238. RHR

Draft

Published in *Notre Dame Law Review* 92 (2016): 427-450

"COME NOW LET US REASON TOGETHER": RESTORING RELIGIOUS FREEDOM IN AMERICA AND ABROAD

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Abstract

This Article challenges the criticisms of religious freedom that have emerged among recent academics and politicians, and the growing subordination of religious freedom to sexual freedom claims. In particular, we analyze recent critical scholarship that claims that religious liberty was not important to the American founders and that calls for the removal of special religious exemptions and accommodations because they are said to threaten other fundamental rights and to privilege religion unfairly. These critical arguments we find historically false, philosophically misguided, sociologically one-sided, and increasingly dangerous given the perilous state of religious freedom around the world today. We call for a return to the founders' insights that religion deserves special constitutional protection and that religious freedom must be open to all forms of religion and belief. We also call for a proper balancing of the enduring principles of freedom of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of religion, which together have helped forge the unique protection of religious freedom that America holds out to all its citizens, and to the world.

Keywords: Religious freedom; First Amendment; Free Exercise Clause; Establishment Clause; Religious Freedom Restoration Act; religious exemptions; religious accommodations; religious corporations; Supreme Court; John Adams; religious violence; sexual liberty; same-sex relations; same-sex marriage; religious discrimination; Brian Leiter; Martin Marty; sociology of religion; religion and human rights; freedom of conscience; religious equality; religious pluralism; separation of church and state; Douglas Laycock.

I. POLITICAL CHALLENGES TO RELIGIOUS FREEDOM

American religious freedom used to be "taken for granted." It's now "up for grabs." So writes distinguished religious liberty scholar Paul Horwitz.[1] Until a generation ago, the opposite was true. In 1993, a virtually unanimous Congress passed the Religious Freedom Restoration Act (RFRA), signed by President Clinton.[2] This was a firm national rebuke of the 1990 Supreme Court case of *Employment Division v. Smith*[3] that had greatly weakened the First Amendment Free Exercise Clause. Four years later, the Court struck down the application of RFRA to the states.[4] In 2000, Congress stood up again and passed the more targeted Religious Land Use and Institutionalized Persons Act (RLUIPA), also signed by President Clinton, a law that was binding on federal and state governments alike and enforceable in the federal courts.[5] Twenty-one state legislatures eventually passed their own state religious freedom statutes, mostly modeled on the federal act.[6] And both Congress and the states added a number of

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1 Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 155 (2014) (quoting Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997)).

2 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

3 Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

4 City of Boerne v. Flores, 521 U.S. 507 (1997). RFRA still applies to federal laws. *See, e.g.*, Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA in a claim about the regulation of a Schedule I narcotic for sacramental purposes).

5 Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000); *see* Holt v. Hobbs, 135 S. Ct. 853 (2015) (applying RLUIPA); Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding RLUIPA against an Establishment Clause challenge pertaining to "institutionalized persons").

6 *See* Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010). Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia have RFRAs: ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2016); ARK. CODE ANN. § 16-123-401 (West 2016); CONN. GEN. STAT. ANN. § 52-571b (West 2016); FLA. STAT. ANN. § 761.01 (West 2016); IDAHO CODE ANN. § 73-402 (West 2016); 775 ILL. COMP. STAT. ANN. § 35/1 (West 2016); KAN. STAT. ANN. § 60-5301 (West 2016); KY. REV. STAT. ANN. § 446.350 (West 2016); LA. STAT. ANN. § 13:5231 (2016); MISS. CODE ANN. § 11-61-1 (West 2016); MO. ANN. STAT. § 1.302 (West 2016); N.M. STAT. ANN. § 28-22-1 (West 2016); OKLA. STAT. tit. 51, § 251 (West 2016); 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West 2016); 42 R.I.

other discrete protections for religion, giving courts some of the tools they needed to protect religious freedom, even without a strong First Amendment.[7]

So matters stood a generation ago. But in the ensuing years, these special legislative protections of religious freedom have come under increasing attack. Several states of late, including relatively conservative bastions like Georgia[8] and Indiana,[9] have buckled under massive lobbying and media pressure, and have scrapped or vetoed their new or revised RFRA plans; other states have started to limit the application of their existing RFRAs.[10]

There are many causes for this change of legislative heart. First, highly publicized religious pathologies have made it more difficult to sympathize with the cause of religion and religious freedom. Particularly, the rise of Islamicism, and the horrors of 9/11, London's 7/7, Fort Hood, Madrid, Paris, San Bernardino, Brussels, Orlando, Nice, and more have renewed traditional warnings about the dangers of religion in general and triggered fresh waves of "anti-Shari'a statutes"[11] and harsh treatment of Muslims by regulators and courts.[12] Leading political figures now advocate a "'total and complete' ban" on Muslims entering the United States[13] and urge that the United States should "test every person here who is of a Muslim background, and if they believe in sharia, they

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GEN. LAWS ANN. § 80.1-1 (West 2016); S.C. CODE ANN. § 1-32-10 (2016); TENN. CODE ANN. § 4-1-407 (West 2016); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (West 2016); VA. CODE ANN. § 57-2.02 (West 2016).

7 *See* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021 (2012); Lund, *supra* note 6, at 479–89.

8 Jim Galloway, *Gearing Up for Next 'Religious Liberty' Fight, Georgia Business Leaders Look to Indiana*, ATLANTA J.-CONST. (Oct. 17, 2015), http://politics.blog.ajc.com/2015/10/17/gearing-up-for-next-religious-liberty-fight-georgia-business-leaders-look-to-indiana/.

9 Emily Bazelon, *What Are the Limits of 'Religious Liberty'?*, N.Y. TIMES MAG. (July 7, 2015), http://www.nytimes.com/2015/07/12/magazine/what-are-the-limits-of-religious-liberty.html; Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015), http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/; Monica Davey et al., *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html?_r=0; Amanda Holpuch, *Indiana Amends Religious Freedom Bill to Put an End to Discrimination*, GUARDIAN (Apr. 2, 2015), http://www.theguardian.com/us-news/2015/apr/02/indiana-republicans-religious-freedom.

10 *See, e.g.*, Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 871 (2014).

11 For more detailed treatment and criticism of the anti-Shari'a statutes, see the discussion and sources in John Witte, Jr., & Joel A. Nichols, *Who Governs the Family? Marriage and Divorce as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321 (2013).

12 *See* LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11, at 16 (2011) ("In the aftermath of the terrorist attacks, Muslims experienced a dramatic increase in the frequency and intensity of these hostile encounters."); s*ee also* Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012); Asma T. Uddin, *American Muslims, American Islam, and the American Constitutional Heritage*, *in* RELIGIOUS FREEDOM IN AMERICA: CONSTITUTIONAL ROOTS AND CONTEMPORARY CHALLENGES 224, 224–40 (Allen D. Hertzke ed., 2015).

13 Jenna Johnson & David Weigel, *Donald Trump Calls for 'Total' Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198_story.html (quoting Donald Trump's statement from December 7, 2015).

should be deported."[14] Second, the media narrative has turned more against legislative protections. For example, in 2006, *The New York Times* ran a sensational six-part exposé describing the "hundreds" of special statutory and regulatory protections, entitlements, and exemptions that religious individuals and groups quietly enjoy under federal, state, and local laws, despite all the loud lamentations about the *Smith* case's truncation of religious freedom.[15] Third, the Catholic Church was 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 constitutional veil of religious autonomy.[16] Fourth, Evangelical megachurches faced withering attacks 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.[17]

But even bigger challenges of late have come with the new culture wars between religious freedom and sexual freedom.[18] 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? Or a county clerk asked to give them a marriage license?[19] Must devout medical doctors or religiously chartered hospitals perform abortions, or give assisted-reproduction procedures for unwed mothers, contrary to their deeply held religious beliefs about marriage and family life? How about if they are receiving government funding? Or if they are the only medical service available to the patient for miles around? Must a conscientiously opposed pharmacist fill a prescription for a contraceptive or

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14 Aaron Blake, *Gingrich Says the Media Is Distorting His Plan to 'Test' All Muslims. But That's What He Proposed*, WASH. POST (July 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/15/newt-gingrich-says-the-media-is-overreacting-to-his-plan-to-test-all-muslims-but-thats-what-he-proposed/?tid=a_inl (offering a transcript of Newt Gingrich's comments from July 14, 2016).

15 Diana B. Henriques, *In God's Name*, N.Y. TIMES (Oct. 8–11, 20; Nov. 23; Dec. 19, 2006), http://www.nytimes.com/ref/business/churchstate.html; *see* Diana B. Henriques & Andrew W. Lehren, *Religious Groups Reap Federal Aid for Pet Projects*, N.Y. TIMES (May 13, 2007), http://www.nytimes.com/2007/05/13/business/13lobby.html; Diana B. Henriques & Andrew W. Lehren, *Federal Grant for a Medical Mission Goes Awry*, N.Y. TIMES (June 13, 2007), http://www.nytimes.com/2007/06/13/business/13cutter.html.

16 *See, e.g.*, John Gehring, *False Choices and Religious Liberty: Is There a Better Way Forward?*, COMMONWEAL (June 21, 2016), https://www.commonwealmagazine.org/false-choices-religious-liberty; Amanda Holpuch, *Ongoing Child Sex Abuse in Catholic Church Casts Shadow on Pope's U.S. Visit*, GUARDIAN (Sept. 10, 2015), https://www.theguardian.com/us-news/2015/sep/10/pope-francis-us-visit-catholic-sex-abuse; Alexander Stille, *What Pope Benedict Knew About Abuse in the Catholic Church*, NEW YORKER (Jan. 14, 2016), http://www.newyorker.com/news/news-desk/what-pope-benedict-knew-about-abuse-in-the-catholic-church.

17 *See, e.g.*, John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203 (2013); Press Release, U.S. Senator Chuck Grassley, Grassley Seeks Information from Six Media-Based Ministries (Nov. 6, 2007), http://www.grassley.senate.gov/news/news-releases/grassley-seeks-information-six-media-based-ministries.

18 For overviews, see RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015); Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Laycock, *supra* note 10.

19 Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky.) (ruling against a county clerk who refused to issue same-sex marriage licenses), *cert. denied*, 136 S. Ct. 23 (2015).

abortifacient?[20] 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 same-sex marriage? May private religious citizens refuse to photograph or cater a wedding, rent an apartment, or offer a general service to a same-sex couple whose relationship they find religiously or morally improper[21]—especially when state non-discrimination laws command otherwise?[22]

These are only a few of the headline issues today, which officials and citizens are struggling mightily to address. Two recent 5-4 Supreme Court cases on point have only exacerbated the tension. In *Christian Legal Society v. Martinez* (2010),[23] sexual non-discrimination rights trumped religious freedom claims; in *Burwell v. Hobby Lobby* (2014),[24] religious freedom trumped reproductive freedom claims.[25] The culture wars have only escalated as a consequence. "Each side is intolerant of the other; each side wants a total win," Douglas Laycock writes, after a thorough study of these new culture wars.[26] "This mutual insistence on total wins is very bad for religious liberty."[27] And with easy political talk afoot about repealing unpopular statutes—not just the Affordable Care Act—legislative protections for religious freedom appear vulnerable. Add the fact that both the Free Exercise and Establishment Clauses are now much weaker protections than they were before the 1980s, and it is hard to resist the judgment of leading jurist Mary Ann Glendon that religious freedom is in danger of becoming "a second-class right."[28]

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20 *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (involving pharmacists' challenge to regulations requiring the disbursing of potential embryo-destructive medications), *cert. denied*, 136 S. Ct. 2433 (2016).

21 *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (ruling against a photographer who claimed religious exemption from a state public accommodation statute with respect to same-sex weddings), *cert. denied*, 134 S. Ct. 1787 (2014).

22 For good overviews see FRANK S. RAVITCH, FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (2016); RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE (Timothy Shah et al. eds., 2016); Laycock, *supra* note 10.

23 Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

24 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (finding that a for-profit company could assert religious liberty rights in conscientious opposition to providing certain kinds of contraceptive care to employees).

25 *See also* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (responding to arguments from religious organizations that the Affordable Care Act's contraceptive coverage mandate violated RFRA because it required them to facilitate the provision of insurance coverage that they opposed on religious grounds, and deciding to vacate and remand after supplemental briefing indicated a possible functional resolution that would retain coverage and also respect the asserted religious rights).

26 Laycock, *supra* note 10, at 879; *see also* Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231, 231–55 (Micah Schwartzman et al. eds., 2016) [hereinafter THE RISE].

27 Laycock, *supra* note 10, at 879.

28 Mary Ann Glendon, *Religious Freedom—A Second-Class Right?*, 61 EMORY L.J. 971 (2012).

II. ACADEMIC CHALLENGES TO RELIGIOUS FREEDOM

That's exactly how it should be, say a number of legal scholars who have challenged the idea that religion is special or deserving of special constitutional or legislative protection.[29] Even if this idea existed in the eighteenth-century founding era—and that is now sharply contested, too—it has become obsolete in our post-establishment, postmodern, and post-religious age. Religion, these critics argue, is too dangerous, divisive, and diverse in its demands to be accorded special protection.[30] Freedom of conscience claimants unfairly demand the right to be a law unto themselves, to the detriment of general laws and to the endangerment of other people's fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization—religious or not. Religious liberty claims are too often proxies for political or social agendas that deserve no more protection than any other agenda. Religion, these critics thus conclude, should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of expression, subject to the same rules of rational democratic deliberation that govern other ideas and values. To accord religion any special protection or exemption discriminates against the nonreligious. To afford religion a special seat at the table of public deliberation or a special role in the implementation of government programs invites religious self-dealing contrary to the First Amendment Establishment Clause. We cannot afford these traditional constitutional luxuries. "The perils of extreme religious liberty" are now upon us.[31]

University of Chicago law professor Brian Leiter is a leading exponent of such critical views of religious freedom. In his widely read title, *Why Tolerate Religion?* (2013), this distinguished legal philosopher, with expertise in the iconoclast views of Friedrich Nietzsche, launches an iconoclastic attack on religious freedom—especially the notion that religious practitioners sometimes deserve exemptions from general laws that are not available to nonreligious citizens. Leiter argues that "there is no apparent moral reason why states should carve out special protections that encourage individuals to structure

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29 For a good, recent sample of arguments pro and con, see LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS (Austin Sarat ed., 2012) [hereinafter LEGAL RESPONSES]; THE RISE, *supra* note 26, at 231–55; Steven D. Smith & Larry Alexander, *Introduction to the Symposium*, 51 SAN DIEGO L. REV. 971 (2014). For overviews of this recent academic literature, and arguments for a realistic middle way, see KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE (2015); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

30 *See e.g.*, LEGAL RESPONSES, *supra* note 29; BRIAN LEITER, WHY TOLERATE RELIGION? 63 (2013); Laycock, *The Campaign Against Religious Liberty*, *supra* note 26; Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); Smith & Alexander, *supra* note 29.

31 MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY (2d rev. ed. 2014); for other recent examples see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. FORUM 416, 419–21 (2016); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005); Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. FORUM 24 (2014).

their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action."[32] Government must be studiously neutral in its devotion to "principled" toleration; it is "unfair," "arbitrar[y]," impractical, and even "anarch[ic]" to give special accommodations, exemptions, immunities, or protections to religion or to religious claims of conscience.[33] Doing so would be "a morally objectionable injury to the general welfare" and would "impose burdens on those who have no claim of exemption."[34] Indeed, Leiter muses whether there may be "reason to worry that religious beliefs, as against other matters of conscience, are *far more likely* to cause harms and infringe on liberty?"[35] Consider religion's track record of late in abridging the fundamental rights of others to reproductive freedom, marital equality, or sexual liberty. Or consider that "religious believers overwhelmingly supported George W. Bush, widely considered one of the worst presidents in the history of the United States, whom many think ought to be held morally culpable both for the illegal war of aggression against Iraq as well as the casualties resulting from domestic mismanagement."[36] This might well provide "the basis of an argument for why there are special reasons *not* to tolerate religion" at all—although, Leiter allows, that would require empirical proof that religion, on balance, does more harm than good.[37]

University of Virginia law professor Micah Schwartzman has similarly attracted attention with a series of sharp law review attacks on religious exemptions and religious institutionalism.[38] He argues that America has now come to embrace a great "diversity of nontheistic religious, ethical, and moral doctrines" from which religion "cannot easily be distinguished . . . on epistemic or psychological grounds."[39] Religious claims of conscience, he writes, have no more right to accommodations or exemptions than any other "comprehensive secular doctrine," and for the state to give them such would be patently "unfair" and unwieldy and yield "inconsistenc[y]" in the application and enforcement of general laws.[40] Moreover, free exercise religious exemptions cannot be viewed as a constitutional counterweight to the Establishment Clause limit on governmental support for religion. Whatever the courts make of the Establishment Clause, the very notion that "religious convictions can serve as sufficient reasons for state

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32 LEITER, *supra* note 30, at 63.

33 *Id.* at 94, 102.

34 *Id.* at 99.

35 *Id.* at 59.

36 *Id.* at 83.

37 *Id.* at 59, 84. *But see* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013); Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395 (2014).

38 *See*, inter alia, Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013); Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES 15 (2013); Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014); Schwartzman, *supra* note 30. For rejoinders, see Thomas C. Berg, *"Secular Purpose," Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24 (2013); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71 (2013).

39 Schwartzman, *supra* note 30, at 1426.

40 *Id.* at 1377, 1424, 1426.

action . . . is one that we should reject as a threat to the very foundations of our constitutional order" in a pluralistic liberal democracy.[41] Finally, Professor Schwartzman (with co-author and colleague Richard Schragger) argues that the notion that religious groups have special corporate autonomy is a quaint species of "neo-medieval" nostalgia about the "two kingdoms" of church and state and a dangerous form of "corporatist" pluralism that would afford free-handed "sovereignty" to other institutions besides the state.[42] The reality is that a religious institution enjoys no more power, rights, or autonomy than the individuals who make it up. A religious group has no more basis for encroaching on other people's rights or freedoms than any one member of that religious group might have. All this, Schwartzman concludes, might be "morally regrettable" and cause "intellectual ache" to religious freedom advocates, but that's just how it is in our postmodern day. Religious freedom had its special time.[43] That time has passed.

There is much more to Professor Leiter's and Schwartzman's arguments than this, of course, and there are many more such critical arguments on religious freedom now crowding the law review pages and library bookshelves.[44] But this sampling gives a little flavor of critical academic opinion today. Religious liberty is increasingly viewed as an impediment to progress, not a bulwark of democracy; as a shield for bigotry, not a haven for the unpopular; as a threat to liberalism, not a foundation of liberty. Leading religious freedom scholars like Michael McConnell,[45] Douglas Laycock,[46] Kent Greenawalt,[47] Andrew Koppelman,[48] Richard Garnett,[49] Thomas Berg,[50] and several others have parried these attacks. But after reading all this internecine law review squabbling, Stanley Fish—no stranger to strong debates about fundamental matters—dismissed it all as "a dispiriting record of hairsplittings, pendulum swings, ad hoc acrobatics, systematic distortions, strained redefinitions, and just plain logical howlers. What we have, in short, is the ongoing spectacle, bordering on farce, that is religion clause jurisprudence."[51]

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41 *Id.* at 1426–27.

42 Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 38, at 922, 930.

43 Schwartzman, *supra* note 30, at 1351–52, 1414 (internal quotation marks omitted) (quoting Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1306 (1983)); *see also* Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 38.

44 *See, e.g.*, Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981 (2013); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2014).

45 *See, e.g.*, McConnell, *supra* note 37.

46 *See, e.g.*, Laycock, *supra* note 10; Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. FORUM 369 (2016).

47 *See, e.g.*, Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131 (2010); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91 (2013).

48 *See, e.g.*, Koppelman, *supra* note 38; Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079 (2014); KOPPELMAN, *supra* note 29.

49 *See, e.g.*, Richard W. Garnett, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman*, 39 PEPP. L. REV. 1149 (2013); Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011); Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493 (2015).

50 *See, e.g.*, Berg, *supra* note 38; Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 280 (2013).

51 Stanley Fish, *Where's the Beef?*, 51 SAN DIEGO L. REV. 1037, 1043 (2014).

III. RESPONDING TO THE CRITICISMS OF RELIGIOUS FREEDOM

We have not joined these law review debates to date, and we dip into them here with some hesitation since analysis and exposition have been our chosen methods of scholarship, not polemics and disputation. But religious liberty is too precious and hard-won a foundation and feature of modern democratic life to allow all these critical assaults to go by without comment on some of their fundamental weaknesses. "Come now let us reason together," says the ancient Prophet Isaiah—an admonition as important for community life today as it was in that ancient time.[52]

Too many of these critical arguments trade in revisionist history that pretends that the American founders cared rather little about religious freedom, that the First Amendment was only an "afterthought" and "foreordained" to fail,[53] or that principles like separation of church and state were really designed to protect Protestant hegemonies against surging Catholicism.[54] The historical reality is that the founding generation spent a great deal of time debating and defending religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791: notably, the principles of liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of religion.[55] Yes, sadly, some later Protestant majorities did abuse Catholics, Jews, Mormons, Native Americans, and too many others.[56] But these were violations of constitutional freedom norms, not manifestations of their prejudicial designs—as some nineteenth-century cases and many more twentieth-century constitutional cases made abundantly clear.

Too many of these critical arguments trade in philosophical abstractions that hover too high above the hard and quotidian legal questions that have occupied the Supreme

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52 *Isaiah* 1:18.

53 STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 48–75 (2014); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1999).

54 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004); DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM (2011); *see* John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003) (reviewing Hamburger). In addition, see the historical claims of HAMILTON, *supra* note 31, which prompted a blistering review by Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007). And more generally, see the new critical historiography of human rights by Samuel Moyn, who argues that the international religious freedom norms and other human rights that emerged in the mid-twentieth century were the product of a conservative Christian movement, driven by aggressive and theologically-infused personalist philosophies of human dignity designed to protect the interests of the church and the hegemony of Christianity. SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015). For a critical review, see John Witte, Jr., *The Long History of Human Rights*, BOOKS & CULTURE, Mar.–Apr. 2016, http://www.booksandculture.com/articles/2016/marapr/long-history-of-human-rights.html; *see also* ALLEN D. HERTZKE, FREEING GOD'S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS (2004); DAVID LITTLE, ESSAYS ON RELIGION AND HUMAN RIGHTS: GROUND TO STAND ON 57–82, 170–76 (2015); Joel A. Nichols, *Evangelicals and Human Rights: The Continuing Ambivalence of Evangelical Christians' Support for Human Rights*, 24 J.L. & REL. 629 (2009).

55 Joel A. Nichols & John Witte, Jr., *National Report [for the] United States of America: Religious Law and Religious Courts as a Challenge to the State*, *in* RELIGIOUS LAW AND RELIGIOUS COURTS AS A CHALLENGE TO THE STATE: LEGAL PLURALISM IN COMPARATIVE PERSPECTIVE 83 (Uwe Kischel ed., 2016); WITTE & NICHOLS, *supra* note *, at 41–63.

56 WITTE & NICHOLS, *supra* note *, at 64–116; NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (T. Jeremy Gunn & John Witte, Jr. eds., 2012).

Court in its 230 cases on religious freedom, let alone the many thousands of lower federal and state court cases on point. Academic reflections on the appropriate forms and scope of religious liberty, of course, are not bound by what courts have said, nor compelled to follow all the silly casuistry that plagues parts of the First Amendment caselaw. But legal theories of religious freedom should at least deal concretely with the laws of religious freedom on the books and in action, offering reforms and improvements on how to apply them.[57]

Professor Schwartzman, for example, spills a great deal of ink building up theoretical constructs—of "inclusive accommodation, exclusive accommodation, exclusive nonaccommodation, and inclusive nonaccommodation"—only to shoot them all down as part of his broader assault on religious freedom gone wild.[58] But nowhere does he acknowledge that religious freedom accommodations have been part of American law from its colonial beginnings—think of religious oath requirements, military conscription laws, or property tax laws that have always included exemptions. Nor does he acknowledge that religious accommodations have not proved to be the unworkable, unwieldy, or (as Leiter puts it) "anarchic" undermining of general laws that they are described to be.[59] Must we dispense with all of the historic religious accommodations? Is the law of religious accommodations or exemptions any harder to administer than any other complex law in action? Would Professor Schwartzman forbid the legislature or the judiciary from creating new accommodations? On what constitutional grounds? Nowhere does he acknowledge that free exercise rights or legislative accommodations do not protect religious activities that put others at serious risk of harm or violate others' fundamental rights. Religious exemptions create spaces for believers to exercise their faiths peacefully, not licenses to do harm to their neighbors or to the common good. Even *Hobby Lobby*, the poster case for "extreme religious freedom," went to great lengths to insist that the company owners' conscientious objections to paying for certain forms of birth control health insurance coverage did not and could not negate a woman's right to contraceptives.[60] The issue in the case is who pays for the contraceptives, not whether a woman has a right to them.[61] And nowhere does Professor Schwartzman's attack on religious institutionalism address the legal reality that all manner of institutions—corporations, labor unions, universities, charities, libraries, hospitals, and many others—exercise power and responsibility, and enjoy rights and liberties beyond what any individual member of that group can muster on his or her own.[62] Surely he cannot want us to go back to simple Lockean social contract theories of legal groups as mere voluntary assemblies of like-minded individuals. Nor can he want us to revisit questions about corporate identity and rights that have been settled in the United States since *Trustees of*

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57 Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

58 Schwartzman, *supra* note 30, at 1358.

59 *See* Koppelman, *supra* note 38, at 71–83; Rienzi, *supra* note 37, at 1410–14; *see also* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163 (2016).

60 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

61 For an interesting analysis, see RAVITCH, *supra* note 22.

62 *See also* Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013), with fuller treatment in PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

Dartmouth College v. Woodward (1819)[63] and its many progeny. If the status of group rights is not up for grabs, why should the legal status of religious groups be up for grabs?[64] The Western legal tradition has recognized religious group rights at least since the Edict of Milan in 313.[65] And today every major international human rights instrument on religion and every liberal democracy in Europe does so, too[66]—even those with professed national policies of "secularism."[67] Why should American law now be different?

Too many of these critical arguments trade in outmoded philosophical assumptions that serious public and political arguments about the fundamentals of life and the law can take place under the "factitious or fictitious scrim of value neutrality."[68] The reality, the last generation of philosophy has taught us, is that every serious position on the fundamental values governing public and private life—on warfare, marriage reform, bioethics, environmental protection, and much more—rests on a set of founding metaphors and starting beliefs that have comparable faith-like qualities.[69] Liberalism and secularism are just two belief systems among many, and their public policies and prescriptions are enlightened, improved, and strengthened by full public engagement with other serious forms of faith, belief, and values. Today, easy claims of rational neutrality and objectivity in public and political arguments face very strong epistemological headwinds. Even the leading architects of religion-free public reason a generation or two ago have abandoned these views. John Rawls and Jürgen Habermas, for example, have affirmed in their later writings that religion can play valuable and legitimate roles in the lawmaking processes of liberal democracies.[70] A growing number of serious political thinkers now acknowledge that deeply held beliefs and values, whether they issue from secular or religious sources, are not easily bracketed in public discourse; that efforts to exclude an entire class of moral and metaphysical knowledge are more likely to yield mutual distrust and hostility than social accord; that free speech norms do not allow the

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63 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

64 *But cf.* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 280 (2015) (disagreeing with *Burwell*, 134 S. Ct. at 2767, and asserting, "There is no principled basis for corporate religious liberty."). *Contra* Alan J. Meese & Nathan B. Oman, Hobby Lobby*, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014); Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777 (2015) (discussing how the *Hobby Lobby* opinion squares well with corporate social responsibility and the notion that corporations can and sometimes do pursue goals other than maximizing shareholder profits); *see also* RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION 139 (2015).

65 WITTE & NICHOLS, *supra* note *, at 10; LACTANTIUS, DE MORTIBUS PERSECUTORUM 71–73 (J.L. Creed trans. & ed., 1984).

66 WITTE & NICHOLS, *supra* note *, at 249–75.

67 *Id.* at 259–65; Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 78 (2002). More recently, see IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 41–112 (2014).

68 LENN E. GOODMAN, RELIGIOUS PLURALISM AND VALUES IN THE PUBLIC SPHERE 101 (2014). This paragraph is adapted from Justin Latterell & John Witte, Jr., *Law, Religion, and Reason in a Constitutional Democracy:* Goodman v. Rawls, 16 POL. THEOLOGY 543, 546 (2015).

69 JOHN PERRY, THE PRETENSES OF LOYALTY: LOCKE, LIBERAL THEORY, AND AMERICAN POLITICAL THEOLOGY (2011); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

70 *See, e.g.*, Jürgen Habermas, *An Awareness of What Is Missing*, *in* AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE 15 (Ciaran Cronin trans., 2010); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

prohibition of religion from the public square; and that avowedly secular values are not inherently more objective than their religious counterparts.[71] Secular norms and idioms can serve as useful discursive resources in religiously pluralistic societies. But purging religion altogether from public life and political deliberation, as some aggressive interpreters of the Establishment Clause demand, is impractical, shortsighted, and unjust.

Too many of these critical arguments against religious liberty trade in caricatures of religion that bear little resemblance to reality. Professor Leiter's *Why Tolerate Religion?*, for example, treats religion as an irrational opiate of the masses. Religion, he writes, by definition consists of categorical beliefs that "are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science."[72] Religions place "*categorical* demands on action . . . that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up."[73] And religion provides mainly "existential consolation" about "the basic existential facts about human life, such as suffering and death."[74] Why should a claim or claimant that is so irrational, unscientific, categorical, abstract, and impervious to empirical evidence or common sense get special constitutional treatment, Professor Leiter asks? Just because religion provides existential consolation? Many other nonreligious things do, too. Just because religion leads some people to do good to others? People do good for all kinds of nonreligious reasons, too, and plenty of religious folks also do very bad things. There's nothing to religion that makes it more special or more deserving of constitutional protection than other types of thought or action, Professor Leiter concludes. If anything, because religion is irrational and categorical, it should be subject to special supervision, not special accommodation.[75]

Few people of faith, and even fewer scholars of religion, would recognize this caricature of religion. For many adherents, religion consists of complex and comprehensive "life-worlds" (as anthropologists call them). Religion involves daily rites and practices, patterns of social life and culture, and institutional structures and activities that collectively involve almost every dimension of an individual's public and private life. Professor Leiter and many other critics of religious freedom posit a flat and anachronistic concept of "religion" as mere irrational belief and self-interested truth claim. And even then, they pay little attention to the immense literature on philosophy of religion and religious epistemology, hermeneutics, theological ethics, and more, which has placed religious ideas and beliefs, metaphors and norms, and canons and commandments into complex and edifying conversations with nonreligious premises and worldviews. It is this diverse and often sophisticated world of religious ideas and institutions, norms and practices, and cultures and communities whose freedom is at stake, not the imagined religious abstractions that haunt the law review world.[76]

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71 Habermas, *supra* note 70; Rawls, *supra* note 70.

72 LEITER, *supra* note 30, at 34.

73 *Id.*

74 *Id.* at 52 (emphasis omitted).

75 *See id.* at 59–64, 73–85.

76 For further discussion, see Christopher J. Eberle, *Religion and Insularity: Brian Leiter on Accommodating Religion*, 51 SAN DIEGO L. REV. 977 (2014); McConnell, *supra* note 37, at 782–89; Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014); *see also generally* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTIONS IN LIBERAL POLITICS (2002).

Too many of these critical arguments trade in one-sided sociologies that dwell on the negatives rather than the positives of religion. It is undeniable that religion has been, and still is, a formidable force for both political good and political evil, that it has fostered both benevolence and belligerence, and both peace and pathos of untold dimensions. But when religious officials or religious group members do commit crimes—embezzling funds, perpetrating fraud, evading regulations, withholding medical care, betraying trust, raping children, abusing spouses, fomenting violence, harming the life and limb of anyone, including their own members—they are and should be prosecuted just like everyone else. Religious freedom does not and should not provide protections or pretexts for crime. But the grim reality is that these crimes occur in every organization, and are perpetrated by all manner of people, religious and nonreligious alike. That these abuses must be rooted out, however, does not mean that the perpetrator's individual or corporate rights must end as a consequence. Governments do not close down schools, libraries, clubs, charities, or corporations when a few of their members commit these crimes. They prosecute the criminals, following the norms of due process. The same should take place in our churches, synagogues, temples, and mosques that harbor criminal suspects.

Moreover, we would do well to remember the immensely valuable goods that religion offers to a community. America's leading religious historian, Martin E. Marty, has documented the private and public goods of religion over a sixty-year career. Religions, he shows, deal uniquely with the deepest elements of individual and social life. Religions catalyze social, intellectual, and material exchanges among citizens. Religions trigger economic, charitable, and educational impulses in citizens. Religions provide valuable checks and counterpoints to social and individual excess. Religions help diffuse social and political crises and absolutisms by relativizing everyday life and its institutions. Religions provide prophecy, criticism, and exemplars for society. Religions force others to examine their presuppositions. Religions are distinct repositories of tradition, wisdom, and perspective. Religions counsel against apathy. Religions often represent practiced and durable sources and forms of community. Religions provide leadership and hope, especially in times of individual and social crisis. Religions contribute to the theory and practice of the common good. Religions represent the unrepresented, teach stewardship and preservation, provide fresh starts for the desperate, and exalt the dignity and freedom of the individual.[77] No religion lives up to all these claims all the time; some religions never do. But these common qualities and contributions have long been among the reasons to support the special place of religion in the American constitutional and cultural order.[78]

Finally, too many of these critical arguments fail to appreciate how dearly fought religious freedom has been in the history of humankind, how imperiled religious freedom has become in many parts of the world today, and how indispensable religious freedom has proved to be for the protection of other fundamental human rights in modern democracies.[79] Even in postmodern liberal societies, religions help to define the

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77 *See* MARTIN E. MARTY & JONATHAN MOORE, POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE (2000).

78 *See* KOPPELMAN, *supra* note 29, at 120–65 (offering a jurisprudential exposition of the goods of religion).

79 *See* BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2011); Daniel Philpott, *In Defense of Religious Freedom,*

meanings and measures of shame and regret, restraint and respect, and responsibility and restitution that a human rights regime presupposes. Religions help to lay out the fundamentals of human dignity and human community, and the essentials of human nature and human needs upon which human rights norms and instruments are built. Moreover, religions stand alongside the state and other institutions in helping to implement and protect the rights of a person and community—especially at times when the state becomes weak, distracted, divided, cash-strapped, corrupt, or is in transition. Religious communities can create the conditions (sometimes the prototypes) for the realization of civil and political rights of speech, press, assembly, and more. They can provide a critical (sometimes the principal) means of education, healthcare, childcare, labor organizations, employment, and artistic opportunities, among other things. And they can offer some of the deepest insights into the duties of stewardship and service that lie at the heart of environmental rights and protection.

Because of the vital role of religion in the cultivation and implementation of other human rights, many social scientists and human rights scholars have come to see that providing strong protections for religious beliefs, practices, and institutions enhances, rather than diminishes, human rights for all.[80] Many scholars now repeat the American founders' insight that religious freedom is "the first freedom" from which other rights and freedoms evolve.[81] For the religious individual, the right to believe often correlates with freedoms to assemble, speak, worship, evangelize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to practice religion collectively implicates rights to corporate property, collective worship, organized charity, religious education, freedom of press, and autonomy of governance. Several detailed studies have shown that the protection of "religious freedom in a country is strongly associated with other freedoms, including civil and political liberty, press freedom, and economic freedom, as well as with multiple measures of well-being"—less warfare and violence, better healthcare, higher levels of income, and better educational and social opportunities, especially for women, children, the disabled, and the poor.[82]

By contrast, where religious freedom is low, communities tend to suffer and struggle. A comprehensive 2009 study, updated in 2016, documented that more than a third of the world's 198 countries and self-administering territories had "high" or "very high" levels of religious oppression, sometimes exacerbated by civil wars, natural disasters, and foreign invasions that have caused massive humanitarian crises. The countries on this dishonor

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Presented at the Annual Meeting of the American Political Science Association, 31 J.L. & RELIGION (forthcoming 2016).

80 *See, e.g.*, Thomas F. Farr, *Diplomacy in an Age of Faith: Religious Freedom and National Security*, 87 FOREIGN AFF. 110, 111 (2008) ("Social science data show strong correlations between religious freedom and social, economic, and political goods."); Nathan R. Todd, *Religious Networking Organizations and Social Justice: An Ethnographic Case Study*, 50 AM. J. COMMUNITY PSYCHOL. 229 (2012).

81 *See, e.g.*, Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000); *cf.* Peter Manseau, *Is Religious Freedom Really Primary?*, N.Y. TIMES (Oct. 26, 2012), http://campaignstops.blogs.nytimes.com/2012/10/26/is-religious-freedom-really-primary (illustrating how the concept of religious freedom as the first freedom is a bipartisan belief among presidential candidates going back decades, and noting that "[t]he suggestion that religious liberty is the nation's 'first freedom' has become so commonplace that it seems churlish to question it").

82 Brian J. Grim, *Restrictions on Religion in the World: Measures and Implications*, *in* THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES 86, 101 (Allen D. Hertzke ed., 2013).

roll include Iran, Iraq, India, Pakistan, Bangladesh, Sri Lanka, Indonesia, Saudi Arabia, Somalia, Yemen, Sudan, South Sudan, Egypt, Israel, Burma, Rwanda, Burundi, Congo, Chechnya, and Uzbekistan, among others.[83] A recent annual report of the U.S. Commission on International Religious Freedom confirms the precarious status of religious minorities in many parts of the world, now exacerbated by the rise of ISIS in the Middle East and the escalating oppression of Muslim and Christian minorities in various parts of the world.[84] A 2014 study found that Christians, in fact, were more widely harassed than any other religious group, experiencing social and political hostility in at least 110 countries.[85] These hostilities against religious believers are carried out by a wide range of private groups and governmental entities. They include arrests and detentions; desecration of holy sites, books, and objects; denial of visas, corporate charters, and entity status; discrimination in employment, education, and housing; closures of worship centers, schools, charities, cemeteries, and religious services; and worse: rape, torture, kidnappings, beheadings, and the genocidal slaughter of religious believers in alarming numbers in war-torn areas of the Middle East and Africa.[86] In light of these grim global realities, those who argue that American religious freedom is a dispensable cultural luxury would do well to direct their formidable talents to more constructive agendas.

IV. RESTORING AMERICA'S ENDURING RELIGIOUS FREEDOM PRINCIPLES

So, where do we go from here? We suggest looking back to the wisdom of the American founders and using their enduring insights to appreciate what it is at stake in the modern culture wars over religious freedom, at home and abroad.

Let's let John Adams, Massachusetts jurist, constitutional framer, and future American president be our guide in the brief look backward. Writing in the context of the United States Constitutional Convention of 1787, Adams offered a robust appraisal of the new American 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

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83 *See* 1–2 CHRISTIANITY AND FREEDOM: HISTORICAL AND CONTEMPORARY PERSPECTIVES (Timothy Samuel Shah & Allen D. Hertzke eds., 2016); PEW FORUM ON RELIGION & PUB. LIFE, GLOBAL RESTRICTIONS ON RELIGION 12 (2009), http://www.pewforum.org/files/2009/12/restrictions-fullreport1.pdf. *But see* PEW RES. CTR., TRENDS IN GLOBAL RESTRICTIONS ON RELIGION (2016), http://www.pewforum.org/2016/06/23/trends-in-global-restrictions-on-religion/?utm_source=Pew+Research+Center&utm_campaign=400ec7484e-Religion_weekly_June_23_2016&utm_medium=email&utm_term=0_3e953b9b70-400ec7484e-399936457 (showing, in the most recent Pew poll, a decline in religious restrictions and hostilities).

84 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANN. REP. 2014, 15TH ANNIVERSARY RETROSPECTIVE: RENEWING THE COMMITMENT (2014).

85 PEW RES. CTR., RELIGIOUS HOSTILITIES REACH SIX-YEAR HIGH 21 (2014), http://www.pewforum.org/files/2014/01/RestrictionsV-full-report.pdf. By comparison, Muslims were harassed in 109 countries; Jews in 71 countries; "others" (e.g., Sikhs, Zoroastrians, Baha'i, etc.) in 40 countries; "folk religionists" in 26 countries; Hindus in 16 countries; and Buddhists in 13 countries. *Id.*

86 *See id.*; *see also* W. Cole Durham, Jr. et al., *The Status of and Threats to International Law on Freedom of Religion or Belief*, *in* THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES, *supra* note 82, at 31.

> will merit even greater punishment than other nations have suffered, and the indignation of Heaven. . . .
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> . . . .
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> 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 may hereafter become an object of curiosity. . . . [For it is] destined to spread over the northern part of . . . the globe . . . .
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> 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.[87]

For Adams, this was a "trust of the greatest magnitude . . . and the eyes of the world are upon [us.]"[88]

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.[89]

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.[90] 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.[91] 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

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87 4 THE WORKS OF JOHN ADAMS 290, 292–93, 298 (Charles Francis Adams ed., 1851) [hereinafter WORKS] (footnote omitted); *see also* THE FEDERALIST NO. 37, at 173 (James Madison) (Terence Ball ed., 2003) (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").

88 8 WORKS, *supra* note 87, at 487.

89 WITTE & NICHOLS, *supra* note *, at 250–55.

90 Letter from John Adams to Josiah Quincy (Feb. 9, 1811), *in* 9 WORKS, *supra* note 87, at 630.

91 WITTE & NICHOLS, *supra* note *, at 24–40.

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.[92]

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.[93] 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.[94] 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 the protection of the First Amendment. And such protection sometimes requires special exemptions and accommodations that cannot be afforded by general laws.[95] "The tyranny of the majority," Madison reminds us, is particularly dangerous to religious minorities.[96]

A second key to re-striking this constitutional balance lies in the eighteenth-century founders' insight that 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"[97]—in John Inazu's apt phrase. Thus in creating the new American constitutions, the framers 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

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92 *See* John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213, 216 (1999).

93 Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996)*; see also generally* 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY (2010); 2 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE (2011).

94 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., 1962).

95 *See* WITTE & NICHOLS, *supra* note *, at 99–101 (regarding the meaning of liberty of conscience in the founding era).

96 *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 272 (Gaillard Hunt ed., 1904).

97 JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

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."[98]

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, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[99] The founders designed the First Amendment religion clauses as twin guarantees of religious liberty for all. The Free Exercise Clause 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 Establishment Clause outlaws government *prescriptions* 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 and free exercise of 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.[100]

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 of these insights recur in *Cantwell v. Connecticut* (1940)[101] and in *Everson v. Board of Education* (1947),[102] the two landmark cases that first applied the First Amendment religion clauses to the states and inaugurated the modern era of religious liberty in America.

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 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. By incorporating the First Amendment religion clauses into the Fourteenth Amendment Due Process Clause, the Court created a common and special law of religious liberty for the whole nation. "*Congress* shall make no law" now became, in effect, "*Government*

98 Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 WORKS, *supra* note 87, at 474; *see also* Letter from John Adams to Thomas Jefferson (June 28, 1813), *in* 2 THE ADAMS-JEFFERSON LETTERS 339–40 (Lester J. Cappon ed., 1959).

99 U.S. CONST. amend. I.

100 Nichols & Witte, *supra* note 55, at 92–94.

101 310 U.S. 296, 303–04, 310 (1940).

102 330 U.S. 1, 16 (1947).

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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.

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."[103] It "safeguards the free exercise of the chosen form of religion," the "freedom to act" on one's beliefs.[104] 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."[105] 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"; "can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."[106] 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 of it*, from receiving the benefits of public welfare legislation" or participating in the American public arena or political process.[107] Such was the original vision of the founders in the eighteenth century and of the Supreme Court at the start of the modern era of religious liberty in the 1940s.[108]

We need another landmark case or two to retrieve and reanimate these fundamental principles of religious freedom. The weakening of the First Amendment religion clauses in Supreme Court cases since the mid-1980s has placed too much discretionary power in the hands of the legislature and the states. Such a shift leaves what should be common national rights of religious liberty too vulnerable to fleeting political fashions and too

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103 *Cantwell*, 310 U.S. at 303.
104 *Id.*
105 *Id.* at 310.
106 *Everson*, 330 U.S. at 15–16.
107 *Id.* at 16.
108 For other insightful renderings of the multiple principles or values of the First Amendment religion clauses, see for example JESSE CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FAIRNESS AND FREE EXERCISE (2006); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008); STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2009).

contingent on a claimant's geographical location. The federal courts should provide common and firm religious liberty protections for all parties, no matter where those parties happen to reside or where they choose to file their lawsuits. This need for a strong common national law on religious liberty, in the face of grim bigotry at home and religious persecution abroad, was among the compelling reasons that led the Supreme Court in the 1940s to "incorporate" the First Amendment religion clauses into the Fourteenth Amendment Due Process Clause and make them binding on state and local governments.[109] It was also the reason that America and the world embraced religious freedom in the 1940s as a universal and non-derogable human right—one of the famous "four freedoms" that President Roosevelt championed to rebuke the horrific abuses inflicted on Jews and others during World War II.[110] This vision of a strong federal constitutional law of religious liberty remains essential for America, and the federal courts are still in the best position to enforce this law. Strong new statutes protecting religious freedom are welcome additions, but strong constitutional norms, enforced by the federal courts, are an essential core of American religious liberty.

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.[111] Robust religious freedom is one of the "fundamentals" of our constitutional structure—and we have certainly seen plenty of constitutional operators get wound up of late about religious liberty and wide pendular swings in First Amendment jurisprudence. But despite the loud criticisms from the academy, we may well have come to the end of a long constitutional swing of cases away from religious liberty 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 seven Supreme Court cases on religious freedom have all been wins for religion: *Arizona Christian School Tuition Organization v. Winn*,[112] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[113] *Town of Greece v. Galloway*,[114] *Burwell v. Hobby Lobby Stores, Inc.*,[115] *Holt v. Hobbs*,[116] *Reed v. Town of Gilbert*,[117] and *Zubik v. Burwell*.[118] And there have been parallel religious freedom victories in the European Court of Human Rights in recent years.[119]

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109 *See* WITTE & NICHOLS, *supra* note *, at 111–15.

110 *See* President Franklin D. Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2855 (Fred L. Israel ed., 1966); *see also* LOUIS B. SOHN, THE HUMAN RIGHTS MOVEMENT: FROM ROOSEVELT'S FOUR FREEDOMS TO THE INTERDEPENDENCE OF PEACE, DEVELOPMENT AND HUMAN RIGHTS (1995).

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

112 563 U.S. 125 (2011).

113 132 S. Ct. 694 (2012).

114 134 S. Ct. 1811 (2014).

115 134 S. Ct. 2751 (2014).

116 135 S. Ct. 853 (2015).

117 135 S. Ct. 2218 (2015).

118 136 S. Ct. 1557 (2016).

119 *See* WITTE & NICHOLS, *supra* note *, at 250–51.

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. As in Adams's day, so in our own, the United States remains positioned to take the global lead on this effort. Most of the core principles of religious freedom—liberty of conscience, freedom of exercise, religious equality and pluralism, and separation of church and state, or religion and government—forged in the course of the American constitutional experiment 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 our 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 liberty jurisprudence—particularly the long and shameful treatment of Native American Indian claims[120] and the growing repression of Muslims and other minorities at the local level, which are not being addressed very well.[121] It is essential that we show our traditional hospitality and charity to the "sojourner[s] who [are] within [our] gates"[122]—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.[123] 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. And it is essential that we make our landmark International Religious Freedom Act[124] 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 deprecated and underfunded when other special administration interests gain political favor.[125] Now is the time for American

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120 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 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"); *see also* Emp't Div. 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 generally* Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 253 (2012) ("[J]udicial events at the intersection of land and religion have been calamitous and, for Native Americans, full of violence and loss.").

121 Evelyn Alsultany, *Muslims Are Facing a Civil Rights Crisis in America, and It's the Media's Fault*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/11/11/muslims-are-facing-a-civil-rights-crisis-in-america/; *see also supra* note 12.

122 *Exodus* 20:10.

123 *See, e.g.*, ROBERT HEIMBURGER, GOD AND THE ILLEGAL ALIEN: FEDERAL UNITED STATES IMMIGRATION LAW AND A THEOLOGY OF POLITICS (forthcoming 2017).

124 22 U.S.C. § 6401 (2012).

125 *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

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, and sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights 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]."[126]

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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."); *cf.* Daniel Philpott, *Culture War or Common Heritage? On Recent Critics of Global Religious Freedom*, LAWFARE BOOK REVIEW (June 30, 2016), https://lawfare.s3-us-west-2.amazonaws.com/staging/2016/Philpott%20Review.pdf (reviewing ELIZABETH SHAKMAN HURD, BEYOND RELIGIOUS FREEDOM: THE NEW GLOBAL POLITICS OF RELIGION (2015) and SABA MAHMOOD, RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT (2015)).

126 8 WORKS, *supra* note 87, at 487; *see also* 4 *id.*, at 290, 292–93, 298.