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Introduction: The Future of Religious Liberty in America

Cover Page Footnote

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INTRODUCTION: THE FUTURE OF RELIGIOUS LIBERTY IN AMERICA

Mark L. Rienzi⁺

Early in the Supreme Court’s 2018-2019 Term, the Catholic University of America hosted a conference titled “The Future of Religious Liberty in America.” The conference was co-hosted by the Heritage Foundation and by the new Center for Religious Liberty at Catholic University’s Columbus School of Law. What you see in the pages that follow are five articles generated by the highly accomplished practitioners and scholars who participated in that conference.

The conference took place in November 2018, just a few days after bitterly-contested national elections, and just a few weeks after the bitterly-contested confirmation of Justice Brett Kavanaugh to the Supreme Court. Those days—like, unfortunately, so many days in recent years—prompted many people to wonder whether our society is fraying at the seams, and whether people with very different beliefs can live together in peace and harmony. Is it really possible for diverse people who have different beliefs about important issues to live together in a pluralistic democracy? Or will we ultimately refuse to tolerate, employ, accept, and live in neighborly peace with those who are different from us?

The question, of course, was not really new. Indeed, in many ways it was the animating idea behind the Constitution’s treatment of religious liberty. The Framers believed that people of different faiths could live together in a peaceful democracy if the government faced two constraints. First, it was important to protect the right of people to freely exercise their religion—even when the majority opposed it. The founding generation was all too familiar with the religious strife and violence that had consumed much of Europe in recent centuries when one religious group was ascendant and tried to use the power of government to stamp out alternative religious exercises. Second, and relatedly, the Framers sought to forbid the new federal government from establishing any religion—even if the majority wanted it. With individuals and groups free to peacefully exercise whatever faith they choose, and with the government foreclosed from adopting any one view of religious truth, the Framers had set the conditions for a healthy pluralism and freedom of religion.

And despite our differing beliefs, our commitment to religious liberty has often been something unified Americans, even across religious and political lines. The high point of that unity was probably 1993, when a broad coalition of interest groups from across the political and religious spectrum and politicians from across the political spectrum rejected the Supreme Court and Justice

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Scalia's decision in *Employment Division v. Smith* and enacted the Religious Freedom Restoration Act or "RFRA." RFRA was co-sponsored by Orrin Hatch and Ted Kennedy; it was sponsored the House by then-Congressman Chuck Schumer; it was supported by the National Association of Evangelicals and the ACLU; it was signed by Bill Clinton; it was passed nearly unanimously.

These days, we still sometimes see that kind of unity over religious liberty. Not long ago in the *Hosanna-Tabor* case, we saw the Supreme Court decide nine-nothing that religious groups ought to be able to choose the people who teach and preach their faith. In *Holt v. Hobbs* in 2015, we saw another unanimous decision from the Court protecting the right of a Muslim prisoner to grow a short, religious beard. And just this past June, we saw a broad cross-section of seven Justices agree that the Religion Clauses "aim to foster a society in which people of all beliefs can live together harmoniously."¹

This type of agreement can even come in unexpected places. For the past eight years, our federal courts have been filled with cases concerning the Affordable Care Act's mandate that many employers provide their employees with free access to contraception, sterilization, and abortion-inducing drugs. The mandate originated with the Obama Administration, and when the Trump Administration took over, many supporters of contraceptive access feared that the mandate would be eliminated. But rather than seek a winner-take-all solution to the religious liberty conflict, the Department of Health and Human Services instead left the mandate in place for virtually every employer to whom it had previously applied. As to the religious and moral objectors, the agency gave them an exemption, but it also moved to expand Title X access to ensure that anyone who worked for a religious objector who would not provide the coverage would have free or reduced cost access through Title X. Of course not everyone will be satisfied with this type of compromise—some on the right would prefer that the government get entirely out of the contraceptive business, and some on the left still insist that religious objectors should be forced to provide contraception rather than the government. But for most reasonable people, the compromise shows that it is possible for people of differing beliefs to co-exist; it turns out it is possible to both have a country with broad contraceptive access and not force Catholic nuns to help with the distribution.

It was in this spirit of finding ways for people of different beliefs to peacefully co-exist that the conference sponsors brought together a broad range of scholars and practitioners to talk about religious liberty. The speakers spanned both the political and the religious spectrum. And they came together for a civil, public discussion about how the law does, and should, address conflicts related to religious liberty. Like the articles that follow, the discussions were a model of thoughtful, intelligent, and friendly discussion among scholars and practitioners who do not all see eye-to-eye, but who demonstrated a commitment to the reasoned and civil exchange of ideas.

1. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074, 204 L. Ed. 2d 452 (2019)

It is a model that our country could use more of these days. I hope you enjoy the articles, and if you would like to watch the panels, they are available at: https://www.youtube.com/watch?v=gkDUEDE3uBw&list=PL_aRAkHbV7Gv iwE6oOCJF6PvHq51Z4EWR.

