, and teaching. And no one is willing to die for the right to culture.<sup>44</sup>

Another proposed replacement is tolerance, exemplified recently by Andrew Koppelman’s *Gay Rights vs. Religious Liberty?: The Unnecessary Conflict*.<sup>45</sup> But tolerance is a two-way street many preachers of the virtue are unwilling to walk, particularly when one’s own commitments become the new orthodoxy.<sup>46</sup> Respect for religious freedom becomes, as Robert George puts it, “a kind of mutual nonaggression pact” disguising a purely self-interested, grudging tolerance.<sup>47</sup>

Underlying these contentions is the more basic claim that religious freedom simply is not special. Legal

<sup>39</sup> JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 89 (Jane Marie Todd trans., Harvard Univ. Press 2011), quoted in Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders’ Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387 (2016).

<sup>40</sup> R. Albert Mohler, Jr., *Secularism Cannot Sustain Liberty, a Response to Greg Forster*, LAW & LIBERTY (Aug. 4, 2020), <https://lawliberty.org/secularism-cannot-sustain-liberty/>.

<sup>41</sup> BRIAN LEITER, *WHY TOLERATE RELIGION?* (Princeton Univ. Press 2013). For a thorough review and critique, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013).

<sup>42</sup> Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

<sup>43</sup> INSTITUTIONALIZING RIGHTS AND RELIGION: COMPETING SUPREMACIES 1 (Leora Batnitzky & Hanoch Dagan eds., Cambridge Univ. Press 2017).

<sup>44</sup> “Though profoundly intertwined with other basic rights such as freedom of expression and association, freedom of religion stands out as the right for which people are most willing to suffer and die.” United States Commission on International Religious Freedom, *USCIRF Annual Report 2018*, at 14 (Apr. 2018), [https://www.uscirf.gov/sites/default/files/USCIRFAnnual2018\\_tagged508.pdf](https://www.uscirf.gov/sites/default/files/USCIRFAnnual2018_tagged508.pdf).

<sup>45</sup> For a thoughtful review of Koppelman’s book, see Stephen D. Smith, *An Unnecessary Conflict?*, Balkinization (July 16, 2020), <https://balkin.blogspot.com/2020/07/an-unnecessary-conflict.html>.

<sup>46</sup> Describing the ideology of liberalism in a manner making it completely analogous to secularism, Stanley Fish wrote: “‘Tolerance’ may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian, views; but liberalism is tolerant only *within* the space demarcated...; any one who steps outside that space will not be tolerated, will not be regarded as a fully enfranchised participant in the marketplace (of ideas)...” Stanley Fish, *Liberalism Doesn’t Exist*, 1987 DUKE L. J. 997, 1000 (1987).

<sup>47</sup> Robert P. George, *Religious Freedom & Why It Matters: Working in the Spirit of John Leland*, TOUCHSTONE (May/June 2014).

scholarship on the question abounds: Is it special?<sup>48</sup> Why is it special?<sup>49</sup> What if it is not special?<sup>50</sup> It is special enough.<sup>51</sup> In some cases, what is not special may even be bad. Schwartzman claims, for instance, that the Religion Clauses are “morally regrettable.”<sup>52</sup> Yet it is just as common today—in the courts and the academy—to see the specialness of religion endangered by indifference. Many ignore it or take it for granted, and as a consequence have no interest in its protection. “In our increasingly secular societies,” Glendon explains, “persons who are simply indifferent to religion and religious freedom are far more numerous—and far more influential—than the militant secularists who want to scrub every trace of religion from public life.”<sup>53</sup>

### *Equality for all instead of discrimination by some.*

A second aspect of our drift toward secularism in law is the continued rise of an equality paradigm striving to stamp out discrimination perceived to be a result of religious freedom. Mirroring a broad global trend, discrimination—principally related to abortion, homosexuality, and gender identity—is seen as “the archetypal harm.”<sup>54</sup> In its tamest form the proposed solution is neutrality—that is, the mandate that government treat religion and secularism the same. But as with tolerance, neutrality has proved to be lopsided. For some time our courts have embraced a form of neutrality that consists not of “even-handedness or nondiscrimination” but instead “the

absence of (something called) ‘religion’ from (something called) the ‘secular’ sphere. That is, ‘neutrality’ was often said to require the forced confinement of religion to the purely private realm....”<sup>55</sup> This version of neutrality was supposedly maintained by the wall of separation, but the Supreme Court’s decision in *Espinoza* this summer drew out more recent fears about the breakdown of that wall. One day before the decision, three law professors (including Schwartzman) complained in *The Atlantic* of the “near-complete collapse” of the separation of church and state due to government pandemic relief privileging religious organizations over secular ones.<sup>56</sup> The day after the decision, it was characterized as “continu[ing] a recent pattern of the Supreme Court erasing stark lines in the separation of church and state.”<sup>57</sup>

But the plea for neutrality masks the more radical demand for equality based on perceived discrimination by religion and religious believers. The battle was recently described as an “ideological clash between those who understand the country as well-served by the robust traditions of American pluralism and religious freedom, and those who would seek instead what might be called a rigorous egalitarian secularism.”<sup>58</sup> This seems charitable. More frequently, religious freedom is characterized as code for bigotry, intolerance, homophobia, Christian nationalism, and any number of pejoratives. Any hesitance to embrace the cultural shift on marriage, sexuality, or identity is seen as discrimination, and religious freedom merely the license to discriminate.<sup>59</sup> In fact,

<sup>48</sup> Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idelman*, 1994 U. ILL. L. REV. 535 (1994).

<sup>49</sup> Stephen G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990).

<sup>50</sup> Schwartzman, *supra* note 42.

<sup>51</sup> Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017); Thomas C. Berg, “*Secular Purpose, Accommodations, and Why Religion is Special (Enough)*,” 80 U. CHI. L. REV. DIALOGUE 24 (2013).

<sup>52</sup> Schwartzman, *supra* note 42, at 1414.

<sup>53</sup> Glendon, *supra* note 8, at 335.

<sup>54</sup> W. Cole Durham, Jr., Matthew K. Richards & Donlu D. Thayer, *The Status of and Threats to International Law on Freedom of Religion or Belief*, in *THE FUTURE OF RELIGIOUS FREEDOM*, *supra* note 14, at 49.

<sup>55</sup> Richard Garnett, *Symposium: Religious freedom and the Roberts court’s doctrinal clean-up*, SCOTUSBLOG (Aug. 7, 2020), <https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/>.

<sup>56</sup> Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, *THE ATLANTIC* (June 29, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498/>.

<sup>57</sup> Robert Barnes, *Supreme Court says states that subsidize private education must include religious schools*, WASHINGTON POST: COURTS & LAW (July 1, 2020), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f_story.html).

<sup>58</sup> Harry Bruinius, *Gay rights, religious freedom, and the battle over adoption*, *THE CHRISTIAN SCIENCE MONITOR* (Feb. 21, 2020), <https://www.csmonitor.com/USA/Politics/2020/0221/Gay-rights-religious-freedom-and-the-battle-over-adoption>.

<sup>59</sup> See, e.g., Katherine Stewart, *The Real Meaning of ‘Religious Liberty’: A License to Discriminate*, *THE NEW YORK REVIEW OF BOOKS: NYR DAILY* (Feb. 28, 2020), <https://www.nybooks.com/daily/2020/02/28/the-real-meaning-of-religious-liberty-a-license-to-discriminate/>.

the entire conversation continues to be framed around discrimination, and the resulting need to institute “egalitarian” secularism. How else to stop religious believers, who “mainstream[] discrimination by rebranding it as religious liberty”?<sup>60</sup> In this egalitarian frame, a case to determine whether certain employers—say, an international congregation of Roman Catholic women running homes for the elderly—are exempt from providing contraception on the ground of sincerely held religious beliefs, is actually giving *carte blanche* to government to trample the reproductive rights and health of millions.<sup>61</sup> Dig just below the surface of this idea of equality, and it becomes clear that accommodating religion in an evenhanded, neutral way is a nonstarter. Religious liberty leads irrevocably to bigotry.

### **Privatization.**

The third and most significant feature of our secular drift is the privatization of religion. It is an aspect of the previous two features, of course. The replacement of religious freedom with a neutered right to conscience; the proposed tolerance of, and practiced indifference to, religion; and the clamor for religion-suppressing equality—all hinge on the diminished place of religion in the public square. Secularism absolutely requires it. America has a history of commitment to the search for truth, particularly religious truth, and this has been especially beneficial (to everyone) in the public square. But secularism forstalls the tradition and forces inquiry, belief, and practice into the

private realm. In European secularism, “religion is gradually pushed back to the borders of social life, reduced to a private fact, and above all reduced to a mere belief: one out of many beliefs that belong to the private sphere of the individual.”<sup>62</sup> Gerard Bradley has argued that the public and private realms in the United States may likewise be converging toward the privatization of religion.<sup>63</sup> The coronavirus pandemic has facilitated this. In a mid-June decision upholding an Illinois shutdown order, Seventh Circuit Judge Frank Easterbrook wrote:

[Certain essential] activities *must* be carried on in person, while concerts can be replaced by recorded music, movie-going by streaming video, and large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways.<sup>64</sup>

It would be a mistake to assume this attitude is an anomaly. Coronavirus has exposed an alarming enthusiasm among some Christian churches for the desirability of online worship services easily tailored to “privatized personal spirituality.”<sup>65</sup> Theological judgment has struggled to cope with the dilemmas of drive-through communion and in-ear worship music.<sup>66</sup> The escape to “the virtual frontier” means that Christians are unwittingly cooperating in privatizing religion.<sup>67</sup>

<sup>60</sup> Jay Michaelson, *Redefining Religious Liberty*, POLITICAL RESEARCH ASSOCIATES (May 28, 2013), <http://www.politicalresearch.org/2013/05/28/redefining-religious-liberty#sthash.koRDfKdT.h8mcMGRI.dpbs>, quoted in Pollock, *supra* note 37, at 69.

<sup>61</sup> See Mark David Hall, *The Little Sisters Win—For Now*, LAW & LIBERTY (July 13, 2020), <https://lawliberty.org/the-little-sisters-win-for-now/>. See also Priscilla Smith, *Court Rules Government Can Restrict Women’s Statutory Right to Contraception Based on Employer Opposition*, HUMAN RIGHTS AT HOME BLOG (July 10, 2020), [https://lawprofessors.typepad.com/human\\_rights/2020/07/court-rules-government-can-restrict-womens-statutory-right-to-contraception-based-on-employer-opposi.html](https://lawprofessors.typepad.com/human_rights/2020/07/court-rules-government-can-restrict-womens-statutory-right-to-contraception-based-on-employer-opposi.html). Professor Smith suggests that seeing the issue in the “(correct) frame” means that “women’s statutory right to contraception” outweighs every person’s Constitutional right to free exercise of religion; that sexual autonomy and “ability to chart a life’s course” outweigh freedom from coercion in matters of conscience; and that objection to violating sincerely held religious beliefs is nothing more than “employer opposition” to contraception.

<sup>62</sup> Cartabia, *supra* note 24, at 450-51.

<sup>63</sup> Gerard V. Bradley, *Emerging Challenges to Religious Freedom in America and Other English-Speaking Countries*, in *THE FUTURE OF RELIGIOUS FREEDOM*, *supra* note 14, at 216.

<sup>64</sup> *Elim Romanian Pentecostal Church and Logos Baptist Ministries v. Pritzker*, No. 20-1811, 11 (7th Cir. June 16, 2020) (emphasis in original).

<sup>65</sup> See Brett McCracken, *Why We Don’t See Church as ‘Essential’*, THE GOSPEL COALITION (May 22, 2020), <https://www.thegospelcoalition.org/article/church-essential/>.

<sup>66</sup> This assumes we are able to comprehend the *dilemma* of necessarily corporate activities willingly relegated to the private sphere. One regrettable example of this failure of understanding: a billboard in San Diego, California, advertising online services, which read, “The best part of online church is not having to admit to your atheist friends that you actually believe in something.”

<sup>67</sup> Witte, Jr., *supra* note 38, at 518.

American secularism seems to be steadily reducing receptivity and space for religion and assimilating religious freedom into a nebulous policy of non-discrimination. This process is not necessarily subtle. While privatization is frequently put in the language of separation of church and state, the mandate is “a public square scrubbed clean of religious symbols, expression, and activism.”<sup>68</sup> All aspects of religion must be kept strictly private. Whatever else religion is or does, it can have no part in public life or public debate. Driving this is an extremist view of separation: “The goal is to grant secularist ideology dominance in the public square by prohibiting or severely restricting public religious expression, relegating it to the purely private domain of home or house of worship, and thereby establish secularism as the state religion, or pseudo-religion.”<sup>69</sup>

Ideological secularism tends to prioritize repressing religious belief and practice, rather than protecting freedom for a plurality of beliefs. It is not meant to keep worshipers from discriminating; it is meant to keep worshipers from worshiping.

## THE RESPONSE TO SECULARISM

Whether or not a French-style secularism is the impending result of Americans’ failure to use freedom of religion, it is not inevitable. *Laïcité* is foreign in more ways than its name. Secularism has no roots in American soil, where religion—and government solicitude for it at state and national levels—has historically thrived. And the heritage of critical inquiry in the United States—largely based on that same historical predominance of religion—ought to make the weaknesses of secularism, as an ideology, especially vulnerable to repudiation.

At bottom, the difference between religious freedom and secularism is that religious freedom is meant primarily to protect religion, whereas secularism is meant primarily to protect the state. Religious freedom

consists of several interdependent principles meant to help religion, society, and individuals flourish.<sup>70</sup> It recognizes the good of religion and values the freedom to believe (or disbelieve) and to exercise that belief in public. Secularism prioritizes a civil religion of the State and values superficial concord. To achieve national cohesion, therefore, secularism must quarantine religion. Within the restrictions of secularism, “religious faith... can [only] coexist with a liberal order when kept in a private dimension of social interaction.”<sup>71</sup>

But religion is not private, or not merely so. Religious exercise is “totalizing and ‘a-jurisdictional’”—it cannot be shepherded out of the public square and silenced.<sup>72</sup> Churches (and most other bodies of religious believers) engage, operate, and advocate with the culture in the public square, and this “renders religion a public phenomenon, socially relevant beyond the small communities of adherents.”<sup>73</sup> Because secularism requires a one-size-fits-all neutrality, it cannot tolerate the “conspicuous presence of religion integrated into the ordinary affairs of society.”<sup>74</sup> So, for example, there is no place for religious organizations that provide services secular organizations cannot, or provide them in ways that secularism will not. Excluding religion from the public square in this way debilitates our political discourse and “undermines the pursuit of political justice by limiting conceptions of the public good.”<sup>75</sup> It is a mistake to presume religion is not public. Discounting or rejecting the invaluable contributions of public religion to civil society and the common good severely compounds the error.

And that is precisely the point. Secularism is not interested in the common good, but in common *identity*. This is part of the essence of *laïcité*. It aims to create one shared identity and, therefore, firmly resists the maintenance of communal identities, such as those found among religious believers. This betrays a basic distrust of

<sup>68</sup> Richard W. Garnett, *Religious liberty, church autonomy, and the structure of freedom*, in *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 279 (John Witte, Jr. & Frank S. Alexander eds., Cambridge Univ. Press 2010) (arguing that this view of “separation” is misguided, and that properly understood, “separation” actually supports religious freedom).

<sup>69</sup> George, *supra* note 47.

<sup>70</sup> JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 63-64 (Westview Press 3d. ed. 2011). These principles, called by the authors “essential rights and liberties of religion,” are: liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment.

<sup>71</sup> Alex Deagon, *Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse*, 41 *HARV. J. L. & PUB. POL’Y* 901, 929 (2018) (quoting Wojciech Sadurski, *Neutrality of Law Towards Religion*, 12 *SYDNEY L. REV.* 420, 441-42 (1990)).

<sup>72</sup> Deagon, *supra* note 71, at 926.

<sup>73</sup> Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 *NOTRE DAME L. REV.* 1191, 1195-96 (1998).

<sup>74</sup> Bradley, *supra* note 63, at 228.

<sup>75</sup> Deagon, *supra* note 71, at 914.

individuals' ability to cooperate without neutral terms or coerced consensus. With no sense of the contradiction, secularism insists on common identity for the sake of pluralism. But it is precisely the nature of a pluralistic society to tolerate and respect (and perhaps even encourage) a diversity of beliefs. "In a meaningfully pluralistic society, not every organization or institution will act the same way, or be structured in the same way, or have the same goals, or be governed by the same rules."<sup>76</sup> A society without religious viewpoints is less pluralistic, not more. A mandatory shared identity may end up being common, but it will sacrifice what is good.

What becomes of the common good when what is good is no longer held in common? Promotion of the common good is an outgrowth of religion, particularly Christianity. Love of neighbor means concern for the good of every person, no one of whom can find fulfillment in himself alone. The common good is not merely "the simple sum of the particular goods" of each individual.<sup>77</sup> As Luther writes, "the good things we have from God should flow from one to the other and be common to all, so that everyone should 'put on' his neighbor and so conduct himself toward him as he himself were in the other's place."<sup>78</sup> But in the place of public common good, secularism promises only private individual good. There is no longer an emphasis on neighbor, community, and the objective good we hold in common. Instead, secularism nurtures subjective and autonomous individual good: "Atomistic individualism really only allows for aggregate conceptions of goods rather than for communal goods that are in some sense greater than the particular constitutive elements."<sup>79</sup> At the heart of this orientation is a fundamental contradiction. A secular society focused on the common good is simply unrealistic.

And despite its emphasis on the radically autonomous individual, secularism is ultimately dehumanizing. The human person is "reduced to a private

religious consumer, and the religious community to a private organization that markets itself to like-minded individuals."<sup>80</sup> By privatizing religion, it restricts what is most formative of human experience and neutralizes what is most important to human flourishing. Religion is certainly characterized by "a private dimension of personal belief," but just as importantly, it is characterized "by a public dimension in which people, consciously or unconsciously, translate their beliefs into a wide variety of everyday activities that are necessarily also social, political, cultural, economic, etc."<sup>81</sup> That is, religion informs a comprehensive way of life—it is a fundamental component of human nature, not a fungible commodity.

Many more robust criticisms of secularism can (and should) be made. But it is not enough merely to refute secularism. The positive case for freedom of religion must be made. Contrary to the ideological secularists who wish to rewrite the history of human rights with surrogates for the transcendent, "the problem is the loss of any transcendent and objectively real basis for the declaration of human dignity, human rights, and human liberty."<sup>82</sup> Freedom of religion is at the core of human experience. The drift toward secularism requires that Christians (and members of all religious communities) do the work of reinforcing the broad protections for religion as "a way of life, not just a set of beliefs."<sup>83</sup> In other words, we have to use our religious freedom.

## THE USE OF RELIGIOUS FREEDOM

How do we make the case for the fundamental human right of religious freedom in a world where that right is little valued and increasingly suppressed? Clearly, the task calls for a comprehensive approach. It must be not only theoretical, but practical as well; relying not only on law, but also on the many other disciplines concerned with the importance of religion to human experience and equipped to protect it. Even with a commitment

<sup>76</sup> Richard W. Garnett, *Religious Schools and the Freedom of the Church*, LAW & LIBERTY (July 10, 2020), <https://lawliberty.org/religious-schools-and-the-freedom-of-the-church/>.

<sup>77</sup> Cardinal Camilo Ruini, *Secularism and the Common Good*, CATHOLICCULTURE.ORG (Matthew Sherry trans., Feb. 18, 2009), <https://www.catholicculture.org/culture/library/view.cfm?recnum=8855>.

<sup>78</sup> Martin Luther, *The Freedom of a Christian*, in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 79 (John Dillenberger ed., Anchor Books 1962).

<sup>79</sup> Jordan J. Ballor, *A Protestant Defense of the Common Good*, PUBLIC DISCOURSE (Aug. 16, 2020), <https://www.thepublicdiscourse.com/2020/08/68900/>.

<sup>80</sup> Carmella, *supra* note 73, at 1202.

<sup>81</sup> Jack Friedman & Timothy Samuel Shah, *Introduction to HOMO RELIGIOSUS? EXPLORING THE ROOTS OF RELIGION AND RELIGIOUS FREEDOM IN HUMAN EXPERIENCE* 15 (Timothy Samuel Shah & Jack Friedman eds., Cambridge Univ. Press 2018).

<sup>82</sup> Mohler, *supra* note 40.

<sup>83</sup> Yuval Levin, *The Perils of Religious Liberty*, FIRST THINGS (Feb. 2016), <https://www.firstthings.com/article/2016/02/the-perils-of-religious-liberty#print>.

to religious freedom in a constitution or treaty, people must insist upon it, use it, and spread it. As the Supreme Court put it nearly seventy years ago, religion will “flourish according to the zeal of its adherents and the appeal of its dogma.”<sup>84</sup> It is undoubtedly true that “human rights norms need a human rights culture. . . .”<sup>85</sup> The brief recommendations that follow are directed at creating and advancing that culture.

***Protect it for all humans, not just Christians.***

Religious freedom must not be defended for the benefit of Christians only. We should be wary of attempts—by public servants or private citizens—to politicize or otherwise instrumentalize Christianity as an “identity marker” designating us and them while “remaining distanced from Christian values and beliefs in practice.”<sup>86</sup> The religious quest for answers to life’s biggest questions are a “constitutive part of our humanity” and, therefore, we must “preserve and protect” religious liberty for all. Each of us has a duty to make the case for supporting religious freedom in full for all, at home and abroad.

***Do not rely or rest on the courts.***

Religion is increasingly subject to “juridification”—the expanded use of law to frame and resolve conflicts. But religious liberty is far more than a legal issue, and religious liberty cases are about more than religious liberty. *Espinoza* is also about school choice and freedom in education. *Little Sisters* is also about the right to life of unborn children. Just as we must stop framing cultural

debates merely as battles over religious freedom, we must strive to protect religious freedom without the aid and frame of the law. To defend religious freedom solely in the courts is to adopt a defensive position of dependence on government’s special treatment or permission. But religion needs and offers much more. Christians in particular have “a vision of the good and a deep conviction that it would be good for everyone and therefore ought to be made as widely available as possible.”<sup>87</sup> Thus, “the case for religious liberty must be part of a larger public argument for and from the underlying truths that religious people seek to defend and advance.”<sup>88</sup>

***Maintain mutual respect and genuine tolerance.***

It is essential that freedom of religion include the right to hold or change any belief or none at all, in private and in public. Religious leaders and

believers have a duty to educate their religious neighbors on the responsible exercise of religious freedom. In the face of claims that religious freedom is a license to discriminate, Christians “must amplify the message of principled pluralism and toleration, in the old-fashioned sense of the word, in our films, books, and other media. We must exercise religious freedom and prove that we can disagree vigorously and publicly, yet civilly, with our opponents.”<sup>89</sup> Religious freedom in full enlivens public compassion, charity, and love toward neighbors in ways that break down bigotry and discrimination. This is not simply tolerance, but also a recognition of fundamental human dignity and worth.<sup>90</sup>

***Promotion of the common good is an outgrowth of religion, particularly Christianity. Love of neighbor means concern for the good of every person, no one of whom can find fulfilment in himself alone.***

<sup>84</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). See also Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 11 (2000). Certainly, Christians would do well to receive this as a call to “contend for the faith that was once for all delivered to the saints” (Jude 3:3) and “to make a defense to anyone who asks you for a reason for the hope that is in you; yet [doing] it with gentleness and respect” (1 Peter 3:15).

<sup>85</sup> John Witte, Jr. & M. Christian Green, *Introduction to RELIGION & HUMAN RIGHTS: AN INTRODUCTION 5* (John Witte, Jr. & M. Christian Green eds., Oxford Univ. Press 2012).

<sup>86</sup> Tobias Cremer, *Defenders of the faith: why right-wing populists are embracing religion*, NEW STATESMAN (May 30, 2018), <https://www.newstatesman.com/2018/05/defenders-faith-0>.

<sup>87</sup> Levin, *supra* note 83.

<sup>88</sup> Anderson, *supra* note 12, at 160. See also Ryan T. Anderson, *Religious Liberty Is Important, But It’s Not Enough*, Public Discourse (July 12, 2020), <https://www.thepublicdiscourse.com/2020/07/67142/>.

<sup>89</sup> Eric Patterson, *Why We Need Religious Freedom for All: An Appeal and Invitation to the Church*, PROVIDENCE (June 15, 2020), [https://providencemag.com/2020/06/why-we-need-religious-freedom-all-appeal-invitation-church-book-review-luke-goodrich-free-to-believe-battle-religious-liberty-america/?utm\\_source=Providence](https://providencemag.com/2020/06/why-we-need-religious-freedom-all-appeal-invitation-church-book-review-luke-goodrich-free-to-believe-battle-religious-liberty-america/?utm_source=Providence).

<sup>90</sup> Allen D. Hertzke, *Introduction*, in THE FUTURE OF RELIGIOUS FREEDOM, *supra* note 14, at 9.

### ***Build cultural support.***

As much as we may think that law will do the job, “the fact is that the preservation of religious freedom depends ultimately on building cultural support.”<sup>91</sup> While law can influence culture, we ought not to begin there. After all, religious freedom is not for political victory, power, or status. It is for religion: the belief and expression of ultimate convictions, human fulfillment, and the common good. We ought to defend religious freedom based not solely on Christian theology but also on philosophy, sociology, economics, and more—that is, on nonreligious grounds.<sup>92</sup> A culture that protects religious freedom for all is one in which human freedom can flourish.

### ***Emphasize the specialness of religion.***

Many today simply do not believe religion is special. They fail to understand “why religion *in particular* and religious exercise *in particular* should shape the common good” over and against “secular visions adopted in law.”<sup>93</sup> But our Founders understood religion as fundamentally special, so much so that freedom of religion has always had a special constitutional status as an inalienable right.<sup>94</sup> If we focus only on winning religious liberty cases in the courts but stop talking about the goods we seek through the exercise of religion—truth, goodness, beauty, justice, virtue—we end up diminishing all of them and the freedom to pursue them. The bottom line is that defending religious liberty “requires a defense of the substance of what that liberty protects.”<sup>95</sup>

Freedom of religion is no mere concession or pluralistic peace treaty, but is good *per se* and valuable to society in a number of important ways. Robust religious freedom for all protects our humanity and the common good.<sup>96</sup> Politically, it promotes democracy and prevents human rights abuses, by sustaining self-government and limiting state power.<sup>97</sup> Economically, it solidifies communities and draws in the poor and marginalized,

creating opportunities for social mobility and contribution.<sup>98</sup> In the moral sphere, it protects religion’s ability to shape character, encourage virtue, and create responsibility to honor the rights and duties of citizenship and the dignity of fellow citizens. In the social sphere, religious freedom promotes and strengthens peace and security. Regarding family, it protects healthy, religious practices in the home, which are strongly associated with pro-social outcomes for children, youth, couples, and families.<sup>99</sup> In sum, religious freedom in full promotes and protects the specialness of religion.

### ***Emphasize the public nature of religion.***

Religious freedom is essential to human flourishing and the common good, and these depend on religion’s necessarily public dimension. Religion “pervades life and is engaged in the building and maintenance of public culture.”<sup>100</sup> Nearly all religions have temporal concerns that drive them to engage their neighbors and even cooperate with government on common goals. Christianity is no exception. Indeed, the life of the church is ineluctably corporate: confession and absolution, liturgy and worship, the proclaimed Word and sacraments, love and service of one’s neighbor—all demand that religion be public.

What Christianity must not do is *privatize itself*. For many churches, the COVID-19 pandemic has exposed a pre-existing orientation toward private, individualized religion and has sanctioned their move into the virtual frontier. But private Christianity is neither authentic nor free. It is a secular surrogate no different than other private opinions and, therefore, no better protected from restriction or prohibition. Christians need to remind themselves, their neighbors, and their governments of the purpose and meaning not just of some private beliefs among others, but of the public nature of this public religion.<sup>101</sup> We need no denuded “freedom of worship” but

<sup>91</sup> Glendon, *supra* note 8, at 338-39.

<sup>92</sup> For an example of this approach, see SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (Encounter Books 2016).

<sup>93</sup> William J. Haun, *Religious Liberty and the Common Good*, NATIONAL AFFAIRS, Spring 2020, at 133, <https://nationalaffairs.com/publications/detail/religious-liberty-and-the-common-good>.

<sup>94</sup> Muñoz, *supra* note 39, at 1388.

<sup>95</sup> Anderson, *supra* note 12, at 160.

<sup>96</sup> The list that follows is based and builds on a similar list in George, *supra* note 47.

<sup>97</sup> Haun, *supra* note 93, at 134.

<sup>98</sup> See Rebecca Samuel Shah, *Religious and Economic Empowerment in India: An Empirical Exploration*, in RELIGION AND INNOVATION (Donald A. Yerxa ed., Bloomsbury Academic 2016).

<sup>99</sup> See David Dollahite, Loren D. Marks And Hal Boyd, *The Best Practices—and Benefits—of Religious Parenting*, PUBLIC DISCOURSE (Feb. 6, 2020), <https://www.thepublicdiscourse.com/2020/02/59688/>.

<sup>100</sup> Carmella, *supra* note 73, at 1213-14.

<sup>101</sup> See Pierre Manent, *The Church Has the Form of a City*, PUBLIC DISCOURSE (July 26, 2020), <https://www.thepublicdiscourse.com/2020/07/68017/>.

free exercise of religion—the right to manifest the truth of Christianity in teaching, practice, worship, and observance, alone and in community, in private and in public.

### “THE MOST INALIENABLE AND SACRED OF ALL HUMAN RIGHTS”

This issue of the *Journal*, the second on the general theme of human rights, is centered on what Thomas Jefferson called “the most inalienable and sacred” of human rights: freedom of religion.<sup>102</sup> John Witte, Jr., writes about the core principles of religious freedom that have been vital to our American constitutional life from the founding through today—which will be vital to preventing its weakening. Francis Beckwith critically examines dangers to religious liberty posed both from without (by persistent anti-Catholicism) and within (by the Catholic abuse scandal), reminding us that while religious liberty protections are even for *imperfect* religion, they are always at the mercy of the secular authorities. Timothy Shah details the significance of institutional religious freedom for religious organizations and communities, making the case that religious institutions must be free from coercive interference to exercise an expansive right to self-determination. In “The Islam Question,” Daniel Philpott addresses the difficult yet necessary issue of promoting religious freedom among Muslim populations and between Muslims and non-Muslims: Can Islam receive and realize religious freedom? Next, Elyssa Koren and Sean Nelson argue that religious freedom is

the key to reviving the international human rights project, the fundamental right necessary to protect all other fundamental rights. Finally, Kim Colby adeptly traces the march toward redefining Title VII, culminating in the recent *Bostock* decision, and the grave consequences that will inevitably result in the short and long terms. Our hope and prayer is that these articles will contribute to a renewed sense of energy to promote and protect the most sacred human right.

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*Andrew DeLoach served as the editor for this issue of the Journal.*

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<sup>102</sup> Thomas Jefferson, *Freedom of Religion at the University of Virginia* (Oct. 7, 1822), in *THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS* 958 (Saul K. Padover ed., Duell, Sloan & Pearce 1943).

The *Journal* expresses its gratitude to Professor Andrew DeLoach, our Guest Editor for this issue. We are grateful for the authors he has gathered on this important topic and for his diligent effort in overseeing the entire editorial process. We know that our readers will be edified and encouraged by this issue, thanks in large part to the great work of Professor DeLoach.



## HISTORICAL FOUNDATIONS AND ENDURING FUNDAMENTALS OF AMERICAN RELIGIOUS FREEDOM

JOHN WITTE, JR.

### FOUNDING PRINCIPLES OF RELIGIOUS FREEDOM

“A page of history is worth a volume of logic,” Oliver Wendell Holmes, Jr., once wrote.<sup>1</sup> In that spirit, this brief article sketches the historical context for the development of modern American religious freedom. I focus first on the American founding era of 1760 to 1820, and leading founders like John Adams, Thomas Jefferson, and James Madison. Like their English counterparts, the American founders drew deeply on the Western legal tradition. They, too, were inspired by biblical, classical, and republican theories of liberty.<sup>2</sup> They, too, drew on the Magna Carta and the common law tradition of rights and liberties that it inspired.<sup>3</sup> Especially important for the American founders were seventeenth-century constitutional developments in England from the 1628 Petition of Right to the 1689 Bill of Rights, and the defenses of religious and civil rights and liberties by great English minds like Edward Coke, John Milton, and John Locke, and their colonial allies in the New World like Roger Williams, Nathaniel Ward, and William Penn.<sup>4</sup>

But the later eighteenth century in America was also an era of violent revolution against England’s political, religious, military, and economic establishment. In its place, the American founders unleashed what Thomas Jefferson called a “fair” and “novel experiment” of guaranteeing religious freedom to all and religious establishment to none.<sup>5</sup> These religious freedom guarantees, set out in the new state and federal constitutions forged between 1776 and 1833, defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community

and that the state must protect and support it against all other forms of faith. America would no longer suffer such governmental prescriptions and proscriptions of religion. All forms of Christianity had to stand on their own feet and on an equal footing with all other religions. Their survival and growth had to turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.

John Adams, leading Massachusetts jurist and future American president, offered a robust appraisal of this new American constitutional experiment:

The people in America have now the best opportunity and the greatest trust in their hands, that Providence ever committed to so small a number, since the transgression of the first pair [Adam and Eve]; if they betray their trust, their guilt will merit even greater punishment than other nations have suffered, and the indignation of Heaven....

The United States of America have exhibited, perhaps, the first example of governments erected on the simple principles of nature; and if men are now sufficiently enlightened to disabuse themselves of artifice, imposture, hypocrisy, and superstition, they will consider this event as [a new] era in their history. Although the detail of the formation of the American governments is at present little known or regarded either in Europe or in America, it [is] destined to spread over the northern part of... the globe....

<sup>1</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

<sup>2</sup> See the collection of sentiments in *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph S. Lerner eds., Liberty Fund reprint ed. 2000).

<sup>3</sup> See *MAGNA CARTA, RELIGION, AND THE RULE OF LAW 81-156* (Robin Griffith-Jones & Mark Hill eds., Cambridge Univ. Press 2015).

<sup>4</sup> JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 209-320* (Cambridge Univ. Press 2007).

<sup>5</sup> THOMAS JEFFERSON, in 1 *THE PAPERS OF THOMAS JEFFERSON 537-39* (Princeton Univ. Press 1950). See analysis in SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 55-71* (Harper & Row 1963).

The institutions now made in America will not wholly wear out for thousands of years. It is of the last importance, then, that they should begin right. If they set out wrong, they will never be able to return, unless it be by accident, to the right path.... [T]he eyes of the world are upon [us].<sup>6</sup>

More than two centuries later, Adams's sentiments prove remarkably prescient. For all of their failures and shortcomings, the eighteenth-century founders did indeed begin on the right "path" toward a free society, and today, Americans enjoy a good deal of religious, civil, and political freedom as a consequence. American principles of religious freedom have had a profound influence around the globe, and they now figure prominently in a number of national constitutions and international human rights instruments issued by political and religious bodies.<sup>7</sup>

To be sure, as Adams predicted, there has always been a "glorious uncertainty of the law" of religious liberty and a noble diversity of understandings of its details.<sup>8</sup> This was as true in Adams's day as in our own. In Adams's day, there were competing models of religious liberty that were more overtly theological than his—whether Puritan, Evangelical, Catholic, Quaker, or Anglican in inspiration. There were also competing models that were more overtly philosophical than his—whether Neoclassical, Republican, Whig, or Liberal in inclination.<sup>9</sup> Today, these and other founding models of religious liberty have born ample progeny, and the great rivalries among them are fought out in the courts, legislatures, and academies throughout the land and, increasingly, the world.

Prone as he was to a dialectical model of religious liberty, Adams would likely approve of our rigorous rivalries of principle—so long as the rivals themselves remain

committed to constitutional ideals of democratic order, rule of law, and ordered liberty for all. But Adams would also likely insist that we reconsider his most cardinal insights about the necessary dialectical nature of religious freedom and religious establishment. Too little religious freedom, Adams insisted, is a recipe for hypocrisy and impiety. But too unbridled religious freedom is an invitation to license and criminality. Too firm a religious establishment breeds coercion and corruption. But too little concern for religion allows anti-religious prejudices to become constitutional prerogatives. Somewhere between these extremes, Adams believed, a society must find its balance.<sup>10</sup>

One key to re-striking this constitutional balance today lies in the eighteenth-century founders' most elementary insight—that religion is special and needs special protection in the Constitution. "[W]e cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor," writes Douglas Laycock.<sup>11</sup> Although America's religious landscape has changed, religion remains today a unique source of individual and personal identity for many, involving "the duty which we owe to our Creator, and the manner of discharging it," in James Madison's words.<sup>12</sup> The founders' vision was that religion is more than simply another form of speech and assembly, privacy and autonomy; it deserves separate constitutional treatment. The founders thus placed freedom of religion *alongside* freedoms of speech, press, and assembly, giving religious claimants special protection and restricting government in its interaction with religion. Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith. All peaceable exercises of religion, whether individual or corporate, private or public, properly deserve

<sup>6</sup> JOHN ADAMS, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 290, 292-93, 298 (Charles F. Adams ed., Little and Brown 1850-1857); 8 *id.* at 487. See also THE FEDERALIST No. 37 (James Madison) (writing of the formation of the Constitution that "[i]t is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution").

<sup>7</sup> JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 250-55 (Oxford Univ. Press 4th ed. 2016); JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (Univ. of Cal. Press 2000); W. COLE DURHAM, JR. AND BRENT W. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES (Wolters Kluwer 2d ed. 2019).

<sup>8</sup> JOHN ADAMS, *Letter from John Adams to Josiah Quincy (Feb. 9, 1811)*, in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, *supra* note 6, at 630.

<sup>9</sup> WITTE & NICHOLS, *supra* note 7, at 24-40.

<sup>10</sup> John Witte, Jr., "A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment, 41 J. CHURCH AND ST. 213, 216 (1999).

<sup>11</sup> Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313-14 (1996).

<sup>12</sup> JAMES MADISON, *Article on Religion Adopted by Convention (June 12, 1776)*, in 1 THE PAPERS OF JAMES MADISON 175 (William T. Hutchinson & William M.E. Rachal eds., Univ. of Chicago Press 1962-1991).

the protection of the First Amendment. And such protection sometimes requires special exemptions and accommodations that cannot be afforded by general laws.<sup>13</sup> “The tyranny of the majority,” James Madison reminds us, is particularly dangerous to religious minorities.<sup>14</sup>

A second key to re-striking this constitutional balance lies in the eighteenth-century founders’ insight that, in order to be enduring and effective, the constitutional process must seek to involve all voices and values in the community—religious, nonreligious, and anti-religious alike. Healthy constitutionalism ultimately demands “confident pluralism,” in John Inazu’s apt phrase.<sup>15</sup> Thus, in creating the new American constitutions, the founders drew upon all manner of representatives and voters to create and ratify these new organic laws. Believers and skeptics, churchmen and statesmen, Protestants and Catholics, Quakers and Jews, Civic Republicans and Enlightenment Liberals—many of whom had slandered if not slaughtered each other with a vengeance in years past—now came together in a rare moment of constitutional solidarity. The founders understood that a proper law of religious liberty required that all peaceable religions and believers participate in both its creation and its unfolding. To be sure, both in the founders’ day and in subsequent generations, some Americans showed little concern for the religious or civil rights of Jews, Catholics, Mormons, Native Americans, Asian Americans, or African Americans, and too often inflicted horrible abuses upon them. And today, some of these old prejudices are returning anew in bitter clashes over race, immigration and refugees, and in fresh outbreaks of nativism, anti-Semitism, and Islamophobia. But a generous willingness to embrace all peaceable religions in the great project of religious freedom is one of the most original and compelling insights of the American experiment. As John Adams put it, religious freedom “resides in Hindoos and Mahometans, as well as in Christians; in Cappadocian monarchists, as well as in Athenian democrats; in Shaking Quakers, as well as in . . . Presbyterian clergy; in Tartars and Arabs, Negroes

and Indians”—indeed in all “the people of the United States.”<sup>16</sup>

A third key to re-striking this constitutional balance lies in balancing the multiple principles of religious liberty that the founders set forth in the frugal, sixteen-word phrase of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>17</sup> These were twin guarantees of religious liberty for all. The free exercise guarantee outlaws government *proscriptions* of religion—actions that unduly burden the conscience, restrict religious expression and activity, discriminate against religion, or invade the autonomy of churches and other religious bodies. The no-establishment guarantee outlaws government *proscriptions* of religion—actions that unduly coerce the conscience, mandate forms of religious expression and activity, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. The First Amendment guarantees of no establishment of any religion and free exercise of all religion thereby provided complementary protections to the other constitutive principles of the American experiment—liberty of conscience, religious equality, religious pluralism, and separation of church and state.<sup>18</sup>

## THE MODERN ERA OF RELIGIOUS FREEDOM IN THE UNITED STATES

These three insights were not only part of the original vision of the eighteenth-century founders; they were also part of the original vision of the Supreme Court as it created the modern constitutional law of religious freedom. All three insights recur in *Cantwell v. Connecticut* (1940)<sup>19</sup> and in *Everson v. Board of Education* (1947),<sup>20</sup> the two landmark United States Supreme Court cases that first applied the First Amendment religion clauses to the states and inaugurated the modern era of religious liberty in America.

<sup>13</sup> WITTE & NICHOLS, *supra* note 7, at 99-101 (regarding the meaning of liberty of conscience in the founding era).

<sup>14</sup> JAMES MADISON, *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 272 (Gaillard Hunt ed., G.P. Putnam’s Sons 1904-1908).

<sup>15</sup> JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (Univ. of Chicago Press 2016).

<sup>16</sup> JOHN ADAMS, *Letter from John Adams to John Taylor* (Apr. 15, 1814), in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, *supra* note 6, at 474; see also John Adams, *Letter from John Adams to Thomas Jefferson* (June 28, 1813), in 2 THE ADAMS-JEFFERSON LETTERS 339-40 (Lester J. Cappon, ed., Univ. of North Carolina Press 1959).

<sup>17</sup> U.S. CONST. amend. I.

<sup>18</sup> WITTE & NICHOLS, *supra* note 7, at 92-94.

<sup>19</sup> 310 U.S. 296, 303-04, 310 (1940).

<sup>20</sup> 330 U.S. 1, 16 (1947).

*Cantwell* and *Everson* declared anew that religion had a special place in the Constitution and deserved special protection in the nation. In a remarkable counter-textual reading, the Supreme Court took it upon itself and the federal judiciary to enforce the First Amendment religion clauses against all levels and branches of government in the nation. The Court “incorporated” the First Amendment religion clauses into the Fourteenth Amendment Due Process Clause, thereby creating a common and special law of religious freedom applicable throughout the nation. “Congress shall make no law” now became, in effect, “Government shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” More than 170 religious freedom cases have reached the Supreme Court since 1940 (only forty-eight cases had reached the Court in the prior 150 years). Fully eighty percent of these post-1940 cases dealt with state and local government issues, and roughly half of the cases found constitutional (and related statutory) violations.<sup>21</sup> And for each of these Supreme Court cases, there were scores, sometimes hundreds, of cases in the lower courts. While this universalization of First Amendment religious liberty after 1940 angered individual states’ rights activists, then and now, it was the growing local bigotry at home and abroad that compelled the Court to act. Local bigotry was also the reason that America and the world embraced religious freedom in the 1940s as a universal and non-derogable human right of all persons—one of the famous “four freedoms” that Roosevelt championed to rebuke the horrific abuses inflicted on Jews and other religious and cultural minorities during World War II. Religious freedom for all was considered too important and universal a right to be left to the political calculus of state or local governments.

*Cantwell* and *Everson* also declared anew that all religious voices were welcome in the modern constitutional process of protecting religious liberty. These two cases welcomed hitherto marginal voices: *Cantwell* welcomed a devout Jehovah’s Witness who sought protections for his very unpopular missionary work. *Everson* welcomed a

skeptical citizen who sought protection from paying taxes in support of religious education. Subsequent cases have drawn into the constitutional dialogue a host of other religious and anti-religious groups—Catholics, Protestants, and Orthodox Christians; Jews, Muslims, and Hindus; Mormons, Quakers, and Hare Krishnas; Wiccans, Santerians, and Summumites; Skeptics, Atheists, and Secularists. While critics have charged the Court with favoring Christians and Christian traditions over others, and with clumsily applying Christian categories of religion to measure the faith claims of others, the Court has been surprisingly solicitous of a number of new and minority religions, even though blind spots remain, notably in dealing with Native American Indian claims.<sup>22</sup>

And *Cantwell* and *Everson* declared anew the efficacy of the founding principles of the American experiment in religious freedom. The Free Exercise Clause, the *Cantwell* Court proclaimed, protects “[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose.” It “safeguards the free exercise of the chosen form of religion,” the “freedom to act” on one’s beliefs. It protects a plurality of forms and expressions of faith, each of

which deserves equal protection under the law. “The essential characteristic of these liberties is that under their shield many types of life, character, opinion, and belief can develop unmolested and unobstructed.”<sup>23</sup> The Establishment Clause, the *Everson* Court echoed, means that no government “can set up a church”; “can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion”; can “punish [a person] for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance”; or “can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.” Government may not “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack*

*While this universalization of First Amendment religious liberty after 1940 angered individual states’ rights activists, then and now, it was the growing local bigotry at home and abroad that compelled the Court to act.*

<sup>21</sup> A table of all Supreme Court cases on religious freedom from 1815-2016 is in WITTE & NICHOLS, *supra* note 7, at 303-37.

<sup>22</sup> See, e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961) (upholding an atheist’s claim that a mandatory oath proclaiming a belief in God is unconstitutional); *Holt v. Hobbs*, 574 U.S. 352 (2015) (upholding a Muslim prisoner’s statutory right to maintain a longer beard contrary to state prison regulations).

<sup>23</sup> *Cantwell*, 310 U.S. at 303, 310.

of it, from receiving the benefits of public welfare legislation” or participating in the American public arena or political process.<sup>24</sup>

## NEW ATTACKS ON RELIGIOUS FREEDOM

Religious freedom has come under increasing attack in America in recent years. Some of these attacks the Supreme Court has brought on itself. Some of its recent opinions have both weakened the First Amendment religion clauses and introduced conflicting logic and contradictory tests that have left lower courts and legislatures without clear direction. In response, leading scholars now write openly that America’s experiment in religious freedom is a “foreordained failure,” an “impossibility” to achieve, and is sliding into its “twilight.”<sup>25</sup> Other scholars are trying to accelerate this decline by strongly attacking the idea that religion deserves any special constitutional consideration at all, and warning the populace against “the perils of extreme religious liberty.”<sup>26</sup> “Why tolerate religion?” reads an influential recent text, given that it is so irrational, unscientific, nonsensical, categorical, abstract, and impervious to empirical evidence or common sense.<sup>27</sup>

Religions have also brought some of these attacks on themselves. The horrors of 9/11 and scores of later attacks, as well as the bloody and costly wars against Islamist terrorism, have renewed traditional warnings that religion is a danger to modern liberty. *The New York Times* ran a sensational six-part exposé describing the “hundreds” of special statutory protections, entitlements, and exemptions

that religious individuals and groups quietly enjoy, prizes extracted by a whole phalanx of religious lobbyists in federal and state legislatures.<sup>28</sup> The Catholic Church has been rocked by an avalanche of news reports and lawsuits about the pedophilia of delinquent priests and cover-ups by complicit bishops—all committed under the thick veil of religious autonomy and corporate religious freedom.<sup>29</sup> Evangelical megachurches have faced withering attacks in Congress and the media for their massive embezzlement of funds and the lush and luxurious lifestyles of their pastors—all the while enjoying tax exemptions for their incomes, properties, and parsonages.<sup>30</sup> And Evangelical and mainline Protestants also now face their own new public reports of massive sex abuses by their clergy and other church leaders against wives, children, parishioners, clients, and students.<sup>31</sup> This two-decades long media and academic narrative of the underside of religion has eroded popular and political support for religious freedom.

Even bigger challenges of late have come with the culture wars between religious freedom and sexual freedom. The legal questions for religious freedom are mounting. Must a religious official with conscientious scruples marry a same-sex or interreligious couple? How about a justice of the peace or a military chaplain asked to solemnize their wedding? Or a county clerk asked to give them a marriage license? Must a devout medical doctor or a religiously chartered hospital perform an elective abortion or assisted-reproduction procedure to a single mother directly contrary to their religious beliefs about marriage and family life? How about if they are receiving government funding? Or if they are the only medical

<sup>24</sup> *Everson*, 330 U.S. at 15-16.

<sup>25</sup> STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (Oxford Univ. Press 1995); WINNIFRED SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton Univ. Press 2005); DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* (Oxford Univ. Press 2011); *Symposium: Rethinking Religious Freedom*, 29 J.L. AND RELIGION 355 (2014); *Symposium: Is Religion Outdated (as a Constitutional Category)?*, 51 SAN DIEGO L. REV. 971 (2014).

<sup>26</sup> MARCI A. HAMILTON, *GOD V. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (Cambridge Univ. Press rev. ed. 2014).

<sup>27</sup> BRIAN LEITER, *WHY TOLERATE RELIGION?* (Princeton Univ. Press 2013).

<sup>28</sup> Diana B. Henriques, *In God’s Name*, N.Y. TIMES, Oct. 8-11, 20, Nov. 23, and Dec. 19, 2006. *See also* Diana B. Henriques & Andrew W. Lehren, *Religious Groups Reap Federal Aid for Pet Projects*, N.Y. TIMES, May 13, 2007; Diana B. Henriques & Andrew W. Lehren, *Federal Grant for a Medical Mission Goes Awry*, N.Y. TIMES, June 13, 2007.

<sup>29</sup> *See, e.g.*, TESTIMONY BY HIS EXCELLENCY CARLO MARIA VIGANÒ, <http://online.wsj.com/media/Viganos-letter.pdf> (last visited July 29, 2020) (detailing Archbishop Viganò’s blistering indictment of the papacy concerning the pedophilia of Cardinal McCarrick and the cover-up by the Vatican).

<sup>30</sup> *See, e.g.*, Press Release, Senator Chuck Grassley, *Grassley Seeks Information From Six Media-based Ministries* (Nov. 6, 2011), <http://www.grassley.senate.gov/news/news-releases/grassley-seeks-information-six-media-based-ministries>; John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203 (2013).

<sup>31</sup> *See* John Witte, Jr., *Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies*, 68 EMORY L.J. 68 (2019) 837.

service available to the patient for miles around? Must a conscientiously opposed pharmacist fill a prescription for a contraceptive, abortifacient, or morning-after pill? Or a private employer carry medical insurance for the same prescriptions? What if these are franchises of bigger pharmacies or employers that insist on these services? May a religious organization dismiss or discipline its officials or members because of their sexual orientation or sexual practices, or because they had a divorce, abortion, or IVF treatment? May private religious citizens refuse to photograph or cater a wedding, to rent an apartment, or offer a general service to a same-sex couple whose lifestyle they find religiously or morally wanting—especially when the state’s new laws of civil rights and non-discrimination command otherwise?

These are only a few of the headline issues today, which officials and citizens are now struggling to address under heavy pressure from litigation, lobbying, and social media campaigns on all sides. Recent sharply divided Supreme Court cases on point have only exacerbated these tensions. In *Christian Legal Society v. Martinez* (2010)<sup>32</sup> and *Obergefell v. Hodges* (2015)<sup>33</sup>, same-sex rights trumped religious freedom concerns. In *Burwell v. Hobby Lobby* (2014)<sup>34</sup> and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018),<sup>35</sup> religious freedom concerns trumped reproductive and sexual freedom claims. The culture wars have only escalated as a consequence. “Each side is intolerant of the other; each side wants a total win,” Douglas Laycock wrote after a thorough study of these new culture wars. “This mutual insistence on total wins is very bad for religious liberty.”<sup>36</sup> For the first time in American history, the nation’s commitment to religious liberty has moved from the status of “being taken for granted” to “being up for grabs.”<sup>37</sup> And with easy political talk afoot about

repealing unpopular statutes—not just the Affordable Care Act—legislative protections for religious freedom appear vulnerable, particularly at the state level. Add the fact that both the Free Exercise and Establishment Clauses are now much weaker protections than they were a generation ago, and it is hard to resist the judgment of Mary Ann Glendon that American religious freedom is at least in danger of becoming “a second-class right”<sup>38</sup> if not expunged altogether in our late modern liberal society.

## RETURNING TO FIRST PRINCIPLES OF RELIGIOUS FREEDOM

Constitutions work like “clock[s],” John Adams reminds us. Certain parts of them are “essentials and fundamentals,” and, to operate properly, “their pendulums must swing back and forth” and their operators must get “wound up” from time to time.<sup>39</sup> We have certainly seen plenty of constitutional operators get wound up of late about religious freedom and seen wide pendular swings in First Amendment jurisprudence. But despite the loud criticisms from the academy and media, we may well have come to the end of a long constitutional swing of cases away from religious freedom protection from 1985 to 2010, and are now witnessing the start of a pendular swing back in favor of stronger religious freedom protection. Since 2011, the last eleven Supreme Court cases on religious freedom have all been wins for religion: *Arizona Christian School Tuition Organization v. Winn*,<sup>40</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>41</sup> *Town of Greece v. Galloway*,<sup>42</sup> *Burwell v. Hobby Lobby Stores, Inc.*,<sup>43</sup> *Holt v. Hobbs*,<sup>44</sup> *Reed v. Town of Gilbert*,<sup>45</sup> *Zubik v. Burwell*,<sup>46</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, *Espinoza v. Montana*

<sup>32</sup> 561 U.S. 661 (2010).

<sup>33</sup> 135 S. Ct. 2584 (2015).

<sup>34</sup> 573 U.S. 682 (2014).

<sup>35</sup> 138 S. Ct. 1719 (2018).

<sup>36</sup> Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 879 (2014).

<sup>37</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 HARVARD L. REV. 154, 156 (2014).

<sup>38</sup> Mary Ann Glendon, *Religious Freedom – A Second-Class Right?* 61 EMORY L.J. 971 (2012).

<sup>39</sup> John Adams, *Letter from the Earl of Clarendon to William Pym (Jan. 27, 1766)*, in THE POLITICAL WRITINGS OF JOHN ADAMS 644, 647 (George W. Carey ed., Regnery Publishers 2000) (originally printed in the *Boston Gazette*, with John Adams using the pseudonym of the Earl of Clarendon).

<sup>40</sup> 563 U.S. 125 (2011).

<sup>41</sup> 565 U.S. 171 (2012).

<sup>42</sup> 572 U.S. 565 (2014).

<sup>43</sup> 573 U.S. 682 (2014).

<sup>44</sup> 574 U.S. 352 (2015).

<sup>45</sup> 576 U.S. 155 (2015).

<sup>46</sup> 136 S. Ct. 1557 (2016).

*Department of Revenue*,<sup>47</sup> *Our Lady of Guadalupe School v. Morrissey-Berru*,<sup>48</sup> and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.<sup>49</sup> While *Hobby Lobby* and *Masterpiece Cakeshop* have attracted massive popular attention and criticism, these other recent cases have been quietly but steadily shifting First Amendment jurisprudence back in favor of stronger religious freedom.

Moreover, and more gravely, the blood of the many thousands of religious martyrs, especially in the genocidal attacks on communities of faith in the Middle East, Central Africa, and Central Eurasia, is now crying out so loudly that the world community will have to move toward concerted action in protection of religious freedom.<sup>50</sup> As in Adams's day, so in our own, the United States remains well positioned to provide global leadership in this effort. Most of the core principles of American religious freedom—liberty of conscience, freedom of exercise, and religious equality and pluralism—forged in the crucible of the revolution against religious establishments and oppression are now at the heart of the international human rights protections. And the work of our constitutional courts remains the envy of the world, even if individual cases are denounced.

It is essential, in my view, that these core principles of religious freedom remain vital parts of our American

constitutional life and are not diluted into neutrality or equality norms alone, and not weakened by too low a standard of review or too high a law of standing. It is essential that we address the glaring blind spots in our religious freedom jurisprudence—particularly the long and shameful treatment of Native American Indian claims<sup>51</sup> and the growing repression of Muslims and other minorities at the local level, which are not being addressed very well.<sup>52</sup> It is essential that we show our traditional hospitality and charity to the “sojourners within our gates”<sup>53</sup>—migrants, refugees, asylum seekers, and others—and desist from some of the outrageous nativism and xenophobia that have marked too much of our popular and political speech of late.<sup>54</sup> It is essential that we balance religious freedom with other fundamental freedoms, including sexual and same-sex freedoms, and find responsible ways of living together with all our neighbors, and desisting from mutually destructive strategies of defaming, demonizing, and destroying those who hold other viewpoints.<sup>55</sup> And it is essential that we make our landmark International Religious Freedom Act<sup>56</sup> a strong focus of our international diplomacy and policy again, not something to be ignored when economic, military, or geo-political interests get in the way, or to be deprecated and underfunded when other special

<sup>47</sup> 140 S. Ct. 2246 (2020).

<sup>48</sup> 140 S. Ct. 2049 (2020).

<sup>49</sup> 140 S. Ct. 2367 (2020).

<sup>50</sup> See DANIEL PHILPOTT AND TIMOTHY SHAW, *UNDER CAESAR'S SWORD: HOW CHRISTIANS RESPOND TO PERSECUTION* (Cambridge Univ. Press 2018); BRIAN J. GRIM AND ROGER FINKE, *THE PRICE OF RELIGIOUS FREEDOM DENIED: RELIGIOUS FREEDOM AND CONFLICT IN THE TWENTY-FIRST CENTURY* (Cambridge Univ. Press 2011).

<sup>51</sup> See, e.g., *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988) (rejecting a challenge to the federal government's logging and road construction activities on lands sacred to several Native American tribes, even though it was undisputed that these activities “could have devastating effects on traditional Indian religious practices”); *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that the state may prohibit the sacramental use of peyote in Native American Church); *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that an agency's use of a social security number does not violate the free exercise rights of a Native American, who believed such use would impair his child's spirit). See also Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253 (2012).

<sup>52</sup> But see *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (upholding Crow Indian treaty claims to hunting rights). On the harsh treatment of Muslims in lower federal courts, see, e.g., Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of Post 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 291 (2012). But see *Holt v. Hobbs*, 574 U.S. 352 (2015) (upholding a Muslim prisoner's statutory religious freedom to sport a longer beard than local prison regulations permitted).

<sup>53</sup> Exodus 20:10.

<sup>54</sup> See, e.g., ROBERT HEIMBURGER, *GOD AND THE ILLEGAL ALIEN: FEDERAL UNITED STATES IMMIGRATION LAW AND A THEOLOGY OF POLITICS* (Cambridge Univ. Press 2018).

<sup>55</sup> See overview in JOHN WITTE, JR., *CHURCH, STATE AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES* (Cambridge Univ. Press 2019).

<sup>56</sup> 22 U.S.C. § 6401 (2012).

administration interests gain political favor.<sup>57</sup> Now is the time for American governments, academics, NGOs, religious and political groups, and citizens alike to stand for strong religious freedom at home and abroad, for all peaceable people of faith.

Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down. In centuries past—and in many regions of the world still today—disputes over religion and religious freedom have often led to violence, sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights and liberties with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process, and help others to achieve the same. As John Adams reminds us: “[T]he eyes of the world are upon [us].”<sup>58</sup>

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<sup>57</sup> See, e.g., Thomas F. Farr, et al., *Religious Liberties: The International Religious Freedom Act*, 31 HOUS. J. INT’L L. 469, 478–79 (2009) (“The International Religious Freedom Act [IRFA] . . . was passed ten years ago. That law aimed to put religious freedom advocacy at the heart of U.S. foreign policy. . . . For the past ten years, the international religious freedom office [and IRFA] and U.S. democracy promotion efforts have been like two ships passing in the night—nothing to do with each other whatsoever. This needs to change.”).

<sup>58</sup> JOHN ADAMS, in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, *supra* note 6, at 487.



## CHURCH, STATE, AND THE ABUSE CRISIS

### *The Role of Assumed Ideas of “Reasonableness” in Religious Liberty*

FRANCIS J. BECKWITH

In this essay<sup>1</sup> I look at the abuse crisis in the American Catholic Church through the lens of the often complex and uneasy relationship between Catholicism and American culture and politics. I will also take us on a brief excursion into Supreme Court jurisprudence and explain why appeals to religious liberty by themselves are ultimately ineffectual in providing a safe harbor for the Church. What I hope to show is that the long-time—and in some cases, continued—reluctance on the part of segments of the American church to aggressively root out and prosecute this wickedness has the potential to provide justification to some of the most deep-rooted and pernicious prejudices about the Church and its place in a liberal democracy.

### CATHOLICS AT THE AMERICAN FOUNDING

Since the American founding, Catholics (and Catholicism) have been held in suspicion by the dominant mainline Protestant culture, with that suspicion appropriated in recent decades by what has become, at least in elite circles, the dominant culture of secular progressivism.

During the years of the American founding, anti-Catholicism, like blue wigs and ruffled shirts, was both fashionable and ubiquitous.<sup>2</sup> Although there were Catholics among the founders—most notably Charles Carroll, who signed the Declaration of Independence, and Thomas FitzSimons and Daniel Carroll (Charles’s cousin), who were among the Constitution’s framers—America was a deeply Protestant nation with all the theologically informed cultural reflexes, and accompanying predispositions, as one would expect. This is why even

so-called second-generation Protestant groups as well as those who historically align themselves to the radical wing of the Reformation—such as Baptists, Unitarians, Universalists, Quakers, and Mennonites—often found themselves bearing the brunt of state laws that clearly favored establishment non-Anabaptist Protestant sensibilities. Nevertheless, Catholics and Catholicism were singled out for special approbation.

Soon after the British Parliament passed the 1774 Quebec Act—which allowed Quebec to keep Catholicism as its official faith and for Catholics to freely practice it—the pre-revolutionary American colonists were outraged, surmising that this was a British effort to encourage Catholic expansion in North America for the ultimate purpose of suppressing their cantankerous American cousins.<sup>3</sup> As Alexander Hamilton put it:

Does not your blood run cold, to think an English Parliament should pass an act for the establishment of arbitrary power and popery in such an extensive country? If they had had any regard to the freedom and happiness of mankind, they would never have done it. If they had been friends to the Protestant cause, they would never have provided such a nursery for its great enemy; they would not have given such encouragement to popery. The thought of their conduct, in this particular shocks me. It must shock you, too, my friends. Beware of trusting yourselves to men, who are capable of such an action! They may as well establish popery in New York, and the other colonies, as they did in Canada. They had no more right to do it there than here.<sup>4</sup>

<sup>1</sup> An earlier version of this essay was delivered in New York City as a paper as part of the panel, “Church–State Relations in a Time of Scandal,” sponsored by The Morningside Institute (Sept. 26, 2019).

<sup>2</sup> MARK S. MASSA, S. J., *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* 18-39 (Crossroad Press 2003).

<sup>3</sup> STEVEN WALDMAN, *FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA* 49-50 (Random House 2008). This wonderful book led me to a variety of other sources, some of which I cite and quote in the body of this text.

<sup>4</sup> ALEXANDER HAMILTON, *A FULL VINDICATION OF THE MEASURES OF CONGRESS* (Dec. 15, 1774), *reprinted in THE WORKS OF ALEXANDER HAMILTON*, 26-27 (John C. Hamilton ed., 1850).

What Hamilton expressed was not an isolated belief among America's founding generation, but one integral, in the minds of many, for a correct understanding of America's patrimony and the patriotism expected of its citizenry. This is why seven of the original thirteen states—Georgia,<sup>5</sup> Massachusetts,<sup>6</sup> New Hampshire,<sup>7</sup> New Jersey,<sup>8</sup> North Carolina,<sup>9</sup> South Carolina,<sup>10</sup> and Vermont<sup>11</sup>—placed in their constitutions provisions that required that office holders be Protestant.

This resistance to Catholicism and Catholic participation in the nation's public life had virtually nothing to do with the Church's liturgy, or even its hierarchical ecclesiology, both of which can be found in differing degrees within Anglicanism. Rather, it had to do with what many believed was the Catholic citizens' promised obedience to the authority of the head of another sovereign state, that they may, in the words of John Locke, "deliver themselves up to the Protection and Service of another Prince [i.e., the Pope]."<sup>12</sup> This is why in an 1810 case, *Barnes v. Inhabitants of the First Parish in Falmouth*,<sup>13</sup> the Massachusetts Supreme Judicial Court held that a Catholic, under the state's qualifications for holding elected office, is free to run as long as he "renounce[s] all obedience and subjection to the pope, as a foreign prince or prelate."<sup>14</sup> When John F. Kennedy, a Catholic Democratic senator from Massachusetts, ran for the presidency in 1960, his victory largely depended on distancing himself from the Church's magisterium by confessing in so many words to the

Greater Houston Ministerial Association that he was just the sort of Catholic elected official that would have passed the *Barnes* test: "I believe in an America where the separation of church and state is absolute, where no Catholic prelate would tell the president (should he be Catholic) how to act . . ."<sup>15</sup>

There were, of course, divisions at the American founding about the propriety of state established churches, with figures like Thomas Jefferson and James Madison taking an anti-establishment position,<sup>16</sup> and others, like Patrick Henry, taking an opposing stance.<sup>17</sup> But between such factions there was general agreement that Catholicism was at root inconsistent with the ends of the American project.

## THE DANGER OF CONVENTIONAL UNDERSTANDINGS

None of this means that the underlying liberal principles of the American Founding—divided government, separation of powers, citizen representation, religious liberty, rights tightly tethered to natural law, consent of the governed—could not be supported by reasoning consonant with Catholicism, as a variety of writers have noted, including Fr. John Courtney Murray, Michael Novak, and Robert Reilly.<sup>18</sup> As I have argued elsewhere,<sup>19</sup> however, how these liberal principles actually get cashed out in practice depends on the anthropological, theological,

<sup>5</sup> GA. CONST. of 1777, art. VI, [https://avalon.law.yale.edu/18th\\_century/ga02.asp](https://avalon.law.yale.edu/18th_century/ga02.asp).

<sup>6</sup> MASS. CONST. of 1780, ch. VI, <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

<sup>7</sup> N.H. CONST. of 1784, pt. II, [http://candst.tripod.com/cnst\\_nh.htm](http://candst.tripod.com/cnst_nh.htm).

<sup>8</sup> N.J. CONST. of 1776, art. XIX, [https://avalon.law.yale.edu/18th\\_century/nj15.asp](https://avalon.law.yale.edu/18th_century/nj15.asp).

<sup>9</sup> N.C. CONST. of 1776, art. XXXII, [https://avalon.law.yale.edu/18th\\_century/nc07.asp](https://avalon.law.yale.edu/18th_century/nc07.asp).

<sup>10</sup> S.C. CONST. of 1778, art. III, [https://avalon.law.yale.edu/18th\\_century/sc02.asp](https://avalon.law.yale.edu/18th_century/sc02.asp).

<sup>11</sup> VT. CONST. of 1777, ch. I, §III; ch. II, §IX, [https://avalon.law.yale.edu/18th\\_century/vt01.asp](https://avalon.law.yale.edu/18th_century/vt01.asp).

<sup>12</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 50 (James H. Tully ed., Hackett Publishing 1983) (1689).

<sup>13</sup> 6 Mass. 400 (1810) (holding that Universalist minister's religious liberty was not violated despite the fact the state did not allow him to receive financial benefits of a tax collected to support Christian ministers, since Universalism was not a Christian faith under state law, that he was not coerced to confess or worship consistent with his conscience, and that the government had an interest in promoting particular Christian churches and their ministers).

<sup>14</sup> *Id.* at 416.

<sup>15</sup> Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960).

<sup>16</sup> Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html>; JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

<sup>17</sup> Patrick Henry, A Bill Establishing a Provision for Teachers of the Christian Religion (1784), <https://pols.tamu.edu/wp-content/uploads/sites/16/2020/02/Henry-Madison-Sundry-letters.pdf>.

<sup>18</sup> JOHN COURTNEY MURRAY, S. J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (Sheed & Ward 1960); MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING (Encounter Books 2002); and ROBERT R. REILLY, AMERICA ON TRIAL: A DEFENSE OF THE FOUNDING (Ignatius Press 2020).

<sup>19</sup> FRANCIS J. BECKWITH, TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH (Cambridge University Press 2015).

and metaphysical assumptions harbored by those with the responsibility to enforce those liberal principles. To understand what I mean, let us take an excursion through several very different U.S. Supreme Court cases.

In 1879, the Supreme Court upheld the criminal conviction of George Reynolds for violating a federal ban on polygamy. The statute was passed by Congress in 1862, fifteen years after the Church of Jesus Christ of Latter-Day Saints (LDS) left its settlements in Illinois and relocated to the Great Salt Lake basin in the Utah Territory. The LDS believed that their first prophet, Joseph Smith, Jr.—the founder of the church who had been assassinated in Illinois in 1844—was instructed by God to introduce the practice of plural marriage to the church. Reynolds, secretary to Smith's successor, Brigham Young, volunteered to be arrested so the church could challenge the constitutionality of the statute. At the Supreme Court, Reynolds argued that the District Court had erred by not instructing the jury that Reynolds's practice of plural marriage was required by his faith and, therefore, he should be acquitted under the Free Exercise Clause of the First Amendment. The Court rejected this reasoning based on the Jeffersonian distinction between belief and act: that the government may not coerce beliefs but it may coerce actions, even if those actions arise from religious sanction. Quoting from a draft of the Virginia Statute for Religious Freedom authored by Jefferson, the Court wrote:

after a recital [in the Act] “that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,” it is declared “that it is time enough for the rightful purposes of civil government for its officers to

interfere when principles break out into overt acts against peace and good order.” In these two sentences is found the true distinction between what properly belongs to the church and what to the State.<sup>20</sup>

According to the Court, there are two reasons why the federal ban on polygamy advances peace and good order: (1) “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people,”<sup>21</sup> and (2) “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”<sup>22</sup>

In the 1927 case *Buck v. Bell*,<sup>23</sup> the Supreme Court upheld a Virginia statute that allowed the “superintendent of certain institutions” to order the sterilizations of “feeble-minded” persons who were under the care of these state institutions, if the superintendent “shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized.”<sup>24</sup> In his majority opinion, Justice Holmes offered

this description of the plaintiff: “Carrie Buck is a feeble minded white woman who was committed to the State Colony. . . . She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child.”<sup>25</sup> Holmes rejected as “the usual last resort of constitutional argument” Buck's claim that the law violated her equal protection because the forced sterilization policy “is confined to the small number who are in the institutions named and is not applied to the multitudes outside.”<sup>26</sup> What animated Holmes's opinion was what he believed was the government's legitimate interest in imparting to Buck the preventative health care that she

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<sup>20</sup> Reynolds v. United States, 98 U.S. 145, 163 (1879).

<sup>21</sup> *Id.* at 164.

<sup>22</sup> *Id.* at 166.

<sup>23</sup> 274 U.S. 200 (1927).

<sup>24</sup> *Id.* at 206.

<sup>25</sup> *Id.* at 205.

<sup>26</sup> *Id.* at 208.

and her feeble-minded peers were resisting. In what has to be one of the most chilling passages in American judicial history, Holmes writes:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. ... Three generations of imbeciles are enough.<sup>27</sup>

In 1972, in the case of *Wisconsin v. Yoder*,<sup>28</sup> the Supreme Court permitted Amish parents to exempt their children from the state's compulsory education law. Wisconsin sought to enforce its requirement that all children attend private or public school until the age of sixteen, while the parents argued that it was their religious duty, commanded by the customs of their faith, to pull their children out of school after the eighth grade for the sake of the children's moral health and eternal salvation. Ruling in favor of the parents, the Court acknowledged that the Amish "succeed in preparing their high school age children to be productive members of the Amish community"; that "their system of learning through doing the skills directly relevant to their adult roles . . . [is] 'ideal,' and perhaps superior to ordinary high school education"; and finally, that "the Amish have an excellent record as law-abiding and generally self-sufficient members of society."<sup>29</sup>

In the 1993 case of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,<sup>30</sup> the Court dealt with the question of whether a city ordinance that prohibited animal cruelty and regulated the killing and hygienic disposal of animals violated the religious liberty of a Santeria church that engaged in animal sacrifice as part of its liturgical

life. It was clear from the record that, even though the ordinance appeared neutral on its face, the city council had crafted it for the purpose of restricting the church's unusual ritual. Much like the anti-polygamy statute in *Reynolds*, the ordinance in *Lukumi* came about because of the unexpected presence of an idiosyncratic religious group that engaged in what the authorities believed to be an odious practice. And yet, unlike the nineteenth-century LDS, the Santerians prevailed in their legal fight.

In 2018, the Supreme Court addressed for the first time the conflict between the religious liberty interests of wedding vendors and the anti-discrimination interests of same-sex couples seeking to procure the services of such vendors. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>31</sup> concerned an evangelical Christian named Jack Phillips, owner of Masterpiece Cakeshop, who refused to make a custom-made wedding cake for a same-sex couple's post-nuptial reception. The couple filed a complaint with the Colorado Civil Rights Commission arguing that, by refusing to provide the cake, Masterpiece had violated the state's prohibition of sexual orientation discrimination by any public accommodation. Phillips, in response, argued that to create a custom-made cake for this purpose violates his religious conscience, since it would involve him materially cooperating with the celebration of an event that his theology teaches is intrinsically immoral. As part of his case, Phillips made a distinction between refusing to serve a member of a protected class and refusing to participate in a particular type of ceremony or event. That is, he would have no problem selling generic baked goods off the shelf to anyone at all, but he contended that that is different from employing his talents for the celebration of a particular type of event. It is like the distinction between an Orthodox Jewish photographer hired by a church to take pictures at its summer pool party that includes some shots of Christians playfully dunking each other and the same Orthodox Jewish photographer being hired by the same church to take pictures of a baptismal rite that includes shots of the church's Christian minister dunking several Jewish converts in a baptistry.<sup>32</sup> Both the Colorado Civil Rights Commission and the state appellate courts rejected this reasoning and

<sup>27</sup> *Id.* at 207.

<sup>28</sup> 406 U.S. 205 (1971).

<sup>29</sup> *Id.* at 212–13 (relying on the expert testimony of Dr. Donald A. Erickson).

<sup>30</sup> 508 U.S. 520 (1993).

<sup>31</sup> 138 S. Ct. 1719 (2018).

<sup>32</sup> This is my illustration, not Phillips'; I have used similar illustrations elsewhere. See, e.g., Francis J. Beckwith, *Gotta Serve Somebody? Religious Liberty, Freedom of Conscience, and Religion as Comprehensive Doctrine*, 33 *STUD. IN CHRISTIAN ETHICS* 168 (2020); Francis J. Beckwith, *Now, I'm Liberal, but to a Degree: An Essay on Debating Religious Liberty and Discrimination*, 67 *CLEV. ST. L. REV.* 141 (2019).

held that *Masterpiece* had run afoul of the anti-discrimination statute, because the plaintiffs' conduct (having a same-sex wedding) could not be divorced from their status (being gay men).<sup>33</sup> Although Phillips wound up winning at the Supreme Court, the majority opinion, authored by Justice Kennedy, does not address this distinction.<sup>34</sup>

The rulings in each of these cases—*Reynolds*, *Buck*, *Yoder*, *Lukumi*, and *Masterpiece*—were consistent with the principles of the American Founding, but if they had gone the other way, they still would have been consistent with the principles of the American Founding. The reason for this is that the principles by themselves provide nothing more than procedural guidelines. This is why judicial levels of scrutiny fare no better. They simply disguise, under the pretense of just process, substantive beliefs about anthropology, theology, and metaphysics. In the days of *Reynolds*, the Court believed it was obvious that the government had a compelling interest in criminalizing the practice of polygamy in the territories. In *Buck*, Justice Holmes thought it obvious that if the state's military can conscript a citizen to die for his country, surely Ms. Bell could be compelled to give up her ovaries for the public good. After all, the science of eugenics, dominant at the time of *Buck*, was thought to give us new and enlightened insights on human nature and how to improve it. The Amish in *Yoder*, unlike the Mormons in *Reynolds*, produce good citizens that stay off the welfare rolls and out of jail. So, the Amish catch a break while the LDS do not. Besides, even though the Amish hold some strange beliefs, these beliefs are not odious and do not lead to stationary despotism. In *Lukumi*, the Santerians won because animal killing and carcass disposal are not in and of themselves a big deal, especially if the state already permits these activities in other contexts outside of religious sacrifice, e.g., hunting, butchery, etc. But suppose our beliefs about animals were to change and align themselves with the views of contemporary animal rights activists. Would not a court that sees those new beliefs as "obviously true" conclude, in the style of the *Reynolds* court, that the Santerian practice is odious, and, like Holmes in *Buck*, say that society has a

right to prevent those who are morally unfit from continuing in their imbecilic practices? In *Masterpiece*, the Court focused almost exclusively on the anti-religious animus of the Colorado Civil Rights Commission, while completely ignoring the liturgical (or sacramental) significance of marriage for believers like Phillips. It was not even on the radar, even though in the Christian tradition, weddings, including those that are exclusively civil, are thought to be more like baptisms, bar mitzvahs, and burials than they are like barbeques or birthday parties. But on that understanding, the Court could have reasonably held that what Colorado was demanding of Phillips was tantamount to what John Locke described as the government compelling a citizen "to embrace a strange religion, and join in the worship and ceremonies of another Church."<sup>35</sup>

My point of this excursion into these cases is to draw out a lesson about the nature of judicial reasoning on matters of so-called fundamental rights, especially religious liberty: they are always at the mercy of the conventional understandings of reasonableness informed as they are by the anthropological, theological, and metaphysical beliefs of those who wield cultural, political, and legal power. For this reason, when it comes to the abuse crisis in the Catholic Church and the extent to which secular authorities may investigate and punish the Church, there will be fewer safe harbors as the Church's anthropological, theological, and metaphysical claims seem increasingly less plausible to secular progressive actors.

Take, for example, SB 360, the 2019 California bill that would have required a Catholic priest to break the seal of the confessional in the case of a clergy-penitent who confesses that he had sexually abused a minor.<sup>36</sup> The bill's chief sponsor (who ultimately withdrew it), Senator Jerry Hill,<sup>37</sup> defended the bill by pointing out that "[m]embers of the clergy have identified their role in some abuse to another member of the clergy in that confessional or in that penitential communication, and in so doing they have felt that they have been absolved of some of their sins and turned around and gone ahead and done the same thing over again."<sup>38</sup> Senator Hill went on to say: "When you take the issue of child abuse and

<sup>33</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶34.

<sup>34</sup> Phillips won because of the hostility exhibited toward his religious beliefs by members of the Colorado Civil Rights Commission. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

<sup>35</sup> LOCKE, *supra* note 12, at 48.

<sup>36</sup> S.B. 360, 2019 Sen., Reg. Sess. (Ca. 2019), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=20190200SB360](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=20190200SB360).

<sup>37</sup> Chaz Muth, *California bill aims to protect children by breaking seal of confession*, CATHOLICPHILLY.COM (July 1, 2019), <https://catholicphilly.com/2019/07/news/national-news/california-bill-aims-to-protect-children-by-breaking-seal-of-confession/>; see also Pablo Kay, *SB 360 withdrawn by sponsor day before key hearing*, ANGELUS NEWS (July 9, 2019), <https://angelusnews.com/local/la-catholics/sb-360-withdrawn-by-sponsor-day-before-key-hearing/>.

<sup>38</sup> Muth, *California bill aims to protect children by breaking seal of confession*.

neglect and you look at every civilized country in this world, every one of them looks at this as a complete violation of anything that is good and right in this society.”<sup>39</sup> So, if an increasing number of Americans come to believe that the seal of the confessional is nothing more than archaic superstition, it is not at all difficult to imagine that a decreasing number of citizens will be persuaded by the Church’s argument that the government’s protection of the seal is required as a matter of religious liberty. After all, if the state may not touch beliefs but only actions (Jefferson and *Reynolds*), and those actions are odious and reinforce stationary despotism (*Reynolds*), and thus restricting them is no different than military conscription (*Buck*) and is in the best interests of society (*Reynold* and *Buck*), and if what we think is a sacrament is for the state no different than any other economic transaction for services and commodities (*Masterpiece*), then it would seem to follow that to exempt confessional conversations from ordinary reporting laws is deleterious to the common good.

## PERSISTENT ANTI-CATHOLICISM

Although the statutory and state constitutional impediments to Catholic participation in public life began to fall and eventually disappear as the nation moved into the nineteenth century, anti-Catholicism as a cultural phenomenon with political and legal implications cyclically waxed and waned depending on the controversy du jour.

In the mid-to-late-nineteenth century, states began passing what were to be called Blaine Amendments. Named after Maine congressional representative, James Blaine, they were modeled after the Federal Constitutional amendment introduced by Blaine in 1875:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of

public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised, or lands so devoted be divided between religious sects or denominations.<sup>40</sup>

The purpose of the amendment was to prevent the growing U.S. population of Catholics—which consisted largely of immigrants—from receiving the same government support for their system of schools that were received by the so-called public schools that inculcated their students with a generic American Protestant understanding of history, faith, and social life. As legal historian Philip Hamburger notes, “[The Blaine Amendment] was an anti-Catholic measure that still permitted a generalized Protestantism in public schools as long as this was not the Protestantism of any one sect.”<sup>41</sup> Although the amendment failed to receive the required two-thirds vote in the Senate after it had prevailed 180–7 in the House, the amendment’s central idea was eventually incorporated into the constitutions of thirty-seven states.<sup>42</sup>

The nineteenth-century American nativism that historically accompanied these anti-Catholic measures often gave us some of the most salacious accounts of Catholic religious life. Sometimes it led to violence, as in 1834 when a mob, “spurred on by the popular Presbyterian Reverend Lyman Beecher[,] burned an Ursuline Convent in Charlestown, Massachusetts, after a false rumor about the mistreatment of a nun spread through Boston.”<sup>43</sup> In other cases, the stories were published as autobiographical accounts—a kind of “Puritan Pornography”<sup>44</sup>—that merely confirmed what everyone really “knew” about the secret lives of priests and nuns and the diabolical nature of the Catholic Church. *The Awful Disclosures of Maria Monk*,<sup>45</sup> published in 1836, was the *Uncle Tom’s Cabin* of lurid Catholic tales. Ms. Monk maintained that while she was living in a

<sup>39</sup> *Id.*

<sup>40</sup> 4 Cong. Rec. 5453 (1876).

<sup>41</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 298 (Harvard University Press, 2002).

<sup>42</sup> Richard D. Komer and Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, THE INSTITUTE FOR JUSTICE AND THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2d ed. 2017), <http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf>. On June 30, 2020, the Supreme Court struck down Montana’s Blaine Amendment as unconstitutional in *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020).

<sup>43</sup> Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 NYU J. OF L. & LIBERTY 267, 293 (2008).

<sup>44</sup> I wish I had thought of the phrase “Puritan Pornography,” but alas, I found it in an essay by Robert P. Lockwood, *Convent Horror Stories*, CATHOLIC ANSWERS MAGAZINE (Mar. 1, 2008), <https://www.catholic.com/magazine/print-edition/convent-horror-stories>.

<sup>45</sup> William S. Cossen, *Monk in the Middle: The “Awful Disclosures of the Hotel Dieu Nunnery” and the Making of Catholic Identity*, 125 AM. CATH. STUD. 25 (2014).

Montreal convent she and other nuns served as sex slaves for the priests who resided in the adjacent seminary. When offspring resulted from these perverse couplings, Ms. Monk claimed the children were baptized and subsequently strangled to death with their remains disposed of on the property. Nuns who resisted were never heard from again. *The Awful Disclosures of Maria Monk* became a best-seller, but it was entirely a work of fiction. Although, as Ian Bartrum points out, “[m]ore scrupulous ministers visited Montreal and debunked Ms. Monk’s story; the book . . . and other sensationalist accounts like it, fueled the flames of nativist bigotry and intensified the Catholic clergy’s fears for their parishioners’ education and their spiritual well-being.”<sup>46</sup> According to the Catholic League, Protestant ministers who exposed the Maria Monk hoax were accused of being secret Jesuits “or bribed by the Church.”<sup>47</sup>

Although American anti-Catholicism lost much of its flamboyant rhetorical edge in the twentieth century, it persisted in more urbane forms, with its advocates often emphasizing what they believed was the threat that Catholic social thought and ecclesial obedience posed to the “American way.” For this reason, religious anti-Catholics—such as George W. Truett and Joseph Martin Dawson, Jr.<sup>48</sup>—were often joined by secular anti-Catholics—such as Paul Blanshard and Leo Pfeffer<sup>49</sup>—in denouncing certain Catholic doctrinal commitments as simply incompatible with America’s understanding of freedom, democracy, and self-determination. Take, for example, these comments made by Dawson:

The second powerful culture bidding for American adoption is that of Roman Catholicism. . . . For that system is undoubtedly a competitor with the Protestant culture on which America was founded. It is a totalitarian system opposed to our democratic order. Quite definitely we shall except Catholicism from religious groups which contribute to

democratic freedom, and so list it with secularism as a threat to national unity. . . .

The Catholics, who are now [in 1948] claiming a near majority over all Protestants in the United States, would abolish our public school system which is our greatest single factor in national unity and would substitute their old-world, medieval parochial schools with their alien culture. Or else they make it plain that they wish to install facilities for teaching their religion in the public schools. . . . Perhaps the burning issue has arisen soon enough to enable the friends of the native American culture to arrest the progress of the long-range plan of those who would supplant it. There can be no doubt about the Catholic plan.<sup>50</sup>

Dawson, and the organizations he helped found—Americans United for the Separation of Church and State and the Baptist Joint Committee on Public Affairs—opposed official diplomatic relations between the United States and the Holy See. The reason was quite simple, as Pfeffer put it: “Extending diplomatic recognition of the Holy See is inconsistent with the American principle of church and state. It would ‘give one church a preferential status in relation to the American government [and would thereby] set aside the principle of according all religious bodies the same status in the eyes of our government.’”<sup>51</sup> In response to those who argued that diplomatic relations with the Holy See could give the U.S. a “listening post” from which it may gather intelligence the Church acquires from its massive global network within hostile nations,<sup>52</sup> Pfeffer replied that the

efficacy of this argument assumes that every bishop, priest, or member of a religious order throughout the world is in effect a spy reporting to his temporal superior, the Pope, on the internal political, military, and economic conditions of the country in which he resides and to which

<sup>46</sup> Bartrum, *supra* note 43, at 293.

<sup>47</sup> Robert P. Lockwood, *The Lie of Maria Monk Lives On*, CATHOLIC LEAGUE (Oct. 23, 2001), <https://www.catholicleague.org/the-lie-of-maria-monk-lives-on-2/>.

<sup>48</sup> JOSEPH MARTIN DAWSON, JR., *AMERICA’S WAY IN CHURCH, STATE, AND SOCIETY* (Macmillan 1953); George W. Truett, Address at the Annual Session of the Southern Baptist Convention, “Baptists and Religious Liberty” (May 16, 1920), <https://bjconline.org/baptists-and-religious-liberty/>.

<sup>49</sup> PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (The Beacon Press 1949); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (The Beacon Press, 1953).

<sup>50</sup> J. M. DAWSON, *SEPARATE CHURCH & STATE NOW* 96, 98-99 (R. R. Smith 1948).

<sup>51</sup> PFEFFER, *supra* note 49, at 266 (alteration in original) (quoting *Reference Manual on U.S. Diplomatic Representation at the Vatican*, National Council of Churches of Christ in the United States of America 5 (1951)).

<sup>52</sup> Pfeffer speaks of the “iron curtain,” in reference to the Soviet bloc countries at the time.

he owes civil allegiance. Furthermore, if a priest in [a non-American nation] ... is an espionage agent of the Holy See, the priest in Washington, who owes the same duties to the Pope, is likewise an espionage agent, potential if not actual, of the Holy See.<sup>53</sup>

## CONCLUSION

For those of us who are Catholic, the first two decades of the twenty-first century have felt like one long Lent.<sup>54</sup> We have been made painfully aware of the seemingly endless stories of clergy sexual abuse, whose villains are sometimes protected by those at the highest levels of the Church. I confess that these relentless revelations—including the ones pried from the Boston Archdiocese,<sup>55</sup> attested to by the victims of Cardinal McCarrick,<sup>56</sup> recorded in the 2018 Pennsylvania grand jury report,<sup>57</sup> culled from the research of the late A. W. Richard Sipe,<sup>58</sup> and disclosed in the August 2018 letter authored by Archbishop Carlo Maria Viganò<sup>59</sup>—are not conducive to habituating charity toward those who claim to be the apostles' successors.<sup>60</sup>

Nevertheless, many of us know, from both our knowledge of the great saints in the Church's history, as well as our encounters with many dear souls in the present, that the barque of Peter has always been and continues to be a place in which true sanctity, love, and devotion flourishes overabundantly. Although we take comfort in this knowledge—occasionally summoning those pillars of grace through memory and prayer—we also know that what people outside the Church believe about her, and the extent to which her ecclesial liberty should be accommodated, is shaped significantly not only by salacious news reports but also by some of the prejudices and philosophical assumptions we covered in this essay.

Unfortunately, many of my fellow Americans, some of whom are legislators, governors, U.S. attorneys, law professors, journalists, and local prosecutors, see the American Catholic Church like Hamilton, Blaine, Dawson, Pfeffer, and the readers of *Maria Monk* saw it. But who can really blame them, given the way in which the bishops in the institutional Church for decades dealt with its priest-predators? Imagine, for example, what Dawson and Pfeffer would think if they were around today to read this passage from Archbishop Viganò's letter: "All the memos, letters and other documentation mentioned here are available at the Secretariat of State of the Holy See or at the apostolic nunciature in Washington, D.C." They surely would say, "We told you so." Whether or not that is fair, it is nevertheless the mission of the American Church to prove them wrong.

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<sup>53</sup> Pfeffer, *supra* note 49, at 267.

<sup>54</sup> George Weigel, *Another Long Lent*, FIRST THINGS (Apr. 12, 2010), <https://www.firstthings.com/web-exclusives/2010/04/another-long-lent>.

<sup>55</sup> Fox Butterfield, *Church in Boston Archdiocese to pay \$85 million in abuse lawsuits*, THE NEW YORK TIMES (Sept. 10, 2003), <https://www.nytimes.com/2003/09/10/us/church-in-boston-to-pay-85-million-in-abuse-lawsuits.html>.

<sup>56</sup> Elizabeth Bruenig, *'Pray for your poor uncle,' a predatory priest told his victims*, THE NEW YORK TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/opinion/sunday/theodore-mccarrick-catholic-abuse.html>.

<sup>57</sup> Report I of the 40th Statewide Investigating Grand Jury, Pa. Att'y Gen. (2018), <https://www.attorneygeneral.gov/report/>.

<sup>58</sup> See his website: <http://www.awrsipe.com/>.

<sup>59</sup> TESTIMONY BY HIS EXCELLENCY CARLO MARIA VIGANÒ, [HTTPS://ASSETS.DOCUMENTCLOUD.ORG/DOCUMENTS/4784141/TESTIMONYXCMVX-XENGLISH-CORRECTED-FINAL-VERSION.PDF](https://assets.documentcloud.org/documents/4784141/testimonyxcmvx-xenglish-corrected-final-version.pdf) (last visited July 28, 2020).

<sup>60</sup> I am not suggesting, by citing these sources, that one should not critically assess them. For example, the accuracy of Archbishop Viganò's August 2018 letter and the subsequent ones he has penned, as well as his motivations for writing them, have come under withering critiques. See, e.g., Cindy Wooden, *Cardinal Ouellet issues response to Archbishop Viganò on McCarrick case*, CHICAGO CATHOLIC (Oct. 7, 2018), <https://www.chicagocatholic.com/vatican/-/article/2018/10/07/cardinal-ouellet-issues-response-to-archbishop-viganò-on-mccarrick-case>.



## INSTITUTIONAL RELIGIOUS FREEDOM IN FULL

*What the Liberty of Religious Organizations Really is and Why it is an “Essential Service” to the Common Good*

TIMOTHY SAMUEL SHAH

In its 2012 judgment in *Hosanna Tabor*, the U.S. Supreme Court held that the First Amendment “gives special solicitude to the rights of religious organizations.”<sup>1</sup> But precisely what kind and level of “solicitude”? Precisely which “rights”? And precisely what is the ground of this solicitude and of those rights? Invoking the so-called “ministerial exception,” the Court in *Hosanna Tabor* largely restricted itself to the idea that the church should be free from government interference in matters of “internal governance,” “internal government,” and “internal church decision.” What the consenting adults who make up the church do among themselves is their own business, the Court implied, and is of no public concern or business of the government. One is tempted to wonder, therefore, if the Court’s “special solicitude” for the rights and freedoms of religious institutions is in the spirit of those old Las Vegas tourism advertisements: “What happens in Vegas, stays in Vegas.”

Is the freedom of religious organizations valorized in the Religion Clauses and defended in recent Supreme Court jurisprudence little more than the ecclesiastical equivalent of the famed “right to be left alone”? In other words: “What happens in the church, stays in the church.” If so, is this all we *should* mean by the rights and freedoms of religious institutions—i.e., a veil thrown over the inner workings of religion, less from respect for the sacred and more from a sense that the affairs of the church are its own private (and perhaps somewhat unsavory) business? Are churches like restive, semi-autonomous regions in some countries, which are given special jurisdictional respect and internal autonomy within their borders less from positive respect for their dignity and value and more from fear that external interference with their “internal governance” would create more problems than it would solve?

In the following, I provide a more robust definition of what I call institutional religious freedom than the crabbed and merely negative understanding that is implicit in the Court’s majority opinion in *Hosanna Tabor*.

In fact, Associate Justice Samuel Alito’s lengthy concurring opinion in *Hosanna Tabor* points the way to the more robust and more positive articulation of the meaning and value of institutional religious freedom I offer here, and I confess I wonder whether he wrote his concurrence precisely to go beyond the majority opinion’s more meager conception. According to Alito, respect for a church’s governance, including in matters of ministerial appointments, is important not merely for the sake of protecting its internal autonomy. “A religious body’s control over” its “employees,” Alito observes, “is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.”<sup>2</sup>

In other words, unfettered church governance subserves not only the internal self-government of religious organizations but also the “free dissemination of religious doctrine.” We protect what happens in the church not because it stays in the church but precisely because it is meant to go forth from the church. Like Alito’s, my definition stresses the essential internal *and* external dimensions of institutional religious freedom, as well as its negative *and* positive dimensions.

### WHAT IS “INSTITUTIONAL RELIGIOUS FREEDOM”?

The concept of the “freedom of the church” was first formulated by Pope Gelasius in the fifth century and then later developed by Pope Gregory VII in the eleventh century as the Roman Catholic Church sought to resist political domination. But the notion that religious institutions do—and should—retain a distinct place in society, as well as some independence and freedom from political control, has strong antecedents and analogs in Hinduism, Buddhism, and Islam. In Judaism and Christianity, for example, it has ancient roots in biblical notions of institutional separation between the roles of prophet and king and the distinction Jesus draws between “the things of God” and “the things of Caesar.”

<sup>1</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

<sup>2</sup> *Id.* at 201 (Alito, J., concurring).

Indeed, there are many aspects of religious freedom or religious self-organization that are distinctively and irreducibly institutional and communal rather than merely individual or personal. One can suggest these aspects or dimensions with a series of simple questions: In any given society, does a religious community or organization have a legal right to exist or obtain what is sometimes called “legal personality” or official “entity status”? Does it have the right to rent or own property or meeting space in order to assemble its members and carry out its distinctive mission and ministry? Does it have the right, as an organization or community, to propagate its teachings publicly, including the right to communicate its views on public matters to political leaders? Does it have the right to choose its own leaders and institute its own authority structure, even across borders? Furthermore, does a religious institution have the right and opportunity to secure its own funding sources, independent of undue political interference? Does it have the freedom to communicate with co-religionists, both within and across national borders? Does it have the freedom—including the legal right—to create institutionalized sub-entities to carry out activities in civil society, including educational and charitable activities? Does it have the freedom—including the legal right—to bring to bear its religious views on debates over law and public policy and, if persuasive, to prevail? And does it have the freedom to form and educate the children of its adherents in its religious teachings, as well as attract and recruit new members?

All of these questions suggest distinct dimensions of a single, reasonably coherent concept—namely, *the right of religious institutions and religious communities to be self-organizing or, in a phrase, institutional religious freedom*. To the extent the concept is coherent, what precisely is it? What exactly does it entail? What are its essential constitutive elements?

Following scholar of law and religion W. Cole Durham, Jr., a collaborative research team I lead at the Religious Freedom Institute takes institutional religious freedom (under any of its various appellations) to be a right of self-determination for religious communities and organizations. Building on the insights of

other scholars, we suggest that at its core this right to self-determination entails the right of religious communities to decide upon and administer their own affairs without government interference.<sup>3</sup> In this sense, we take institutional religious freedom to be *the effective power of religious communities and organizations to be independent of control or interference by the state and other social actors and, therefore, to enjoy meaningful self-determination in the conduct of their “internal” affairs or self-governance as well as their “external” affairs or engagement with the wider society*. To elaborate, *institutional religious freedom is the presumptive right of a religious institution to be free from coercive interference on the part of individuals, social groups, governments, or of any human power in three main areas or dimensions: self-definition, self-governance, and self-directed outward expression and action*.

If the essence or core of institutional religious freedom is reasonably clear, what are its main components or constituent elements? Durham argues that institutional religious freedom has three main dimensions: substantive, vertical, and horizontal. *Substantive* dimensions of institutional religious freedom pertain to the core content of a religious community’s religious life, such as the definition of the community’s beliefs and doctrines and the content and organization of its worship and rituals. *Vertical* dimensions pertain to a community’s leadership structure, hierarchy, lines of authority, the training and appointment of

ministers and leaders, the conferral of membership, and the disciplining of members. *Horizontal* dimensions pertain to a community’s ability to engage the wider society in systematic ways through the creation of specialized institutions and the organized manifestation and propagation of its religious message and teachings.

That is, a religious institution enjoys the presumptive right to define its identity and its core convictions (the self-definition or “substantive” dimension of institutional religious freedom), to govern itself by its core convictions (the self-governance or “vertical” dimension of institutional religious freedom), and to act and express itself based on its core convictions in society and public life to the extent and in the manner it wishes to do so (the self-directed action and expression or

*The substantive or core dimension of institutional religious freedom has been—and remains—a frequent axis of conflict between political and religious authorities throughout history.*

<sup>3</sup> W. Cole Durham, Jr., *The Right to Autonomy in Religious Affairs: A Comparative View*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY (Gerhard Robbers ed., Peter Lang 2001).

“horizontal” dimension of institutional religious freedom). The horizontal dimension of institutional religious freedom is subject to two basic limits: it does not authorize violence or the infringement of the fundamental rights of others.

Note that this freedom is presumptive in the sense that there is a strong presumption in its favor and a corresponding duty on the part of other actors, including the state, to defer to the threefold freedom of religious institutions (substantive, vertical, and horizontal) to the maximum extent possible. In certain respects, however, such as concerning the freedom of a religious body to define and interpret its own identity and doctrine, this freedom is absolute or near-absolute.

Of course, this definition presupposes a definition of “religious institution” and a definition of “religion.” A “religious institution” is an organized entity (as opposed to a mere religious “group” or “community” in the sense of Muslims or Buddhists). What distinguishes a religious institution from a more amorphous group is that it enjoys agency—it can act—and others can engage it and act on it.<sup>4</sup> “Religion” is an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in relationship to the ultimate power (or powers) that grounds reality and is present to them in the real circumstances of their lives. They do this most characteristically through worship and similar practices seeking a connection with the divine. Religion typically involves related rituals, a community, a clerical professional, and a moral code grounded in the sacred realm.<sup>5</sup>

## THE SUBSTANTIVE DIMENSIONS OF INSTITUTIONAL RELIGIOUS FREEDOM

The substantive dimensions of institutional religious freedom pertain to the core content of a religious community’s religious life. *A religious community enjoys the substantive dimension of institutional religious freedom when it is independent of outside interference and*

*meaningfully self-determining in (a) defining its core beliefs and doctrines, (b) defining and exercising its core ministry functions, and (c) organizing its core leadership and administrative structures and exercising their core functions.* This is the most central dimension of institutional religious freedom because it pertains to the freedom of a religious community or organization to define and constitute itself in the most fundamental ways—i.e., in terms of what it believes and teaches, what constitutes its authentic worship and religious rites, and how its leadership and administration should be organized.

The substantive or core dimension of institutional religious freedom has been—and remains—a frequent axis of conflict between political and religious authorities throughout history. For example, at regular intervals between the fourth and eighth centuries, Christian emperors with Arian leanings sought to impose Christological formulas on the church that many Christian authorities and councils considered incompatible with core Christian doctrine, triggering fierce defenses of the substantive dimension of the church’s institutional religious freedom (such as by St. Maximus the Confessor in the seventh century).

But among the most notable and radical attempts in history to limit the substantive dimensions of institutional religious freedom were those that occurred in France in the late eighteenth century and in Turkey in the early twentieth century. After the French Revolution, the republican government instituted the Civil Constitution of the Clergy (1790) and thus initiated the complete re-organization—and, effectively, the destruction and re-creation—of the French Catholic Church in terms of its core doctrines, core ministry, and core leadership and administration. In the eyes of its architects, of course, the aim of this policy was not to abolish the Church or destroy religion *per se* but to guarantee “the Church’s fidelity [to the state] and prevent it from constituting itself as an independent power.”<sup>6</sup>

Inspired in no small degree by the example of the French Revolution, the National Assembly of the young Turkish Republic followed the initiative of Kemal

<sup>4</sup> In other words, by “religious institutions”—the beneficiaries of the freedom we explore here—we mean any more-than-merely-informal religious body, organization, community, or institution. In an insightful study entitled *Global Institutions of Religion*, religion and development expert Katherine Marshall provides an analytical mapping of the enormous variety of religious institutions that operate around the world: formal ecclesial or religious communities; religiously inspired movements; global interreligious or ecumenical bodies; community and congregation-level groups; faith-inspired organizations; and religiously linked academic institutions. All of these various kinds of religious institutions fall within the scope of our concern and analysis. See KATHERINE MARSHALL, *GLOBAL INSTITUTIONS OF RELIGION: ANCIENT MOVERS, MODERN SHAKERS* (Routledge 2013).

<sup>5</sup> This definition draws on the reflection of Kathleen Brady and Daniel Philpott, as influenced by the work of Christian Smith and Martin Riesebrodt.

<sup>6</sup> PATRICE GUENIFFEY, *BONAPARTE: 1769-1802*, at 734 (Steven Rendall trans., Harvard Univ. Press 2015).

Atatürk and, in March 1924, abolished the Caliphate, the pinnacle of leadership of the Sunni Islamic community that had endured for centuries. This was a direct political intervention in the core governance structure of one of the world's largest religious communities, and it triggered criticism and repercussions that continue to be felt today.<sup>7</sup>

## THE VERTICAL DIMENSIONS OF INSTITUTIONAL RELIGIOUS FREEDOM

Second, the vertical dimensions of institutional religious freedom pertain to the freedom of a religious community from outside interference in the exercise of its self-defined authority over the members of its hierarchy as well as its lay membership. In other words, *the vertical dimension of institutional religious freedom pertains to the freedom of religious communities to make particular leadership decisions as well as decisions about ministry positions within an accepted governance structure or system.* In the words of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe of 1989, the vertical dimension of institutional religious freedom is “the right of religious communities” to “organize themselves according to their own hierarchical and institutional structure.”<sup>8</sup>

As indicated above, one aspect of the substantive dimension of institutional religious freedom also pertains to leadership and structure; however, this substantive dimension concerns the religious community's core governance structure—what the Anglican theologian Richard Hooker termed “ecclesiastical polity.” This substantive dimension is implicated whenever the most fundamental features of a religious community's governance structure are challenged or altered, whether for good reasons or bad reasons, by an outside actor. This was clearly the case with the Constitution of the Clergy in post-revolutionary France, which originally demanded the popular election of priests and bishops, removed papal involvement in the selection of bishops, and ultimately decreed that all clergy must take a public oath of loyalty to the Constitution as a condition of their appointment.

In other words, a religious community's right of self-determination in matters of leadership and governance has what we may call wholesale dimensions and retail dimensions. If a government were to impose a politically-appointed bishop on a Baptist denomination, or if it were to remove the Pope from playing any role in the appointment of bishops in its territory, the action of the government in either case would represent an attack on a wholesale or core dimension of the religious community's right to self-determination in matters of leadership and governance. In each hypothetical case, an outside actor attempts to alter the basic form and structure of a religious community's self-governance. If the attempt is successful, the religious community *ipso facto* undergoes a radical transformation. In these cases, therefore, it is clearly the substantive dimension of institutional religious freedom that is at issue.

Consider, however, a different kind of case. In medieval Western Christendom, both ecclesiastical and temporal authorities agreed that the appointment and investiture of bishops could not validly occur without the Pope. There was a virtually universal understanding and acceptance of the Catholic Church's core governance structure and hierarchical line of authority, deriving from its core doctrine of Petrine supremacy and apostolic succession. Without attacking this basic structure in a “wholesale” way, however, kings, emperors, and other political rulers nonetheless frequently sought to exercise “retail” influence over the appointment of particular bishops, especially in important sees. In some instances, the Church accepted or at least tolerated attempts by political authorities to influence certain episcopal appointments.

In other instances, particularly beginning with Pope Gregory VII (1020-1085), the Church increasingly resisted “lay investiture” as undue interference in its proper freedom or *libertas ecclesiae* (“freedom of the church”); however, even though the famous “Investiture Controversy” that resulted involved intense and protracted conflict, it was played out between disputants who were all Catholic Christians, and who all agreed far more than they disagreed. Above all, they agreed that the Church must enjoy *some* independent role in the appointment of bishops, and they also agreed that it was not *necessarily* illegitimate for temporal authorities to exercise some influence on episcopal appointments as well. The challenge was identifying a precise

<sup>7</sup> At the time, the abolition of the Caliphate deeply disturbed Muslims around the world, causing significant reverberations in far-away India, for example.

<sup>8</sup> Org. for Sec. and Cooperation in Eur. [OSCE], *Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe* (Jan. 17, 1989), <https://original.religlaw.org/content/religlaw/documents/viennamtgsce1986.htm>.

jurisdictional boundary and division of labor that both sides could accept.<sup>9</sup>

In this second example, the dimension of institutional religious freedom at issue was not so much the substantive or wholesale dimension of the religious community's core self-understanding as the vertical or retail dimension of *the precise scope, application, and limits of its line of authority*. This is not to say that the Investiture Controversy was not profound and consequential. Indeed, it illustrates the reality that "retail" encroachments on a religious community's vertical religious freedom can over time endanger its "wholesale" independence. While it could be argued that none of the ad hoc bargains the Church made with temporal rulers in medieval Christendom fatally compromised its essential freedom, Pope Gregory VII initiated his extraordinarily consequential "Gregorian Revolution" partly to ensure that the Church would not negotiate away its independence by degrees and become the mere spiritual department of an ascendant Holy Roman Empire. For a religious community that cannot choose its own leaders and personnel, according to its own criteria and without outside interference, is in an important way neither free nor independent. (The Investiture Controversy also illustrates that on occasion some of the most serious threats to a religious community's institutional religious freedom can come from its putative friends and allies.)

Issues related to the vertical dimensions of institutional religious freedom are numerous. According to Cole Durham, the vertical aspects of institutional religious freedom include a religious community's authority over its senior leadership and clergy, over lay individuals carrying out teaching functions and other ministerial roles, and over individuals carrying out roles that are arguably secular. And all these aspects have been proven to be dynamic issues and a source of salient conflict and controversy in numerous contexts in recent years.

Consider the recent negotiations between the Vatican and the Chinese government over the appointment of bishops. The foregoing analysis of institutional religious freedom may help to clarify the terms of the negotiations and thus, in the process, may illustrate the value of careful attention to the distinct dimensions of this concept. Interpreted charitably, the Vatican appears to have sought from the Chinese government some recognition in principle of its hierarchical, episcopal structure and the supreme, extraterritorial authority of

the Pope within this structure. In the terms of our analysis, therefore, the Vatican is apparently seeking Chinese recognition of the substantive dimension of its institutional religious freedom (or at least a slice thereof). But to achieve what it hopes will be a portion of its substantive religious freedom, it is manifestly willing to sacrifice at least a non-trivial portion of its vertical religious freedom—i.e., it is willing to accept a role for the Chinese government in the appointment of bishops. As the Investiture Controversy illustrates, however, where the civil authority has a large enough role in the appointment of bishops, the religious community's governance structure arguably becomes a different kind of structure in substance if not in name, and perhaps even verges on a *de facto* caesaropapism.

Consider, too, the *Hosanna Tabor* decision. In a 9-0 decision, in a case that squarely addressed the vertical dimensions of institutional religious freedom (without addressing either its substantive or horizontal dimensions), the U.S. Supreme Court cited the legal and historical importance of the "autonomy of religious groups" and "religious autonomy" as a basis for giving religious organizations wide latitude in hiring and firing clergy and other employees who perform religious duties. The Court held that a "ministerial exception"—precluding the general application of employment discrimination laws to the employment relationship between a religious institution and its ministers—is grounded in the First Amendment Free Exercise Clause and Establishment Clause. Importantly, the decision explicitly argued that a religious community's autonomy concerning the hiring and firing of employees is not restricted to senior leaders and clergy. Instead, the Court ruled that the authority to select and control all those who minister to the faithful must be the church's alone.<sup>10</sup>

## THE HORIZONTAL DIMENSIONS OF INSTITUTIONAL RELIGIOUS FREEDOM

A third and often overlooked dimension of institutional religious freedom is horizontal. As noted above, *the horizontal dimension of institutional religious freedom pertains to a religious community's freedom to extend outward, as it were, and engage the wider society in systematic ways through the creation of core institutions, specialized institutions, and the organized manifestation and propagation of its religious message and teachings*. This is undoubtedly

<sup>9</sup> For a judicious analysis and excellent collection of the relevant primary sources, see BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300* (Univ. Toronto Press in association with the Medieval Academy of America 1996). See also A. D. LINDSAY, *THE MODERN DEMOCRATIC STATE* 64-83 (Oxford Univ. Press 1962).

<sup>10</sup> *Hosanna-Tabor*, 565 U.S. at 194-95.

the largest and most complex component of institutional religious freedom, comprising a wide variety of distinct but nonetheless closely interrelated freedoms, rights, and privileges.

One of the most important rights or privileges falling within the horizontal dimension of institutional religious freedom is the right to entity status. To what extent does a given religious community enjoy the right to acquire “legal personality” or the status of a recognized “legal entity” under the laws of the nation, region, or district in which it exists and operates? Under the conditions of the post-Westphalian, sovereign administrative state, religious communities often must acquire some kind of formal legal recognition or legal personality in order to mount an organized presence, own property and construct buildings, and engage and influence civil society and public life. This is, therefore, a fundamental aspect of institutional religious freedom. And available evidence suggests that there is enormously wide global variation in the registration requirements that governments use to grant and deny legal entity status to religious communities, as well as to sub-entities they seek to establish for particular purposes (such as education, promotion of human rights and social justice, and charitable or humanitarian work).<sup>11</sup>

It is important to note, though, that the acquisition of such legal personality or legal recognition is normally a precondition of effective religious influence but not necessarily a precondition of what one might call substantive religious existence. Maryann Cusimano Love observes that many of the world’s major religious communities and traditions have existed long before most of the world’s nation-states and long before the creation of the Westphalian state system. To that extent many religious actors are not so much non-state actors as “pre-state” actors. They precede the modern nation-state and, therefore, their core substantive commitments and identities do not ultimately depend on the modern nation-state.<sup>12</sup> At the same time, as in the

case of post-revolutionary France, as well as in the more recent cases of Cambodia under the Khmer Rouge (1975-1979), China during the Cultural Revolution (1966-1976), or North Korea today, particular nation-states have sometimes engaged in such extreme efforts to restrict or eliminate the core institutional capacities of religious communities that they have posed an existential threat to these communities. In these extreme cases, it is the substantive dimension of institutional religious freedom, not merely the horizontal dimension, that is threatened.

Of course, apart from these extreme cases, a religious community’s substantive existence (and perhaps even significant social influence) may not be lost or threatened when it cannot acquire official or legal entity status. Religious communities have often survived and thrived when they have been compelled to live an underground existence, whether extra-legal or illegal, as numerous historical and contemporary examples suggest. What restrictions on access to entity status do normally and directly influence is the horizontal freedom or capacity of religious communities to reach outward into their societies in a public and systematic way.<sup>13</sup>

Still, if restrictions on access to legal entity status go far enough, they can exercise a kind of institutional stranglehold. While such a stranglehold may not threaten a religious community’s immediate survival, it may doom it to marginality and slow-motion decline. A contemporary example may be found in Turkey’s treatment of the Ecumenical Patriarchate. The Turkish government refuses to grant legal standing or entity status to the Ecumenical Patriarchate, and this refusal carries far-reaching implications. “The lack of legal standing and status in essence nullifies property and other fundamental civil rights in Turkey for the Ecumenical Patriarchate which precludes its full exercise of religious freedom,” according to one recent analysis. “Since it lacks a legal standing, the Ecumenical Patriarchate is powerless to

<sup>11</sup> On registration requirements for religious groups, see the outstanding article by Roger Finke, Dane R. Mataic & Jonathan Fox, *Assessing the Impact of Religious Registration*, 56 J. SCI. STUDY RELIGION 720 (2017). See also JONATHAN FOX, *POLITICAL SECULARISM, RELIGION, AND THE STATE: A TIME SERIES ANALYSIS OF WORLDWIDE DATA* (Cambridge Univ. Press 2015).

<sup>12</sup> Maryann Cusimano Love, *Christian Transnational Networks Respond to Persecution*, in UNDER CAESAR’S SWORD: HOW CHRISTIANS RESPOND TO PERSECUTION 457-458 (Daniel Philpott & Timothy Samuel Shah eds., Cambridge Univ. Press 2018). See also MARYANN CUSIMANO LOVE, *BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA* (Wadsworth 2011).

<sup>13</sup> On the remarkable ability of religious communities and institutions to eke out a remarkable degree of freedom and independence even under conditions of severe and systematic repression, see Fenggang Yang’s discussion of black, red, and gray religious markets in China, in “The Red, Black, And Gray Markets of Religion in China,” 47 *The Sociological Quarterly* 93 (2006). See also Yang’s *RELIGION IN CHINA: SURVIVAL AND REVIVAL UNDER COMMUNIST RULE* (Oxford Univ. Press 2012).

pursue legal remedies to assert property rights or even seek to repair deteriorating property without government approval.<sup>14</sup>

To disaggregate the horizontal dimension of institutional religious freedom a bit further, based again on the analysis of Cole Durham, it undoubtedly includes the freedom to create legally recognized entities that are sufficient to carry out the full range of a religious community's activities, including charitable, educational, cultural, health, and humanitarian activities. And as Alfred Stepan noted in elaborating his important concept of the "twin tolerations," or the minimal conditions necessary for institutionalizing the relationship between religious and political authority in a way that is compatible with liberal democracy, institutional religious freedom must also include the right of religious communities to create civil society organizations, NGOs, and political parties.

As Stepan put it, religious communities "should also be able to publicly advance their values in civil society, and to sponsor organizations and movements in political society, as long as their public advancement of these beliefs does not impinge negatively on the liberties of other citizens, or violate democracy and the law, by violence. This core institutional approach to democracy necessarily implies that no group in civil society—including religious groups—can a priori be prohibited from forming a political party."<sup>15</sup> In addition, institutional religious freedom includes the freedom of religious communities to create media

organizations dedicated to promoting and propagating their religious message and the implications of this message for society. And it includes their right to create and operate for-profit corporations that reflect their religious values, though the precise scope and application of this right are a matter of disagreement (as is true, more or less, of all the features of institutional religious freedom discussed here).<sup>16</sup>

Closely related to the freedom of religious communities to establish legally recognized entities and sub-entities to advance their religious mission is the freedom to seek and secure the financial resources necessary to operate and sustain these entities and sub-entities. Of course, if in a given context religious communities possess the right to create legal entities but do not have the right to fund and support them without undue and arbitrary restrictions, then their right to institutional religious freedom is merely formal and empty. Furthermore, what may seem like subtle restrictions on funding—such as the imposition of governmental limits on the amounts or types

of foreign funding—can sometimes have devastating consequences for religious institutions (as well as other organizations) that are seeking to operate in contexts where there may not be significant indigenous sources of funding or traditions of philanthropic contribution to non-governmental organizations.<sup>17</sup>

A final and critical aspect of the horizontal dimension of institutional religious freedom worth highlighting is the legally recognized right of religious communities to

*If restrictions on access to legal entity status go far enough, they can exercise a kind of institutional stranglehold. While such a stranglehold may not threaten a religious community's immediate survival, it may doom it to marginality and slow-motion decline.*

<sup>14</sup> Theodore Bozonelis, *Turkey: The systematic persecution of religious minorities*, HUMAN RIGHTS WITHOUT FRONTIERS (Feb. 16, 2018), <http://hrwf.eu/turkey-the-systematic-persecution-of-religious-minorities/>.

<sup>15</sup> ALFRED C. STEPAN, *The World's Religious Systems and Democracy: Crafting the "Twin Tolerations,"* in ARGUING COMPARATIVE POLITICS 217 (Oxford Univ. Press 2001). See also Michael McConnell's argument that the U.S. Constitutional guarantee of the "free exercise" of religion was intended to protect the public exercise of religion by communities as well as individuals, in Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARVARD L. REV. 1488-91 (1989).

<sup>16</sup> See THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., Oxford Univ. Press 2016).

<sup>17</sup> Worth noting is that challenges of funding in Global South contexts are probably much more likely to hamper fundraising for religious sub-entities engaged in charitable, educational, or human rights advocacy work than for core religious and ministry institutions (e.g., churches, mosques, temples, etc.). On the challenges and opportunities of fundraising for local NGOs in the Global South, both secular and religious, see JAMES RON, SHANNON GOLDEN, DAVID CROW & ARCHANA PANDYA, *TAKING ROOT: HUMAN RIGHTS AND PUBLIC OPINION IN THE GLOBAL SOUTH* (Oxford Univ. Press 2017).

own, use, transfer, and rent property, as well as construct buildings in order to carry out their distinctive activities. Much of the ability of religious communities to establish a presence in their societies depends on their ability to secure and maintain a quite literal and physical presence in terms of visible houses of worship, as well as other buildings dedicated to the fulfillment of their religious mission.

As prosaic and unglamorous as it may seem, the freedom of religious communities to acquire or rent property and construct buildings for religious use is a frequent target of government regulation and interference and a common flashpoint in religion-state relations throughout the world. It is, for example, a major issue for unregistered churches and other religious communities in China.

Consider the case of the Shouwang Church. The Shouwang Church is a Protestant house church in Beijing, and among the largest of some 3,000 such congregations in the city. After years of government harassment prevented the Shouwang Church from renting or buying a building, police finally forbade church members to hold services in the open air, placing the pastor under house arrest and detaining other congregants as well. According to the German weekly *Die Zeit*, Beijing police used some 4,500 officers to provide surveillance of the area where the church had been hoping to meet, as well as of the homes of about 500 church members in order to prevent the church from congregating. In response, in May 2011, the pastors of the Shouwang Church sent a petition to the National People's Congress not only protesting their mistreatment but also insisting on the positive social and political contributions of religious freedom: "We believe that liberty of religious faith is the first and foremost freedom in human society, is a universal value in the international community, and is also the foundation for other political and property rights."<sup>18</sup>

For our purposes, one aspect of this case is striking. The dimension of religious freedom that the Shouwang Church was trying to exercise when it ran afoul of Chinese authorities was not individual but institutional and, in particular, horizontal. None of the specifically

individual dimensions of religious freedom that we often assume to be the core of this fundamental freedom—such as the individual right to choose, change, practice, or exit one's religion or the right to proselytize or manifest one's religion to other individuals—was at issue or directly threatened. Indeed, though the church was an unregistered house church, it grew for years, successfully evangelized, conducted innumerable Bible studies and other church meetings in members' homes, and won adherents even among intellectuals and Chinese Communist Party members—all without triggering official opposition or persecution.

What the Chinese authorities were determined to stop in 2011 were the Shouwang Church's repeated and increasingly public attempts to exercise rights and freedoms *as an institution or self-organizing community*, and, in this case, precisely the unglamorous or prosaic rights to purchase property and rent building space. Of course, China is not alone in this respect. Other countries in which religious communities face serious challenges to their horizontal rights to own property and construct buildings include Egypt, Russia, Vietnam, Turkey, Malaysia, and Indonesia.<sup>19</sup>

## CONCLUSION

I am glad that what happens in Las Vegas generally stays in Las Vegas. As a rule, however, what happens in churches and other religious institutions is too important and too valuable to stay within their walls. To ensure that what is incubated in religious institutions is free to spread well beyond their sanctuaries, we need a broader, rich, and truly multi-dimensional understanding of institutional religious freedom that goes beyond giving religious institutions concessive carve-outs and ministerial "exceptions" so they can be left alone. Such protections are necessary, to be sure, but so much more is at stake than the internal autonomy or the well-being of religious organizations in a narrow sense. What is at issue is not just the negative freedom of religious institutions or a jurisdictional boundary dispute between church and state. At issue are the hundreds of millions of people around the world—human beings both religious and non-religious—whose political, social,

<sup>18</sup> Petition, "We Stand Up for Our Faith" (May 10, 2011), <https://www.chinaaid.org/2011/05/we-stand-up-for-our-faith-petition-to.html>.

<sup>19</sup> That the Chinese government does not consider horizontal rights of property and building construction prosaic or insignificant is further illustrated by the recent case of the Golden Lampstand Church in Shanxi Province, an underground church with some 50,000 worshippers. Though authorities tolerated the existence of the church for years, the large and visible worship hall the church built for itself was not something they could accept. In early January 2018, China's paramilitary "People's Armed Police" took over the building, packed it with explosives, and then finished the demolition with excavators. See Russell Goldman, *Chinese Police Dynamite Christian Megachurch*, THE NEW YORK TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/world/asia/china-church-dynamite.html>.

economic, and spiritual flourishing (and not infrequently survival) depends on the self-organizing dynamism of religious institutions of all kinds. Institutional religious freedom is not merely constitutionally correct. In its positive and expansive dimensions, it is globally essential.

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## THE ISLAM QUESTION

DANIEL PHILPOTT

Whereas publics in the United States and other developed democracies once regarded religious freedom as an unquestioned feature of constitutional liberal democracy and the global human rights regime, over the past decade they have come to contest the principle hotly. While the controversies have often involved Christians, they likewise surround Muslims.

Consider these episodes:

- Hate crimes against Muslims in the U.S. spiked in 2016 and 2017,<sup>1</sup> while in 2019, a white supremacist attacked a mosque in New Zealand, killing fifty-one people and injuring forty-nine.
- The vast majority of religious terrorist groups are ones that proclaim a radical Islamic message. Muslim terrorists have committed a long string of attacks in the past twenty years beginning with (though also preceding) the attacks of September 11, 2001, and including attacks in Madrid, Paris, Nice, London, Berlin, Fort Hood, New Jersey, Boston, Ottawa, San Bernardino, and Sri Lanka. Most recently, the Islamic State and Al-Nusra have controlled large parts of Iraq and Syria and ruled there with brutality.
- Islamist ideology is a key source of the threats that the United States has faced in its two greatest foreign policy challenges over the past two decades, wars in Afghanistan and Iraq.
- Many Americans claim that Islam is not a religion but rather a violent and intolerant ideology, as Asma Uddin, a legal advocate for religious freedom, describes in her recent book, *When Islam Is Not a Religion: Inside America's Fight for Religious Freedom*. Leading voices of this view have sought to

block the building of mosques and the outlawing of the use of sharia law for conflict resolution among Muslims.<sup>2</sup>

- Muslims are victims of religious repression on a large scale in places like Communist China, which has placed over one million Uighur Muslims in concentration camps, and in Burma, whose government has driven hundreds of thousands of Rohingya Muslims into refugee camps in Bangladesh.
- Laws in France prohibit girls from wearing headscarves, restricting the religious practice of Muslims.
- Twenty-one Muslim-majority states are governed by an Islamist ideology that calls for the government to impose a strict, traditional form of sharia law, resulting in harsh restrictions on Muslim dissenters and religious minorities.
- During the 2000s, many Muslim-majority states, led by the Organization of the Islamic Conference (OIC) (now the Organization of Islam Cooperation), sought passage of United Nations resolutions condemning “defamation of religion,” which most western states opposed as sanctioning repressive blasphemy laws. These efforts have slowed but they continue.

These snapshots—episodes, patterns, and trends—are found within Western countries, outside Western countries, between Western and non-Western countries, and in groups that span borders. In some of the episodes, Muslims are the source of repression, and in others the target of repression.

They involve religious freedom in two senses. First, religious freedom is a diagnostic. The denial of religious freedom is critical for understanding how the dilemma, controversy, or conflict arose and why it poses a problem.

<sup>1</sup> Agrawal, Priyanka, *Interpersonal stranger violence and American Muslims: an exploratory study of lived experiences and coping strategies*, 30 *GLOBAL BIOETHICS* 28 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6830250/>.

<sup>2</sup> ASMA UDDIN, *WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM* (Pegasus Books 2019).

The most recent U.S. involvement in Iraq, for instance, began in 2003, when the U.S. went to war against Iraq on the rationale of disarming its weapons of mass destruction. After the U.S. quickly overthrew Iraqi President Saddam Hussein, it confronted a long and vicious civil war that it had not anticipated, one fueled in large part by tensions between the majority Shia Muslims, whom Saddam had brutalized under his secular repressive rule, and Sunni Muslims, whom Saddam had protected. The militants of both sides were unwilling to allow people on the other side to practice their version of Islam. After the U.S. largely withdrew from Iraq in 2011, Iraq then saw the rise of the Islamic State, which came to control a large swath of Iraqi territory in 2014, in good part through the acquiescence of Sunni Muslims, whom Shias largely had excluded from governance. The Islamic State committed cruelties of a genocidal nature against religious minorities, including Yazidis, Mandaeans, and Christians. With the help of U.S. air power, the Islamic State was defeated finally in 2019.

In a second sense, religious freedom is a potential solution to the enumerated issues, both morally and pragmatically. In Iraq, the protection of religious minorities, the willingness of Shias and Sunnis to respect the others' right to practice their faith, and the inclusion of Sunnis in governance (in the spirit of religious freedom, which forbids religious discrimination) not only advances justice but is also critical to attaining long-term stability, one of whose fruits would be to relieve the U.S. from having to intervene again. In this and in the other cases, religious freedom is not only a matter of justice but is also a strategic asset for building a sustainable peace, one built upon reconciliation between opposing groups. Religious freedom, then, carries potential for promoting justice and peace between Muslim minorities and surrounding populations in Western and non-Western countries, between Western countries and Muslim-majority countries, and within Muslim countries.

Here, I explore this promise. The next section argues that religious freedom is both a matter of justice and an instrument of peace and stability. I then confront skepticism toward promoting religious freedom in settings where Muslim populations are involved. The essay closes with insights into how religious freedom might be promoted among Muslims and in relations between Muslims and non-Muslims.

## THE CASE FOR RELIGIOUS FREEDOM

The case for religious freedom is both principled and pragmatic.<sup>3</sup> That is, religious freedom is intrinsically just and it promotes other goods like peace, stability, economic development, reconciliation, democracy, other freedoms, and improvements in the condition of women.

At the core of the case for justice is the claim that religious freedom is a universal human right. It is found squarely in the Universal Declaration of Human Rights (UDHR), which launched the modern human rights movements in 1948. The UDHR's framers, who hailed from remarkably diverse religions and cultures, agreed with little controversy that religious freedom ought to be included in the document.<sup>4</sup> The human right of religious freedom shows up again in the legally binding International Covenant on Civil and Political Rights of 1966, finds its fullest expression in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and has been promoted through the establishment of a United Nations Special Rapporteur for Freedom of Religion or Belief in 1986.

That religious freedom enjoys prominence in the declaratory human rights tradition, though, alone does not mean that it is truly a human right—an entitlement that human beings rightly assert prior to and apart from its articulation in a declaration or constitution. A long-standing skepticism, revived recently by post-modern critics of religious freedom, holds that human rights are

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<sup>3</sup> For an approach based on this distinction, see THE TASK FORCE ON INTERNATIONAL RELIGIOUS FREEDOM OF THE WITHERSPOON INSTITUTE, RELIGIOUS FREEDOM: WHY NOW? DEFENDING AN EMBATTLED HUMAN RIGHT (2012), of which Timothy Samuel Shah is the principal author.

<sup>4</sup> JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 260-263 (2000).

the product of the discourses and power structure of a certain time and place, in this case, the world of the mid-twentieth century, dominated by the United States.<sup>5</sup>

The strongest argument for human rights in general and for religious freedom in particular is that human rights are entailed in the natural law, the moral norms that people apprehend through the exercise of their rationality. The natural law forbids the violation of human rights because they are rooted in human dignity, or the inestimable worth of human beings. How specific human rights are grounded in human dignity can be understood through basic goods, ends that are valuable for their own sake as aspects of human flourishing. To violate a basic good of a person is to violate an intrinsically valuable dimension of her flourishing and thus her dignity. One of these basic goods is religion.

What is religion? That there is a universal human phenomenon called religion, a genus of which there are species, is also the subject of debate, particularly among scholars of religion of the past generation. An old tradition exists, though, of understanding religion as a natural good, dating back to Cicero and running through early Christian thinkers like Lactantius up through the medieval scholar, Thomas Aquinas. Today, thinkers in the tradition of Aquinas's thought, particularly ones known as New Natural Law scholars, continue to argue for religion as a natural (and basic) good.<sup>6</sup> Recently, their perspective has come to be corroborated by certain scholars of religion, including Martin Riesebrodt in his book of 2010, *The Promise of Salvation*, and sociologist Christian Smith, who developed Riesebrodt's ideas further in his 2017 book, *Religion: What It Is, How it Works, and Why it Matters*.<sup>7</sup>

Broadly, Smith and Riesebrodt view religion as a set of practices through which human beings seek to align themselves with a superhuman power who brings about great benefits and alleviates misfortune and suffering. My own definition of religion runs in the same spirit:

“an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in harmony with a superhuman power that intervenes in the real circumstances of their lives. They do this most characteristically through worship. Religion typically involves related rituals, a community, a clerical profession, and a moral code grounded in a transcendent realm.”<sup>8</sup> Riesebrodt argues that religion has been practiced over an enormous expanse of time and place and is endemic to human experience.<sup>9</sup>

Thus understood, religion is a basic good, a dimension of human dignity. The case for its being a human right, though, depends on one other dimension—interiority. Virtually every religion places great value on a sincere interior commitment—enlightenment, the heart, purity, conscience—while also prescribing outward conformity to the requirements of rituals and diverse practices. It is interiority that makes religious freedom, and not simply religion, a human right.

Religious freedom, in my definition, is “the civic right of all persons and religious communities to express, practice, and spread their religion in all of its public and private dimensions and to be free from heavy discrimination on account of their religion.”<sup>10</sup> Religious freedom means that no person or community ought to be penalized for the practice of religion. To respect religious freedom is to respect enduringly the citizenship rights of the person whose views of the most important questions are different from one's own.

The pragmatic value of religious freedom lies in its promotion of other important goods and values. In a recent book, *A Weapon of Peace*, political scientist Nilay Saiya argues through his extensive study of cross-national data that the absence of religious freedom is a cause of religious terrorism, both within and across borders, as well as civil wars and interstate conflicts, and that religious freedom tames the same maladies.<sup>11</sup> Other scholars have shown that religious freedom promotes economic growth

<sup>5</sup> This is the view of several essays in, and the general thesis of, *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood & Peter G. Danchin, eds., Univ. of Chi. Press 2015).

<sup>6</sup> For arguments for the human right of religious freedom along these lines, see Christopher Tollefsen, *Religious Liberty, Human Dignity, and Human Goods*, in *HOMO RELIGIOSUS? EXPLORING THE ROOTS OF RELIGION AND RELIGIOUS FREEDOM IN HUMAN EXPERIENCE* 230 (Timothy Samuel Shah & Jack Friedman eds., Cambridge Univ. Press 2018); Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 *AM. J. JURIS.* 1 (1998).

<sup>7</sup> MARTIN RIESEBRODT, *THE PROMISE OF SALVATION: A THEORY OF RELIGION* xi (Steven Rendall trans., Univ. of Chi. Press 2010), xi; CHRISTIAN SMITH, *RELIGION: WHAT IT IS, HOW IT WORKS, AND WHY IT MATTERS* (Princeton Univ. Press 2017).

<sup>8</sup> DANIEL PHILPOTT, *RELIGIOUS FREEDOM IN ISLAM: THE FATE OF A UNIVERSAL HUMAN RIGHT IN THE MUSLIM WORLD TODAY* 22 (Oxford Univ. Press 2019).

<sup>9</sup> RIESEBRODT, *supra* note 7, at xi, xiii, 19.

<sup>10</sup> PHILPOTT, *supra* note 8, at 29.

<sup>11</sup> See NILAY SAIYA, *WEAPON OF PEACE: HOW RELIGIOUS LIBERTY COMBATS TERRORISM* (Cambridge Univ. Press 2018).

and that it is positively correlated with other freedoms and with the empowerment of women.<sup>12</sup> All of these goods, along with religious freedom itself, lie at the center of the problems that involve Muslims, and relations between Muslim and non-Muslims, that are enumerated above.

## A SOURCE OF PROMISE FOR MUSLIMS?

That religious freedom could bring justice, peace, stability, and other goods to Muslims and their relations with others will meet with doubt in influential quarters in the West. First and foremost among these are what may be called Islamoskeptics, who hold that violence and intolerance are hardwired in Islam's texts and widespread within the Muslim world, and that the West should be prepared for enduring conflict. Islamoskeptics are numerous among conservatives, including Christian conservatives, but also include feminists, LGBT activists, and others who find reason to doubt or fear Islam. "[T]hat faction, militant Islam, is plainly far more robust and extensive than the scant lunatic fringe the U.S. delusionally comforts itself to limn," writes Andrew McCarthy, a journalist for *National Review*, "and its killings, far from condemnation, provoke tepid admiration if not outright adulation in a further, considerable cross-section of the Muslim world."<sup>13</sup> Islamoskeptics don't necessarily doubt that religious freedom would be good for Muslims, but they view the proposition as much like saying that a stock market would be good for a communist country—true, but highly unlikely to come about.

Is Islamoskepticism warranted? There is evidence for it especially from a satellite view that takes in the entire landscape of the world's Muslim communities. A pair of sociologists, Brian J. Grim and Roger Finke, reported in 2011 that a moderate to high degree of persecution can be found in sixty-two percent of Muslim-majority countries, compared with twenty-eight percent of Christian-majority countries and sixty percent of all other countries. They also show that high levels of government restrictions on religion can be found in seventy-eight percent of Muslim-majority countries, compared with forty-three

percent of all other countries and ten percent of Christian-majority countries.<sup>14</sup> Likewise, an analysis of a dataset compiled by political scientist Jonathan Fox shows that during the period 1990-2008, Muslim-majority countries averaged 2.6 on a scale of 0 to 5 measuring official restrictions on religion (where 5 is most restrictive), whereas the global average was 1.77 and Christian-majority countries averaged 1.36.<sup>15</sup> The contrast with Christianity is important because it is the other religion with a popular majority in a comparably high number of countries in the world. According to my own research, in 2007, ninety-one percent of all religious terrorist groups in the world proclaimed a radical Islamist message.<sup>16</sup> As reported in the snapshots above, twenty-one, or forty-five percent, of Muslim-majority states are Islamist in their orientation, a proportion that has no parallel in the set of Christian-majority countries.<sup>17</sup>

Despite this evidence, though, Islamoskepticism is overstated, overly pessimistic, and closed to prospects for progress. Evidence for Islam's capacity for freedom can be described, especially if one zooms in from a satellite to a close-up view of the world's Muslims. First, we see that eleven out of forty-seven Muslim-majority countries are religiously free—or were in the benchmark year of 2009—according to the widely respected indices of the Pew Research Center.<sup>18</sup> Several of these countries are in West Africa, the heart of the religiously-free Muslim world, the others being Albania, Kosovo, Djibouti, and Lebanon. The West African countries manifest unusually high levels of tolerance on the part of Muslim supermajorities towards small religious minorities. Religious minorities are free to practice and express their faith and Muslim dissenters are free to express their views and even exit Islam without penalty. In these countries, religious freedom exists not despite Islam but because of Islam, or at least the local version of Islam. Prevalent is Sufi spirituality, which stresses interior commitment and the importance of freedom in the adoption and enactment of religion. Islam here is robust, too. These countries exhibit high degrees of religiosity on global indices, proving that tolerance is not dependent upon secularism.<sup>19</sup>

<sup>12</sup> BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 206 (Cambridge Univ. Press 2011).

<sup>13</sup> Andrew McCarthy, *The Great War in Militant Islam*, *AMERICAN SPECTATOR*, July/Aug. 2004, at 32.

<sup>14</sup> GRIM & FINKE, *supra* note 12, at 169-171.

<sup>15</sup> See the Religion and State Dataset at <https://www.thearda.com/ras/>.

<sup>16</sup> Daniel Philpott, *Explaining the Political Ambivalence of Religion*, 101 *AM. POL. SCI. REV.* 520 (2007).

<sup>17</sup> PHILPOTT, *supra* note 8, at 50.

<sup>18</sup> PHILPOTT, *supra* note 8, at 50; Pew Research Center, *Global Restrictions on Religion* (2009), <https://www.pewforum.org/2009/12/17/global-restrictions-on-religion/>.

<sup>19</sup> PHILPOTT, *supra* note 8, at 45-76.

Indeed, secularism is often the source of intolerance towards religion, as exhibited by the fifteen out of forty-seven Muslim-majority states that are repressive of religious freedom (again, according to Pew indices of 2009), but on the basis of a secular ideology imported from the West.<sup>20</sup> They illustrate that where religious freedom is lacking in the Muslim world, Islam is not necessarily the cause. The secular ideology here is that of the French Revolution, whose leaders viewed religion as irrational, oppressive, and socially divisive and sought to marginalize its role in public life. It was Kemal Atatürk, founder of the Republic of Turkey in 1923, who imported this ideology into the Muslim-majority world, aiming to build a modern nation-state patterned on the West and premised on modernization, science, military strength, and secularism. He taught that religion was a medieval atavism and an enemy of his nation-building project and sought to neuter religion's influence in education, culture, public life, and even the dress of citizens. The secular repressive pattern was replicated by Gamal Abdel Nasser in Egypt in the 1950s, by the Ba'ath Party in Iraq and Syria in ensuing decades, in other Arab countries like Tunisia and Algeria, and in post-Soviet Central Asian republics. Governments in these countries typically uphold a moderate form of Islam, repress traditional Islam, and seek to marginalize religion from public life, often through harsh measures. Egypt and Syria have been among the torture capitals of the world.<sup>21</sup>

Another pattern that counsels against Islamoskepticism can be found in the conditions that incubate Islamist groups and regimes. The bulk of modern militant Islamist movements, argues historian Nikkie R. Keddie, arose in reaction to Western colonialism.<sup>22</sup> The founders of Islamism, which seeks a revival of traditional Islam through political vehicles, wrote during the mid-twentieth century, when the global influence of Islam was at its nadir. Tellingly, the Muslim Brotherhood, the largest revival movement within Islam, was founded in 1928, four years after Turkey's parliament dissolved the last Caliphate (a claimant to leadership of the worldwide Muslim community). Islamists in Iran, who took power in a revolution in 1979 and sought to export similar revolutions around the world, arose in reaction to the harsh

repression of religion of the Shah of Iran, whom the United States and other Western governments strongly supported.

The same dynamic was evident in Sri Lanka, where radical Islamic terrorists belonging to the Islamic State carried out a suicide attack that took the lives of hundreds of Christian worshippers on Easter 2019. A minority of about ten percent of Sri Lanka Muslims had been treated ruthlessly by the Sinhalese Buddhist government in previous years and had been victims of numerous violent attacks at the hands of Buddhist militant groups. In no way, of course, were the Easter attacks even remotely justified—terrorism never is—but neither can their motivations be understood apart from the harshly repressive surrounding environment.<sup>23</sup>

Muslim countries governed by Islamism exhibit another pattern that confutes Islamoskepticism: their populations are by and large not Islamist. Islamist parties have never polled well in democratic elections, usually winning only a small percentage of electorates. Islamist regimes are authoritarian because they must be so. Were they to submit their agenda to the vote, they would lose.<sup>24</sup>

The tradition of Islam, and today's global Muslim population, also contain "seeds of freedom," meaning patterns and trends that exhibit religious freedom and contain the potential for growth in religious freedom even if they remain overshadowed by a dearth of religious freedom. A verse in the Quran contains one of the most direct statements of the free character of faith in the founding texts of any religion, namely Quran 2:256: "There is no compulsion in religion." The verse is not an obscure or overlooked one but has been quoted by advocates of religious freedom over the course of the Islamic tradition, even if religious freedom has been and remains a minority position.

Historically, the Muslim world has contained communities that have practiced high levels of tolerance towards non-Muslims, especially by the standards of their times, including medieval Spain, the Ottoman Empire of the nineteenth century, Tunisia in the mid-nineteenth century, Iran in the early twentieth century, Egypt in the late nineteenth and first half of the twentieth

<sup>20</sup> *Id.* at 50.

<sup>21</sup> *Id.* at 77-113.

<sup>22</sup> Nikkie R. Keddie, *The Revolt of Islam, 1700 to 1993: Comparative Considerations and Relations to Imperialism*, 36 COMP. STUD. SOC'Y & HIST. 463-487 (1994).

<sup>23</sup> See Nilay Saiya, *Religious Repression and the Easter Attacks: The Hidden Connection*, THE DIPLOMAT: The Debate (Apr. 30, 2019), <https://thedi diplomat.com/2019/04/religious-repression-and-the-easter-attacks-the-hidden-connection/>.

<sup>24</sup> Charles Kurzman & Ijlal Naqvi, *Islamic Political Parties and Parliamentary Elections* (U.S. Institute of Peace, Working Paper, January 15, 2009, revised March 17, 2009), [https://kurzman.unc.edu/files/2011/06/Kurzman\\_Naqvi\\_USIP\\_Working\\_Paper.pdf](https://kurzman.unc.edu/files/2011/06/Kurzman_Naqvi_USIP_Working_Paper.pdf).

century, and what are known today as the Central Asian Republics in the late nineteenth and early twentieth centuries. Apart from medieval Spain, at some point in the twentieth century, all of these regimes became secular repressive or, in the case of Iran, first secular repressive, then Islamist in reaction. Liberal Islam was defeated by factors extending well beyond liberal Islam.

Today, there exists a critical mass of Muslim intellectuals who argue for religious freedom on the basis of the Quran and other authoritative sources. Examples are Abdullah An-Naim, a Sudanese intellectual who has advocated an “Islamic Reformation” that would include liberal governance; Mustafa Akyol, a Turkish journalist who argues for religious and economic freedom; and Abdullah Saeed, a scholar from the Maldives who has advocated for the abolition of blasphemy and apostasy laws.<sup>25</sup> In 2008, a coalition of 138 prominent Muslim leaders signed a statement that affirmed religious freedom along with other related principles. Similarly, in 2016, 250 notable Muslim religious leaders, scholars, and even heads of state signed the Marrakesh Declaration, affirming the rights of religious minorities.

Islamoskeptics will retort that these are isolated examples and point to the fact that An-Naim, Akyol, and Saeed cannot travel to certain traditional Muslim-majority countries, including their home countries, without fearing imprisonment or the loss of their life. The argument, though, is not that religious freedom has gained a wide consensus in the Muslim world today but rather than there is enough evidence of support for religious freedom—today, historically, and in the Quran—to doubt that repression is hard-wired in Islam and to make efforts to encourage the development of religious freedom in the world with hopes that these efforts might bear fruit. Just such a development might be recalled in the Christian world, where, from early in the fourth century up through the seventeenth century, what is now considered religious repression was the established view, proceeding through six centuries of inquisition and culminating in the religious wars between Catholics and Protestants in the sixteenth and

seventeenth centuries. Today’s prevalence of regimes safeguarding religious freedom in Christian-majority countries came about only gradually, through starts and stops, over the course of three centuries. Countries such as Spain practiced the coercion of non-Catholics well after the Second World War. Christianity’s long-term history renders difficult the argument that a religion cannot change.

Opposite Islamoskepticism in public debates over Islam, particularly in the West, are what may be called Islamopluralists, who view Islam as being no different from any other religion in its capacities for peace or its tendencies towards violence and intolerance, who stress the role of the West as a source of problems in the Muslim world, who counsel dialogue between Western countries and Muslim-majority countries, and who caution against

confrontational rhetoric and policy, which, they argue, only encourages terrorism and extremism. If Islamoskepticism holds that promoting religion is futile, Islamopluralism holds that it is unnecessary. While several of the points just offered in response to Islamoskepticism reflect the Islamopluralist view, Islamopluralists have difficulty explaining the overall dearth of religious freedom in Islam; the twenty-one religiously repressive regimes which, though many of them may have been

formed in the fires of secular repression, are yet fueled by Islamist ideology; and the heavy disproportion of Islamist ideology in the identity of religious terrorists. Both viewpoints capture insights into Islam and today’s Muslim world, but both accounts come up short as well. The Muslim world is amenable to and in need of an expansion of religious freedom.

## REALIZING RELIGIOUS FREEDOM

Religious freedom is promoted best through measures that model, express, and extend its universality, thus lodging the principle firmly into what the preamble to the Universal Declaration of Human Rights called “the conscience of mankind.” It is promoted worst when it appears to be one side of a clash of civilizations or a tool

*Religious freedom is promoted best through measures that model, express, and extend its universality, thus lodging the principle firmly into what the preamble to the UDHR called “the conscience of mankind.”*

<sup>25</sup> ABDULLAHI AHMED AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (Syracuse Univ. Press rev. ed. 1996); MUSTAFA AKYOL, *ISLAM WITHOUT EXTREMES: A MUSLIM CASE FOR LIBERTY* (W.W. Norton 2011); ABDULLAH SAEED & HASSAN SAEED, *FREEDOM OF RELIGION, APOSTASY AND ISLAM* (Ashgate Pub. Limited 2004).

of one country or party. The list of episodes that opened this essay shows that religious freedom can be denied to Muslims and by Muslims, as could be said about the people of any or no religion, and the ensuing argument of the essay shows that religious freedom can be denied by religiously repressive states but also by secular repressive states and is present in a significant number of Muslim-majority states. Religious freedom is promoted by a wide variety of parties from many directions, makes demands on a wide variety of parties, and is most auspicious when it embodies these many dimensions and indeed the principle's universality.

How might the universal acceptance and practice of religious freedom be expanded? In 1998, the U.S. Congress bolstered the cause of religious freedom when it passed the International Religious Freedom Act mandating the promotion of religious freedom in U.S. foreign policy. It established an Office of International Religious Freedom in the U.S. State Department and required it to issue an annual report on religious freedom around the world; an independent U.S. Commission on International Religious Freedom; and an Ambassador At Large for International Religious Freedom. Over twenty years, the policy has succeeded in raising awareness of the violation of religious freedom around the world, placing religious freedom on the foreign policy agenda, and freeing religious political prisoners. It is doubtful whether the policy has caused entire countries to become more religiously free. Aside from its successes and shortcomings, though, does the policy risk appearing as the cause of only one state?

An important step towards internationalizing religious freedom was the subsequent adoption of policies that promote religious freedom in one manner or another on the part of the United Kingdom, Germany, Italy, Austria, the Netherlands, Norway, Canada, and the European Union, although Canada reversed course and closed its Office of Religious Freedom in March 2016. Recently, the U.S. government itself promoted the universality of religious freedom effectively by hosting two annual ministerials in summer 2018 and summer 2019—with a third scheduled for 2020—that convene foreign officials from over 100 countries and several hundred civil society leaders to build networks and form a consensus on religious freedom.

What the ministerials promote may well be the most promising pathway to encouraging religious freedom around the world—a transnational network of

government ministers, NGOs, party leaders, religious leaders, and other civil society actors who have some degree of capacity to further this cause.<sup>26</sup> In the Muslim world, this network would be composed of intellectuals, religious leaders, heads of religiously free states, party leaders, and NGOs who support religious freedom. An example of a critically important actor is the Nahdlatul Ulama, the largest political movement in Indonesia, which supports religious freedom and tolerance in a country where the principle is contested and sometimes violently compromised. Networked with other Muslim advocates of religious freedom around the world and with voices who represent the international community, Nahdlatul Ulama would be strengthened in its influence. A transnational network can create global pressures against violator states and empower constituencies for religious freedom within countries where the expansion of religious freedom is called for.

The more people and groups around the world who embrace, promote, and practice the human right of religious freedom, the stronger the pressure for change will be upon those regimes and non-state actors who violate this human right. These regimes and actors are numerous and varied, including ones that involve or affect Muslims. By challenging religiously repressive Islamist states in the way that they treat their dissenters and minorities, secular repressive Muslim-majority states in the way that they treat their religious populations, and the populations and governments of Western democracies in the way that they treat their Muslim minorities, advocates of religious freedom act as agents not only of justice but also of peace and reconciliation.

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<sup>26</sup> On transnational issue networks, see MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (Cornell Univ. Press 1998).

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## RENEWING THE INTERNATIONAL HUMAN RIGHTS PROJECT

*The Fundamental Importance of Religious Freedom*

ELYSSA KOREN AND SEAN NELSON

It is plain to see that the ambitious human rights project of the past century is in crisis.” So warns the Commission on Unalienable Rights,<sup>1</sup> a body of the United States Department of State, tasked with charting the way forward for American engagement in the world of international human rights. Launched by Secretary of State Michael Pompeo in July 2019, the Commission seeks to redirect the course of the international human rights project, in light of the fact that international institutions such as the United Nations “designed and built to protect human rights have drifted from their original mission.”<sup>2</sup>

The scope and impact of the human rights crisis is immense. As the Commission notes in its Draft Report, “human rights are now misunderstood by many, manipulated by some, rejected by the world’s worst violators, and subject to ominous new threats.”<sup>3</sup> Ideological preferences are championed above real rights, and the very existence of an agreed category of “fundamental rights” is questioned and maligned.

At the dawn of the international human rights project following World War II, the drafters of the Universal Declaration on Human Rights (UDHR)<sup>4</sup> settled on a core set of rights inherent to all persons, putting aside seemingly insurmountable differences for the goal of reaching a foundational consensus. Now, a surge in “false rights” undermines their hard-won consensus, threatening the legitimacy and longevity of the entire project.<sup>5</sup>

It is in this context that the Commission sets out a detailed plan for the United States to revitalize

international human rights, drawing on the history of American constitutional democracy. Despite myriad and ongoing failings throughout the years, recognized by the Commission,<sup>6</sup> the United States has a robust national heritage of human rights protection, and is uniquely suited to catalyze an international human rights revival.

The United States can rehabilitate international human rights by hinging American foreign policy on a tireless respect for religious freedom and other fundamental rights. This is the forward-looking claim advanced by the Commission that breathes new life into a crumbling framework, while remaining rooted in a profound analysis of the lessons of history.

As fundamental rights go unheeded, and crimes against humanity overlooked, the toll of human suffering is vast. The tragic inadequacy of the international response makes clear—it is the responsibility of the United States to revive international human rights, and religious freedom must be at the center of this effort.

### RELIGIOUS FREEDOM: THE KEY TO REVITALIZATION

Religious freedom is clearly enshrined in international law as a fundamental human right.<sup>7</sup> The right to seek and express a religious identity is inherent to all persons. No despot nor naysayer can take it from us. Likewise, no person can relinquish this right. This is not to say that it cannot be violated, but that it is so linked to our humanity as to be inseparable from us.

<sup>1</sup> U.S. Dep’t of State, Comm’n on Unalienable Rts, Draft Report 5 (2020), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>.

<sup>2</sup> Michael R. Pompeo, Sec’y, U.S. Dep’t of State, Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>.

<sup>3</sup> Draft Report, *supra* note 1, at 6.

<sup>4</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

<sup>5</sup> Draft Report, *supra* note 1, at 6.

<sup>6</sup> *Id.* at 43.

<sup>7</sup> See, e.g., International Covenant on Civil and Political Rights art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

Despite its primacy in international law, religious freedom is under threat in nearly every corner of the globe, often with little to no concrete action. Six years have elapsed since ISIS perpetrated a genocide against Yazidis, Christians, Shia, and other groups, inflicting mass violence and killing thousands simply because of their beliefs. And yet not one person has been tried by an international mechanism, despite recognition by the United Nations Security Council that it “may amount to” genocide.<sup>8</sup>

Ranging from loss of life to limits on free practice, examples of religious freedom violations gone largely unheeded by the international institutions are innumerable the world over. The world decried the massacre at a mosque in Christchurch, New Zealand, in March 2019, and only a month later mourned the bombings of three churches on Easter in Sri Lanka. In China, at least a million Uyghurs have been sent to internment camps over the last two years and forced into labor in Xinjiang and elsewhere, while thousands of churches have had their crosses removed, buildings demolished, or members arrested.<sup>9</sup>

In Pakistan, blasphemy laws have led to the sentencing of Christians to death, and the accused, as well as their lawyers and advocates, have been murdered in cold blood.<sup>10</sup> In Iran, Ahmadiyya Muslims, Bahá'ís, and Christians are imprisoned and forbidden from participation in public service and higher education.<sup>11</sup> In Nigeria, thousands of Christians have been slaughtered by terrorists for their faith.<sup>12</sup> And in the United States, Europe, and Latin America, churches, synagogues, and

mosques have faced increasing desecration while conscience rights are under attack.

While critics of the Commission have challenged its report on the grounds that it unduly elevates religious freedom above other rights,<sup>13</sup> religious freedom is an essential precondition for the authentic exercise of all human rights. The Commission advocates not for a defense of religious freedom that overshadows its counterpart fundamental rights, but one that is required for all rights to flourish. Speaking to the United Nations General Assembly, Pope John Paul II emphasized that religious freedom “constitutes the very heart of human rights.”<sup>14</sup> In his view, respect for man’s spiritual dimension is necessary to achieve peace.<sup>15</sup> To protect religious freedom is, therefore, to safeguard peace.

Religious freedom violations negatively impact the full spectrum of human rights. Likewise, the protection of religious freedom necessarily

implies the protection of other fundamental rights. The right to life only makes sense when life has ultimate value and meaning, and that is found in the religious impulse. But where there is meaning to life, then life gains an absolute and universal value, from conception to natural death. Freedom of speech is required for evangelization and for there to be open discussion about the ultimate ends of humanity. Freedom of assembly is necessary for congregations to be able to meet, to petition their governments for positive change, and for redress when their rights are violated. The right to raise one’s children in one’s faith implies a broad array of parental rights. And the guarantee to be able to practice one’s faith in public

*Ranging from loss of life to limits on free practice, examples of religious freedom violations gone largely unheeded by the international institutions are innumerable the world over.*

<sup>8</sup> S.C. Res. 2379 (2017), [https://undocs.org/S/RES/2379\(2017\)](https://undocs.org/S/RES/2379(2017)).

<sup>9</sup> U.S. Dep’t of State, Off. of Int’l Religious Freedom, 2019 Report on International Religious Freedom: China—Xinjiang (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/china/xinjiang/>.

<sup>10</sup> U.S. Dep’t of State, Off. of Int’l Religious Freedom, 2019 Report on International Religious Freedom: Pakistan (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/pakistan/>.

<sup>11</sup> U.S. Dep’t of State, Off. of Int’l Religious Freedom, 2019 Report on International Religious Freedom: Iran (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/iran/>.

<sup>12</sup> OPEN DOORS INT’L, WORLD WATCH RESEARCH, NIGERIA: COUNTRY DOSSIER (2020), <https://www.opendoorsusa.org/wp-content/uploads/2016/09/WWL-2020-Country-Dossier-Nigeria.pdf>.

<sup>13</sup> USA: State Department’s flawed ‘unalienable rights’ report undermines international law, AMNESTY INT’L (July 16, 2020), <https://www.amnesty.org/en/latest/news/2020/07/usa-state-department-report-undermines-international-law/>.

<sup>14</sup> Pope John Paul II, Message for the World Day of Peace (Jan. 1 1999), [http://www.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf\\_jp-ii\\_mes\\_14121998\\_xxxii-world-day-for-peace.html](http://www.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace.html).

<sup>15</sup> Pope John Paul II, Address to the 34th General Assembly of the United Nations (Oct. 2 1979), [http://www.vatican.va/content/john-paul-ii/en/speeches/1979/october/documents/hf\\_jp-ii\\_spe\\_19791002\\_general-assembly-onu.html](http://www.vatican.va/content/john-paul-ii/en/speeches/1979/october/documents/hf_jp-ii_spe_19791002_general-assembly-onu.html).

makes conscience rights necessary. When religious freedom rights are violated, each of these other rights is impugned, and vice versa.

It is clear that without a dramatic reprioritization of religious freedom, the revitalization of the international human rights project will remain elusive. Enhanced attention to religious freedom, so imperiled at this time, is thus not only necessary in and of itself, it is also a prerequisite for human rights in general. Although all human rights are universal, indivisible, interdependent, and interrelated,<sup>16</sup> it is no contradiction to recognize, as the Commission does, that religious freedom warrants particular attention if we are to see the authentic exercise of all human rights.<sup>17</sup>

### BACK TO BASICS: HOW TO SAVE THE HUMAN RIGHTS PROJECT

There is an extreme urgency to the revitalization of the international human rights project. As neo-colonial ideological agendas proliferate, and the human rights discourse grows increasingly polarized, more abuses of fundamental freedoms go unchecked, and more lives are lost. The first step in halting impunity for human rights violations requires narrowing in on the protection of the fundamental rights upon which we can all agree—such as through the cessation of genocide. This approach is imperative if we are even to begin the arduous task of restoring credibility to the project.

While seemingly impossible, the Commission notes that this has been done before with the launch of the international human rights project, and can most certainly happen again.<sup>18</sup> Like today, there were stark disagreements over what human rights consisted of when the drafters of the UDHR convened in 1948. It was the focus on a common denominator upon which all States could agree that allowed for the emergence of a consensual framework for international human rights.<sup>19</sup>

Mary Ann Glendon, chair of the Commission, has explained that the international community must focus on “the systematic elimination of a narrow set of evils

for which a broad consensus exists across all societies.”<sup>20</sup> With regard to what happens in the absence of consensus, the Commission provides a prudent and much needed answer. As it notes, the international human rights project is strongest when “grounded in principles so widely accepted as to be beyond debate,” and “weakest when it is employed in disputes among competing groups in society over political priorities.”<sup>21</sup> In accordance with this view, the solution put forth by the Commission is that controversial and very recent claims to new “rights” are best handled at the domestic level of each sovereign state.

According to the Commission, political battles, such as the debate on abortion, should not be couched in the “vocabulary of human rights,” but waged in accordance with each country’s national context.<sup>22</sup> This is the same perspective that guides the way in which the UN was designed to tackle issues of controversy. The working methods of the UN technically are based on an overarching respect for consensual agreement among its 193 Member States. In the absence of consensus, even on the part of one country, the position of the UN on a particular issue should drop down to that which can be accepted by all. Given that every country stands on equal footing at the UN per its Charter,<sup>23</sup> this approach grants any one country the right to object to issues that contravene its national laws.

As identified by the Commission, the international institutions have dangerously deviated from their founding mandates, and the way in which they were designed to function has given way to the pull of “false rights.”<sup>24</sup> True consensus no longer guides the majority of UN deliberations. Instead, governments, typically from developing countries dependent on UN aid, are forced to accept prevailing Western views of “human rights,” often in direct violation of their religious and cultural values, as well as their own legitimate understandings of fundamental rights as captured in binding treaties. This coercive reality has resulted in a traditional conservative skepticism of the international institutions, leaving

<sup>16</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (June 14-25, 1993), <https://undocs.org/A/CONF.157/23>.

<sup>17</sup> Draft Report, *supra* note 1, at 18.

<sup>18</sup> *Id.* at 57.

<sup>19</sup> *Id.* at 27.

<sup>20</sup> Mary Ann Glendon & Seth D. Kaplan, *Renewing Human Rights*, FIRST THINGS (Feb. 2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights>.

<sup>21</sup> Draft Report, *supra* note 1, at 57.

<sup>22</sup> *Id.*

<sup>23</sup> UN Charter, <https://www.un.org/en/charter-united-nations/>.

<sup>24</sup> Draft Report, *supra* note 1, at 6.

“progressives” to hijack them for the pursuit of their desired world order.

That said, at their start, the international institutions were created to leave space for sovereign differences. For example, this explains why the United Nations Population Fund was expressly prohibited from promoting abortion at its founding,<sup>25</sup> and why the International Conference on Population and Development held that it is the sovereign prerogative of States to determine laws on abortion at the level of national legislatures.<sup>26</sup> Recent efforts to harness the COVID-19 pandemic to promote abortion reveal that the UN clearly is operating in breach of its mandate—reflective of the egregious extent of the hijacking of the international human rights project.<sup>27</sup> And yet, as the Commission recalls, it is crucial to keep in mind the noble ends for which the project was initially created.<sup>28</sup>

To be clear, there is no right to abortion in international law.<sup>29</sup> In fact, as indicated by the *travaux préparatoires* of the International Covenant on Civil and Political Rights, international law explicitly recognizes the unborn child’s human rights—article 6(5) of the treaty protects the right to life of unborn children whose mothers have been sentenced to death.<sup>30</sup> Arguably, the Commission, in line with international law, should have identified the right to life of the unborn as an unalienable right—but the Commissioners were not in agreement on this issue.<sup>31</sup>

As the Commission explained, “it is common for both sides [of, for example, the abortion debate] to couch their claims in terms of basic rights.”<sup>32</sup> In fact, “it is a testament to the deep roots in the American spirit of our founding ideas about unalienable rights that our political debates continue to revolve around the concepts of individual freedom and human equality, even as we disagree—sometimes deeply—on the proper interpretation and just application of these principles.”<sup>33</sup> Until all

the world can be persuaded of the legal and moral necessity to protect the unborn, the most just approach is to allow the flourishing of debate at the national level. Absent international pro-life consensus, robust debate at the national level, rather than the imposition of non-consensual norms from international bodies, is the most appropriate way to see due recognition for the unalienable right to life of every person. At the same time, it is crucial for pro-life advocates to continue to insist that the right to life of *all* persons be properly protected internationally.

The role of the United States and other States concerned with the protection of fundamental freedoms should be to ensure that controversial agendas are removed from the human rights discourse at the international institutions when no consensus exists. Such a stance protects the integrity of the human rights project, as well as the many States who lack the ability to stand up to the international institutions in defense of their national laws, norms, and understandings of human rights.

The claim for a greater appreciation for national sovereignty where universal consensus on human rights has not been reached, or is in principle unwarranted, stems itself from natural law reasoning and finds expression in the American and international traditions. The Declaration of Independence establishes that the securing of life, liberty, and the pursuit of happiness among humankind relies on the consent of the governed in order to be just. Where there is no consent among nations, then the forcing of certain ideas as rights upon them is inherently unjust. Article 21 of the UDHR reiterates this point when it declares that the “will of the people shall be the basis of the authority of government.”<sup>34</sup>

The principle of the consent of the governed sits easily with another important principle undergirding national sovereignty, that of subsidiarity. Under the principle of subsidiarity, decisions that affect a community should

<sup>25</sup> ELYSSA KOREN, *THE UNITED NATIONS POPULATION FUND AND THE ILLICIT PROMOTION OF ABORTION 6* (2018) (e-book), [http://adfinternational.org/wp-content/uploads/2018/08/AS-Book\\_UNFPA-2018.08.07-ebook.pdf](http://adfinternational.org/wp-content/uploads/2018/08/AS-Book_UNFPA-2018.08.07-ebook.pdf).

<sup>26</sup> International Conference on Population and Development, *Programme of Action*, ¶ 8.25, A/CONF.171/13/Rev.1 (Sep. 5-13, 1994), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.171\\_13.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.171_13.pdf).

<sup>27</sup> Elyssa Koren, *The United Nations is Using Coronavirus Funding to Promote Abortion*, NEWSWEEK, May 8, 2020, <https://www.newsweek.com/united-nations-using-coronavirus-funding-promote-abortion-opinion-1502710>.

<sup>28</sup> Draft Report, *supra* note 1, at 29.

<sup>29</sup> See, e.g., Tom Finegan, *The Right to Life in International Human Rights Law*, The Heritage Foundation (Jan. 24, 2020), <https://www.heritage.org/sites/default/files/2020-02/BG3464.pdf>.

<sup>30</sup> ICCPR, *supra* note 7, art. 6(5).

<sup>31</sup> Draft Report, *supra* note 1, at 7.

<sup>32</sup> *Id.* at 24.

<sup>33</sup> *Id.* at 25.

<sup>34</sup> UDHR, *supra* note 4, art. 21.

be made at the lowest level of governance that is reasonable. It is appropriate that the protection of fundamental human rights would be enunciated at an international level, since they are universal and widely consented to. The International Covenant on Civil and Political Rights points to the justness of international protection of fundamental human rights when it provides in article 5 that they are non-derogable.<sup>35</sup> But where no consensus on a right exists or where the application of a right inherently will be variable depending on national and local circumstances, then deference should be paid to the decisions of individual nations, at least within reasonable bounds. The federalist system of the United States is one example of the principle of subsidiarity.

One important objection to an increased emphasis on deference to national sovereignty is that governments that abuse human rights may co-opt such language in order to protect themselves against criticism and action for their violations. For example, many countries that implement Sharia law often abuse religious freedom rights, freedom of speech, and women's rights. Articles 24 and 25 of the Organisation of Islamic Cooperation's Cairo Declaration on Human Rights in Islam explicitly limits such rights to the extent that they are not compatible with Sharia law.<sup>36</sup>

However, a renewed emphasis on fundamental rights instead would provide fewer excuses for rights-abusing countries than the current international system. When the international system is used to manufacture tendentious interpretations of debatable so-called "rights," then countries that abuse fundamental rights can more easily argue that their own interpretations of those rights are as valid as any other, even when they would use these interpretations as a pretext to violate rights. Similarly, these countries more credibly can argue that the international human rights system is being used in a biased way to advance a particular Western understanding of rights that does not hold for all people. Returning to an international rights system that focuses on genuinely universal and widely shared fundamental rights would undercut both of these arguments.

Further, the current proliferation of "rights" in the international system makes it structurally and politically more difficult to punish states that systematically violate

fundamental rights. When governments use various sanctions measures to go outside the international system in the—often correct—belief that human rights abusers have too much control over the system, countries within the international system often condemn the sanctioning countries rather than oppose the abusers. A return to fundamental rights would be especially important in countering those countries that use limitations on rights as a pretext to violate rights—such as in many Communist or authoritarian governments when they cite vague national security and national unity pretexts to clamp down on and severely restrict religious freedom.<sup>37</sup>

In sum, a return to the protection of fundamental rights as the animating reason for the international human rights system would not only provide greater coherence and justification for the system, but also would greatly help to curb bad actors and violators of human rights throughout the world.

## THE REJECTION OF RELIGIOUS FREEDOM

Since the start of its work, the Commission has garnered significant criticism with regard to its most rudimentary of assertions that fundamental rights rooted in natural law exist, sparking outcry even on the part of self-described defenders of human rights. Groups such as Amnesty International oppose the prioritization of religious freedom as a fundamental human right, in addition to the idea of a defined category of fundamental rights in general.<sup>38</sup> Amnesty's claim that the Commission "could damage human rights protections globally" makes clear that the back-to-basics approach long championed by Commissioner Glendon has been met with significant resistance.

The prioritization of religious freedom is opposed for numerous reasons. As Amnesty states, one view is that by grounding American international engagement in U.S. history, the Commission seeks "to subordinate international human rights law to a specific Judeo-Christian religious tradition."<sup>39</sup> The Commission Report refutes the idea of imposing a vantage particular to one religion or belief system on the world. It highlights the following statement from George Washington: "It is

<sup>35</sup> ICCPR, *supra* note 7, art. 5.

<sup>36</sup> Organisation of Islamic Cooperation [OIC], *Cairo Declaration on Human Rights in Islam*, UN Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990).

<sup>37</sup> See, e.g., U.S. Comm'n on Int'l Religious Freedom, Annual Report: Vietnam (2020), <https://www.uscirf.gov/sites/default/files/Vietnam.pdf>.

<sup>38</sup> Amnesty Int'l, *supra* note 13.

<sup>39</sup> Amnesty Int'l, Submission to the US Department of State Commission on Unalienable Rights 5 (May 20, 2020), <https://www.amnesty.org/download/Documents/AMRS123752020ENGLISH.PDF>.

now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance. . . .”<sup>40</sup>

American religious liberty, as traditionally understood, encompasses broad freedoms that transcend mere tolerance—key for the flourishing of diversity. As explained by the Commission, the reverberations of this essential right can be felt in the “guarantees of freedom of speech, press, peaceful assembly, and petition of government [that] enable citizens of diverse views to exchange opinions, to hear and be heard, and to hold their leaders up to public scrutiny.”<sup>41</sup> Freedom of religion is at the crux of what makes America free.

The origins of the international human rights project reveal a similar regard for diversity in the prioritization of religious freedom. Although they did not share a unifying religion, the drafters of the UDHR did not in any way devalue religious freedom, contrary to what Amnesty argues. They did intentionally prevent a single religion from defining their understanding of human rights; however, this in no way deterred them from according religious freedom utmost primacy as a fundamental right. Charles Malik’s proposal to explicitly ground the UDHR in the sovereignty of God was rejected as part of Eleanor Roosevelt’s grand compromise to bring the project to a successful completion, given objections from the Soviet Union.<sup>42</sup> They moved forward instead, as the Commission explains, “with a minimally foundational appeal to human dignity without any specification of the source of that dignity.”<sup>43</sup>

Both the history of the American experience and the founding lessons of the international human rights project make clear that true religious freedom is not the instrumentalization of a single religious viewpoint. As noted in the Commission’s Report, “one aspect of the Universal Declaration’s overall structure that has been essential to attaining its global status as the cornerstone of the entire international human rights edifice is its capacity to accommodate a broadly diverse set of political, economic, cultural, religious, and legal traditions.”<sup>44</sup> The view of religious freedom espoused by both the United States and the UDHR is one of true diversity. Why then

the insistent de-prioritization of this essential right from the Commission’s opponents?

Ultimately, the rejection of religious freedom points to an ultimate denial of objective truth. The reality is that religious freedom makes it possible for religion to serve as a reference point with regard to many people’s moral beliefs. Religion informs how we interact with the world, make value judgments, and determine what is morally right and wrong. It submits us to an authority higher than any human system. The agenda of “false rights” cannot take root where immutable religious truths are allowed to flourish. It thus makes sense that promoters of progressive agendas would seek to devalue religious freedom in the interest of relativistic rights. The radical autonomy of the person, at the core of the opposition’s agenda, is only possible if we are severed of all supernatural ties.

While Amnesty agrees with the Commission that it was an overarching conception of human dignity that saved the international human rights project at its start, it is clear that the ramifications of this dignity are now deeply disputed. Not naïve, the drafters of the international human rights project knew that the lack of ultimate answers would lead to problems, and they foresaw the complexity of the human rights mess in which we now find ourselves.<sup>45</sup> That said, the first success of the human rights projects is that it got off the ground in the first place. The compromise position—uniting around a basic common denominator—remains the most promising way to provide genuine coherence to the notion of human rights. This stance allowed us to succeed then, and would pave the way for a successful reset of international human rights now.

## THE WAY FORWARD FOR THE UNITED STATES

Despite the innumerable failings of the international human rights project, the message of the Commission is one of optimism. It offers a highly nuanced “third way” of understanding American foreign policy, which transcends the tired liberal/conservative divide on international engagement. It is possible to marry historical U.S. apprehension towards the international order with an

<sup>40</sup> Draft Report, *supra* note 1, at 14.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> THE TASK FORCE ON INTERNATIONAL RELIGIOUS FREEDOM OF THE WITHERSPOON INSTITUTE, RELIGIOUS FREEDOM: WHY NOW? DEFENDING AN EMBATTLED HUMAN RIGHT 54 (2012).

<sup>43</sup> Draft Report, *supra* note 1, at 32.

<sup>44</sup> *Id.* at 32.

<sup>45</sup> *Id.* at 39.

insistence on active American engagement for the pursuit of human rights.

The United States is wise to maintain “a position of selective constructive engagement” with institutions such as the UN, as the Commission recommends.<sup>46</sup> The crucial importance of an American contribution there is clear—the United States has a responsibility to hold the international institutions accountable to their mandates and prevent unwarranted incursions on sovereignty.

The future of human rights demands that the United States remains a major player on the international stage. The United States has an obligation to exert pressure to end human rights abuses internationally, starting with those that fall under the category of the egregious, but narrow, set of evils that Commissioner Glendon references. American influence, as informed by its democratic heritage, must be leveraged for the pursuit of human rights everywhere.

An evident example is Myanmar, to which the United States has granted over \$18 million in Covid-19 relief.<sup>47</sup> With regard to a country where minority populations are subject to horrific discrimination and persecution, the United States should ensure that serious and real efforts to reform human rights abuses accompany its humanitarian assistance. A recent Executive Order on advancing international religious freedom mandates such an approach, as it directs U.S. government agencies to consider religious freedom measures when conferring aid.<sup>48</sup> In the example of China, the United States has increasingly adopted a comprehensive approach outside of the international order to sanctioning the Communist Party’s atrocities committed against Uyghurs given China’s structural dominance at the international institutions.

Lastly, as emphasized by the Commission, the United States must proceed carefully with regard to the proliferation of “new” human rights, many of which may be “false rights.”<sup>49</sup> Maintaining a laser-like focus on the protection of universally recognized fundamental rights is needed now more than ever, as countless atrocities transpire without redress. The international human rights project can, and must, be revived for its

intended purpose. It is evident that the way forward will be arduous—but fundamental rights must be defended unapologetically.

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<sup>46</sup> *Id.* at 48.

<sup>47</sup> George Sibley, Chargé d’Affaires, U.S. Dep’t of State, U.S. Embassy in Burma, Virtual Press Briefing on U.S. Assistance to Myanmar for COVID-19 Response (July 22, 2020), <https://mm.usembassy.gov/charge-daffaires-george-sibleys-remarks-as-prepared-virtual-press-briefing-on-u-s-assistance-to-myanmar-for-covid-19-response/>.

<sup>48</sup> Exec. Order No. 13926, 85 F.R. 34951 (June 2, 2020), <https://www.federalregister.gov/documents/2020/06/05/2020-12430/advancing-international-religious-freedom>.

<sup>49</sup> Draft Report, *supra* note 1, at 48.

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## THE ROAD TO *BOSTOCK* AND ITS RAMIFICATIONS

KIM COLBY

The Supreme Court's decision on June 15, 2020, in *Bostock v. Clayton County, Ga.*,<sup>1</sup> signifies a seismic shift in the law that will have ramifications, both predictable and unforeseen, for years to come. To appreciate *Bostock's* importance, it is useful to place it in its historical legal context and summarize the majority's and dissents' basic points. After first tracing the road to *Bostock*, this article will then discuss some of the potential ramifications of *Bostock*.

Of its many negative consequences, the most troubling is that the conservative justices, in joining the *Bostock* majority, failed a generation of law students and young lawyers by abandoning the principles of judicial restraint that they had previously publicly championed.

### THE LGBT MOVEMENT'S FIFTY-YEAR EFFORT TO RE-DEFINE TITLE VII

Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit discrimination against an individual in employment "because of such individual's race, color, religion, sex, or national origin."<sup>2</sup> All agree that when Title VII was enacted in 1964, Congress had no intention of prohibiting discrimination on the basis of sexual orientation or gender identity.

**Federal and State Legislative Efforts to Add Sexual Orientation and Gender Identity:** Beginning in 1975, the LGBT movement tried to persuade Congress to amend Title VII by adding "sexual orientation" as a class protected from employment discrimination, in addition to the original protected classes of "race, color, religion, sex, or national origin."<sup>3</sup> In 2007, such legislation passed the House but stalled in the Senate. In 2013, such legislation passed the Senate but stalled

in the House.<sup>4</sup> Beginning in 2007, some legislative efforts also included "gender identity" as a protected class.

In 2019, the House of Representatives passed the Equality Act, 236-173, to add "sexual orientation" and "gender identity" as protected classes not only to Title VII, but to all titles of the 1964 Civil Rights Act, including public accommodations (Title II), housing (Title VIII), and federal financial assistance (Title VI). The Equality Act would also expressly eviscerate the Religious Freedom Restoration Act,<sup>5</sup> removing vital protections for religious institutions and individuals who hold traditional beliefs regarding marriage, sexual conduct, and gender identity. As of July 2020, the Senate had not held a floor vote on the Equality Act and was not expected to do so in the 116<sup>th</sup> Congress.

By 2020, twenty-three state legislatures included "sexual orientation" as a protected class in their state employment laws, while twenty included "gender identity." In addition, many local governments had enacted such protections, including in states in which state law did not prohibit sexual orientation or gender identity discrimination in employment. Several state governors issued executive orders designating "sexual orientation" and "gender identity" as protected classes in employment by the state or by state contractors.

**Executive Branch Efforts to Add SOGI:** During the Obama Administration, the Equal Employment Opportunity Commission ("EEOC") issued administrative rulings and guidance documents that re-defined "sex" in Title VII to include sexual orientation and gender identity discrimination. In July 2014, by Executive Order 13672, President Obama amended Executive

<sup>1</sup> 140 S. Ct. 1731 (2020), which is also the Court's opinion in *Altitude Express v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107.

<sup>2</sup> 42 U.S.C. § 2000e-2(a).

<sup>3</sup> *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("For the past 45 years, bills have been introduced in Congress to add 'sexual orientation' to the list, and in recent years, bills have included 'gender identity' as well. But to date, none has passed both Houses); *id.* at nn.1 & 2 (Alito, J., dissenting) (listing bills introduced since 1975).

<sup>4</sup> H.R. 3685, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007) (passed House, 235-184, on Sept. 27, 2007); S. 815, 113<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2013) (passed Senate, 64-32, on Nov. 7, 2013). See *Bostock*, 140 S. Ct. at 1822-23 (Kavanaugh, J., dissenting).

<sup>5</sup> 42 U.S.C. § 2000bb *et seq.*

Order 11246, which prohibited federal contractors from discriminating on the basis of race, color, sex, religion, and national origin, to also prohibit sexual orientation and gender identity discrimination.<sup>6</sup>

**Court Efforts to Re-define Title VII:** Beginning in 1979, the LGBT movement pressed the federal courts to interpret Title VII's prohibition of sex discrimination to include prohibition of sexual orientation and gender identity discrimination. Until April 2017, no court of appeals had adopted this interpretation.<sup>7</sup> Instead, of the thirty appellate judges hearing these claims, all thirty rejected re-interpreting Title VII to include sexual orientation and gender identity discrimination.<sup>8</sup>

**Seventh Circuit:** This consensus abruptly altered in April 2017, in *Hively v. Community College*, when the *en banc* Seventh Circuit held, 8-3, that Title VII's prohibition on sex discrimination did indeed include sexual orientation discrimination.<sup>9</sup> An adjunct professor sued for sexual orientation discrimination after a public community college refused to hire her for several full-time positions and eventually did not renew her contract. Denying the charge that it discriminated based on sexual orientation, the college filed a motion to dismiss, relying on Seventh Circuit precedent ruling that Title VII did not prohibit sexual orientation discrimination.

Eight judges voted to re-interpret Title VII. Two conservative judges relied on a "textualist" reading to support their conclusion that Title VII prohibited sexual orientation discrimination.<sup>10</sup> In a separate solo concurrence, Judge Posner urged his colleagues to "acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted."<sup>11</sup> Judge Sykes' dissent expertly dissected the

so-called "textualist" arguments, as well as other arguments made in support of re-defining sex discrimination to include sexual orientation and gender identity.<sup>12</sup>

**Second Circuit:** The Second and Sixth Circuits quickly followed in the Seventh Circuit's footsteps. In *Zarda v. Altitude Express*, a skydiving instructor was fired after a customer alleged that he had touched her inappropriately.<sup>13</sup> The employer responded to the instructor's sexual orientation discrimination suit with a motion for summary judgment, relying on Second Circuit precedent holding that Title VII did not prohibit sexual orientation discrimination.

Sitting *en banc*, the Second Circuit ruled that Title VII prohibited sexual orientation discrimination. Interestingly, the federal EEOC filed in support of the employee, while the United States Department of Justice filed in support of the employer, reflecting the Obama Administration's and the Trump Administration's diametrically opposed interpretations of Title VII.<sup>14</sup>

**Sixth Circuit:** In *EEOC v. Harris Funeral Homes*, a Sixth Circuit panel ruled that Title VII prohibited gender identity discrimination in employment.<sup>15</sup> A funeral home owner fired a transgender employee who announced that he was transitioning and would begin to dress as a woman at work. For the first time, the EEOC brought suit on behalf of a transgender employee under Title VII.

**Eleventh Circuit:** In *Bostock v. Clayton County, Georgia*, a county employee claimed that his employer's proffered reasons for firing him were pretextual and that he was fired because of his sexual orientation.<sup>16</sup> An Eleventh Circuit panel upheld the trial court's dismissal of his suit because circuit precedent held that Title VII did not prohibit sexual orientation discrimination. The Eleventh Circuit denied rehearing *en banc*.<sup>17</sup>

<sup>6</sup> Exec. Order No. 13672, 79 Fed. Reg. 42971 (Jul. 21, 2014).

<sup>7</sup> *Bostock*, 140 S. Ct. at 1777-1778 (Alito, J., dissenting) (listing cases since 1991); *id.* at nn.38-40 (listing cases before 1991).

<sup>8</sup> *Id.* at 1824 (Kavanaugh, J., dissenting) ("Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.")

<sup>9</sup> 853 F.3d 339 (7th Cir. 2017) (*en banc*).

<sup>10</sup> *Id.* at 357-359 (concurring opinion) (Flaum, J., joined by Ripple, J.).

<sup>11</sup> *Id.* at 357 (concurring opinion) (Posner, J.).

<sup>12</sup> *Id.* at 359 (dissenting opinion) (Sykes, J., joined by Bauer and Kanne, JJ.).

<sup>13</sup> 883 F.3d 100 (2d Cir. 2018) (*en banc*).

<sup>14</sup> Compare *En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal*, 2017 WL 2730281 (June 23, 2017) with *Brief for the United States as Amicus Curiae*, 2017 WL 3277292 (Jul. 26, 2017).

<sup>15</sup> 884 F.3d 560, 574-75 (6th Cir. 2018).

<sup>16</sup> 723 Fed. Appx. 964 (11th Cir. 2018).

<sup>17</sup> 894 F.3d 1335 (11th Cir. 2018) (denying rehearing *en banc*).

## THE SUPREME COURT RE-INTERPRETS TITLE VII

**United States Supreme Court:** The Court granted review in *Zarda, Harris*, and *Bostock*. With the new conservative majority, most observers expected the Court to rule, 5-4, that Title VII did not prohibit sexual orientation and gender identity discrimination.

This expectation continued notwithstanding oral argument on October 8, 2019, when Justice Gorsuch sparked speculation by prefacing a question to the *Harris* employee's counsel with the comment: "When a case is really close, really close, on the textual evidence, and I – assume for the moment . . . I'm with you on the textual evidence." Many observers downplayed Justice Gorsuch's comment because he was believed to be a reliable textualist given his writings in support of a textualist approach to judging. Moreover, his comments acknowledged the highly disruptive consequences of re-interpreting Title VII, when he asked whether a judge should "take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that . . . Congress didn't think about it . . . and that is . . . more appropriate a legislative rather than a judicial function?"<sup>18</sup>

On June 15, 2020, the Court announced its 6-3 ruling that Title VII already prohibited sexual orientation and gender identity discrimination.<sup>19</sup> Justice Gorsuch wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Two masterful dissents were filed. One by Justice Alito, joined by Justice Thomas, evoked "a pirate ship" to describe the majority opinion as "sail[ing] under a textualist flag, but what it actually represents is a theory of statutory interpretation . . . that courts should 'update' old statutes so that they better reflect the current values of society."<sup>20</sup> Stressing the violation of separation of powers represented by the Court's opinion, Justice Kavanaugh's dissent bluntly stated, "Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation."<sup>21</sup>

**Majority opinion:** Characterizing his reading of the statute as "textualist," Justice Gorsuch wrote that Title VII's original prohibition on sex discrimination necessarily prohibits both sexual orientation and gender identity discrimination. According to the Court, this outcome follows from the scenario in which a male employee is fired after bringing his male spouse to a work event, while a female employee is not fired after bringing her male spouse to the event.<sup>22</sup> This difference in treatment, according to the majority, is "because of" the employees' biological sex, meaning that Title VII includes sexual orientation discrimination.

Justice Gorsuch forthrightly acknowledged that Congress in 1964 "might not have anticipated" this outcome.<sup>23</sup> Or as Justice Alito asserted in his dissent: "While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of 'transgender status' or 'gender identity,' terms that would have left people at the time scratching their heads."<sup>24</sup>

Justice Gorsuch's candid acknowledgement seemingly collides head-on with the majority opinion's claim that textualism ascertains and implements the "ordinary public meaning" of a statute at the time it was enacted.<sup>25</sup> It seems to be more important to Justice Gorsuch that his reading of Title VII align with prior Title VII decisions, including decisions in which the Court was not attempting a textualist reading,<sup>26</sup> than that it align with what Congress thought it was doing in 1964, or how federal appellate courts had uniformly interpreted Title VII for nearly four decades.

**In Dissent:** As Justice Kavanaugh observed, by bypassing the "ordinary public meaning" of Title VII in 1964, Justice Gorsuch took a "literalist," rather than a "textualist," approach to statutory interpretation.<sup>27</sup> Justice Kavanaugh's dissent focused on the majority's unconstitutional violation of the separation of powers arising from the Court's usurpation of Congress' legislative

<sup>18</sup> *Harris Funeral Homes v. EEOC*, No. 18-107, oral arg. trans. at 25, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf).

<sup>19</sup> *Bostock*, 140 S. Ct. 1731.

<sup>20</sup> *Id.* at 1755-56 (Alito, J., dissenting).

<sup>21</sup> *Id.* at 1823 (Kavanaugh, J., dissenting).

<sup>22</sup> *Id.* at 1742.

<sup>23</sup> *Id.* at 1737, 1750.

<sup>24</sup> *Id.* at 1772 (Alito, J., dissenting).

<sup>25</sup> *Id.* at 1738.

<sup>26</sup> *Id.* at 1743-44.

<sup>27</sup> *Id.* at 1824-25 (Kavanaugh, J., dissenting).

function.<sup>28</sup> In their dissent, Justices Alito and Thomas detailed the flaws with the Court's opinion, including the long history of failed efforts to amend Title VII in the courts and Congress. Both dissents merit a thoughtful reading.<sup>29</sup>

## THE RAMIFICATIONS OF *BOSTOCK*

At oral argument, Justice Gorsuch had foreseen "massive social upheaval" if Title VII were re-interpreted to include sexual orientation and gender identity.<sup>30</sup> But his majority opinion brushed aside the likely consequences of the decision, implying that it might be possible to confine its logic to Title VII, while punting the peril for religious freedom to future cases.<sup>31</sup>

### *Near-term Ramifications*

**1. Federal laws that prohibit "sex" discrimination:** Justices Alito and Thomas appended to their dissent an appendix listing over 160 federal laws that currently prohibit sex discrimination. It is unclear how Title VII's prohibition on sex discrimination must include a prohibition on sexual orientation and gender identity discrimination, yet other federal statutes that prohibit sex discrimination do not. It seems probable that the Court amended not only Title VII but also 160 other federal laws to include prohibitions on sexual orientation and gender identity. In particular, because Title IX generally is interpreted in tandem with Title VII,<sup>32</sup> its broad prohibition on sex discrimination in education likely also prohibits sexual orientation and gender identity discrimination in K-12 schools and colleges. Title IX includes a religious exemption that will, no doubt, be tested.<sup>33</sup>

**2. State and local laws that prohibit "sex" discrimination:** Before the *Bostock* decision, twenty-three states had laws prohibiting sexual orientation discrimination in employment, and twenty states had laws prohibiting gender identity discrimination. With the *Bostock* decision, federal law applies in the other twenty-seven states to prohibit sexual orientation discrimination in employment, and in the other thirty states to prohibit gender identity discrimination. And not a single vote was cast by any state legislator.

Twenty-four states previously prohibited sex discrimination, but not sexual orientation and gender identity discrimination, in employment.<sup>34</sup> At least some state supreme courts likely will adopt Justice Gorsuch's logic in order to interpret state laws to prohibit not only sex discrimination but also sexual orientation and gender identity discrimination. One might ask why that matters if Title VII applies in the states. But it matters for religious employers in those states because many state nondiscrimination laws lack exemptions for religious employers. That is, Title VII's religious exemption protects religious employers only as to federal employment discrimination claims, not as to state employment discrimination claims. Religious exemptions in state laws, if they exist, may be inadequate to protect the religious employers in those states.

**3. Equality Act:** As discussed earlier, amending Title VII to include sexual orientation and gender identity as protected classes has been a high priority for the LGBT movement for decades. Some commentators have opined that the *Bostock* decision, therefore, will diminish the momentum for the Equality Act, but that seems unlikely. Passage of the Equality Act<sup>35</sup> will remain a high priority for the LGBT movement. While *Bostock* may mean that Congress no longer needs to amend Title VII, other

<sup>28</sup> *Id.* at 1822 (Kavanaugh, J., dissenting).

<sup>29</sup> *Id.* at 1754 (Alito, J., joined by Thomas, J., dissenting).

<sup>30</sup> *Harris Funeral Homes v. EEOC*, No. 18-107, oral arg. trans. at 25, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf); audio at <https://www.oyez.org/cases/2019/18-107>. The oral argument in the *Bostock* and *Zarda* cases are at *Bostock v. Clayton County and Altitude Express v. Zarda*, Nos. 17-1618 & 17-1623, oral arg. trans., [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_7k47.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf); audio at <https://www.oyez.org/cases/2019/17-1618>.

<sup>31</sup> 140 S. Ct. at 1753-54.

<sup>32</sup> *See, e.g., Whitaker v. Kenosha School District*, 858 F.3d 1034 (7th Cir. 2017) (Title IX prohibition on sex discrimination includes prohibition on gender identity and, therefore, allows a transgender student to sue a school district for access to bathrooms and locker rooms of the student's choice).

<sup>33</sup> 20 U.S.C. 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization[.]")

<sup>34</sup> The number adds up to forty-seven states because three states lack nondiscrimination laws regarding employment.

<sup>35</sup> H.R. 5, 116<sup>th</sup> Cong., 1<sup>st</sup> Sess. (passed House, 236-173, May 17, 2019), at <https://www.congress.gov/116/bills/hr5/BILLS-116hr5rfs.pdf>. The Senate companion bill is S. 788, 116<sup>th</sup> Cong., at <https://www.congress.gov/116/bills/s788/BILLS-116s788is.pdf> (46 co-sponsors).

significant areas of federal nondiscrimination law do not prohibit sex discrimination. For example, sex discrimination (and, therefore, sexual orientation and gender identity discrimination) is not prohibited in federal public accommodations law<sup>36</sup> or federal financial assistance law.<sup>37</sup>

Recall how dangerous the so-called Equality Act is. It vastly expands the federal definition of “public accommodation” to encompass nearly every business,<sup>38</sup> as well as any “individual whose operations affect commerce and who is a provider of a good, service, or program.”<sup>39</sup> And “public accommodation” shall not be construed to be limited to a physical facility or place.<sup>40</sup> The Equality Act would gut the Religious Freedom Restoration Act’s protection for religious individuals and institutions, making it unavailable to “provide a claim concerning, or a defense to a claim” or to “provide a basis for challenging the application or enforcement” of any part of the Equality Act.<sup>41</sup>

#### 4. Constitutional and statutory religious freedom protections:

Both the majority and dissenters emphasized that various federal protections already exist for religious individuals and institutions.<sup>42</sup> Some commentators have suggested that these protections are sturdy enough to withstand the upheaval unleashed by *Bostock*. Others think that assumption is ill-founded.<sup>43</sup>

*Recall how dangerous the so-called Equality Act is. It vastly expands the federal definition of “public accommodation” to encompass nearly every business, as well as any “individual whose operations affect commerce and who is a provider of a good, service, or program.”*

a. *Title VII exemption for religious employers:* Title VII has strong protection for religious employers, but its scope is contested on two crucial fronts. First, the definition of “religious employers” who are entitled to claim the exemption is broad but not limitless. Those limits are still being determined by the courts.<sup>44</sup> Second, while Title VII defines “religion” broadly,<sup>45</sup> an increasing number of liberal academics claim that the religious employer’s right to hire employees of a particular religion is limited and does not protect a religious employer’s standards of conduct for employees. That is, while a Baptist college may limit its hiring to Baptists, it may not refuse to hire a Baptist who enters a same-sex marriage. While the case law regarding “sex discrimination” typically supports the employer’s right to require that employees abide by non-pretextual religious standards of conduct, the newly added prohibitions on sexual orientation and gender identity will trigger future litigation.<sup>46</sup>

b. *Title IX exemption for religious schools and colleges:* Title IX does “not apply to an educational institution that is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”<sup>47</sup> But retaliation against religious colleges and their students

<sup>36</sup> 42 U.S.C. § 2000a.

<sup>37</sup> 42 U.S.C. § 2000d.

<sup>38</sup> H.R. 5, § 3(a)(2)(c) (the definition includes in part “any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services”).

<sup>39</sup> *Id.*, § 3(c).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, § 9.

<sup>42</sup> 140 S. Ct. at 1753-54; *id.* at 1777-83 (Alito, J., dissenting); *Id.* at 1823 n.2 (Kavanaugh, J., dissenting).

<sup>43</sup> Kim Colby, *Symposium: Free Exercise, RFRA, and the Need for a Constitutional Safety Net*, SCOTUSBLOG (Aug. 10, 2020), <https://www.scotusblog.com/2020/08/symposium-free-exercise-rfra-and-the-need-for-a-constitutional-safety-net/>.

<sup>44</sup> See, e.g., *Spencer v. World Vision*, 633 F.3d 723 (9<sup>th</sup> Cir. 2011).

<sup>45</sup> 42 U.S.C. § 2000e(j) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).

<sup>46</sup> For a thorough discussion of this issue, see Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Decisions: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD JOURNAL OF LAW AND RELIGION 368 (2015), at <https://academic.oup.com/ojlr/article-abstract/4/3/368/1557522>.

<sup>47</sup> 20 U.S.C. § 1681(a)(3).

for invoking the Title IX religious exemption reared its ugly head in 2016, when the California Assembly came within a few votes of denying state financial assistance to low-income students who attended religious colleges that had invoked their Title IX exemption.<sup>48</sup> The effort failed only after intense engagement by religious colleges representing diverse faiths.

*c. Religious Freedom Restoration Act:* Because of a 1990 Supreme Court decision,<sup>49</sup> a federal statute, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, provides more protection for Americans' religious freedom against *federal* government overreach than does the United States Constitution.<sup>50</sup> RFRA protects religious freedom by requiring the government to demonstrate a compelling interest that cannot be achieved by a less restrictive means before a government action may impose a substantial burden on an individual's (or institution's) sincerely held religious exercise. RFRA was passed by overwhelmingly bipartisan, nearly unanimous votes in Congress and signed into law by President Clinton in 1993.

But there is strong pressure on Congress to eviscerate RFRA's protections, especially in the nondiscrimination context. As noted above, the House of Representatives passed the Equality Act in May 2019, which contains a provision that makes RFRA inapplicable to nondiscrimination claims.<sup>51</sup> In addition, the so-called Do No Harm

Act<sup>52</sup> would gut RFRA. Drawing its support solely from the Democratic side of the aisle, it has 176 co-sponsors in the House and 28 co-sponsors in the Senate. Because RFRA is vital to the survival of religious freedom, it deserves and needs the support of all Americans.<sup>53</sup>

*d. The Free Exercise Clause:* In its 1990 decision in *Employment Division v. Smith*,<sup>54</sup> the Supreme Court severely weakened the protection for religious exercise afforded by the Free Exercise Clause of the First Amendment. The Court ruled that a neutral and generally applicable law – such as a nondiscrimination law – could burden the free exercise of religion as long as the government was not targeting religion for discriminatory treatment. Three years later, Congress passed RFRA to restore strong protection for religious freedom. But RFRA only protects religious freedom as to federal laws, not as to state or local laws.<sup>55</sup>

Between 1990 and 2017, the Free Exercise Clause essentially went into hibernation, with occasional sightings when states discriminated against religious individuals and institutions. But in the past three years, the Court has issued two rulings in which the Free Exercise Clause is re-awakening.<sup>56</sup> And in Fall 2020, the Court will hear argument in a case, *Fulton v. City of Philadelphia*,<sup>57</sup> in which the Court may overrule the *Smith* decision and again make the Free Exercise Clause a meaningful

<sup>48</sup> Kim Colby, *Whose Shame?*, Religious Freedom Institute Cornerstone Blog (Sept. 20, 2016), at <https://www.religiousfreedominstitute.org/cornerstone/2016/9/20/whose-shame>.

<sup>49</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>50</sup> Kim Colby, *The Religious Freedom Restoration Act: A Complicated Legacy for Justice Scalia*, OUTCOMES 32-33, Summer 2016, at <https://www.clsnet.org/document.doc?id=967>.

<sup>51</sup> H.R. 5, 116<sup>th</sup> Cong., 1<sup>st</sup> Sess., §9.

<sup>52</sup> H.R. 1450, 116<sup>th</sup> Cong., at <https://www.congress.gov/116/bills/hr1450/BILLS-116hr1450ih.pdf>; S. 593, 116<sup>th</sup> Cong., at <https://www.congress.gov/116/bills/s593/BILLS-116s593is.pdf>.

<sup>53</sup> Kim Colby, *How the Religious Freedom Restoration Act Benefits All Americans*, at <https://www.clsnet.org/document.doc?id=803>.

<sup>54</sup> 494 U.S. 872 (1990).

<sup>55</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress failed to make the factfinding necessary to support its constitutional authority to apply RFRA to state and local laws).

<sup>56</sup> *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). See CLS's amicus brief in *Espinoza*, Brief of Christian Legal Society, United States Conference of Catholic Bishops, the Union of Orthodox Jewish Congregations of America, American Association of Christian Schools, the Anglican Church in North America, Association of Christian Schools International, the Church of Jesus Christ of Latter-Day Saints, Council for American Private Education, Council for Christian Colleges & Universities, Ethics & Religious Liberty Commission, Evangelical Council for Financial Accountability, the General Conference of Seventh-day Adventists, Institutional Religious Freedom Alliance, the Lutheran Church-Missouri Synod, National Association of Evangelicals, Queens Federation of Churches, and World Vision, Inc. (U.S.) as Amicus Curiae in Support of Petitioners, 2019 WL 4640380 (Sept. 18, 2019).

<sup>57</sup> *Fulton v. City of Philadelphia*, 922 F.3d 140 (2019), *cert. granted*, 140 S. Ct. 1104 (Feb. 24, 2020). CLS's amicus brief in *Fulton*, Brief of Christian Legal Society, The Anglican Church in North America, Center for Public Justice, institutional Religious Freedom Alliance, the Lutheran Church-Missouri Synod, Queens Federation of Churches, Union of Orthodox Jewish congregations of America, and World Vision, Inc., as Amici Curiae in Support of Petitioners, 2020 WL 3078340 (June 3, 2020).

protection for religious freedom at the state and local levels, as well as the federal level.

*e. Ministerial exception:* The “ministerial exception” is a religious freedom doctrine rooted in both the Free Exercise and Establishment Clauses of the First Amendment that requires federal and state judges to refrain from deciding cases involving religious congregations’ and religious schools’ employment decisions regarding their leaders and teachers. The Supreme Court has ruled that judges are not competent to sort through religious doctrine when a congregation decides whether to hire or retain someone as a minister or teacher.<sup>58</sup> Even if the case involves race, sex, or other protected classes, the courts are to respect the autonomy of religious organizations and allow them to make necessary decisions regarding employment of the persons who lead their worship or teach their doctrine. While its coverage is deep, the ministerial exception’s applicability is somewhat narrow because it is limited to employees whose jobs include religious functions.

*f. State and local religious protections:* If state courts decide to follow the Court’s lead in *Bostock* and re-interpret their state laws to prohibit sexual orientation and gender identity discrimination, the primary protections for religious freedom will be the religious exemptions found in those local and state nondiscrimination laws, which may or may not be adequate. Some state courts have interpreted their state constitutions to require strict scrutiny for state or local laws that burden religious exercise. In addition, 22 states have state RFRAs, which the courts may or may not apply robustly. If *Smith* is overruled in *Fulton*, the federal Free Exercise Clause will again provide necessary protections at the state and local level.<sup>59</sup>

*g. Tax-exempt status:* During oral argument in *Obergefell v. Hodges*,<sup>60</sup> in response to a question from Justice Alito, the United States’ top attorney at the time, Solicitor General Donald Verrilli, agreed that religious colleges’ tax-exempt status would likely become an issue for religious colleges that prohibited same-sex conduct by their students.<sup>61</sup> With its finding that sexual orientation

and gender identity discrimination has been prohibited by Title VII for the past fifty-six years, the *Bostock* decision contributes to a narrative that some religious institutions’ religious beliefs concerning marriage, sexual conduct, and gender identity violate “public policy” and should render them ineligible for tax-exempt status.<sup>62</sup>

### *Long-term Ramifications*

The short-term ramifications are daunting, and the potential damage to religious freedom deeply troubling, but the *Bostock* opinion wreaks even worse damage in at least two fundamental ways.

**1. “A Republic if you can keep it”:** Those words are reportedly Benjamin Franklin’s response to a Philadelphia woman who asked him what kind of government the Constitutional Convention had given the American people. But a self-governing republic, and even the rule of law, are only possible if words have objective meaning that judges respect when they apply the law. The *Bostock* opinion erodes this essential element. While some courts have ignored words’ objective meaning for decades, the textualist legal movement promised a return to these first principles for rebuilding authentic respect for the rule of law. These principles also make legislative compromises possible for the challenging problems facing our country. Citizens need to be confident that legislative compromises will be enforced by a judiciary that defers to Congress’ words, rather than substituting its own judgment.

**2. Law students and the next generation of lawyers:** CLS law students come from across the political spectrum. Many identify as “progressives,” many as “moderates,” and many as “conservatives.” The “progressive” and “moderate” law students have little to fear in their law school classrooms because they are ideologically compatible with their “progressive” professors and classmates.

But that is not true for conservative law students. Too many law schools allow a hostile learning environment to surround conservative women and men. Too often conservative students are harassed by their

<sup>58</sup> *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>59</sup> See Colby, *supra* note xliii.

<sup>60</sup> 135 S. Ct. 2584 (2015).

<sup>61</sup> Transcript of Oral Argument in *Obergefell v. Hodges*, No. 14-556, U.S. Supreme Court (April 28, 2015), available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2014/14-556q1\\_l5gm.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_l5gm.pdf) at 38 (last visited July 10, 2020).

<sup>62</sup> See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (IRS could revoke religious college’s tax-exempt status because its racially discriminatory policy regarding student dating was against “public policy”).

professors and classmates.<sup>63</sup> Their conservative legal philosophy often means they will not be recommended for clerkships or jobs by professors who disdain their conservative ideas and values. Their conservative speech exposes them to the risk of public ridicule and professional harm. One off-hand classroom comment can be instantly tweeted to the world by a classmate who reflexively chooses scoring political points over treating others decently.

Despite this, some conservative students courageously raise their hands to question the “progressive” legal theories of their professors and classmates. They risk their reputations merely to suggest that the rule of law depends on judges honoring the objective meaning of the words in the Constitution or a statute. They question the “progressive” stranglehold on the classroom by making principled arguments that the conservative justices in the *Bostock* majority were believed to champion.

The *Bostock* majority opinion betrays their defense of the idea that the words of the People’s elected representatives have objective meaning which judges

are duty-bound to respect by their oath to uphold the Constitution. These law students – and the country – deserved better than the outcome in *Bostock*.

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<sup>63</sup> Aaron Haviland, *I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong*, *The Federalist* (Mar. 4, 2019), <http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

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