

# Exceptional and Universal? Religious Freedom in American International Law

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## Abstract

This essay explores the paradoxical claims to exceptionalism and universalism that lie at the heart of the American tradition of religious liberty. In considering how and with what consequences religious freedom has become embedded in the international legal order with the rise of American power, the essay considers three themes linking together this history: first, the ambiguity of religious liberty conceived as internal to and outside of history; second, American efforts forcibly to transform the constitutional orders of foreign states over the last century to include religious freedom; and third, attempts to promote religious freedom through international conventions and extraterritorial domestic legislation.

## I. Introduction

The American International Religious Freedom Act of 1998 requires the annual publication of a report describing the status of religious freedom in every other country in the world so as to advance the foreign policy objective of promoting religious liberty internationally. This policy is said to draw deeply on two not just “consistent” but “mutually supportive” traditions:

Religious freedom has always been at the core of American life and public policy. It is the first of the freedoms enumerated in the Bill of Rights—a reflection of the founders’ belief that freedom of religion and conscience is the cornerstone of liberty. Freedom of religion and conscience, however, is not an American invention. Indeed, as recognized in the Universal Declaration of Human Rights, religious liberty and other universal rights are not “granted” by any state or society.<sup>1</sup>

The Act thus encapsulates the inscrutable paradox that lies at the heart of the American tradition of religious liberty: on the one hand, the venerated religion clauses of the First Amendment with their guarantees of non-establishment and free exercise are viewed as normatively exceptional (“our first liberty”) and exceptionally “ours” (America as the “particular guardian of freedom”); on the other hand, religious liberty is also viewed as a universal right (valid “for all nations and people who yearn to be free”). But how can reli-

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<sup>1</sup> Office of International Religious Freedom, Bureau of Democracy, Human Rights & Labor, Religious Freedom: An International Responsibility 1 (Apr. 16, 2001); U.S. Department of State, Annual Report on International Religious Freedom xiii (2001) (<http://www.state.gov/j/drl/rls/irf/2001/index.htm>).

gious liberty be simultaneously exceptional *and* universal? Is it universal because venerated by America's higher law, or is it constitutionally venerated because universal? The first proposition relates to the question of subjectivity (*we* declare religious liberty to be universal) while the second relates to that of normativity (it is ours because *universal*). But these propositions about American subjectivity and universal normativity cannot both be true at once: either *this* exceptional subject makes a constitutive difference to the universality of the right to religious liberty, or it does not.<sup>2</sup>

In order to see the paradox, consider the classic argument made by James Madison for religious liberty in 1785:

[W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.<sup>3</sup>

The close intertwining of subjectivity and normativity and the ensuing ambiguity internal to Madison's argument are remarkable. The question whether such founding arguments for religious liberty are properly understood as secular or religious is ceaselessly debated in American public life without possibility of resolution. The argument can be seen to rest on a double-maneuver. On the one hand, Madison makes a theological claim: while it is God who is the ultimate source of normativity, it is Man who has the authority to decide, according to his "conviction and conscience[,] the duty which we owe to our Creator and the manner of discharging it." This is a recognizably Protestant understanding of religion grounded in the unique double-bind of conscience viewed as simultaneously "interiorized" (and "privatized") in the individual subject and "freely chosen": the paradoxical idea that "conscience was directly bound to obey and follow God and not men: a theory of the free and at the same time unfree conscience (as the 'work of God,' as Luther had said)."<sup>4</sup>

On the other hand, Madison makes a moral-political claim: it is a "fundamental and undeniable truth" that there is an "inalienable right" to religious liberty. The ultimate source of normativity of this right is to be found not in God but in popular sovereignty

<sup>2</sup> This way of framing the question is, of course, a variant of the Socratic dilemma posed to Euthyphro. See John Gardner, *Law as a Leap of Faith*, in *Law as a Leap of Faith: Essays on Law in General* 1 (2012).

<sup>3</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).

<sup>4</sup> Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* 189 (2014).

itself (“*we hold it* for a fundamental and undeniable truth”) while the authority of the right lies not in the individual conscience but in the revealed law of the Constitution (“our first liberty”). This exceptional political theology helps to explain the remarkable *nexus* in American constitutionalism between textualism and originalism.<sup>5</sup> As Paul Kahn has observed, the American political imaginary is occupied by a new revolutionary trans-temporal collective subject: the popular sovereign and the Constitution is in this respect a sacred text.<sup>6</sup> The role of the judge is not to interpret but to *read* the Constitution, which is “a trace, a remainder, of the presence of the popular sovereign.”<sup>7</sup>

What is vital to see here is the paradoxical interrelationship between these maneuvers. In the first case, a universalist Protestant deism yields an exceptional subject for whom religion is both tamed in the form of “inner conscience” and free as a matter of “individual authority”; in the latter case, however, a universalist subject (the popular sovereign) yields an exceptional norm in the form of an inalienable right to religious liberty in which religion is again tamed, now under the constitutional authority of the state, but also free as a matter of normative right as an object of autonomous choice. This double-structure again raises the question with which this essay began: how, under Madison’s argument, can the subject and its liberty be simultaneously exceptional and universal? How can it be simultaneously religious *and* secular? It is an ineluctable feature of the American legal imagination to be able to hold the exceptionalism of both the subject and norm of Enlightenment-era Protestant thought as universal.

Writing in 1835, Tocqueville memorably observed that “[t]he Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other,” with the consequence that “[i]n the United States it is not only *mores* that are controlled by religion, but its sway extends over *reason*. . . . [s]o Christianity reigns without obstacles, by universal consent.”<sup>8</sup> The result is that “while the law allows the American people to do everything; there are things which religion prevents them from imagining and forbids them to become . . . . Religion, which

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<sup>5</sup> *Everson v. Board of Education*, 330 U.S. 1, 333 (1947) (Rutledge J., dissenting) (“No provision of the Constitution is more closely tied to or given content by its generating history than the religious clauses of the First Amendment.”).

<sup>6</sup> The popular sovereign is “a trans-temporal, omnipresent, and omniscient plural subject. It is invisible to those outside of its presence just as other forms of the sacred are invisible to those outside of the faith. It is the reified object of an experience of faith sustained through the imagination of sacrifice. This is the national narrative, endlessly repeated in film, books, and political rhetoric.” Paul W. Kahn, *Sacrificial Nation*, *The Utopian* (Mar. 29, 2010) (<http://www.the-utopian.org/post/2340099709/sacrificial-nation>).

<sup>7</sup> The judge’s “will is determined by his sight. Reading becomes an act of seeing.” This form of spectral knowledge is coupled with “an appeal to original history: temporal proximity to sacred presence carries its own weight.” In this way, the judge can appear to “subordinate himself to a law outside himself” while simultaneously “call[ing] the nation back to its sacred origin.” *Id.*

<sup>8</sup> Alexis de Tocqueville, *Democracy in America* 292 (J.P. Mayer ed., George Lawrence trans., 1969) (1851) (emphasis added).

never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions.”<sup>9</sup>

## II. “European” International Law

The notion of Christianity as at once foundational to modern liberal political order and exceptional as a collective civilizational identity has, of course, long been asserted in European public law and politics.<sup>10</sup> As Charles Hirschkind has noted, the “incorporation of what had been modernity’s other—religion—into its very fabric does not decenter the conceptual edifice of European modernity in any way.” Rather, as in Madison’s argument,

it turns out that the modern concept of religion as private belief conforms to religion in its essence [such that a] certain post-Reformation understanding of Christianity is valorized as true religion in its undistorted form, while all other religious traditions and forms of religiosity are recognized as incompatible with modernity, lacking all the doctrinal resources that would enable them to accede to the modern.<sup>11</sup>

There is today a vast literature on how this dialectic has shaped the distinctive center/periphery structure of modern European international law.<sup>12</sup> Prominent nineteenth-century international lawyers such as Lassa Oppenheim argued that international law was “essentially a product of Christian civilization” and represented a “legal order which binds States, chiefly Christian, into a community.”<sup>13</sup> On this premise, non-Christian States were in a separate category for “neither their governments nor their population are at present able to fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of [international] law.”<sup>14</sup> As Noyes observes, the equation of Christianity with the highest form of civilization and historical progress justified “interference by European States in the affairs of, and even subjugation of, some international actors that did not adhere to Christianity.”<sup>15</sup>

<sup>9</sup> Id. For this reason, “politics is free to dance lightly on the surface of life only because everything fundamental is fixed below it. The American imaginary is determined outside of politics.” William E. Connolly, *Tocqueville, Religiosity, and Pluralization*, in *The Ethos of Pluralization* 163, 169 (1995).

<sup>10</sup> See, e.g., Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion* 3-6 (Oscar Burge trans., 1997) (1985); Charles Taylor, *A Secular Age* 15, 20-21 (2007) (noting both the unique ability of Christianity to transcend its own particularity and the inexorable rise of modern liberal political orders as a signal achievement of Latin Christendom).

<sup>11</sup> Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 *Temenos* 123, 126 (2008).

<sup>12</sup> See especially Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv. Int'l. L.J.* 1 (1999) [hereinafter Anghie, *Finding the Peripheries*]; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

<sup>13</sup> Lassa Oppenheim, *International Law: A Treatise* 4, 346 (1905). Oppenheim considered religion as one of the main interests that define “civilised States” and “[a]s the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them.” Id. at 10.

<sup>14</sup> Id. at 148.

<sup>15</sup> John E. Noyes, *Christianity and Late Nineteenth-Century British Theories of International Law*, in *The Influence of Religion on the Development of International Law* 86 (Mark W. Janis ed., 1991).

For nineteenth-century European international lawyers such as James Lorimer, natural law explained the “right of national and ethical development and expansion” and “reconcil[e] us to the course of the world’s history.”<sup>16</sup> These jurists did not believe in sovereign equality.<sup>17</sup> Rather, the civilized/uncivilized distinction was the essential premise whereby only civilized states participated fully in the circle of sovereigns subject to the law of nations. For Lorimer, the “patent inequality that human reason so clearly revealed must be part of God’s natural order” and this led him to an obvious corollary of the inequality of States: the “need to rearrange States’ existing relationships to correspond to those suggested by their true power.”<sup>18</sup> On this basis, *to fail to intervene* in the affairs of foreign states was worse even than the “terrible form of war,” for the former “would involve the abandonment of progress, whereas the latter secures its attainment, though at a terrible, and perhaps needless, price.”<sup>19</sup>

The notion of human progress necessitated guardianship towards “barbarians and savages” and provided the moral and legal justification for the colonization of non-European peoples. As Lorimer stated:

All that can be said is, that at the point at which the rights and duties of recognition cease, the rights and duties of guardianship begin . . . . Colonisation, and the reclamation of barbarians and savages, if possible in point of fact, are duties morally and jurally inevitable; and where circumstances demand the application of physical force, they fall within necessary objects of war.<sup>20</sup>

The history of international law in the nineteenth century was thus the story of European expansion over a world imagined to be divided among civilized, barbarian (partly civilized) and savage (uncivilized) peoples, with the Christian/non-Christian distinction operating as the controlling opposition.<sup>21</sup> As discussed in Part III below, we see a remarkable congruence today between Lorimer and the threefold distinction drawn by John Rawls in his *Law of Peoples* as between liberal, nonliberal (“decent hierarchical societies”) and outlaw (“rogue”) states.<sup>22</sup> The basis for Rawls’s liberal/nonliberal distinction similarly hinges on a particular conception of religion and religious subjectivity as illustrated by his

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<sup>16</sup> James Lorimer, *The Institutes of Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* 334 (1872). Natural law, as with all legal and scientific postulates, derived from God who was infinite in His power and wisdom. Given that the law of nature was universal, the Law of Nations was itself the law of nature “realized in the relations of separate political communities.” James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* 12 (1883) [hereinafter Lorimer, *Law of Nations*].

<sup>17</sup> Indeed the “naturalist notion that a single universally applicable law governed a naturally constituted society of nations was completely repudiated by jurists of the mid-nineteenth century.” Anghie, *Finding the Peripheries*, supra note 12, at 20.

<sup>18</sup> Noyes, supra note 15, at 93.

<sup>19</sup> Lorimer, supra note 16, at 335-36.

<sup>20</sup> Id. at 227-28.

<sup>21</sup> Noyes, supra note 15, at 93.

<sup>22</sup> John Rawls, *The Law of Peoples* (1999).

telling hypothetical example of a “nonliberal Muslim people [called] ‘Kazanistan’” whose “system of law does not institute the separation of church and state” and where “Islam is the favored religion.”<sup>23</sup> It is not difficult to trace this same pattern and logic to those states repeatedly designated today by the U.S. Commission on International Religious Freedom as being “of particular concern.”<sup>24</sup>

### III. “American” International Law

While these themes concerning religion, colonialism and imperialism in European international legal histories have been widely studied, and while religious liberty has been a central preoccupation of American constitutionalism, such questions have not to date received the same attention in relation to American foreign policy and conceptions of international law. Anna Su’s path-breaking *Exporting Freedom: Religious Liberty and American Power* seeks to remedy this.<sup>25</sup> The book is arguably the first sustained attempt to map in detail the shifting contours and dynamics of efforts by the United States over the last century to promote religious freedom abroad.

Consistent with the thought of Oppenheim and Lorimer, Su begins by noting how “British and French religious freedom promotion efforts occurred within the broad confines of their respective empires as religious liberty largely facilitated the civilizing mission either to transform recalcitrant natives into loyal imperial subjects or to protect beleaguered Jews and Christians in extraterritorial extensions within other empires.”<sup>26</sup> But through a series of six closely researched historical vignettes, the book seeks primarily to recover the “outward-looking story of American religious freedom and the transnational legal regime it generated.”<sup>27</sup>

The signal contribution of *Exporting Freedom* is to elucidate through rich historical narrative the exceptionalist/universalist dialectic discussed in Part I in the story Su tells of American foreign policy and the shifting efforts by the United States to create various international religious freedom regimes. Here, the critical literature on European international law is a helpful point of comparison. Martti Koskenniemi has pointed to four directions in which to demonstrate the fluidity and incoherence of European legal histories and thus “destabilize the political and teleological normativities that go with them.”<sup>28</sup> The first is to show the colonial origins of international legal rules and institutions and the ways these have been deployed to impose Eurocentric and highly flexible

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<sup>23</sup> Id. at 75.

<sup>24</sup> See *infra* note 63 and accompanying text. These states are predominantly either “communist” (e.g., Cuba, China, North Korea) or “Islamic” (e.g., Iran, Iraq, Egypt, Pakistan, Saudi Arabia, Sudan, Syria).

<sup>25</sup> Anna Su, *Exporting Freedom: Religious Liberty and American Power* (2016) [hereinafter *Exporting Freedom*].

<sup>26</sup> Id. at 3.

<sup>27</sup> Id.

<sup>28</sup> Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 *Rechtsgeschichte* 152, 171 (2011).

standards of inclusion and exclusion. The second is to focus more closely on facts and the making of rules and practices at different moments and locations of the colonial encounter so as to “bring out the varyingly instrumental nature of the law that tended to follow the convenience of the Europeans.”<sup>29</sup> The third is to direct attention to the “hybridization of the legal concepts as they travel from the colonial metropolis to the colonies and their changing uses in the hands of the colonized.”<sup>30</sup> And the fourth is to “provincialize Europe and European laws” in the hope that such “genealogies may operate to pinpoint the ‘particular’ that is hidden by the discipline’s universal voice” and thus make visible “the relations of power they entail.”<sup>31</sup>

The remarkable achievement of *Exporting Freedom* is to have pursued all four of these strategies in telling how, and with what consequences, religious liberty has become embedded in the international legal order in accordance with the rise of American power. The sections that follow discuss three broad themes that run through and link together these historical accounts: first, regarding the ambiguity of religious liberty conceived as both internal to and outside of history (section A); second, regarding the American military occupations and efforts forcibly to transform the constitutional orders of the Philippines, Japan and Iraq to include religious freedom (section B); and third, regarding the attempts by Woodrow Wilson, Franklin Roosevelt, Scoop Jackson and the drafters of the International Religious Freedom Act of 1998 to promote religious freedom through international conventions and domestic legislation (section C).

### A. *Religious Liberty in History*

Of all the claims that modern discourse on the right to religious freedom makes, none is more insistent or polemical than the claim to universality. As I have argued elsewhere, by simultaneously invoking principles of neutrality, secularity, freedom, and right, this claim is to have located an Archimedean vantage point somehow above or independent of the contingencies and disorder of politics, culture, religion, and, indeed, even of history itself.<sup>32</sup> A great deal of recent scholarship, however, has begun to interrogate this reigning narrative to suggest that religious liberty is inescapably context-bound and inseparable from contingencies of politics, power, and history. While not advancing any overarching theoretical explanation or critique, *Exporting Freedom* makes an important contribution to this literature by tracking the career of religious liberty through over a century of American foreign policy and decisively confirming this critical thesis through its rich historical detail.

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<sup>29</sup> Id. at 172-73.

<sup>30</sup> Id. at 173. A wonderful example is Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 *Harv. Int'l. L.J.* 289 (2007).

<sup>31</sup> Koskenniemi, *supra* note 28, at 174. The aim is thus to “make that which presents itself as timeless and universal as contextually bound to particular projects or interests.” Id.

<sup>32</sup> See Special Issue, *Politics of Religious Freedom: Contested Genealogies*, 113 *So. Atl. Q.* 1 (Saba Mahmood & Peter G. Danchin eds., 2014).

In her other recent work, Su has made clear she is attentive to the dangers of what Eric Foner calls “the plumb line” problem in legal historiography whereby “a political theory or idea is given a fixed definition and is then traced how it has been worked out over time.”<sup>33</sup> This approach presents the twin dangers of naturalizing either present factual arrangements or a normative ideal. Much recent debate in human rights literature has focused on the quest for origins and, in particular, on Samuel Moyn’s *The Last Utopia: Human Rights in History*. This work has questioned the relationship between Enlightenment era doctrines of the Rights of Man—or indeed earlier conceptions of humanist universalism from the Stoics to the authors of the New Testament—and contemporary notions, especially as embedded in the post-1948 international law of human rights.

Is this a story of continuity and linear teleological progress, as an essential idea or concept, itself in some sense ahistorical, foundational and universal, gradually works itself out towards the *End of History and the Last Man*? Or is this instead a story of constant rupture and contingency, as new ideas and concepts emerge and submerge as a result of competing historical forces, power relations, and ultimately incommensurable and plural normativities and ways of life? Are the eighteenth-century Rights of Man, conceived as internal to the emergence of the European nation-state, an earlier version of the same concept or an entirely different concept to the universal human rights articulated in the Universal Declaration of 1948?

What is compelling about *Exporting Freedom* is how the book charts the ambiguities and shifting normativities of religious liberty within the history of global projection of American power. As discussed above, there are at least two universalities entwined in the American imaginary of religious freedom, one theological in the form of conscience/belief and the other moral-political in the form of right/freedom.<sup>34</sup> At some level, all of these norms claim to stand outside of history while at the same time revealing themselves within it in an individual subject who simultaneously believes freely as a matter of conscience/faith and chooses autonomously as a matter of right. In the American constitutional tradition, this revelation is codified tersely in the non-Establishment and Free Exercise clauses of the First Amendment which together represent a complex entanglement of these claims.<sup>35</sup>

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<sup>33</sup> Anna Su, Separation Anxiety: The End of American Religious Freedom?, 30 Const. Comm. 127, 134 (2014) (citing Eric Foner, *The Story of American Freedom* xiv (1999)).

<sup>34</sup> Su makes the same point in relation to European histories of religious liberty, noting Eric Nelson’s recent argument that “theological debates in Europe around the notion of a Hebrew Republic influenced the development of ideas surrounding religious tolerance among British Protestants during the early modern period,” and Jeremy Waldron’s argument that “John Locke, that quintessential Enlightenment thinker and progenitor of so many American constitutional ideas, was very much influenced by Christian theism in his political writings, including his ideas on religious toleration.” Id. at 134-35 (discussing Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (2010); Jeremy Waldron, *God, Locke and Equality: Christian Foundations of Locke’s Political Thought* (2002)).

<sup>35</sup> On Madison’s argument, a transcendent but otherwise absent “clockmaker” God stands behind the claim to conscience/belief as the essence of religion—a theological argument that privileges inner faith and belief over external religious authority and law, e.g., *halacha* or *sharia*—while a transcendental or natural claim to reason stands behind the claim to individual right as the essence of freedom—a moral-political argument



The underlying question raised by *Exporting Freedom* is what happens when we view the conjoined claims of conscience/faith and right/freedom as *themselves* the products of and evolving within particular histories and historical forces. What conceptions of religion and religious subjectivity do these contingent claims make possible and/or foreclose? In particular, what are the implications for non-Western religious and political traditions once we recognize that both the origins and justifications of the right to religious liberty have developed in a way that is predominantly internal to Western Christian histories? These questions present two critical challenges to religious liberty's claim to universality: first, in relation to normative pluralism and the challenge this poses to foundationalism; and second, in relation to tainted or parochial origins and the challenges posed more broadly by genealogy. It is to these issues we can now turn.

### *B. Religious Liberty and Sovereignty*

International law traditionally fights a battle for its validity *qua* law on two fronts: first against the notion that it is merely a species of international morality and thus substitutes vague and subjective ideas about justice for the rules actually obtaining between states;<sup>36</sup> and second against the notion that it is merely external domestic law because it identifies international law primarily with State will and consent.<sup>37</sup> In the American tradition of international law, these two strands of universal morality and national interest have always been fluidly combined as the exceptional nature of the American constitutional order is projected as universally right. In the words of Thomas Paine, the “cause of America is in a great measure the cause of all mankind.”<sup>38</sup>

The American international legal project has increasingly been defined by concerted efforts to shape and at times forcibly transform the nature and identity of foreign states and their freedom as subjects of international law. Here, again, the European history of international law in the nineteenth century is instructive to show how European powers refused to recognize non-European states as “sovereign” and thus as possessing formal legal personality. The duty of civilized nations was thus to civilize non-European states—by consent, acquiescence or by force if necessary—in order to assimilate them into the international law of the *jus publicum Europaeum*.<sup>39</sup> This involved creating a new kind of international legal subject modeled on the subjectivity of the European nation-state.

*Exporting Freedom* documents three cases of American attempts over a century of foreign policy to transform by force the internal political order and constitutional structure of foreign states: the military occupation, first, of the Philippines at the turn of the

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that paradoxically privileges the authority of an exceptional revealed law (the Constitution) and collective subject (the State) over individual normativity.

<sup>36</sup> John Austin, *The Province of Jurisprudence Determined* (1832).

<sup>37</sup> Georg Jellinek, *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (1880).

<sup>38</sup> Thomas Paine, *Common Sense* (Feb. 14, 1776).

<sup>39</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (1950).

twentieth century; second, of Japan following its defeat in the second World War; and third, of Iraq following the second Gulf War in 2003. In each case, Su shows how the American conception of a secular liberal democratic state drove these vast reform and state-building efforts. The imagined place of religion in the social and political order and the corresponding understanding of religious liberty in each of these efforts and struggles are instructive.

Consider first the book's opening chapter on the military occupation of the Philippines. This chapter seeks to show how the American-led imposition of a constitutional right to free worship "served to reconcile the seemingly paradoxical notions of self-rule and colonialism, both to the American colonizers and the Filipino colonized."<sup>40</sup> As Su notes, this paradox consisted in the U.S. government forcibly providing and promoting religious freedom while at the same time taking away political independence from the Filipinos. This was brought about in part through disestablishment and resolution of the friar lands controversy, which effectively broke the centuries-long Catholic monopoly in the Philippines in the name of religious pluralism. But it also involved the pacification and subjugation of the Muslim parts of the islands to reorganize their political and religious structures while at the same time maintaining adherence to free religious worship for the area's Muslim inhabitants.<sup>41</sup>

How this was done exactly is fascinating and Su's account of Leonard Wood's term as governor of Moro Province in the early 1900s is for me one of the most telling passages in the book. Wood and other U.S. officials considered the Islam practiced by the Moros as a "deficient version, an unruly amalgam of local customs and Islamic rules, which was also similar to how they felt about the Catholicism of the Christian Filipinos."<sup>42</sup> Wood thus advanced a particular conception of religious freedom while praising Jesuit missionary work in the Province because he considered the "principles of the Christian religion conducive to the observance of law and order and respect for authority." Importantly, promotion of religious freedom and respect for the legal authority of the secular liberal state meant

destroying the traditional power and social relations existing at the time. The *datu* or local chief would remain a political figure but would be divested of any divine rights. The sultan, ironically, would remain a religious head but would no longer possess any political authority. Slowly but surely, the Moro government was being turned into a secularized bureaucracy.<sup>43</sup>

As Su further notes, these "efforts were as much a continuing contest and negotiation on what religious freedom meant between Catholics and Protestants in the United States as these were about the achievement of American aims in the colonies." In this respect, they

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<sup>40</sup> Exporting Freedom, *supra* note 25, at 13.

<sup>41</sup> *Id.* at 13-14.

<sup>42</sup> *Id.* at 32.

<sup>43</sup> *Id.* As Wood notes in a letter to J. St. Loe Strachey on January 6, 1904, "our policy is to develop individualism among these people and little by little, teach them to stand up on their own feet independent of petty chieftains." *Id.* at 182 n.133. Legal reforms thus included establishing secular and abolishing religious courts; adoption of Western-style codes of procedure; and privatizing land ownership. *Id.* at 33.

illustrate the dialectic between attempts to reconcile the (exceptional) American conscience with its turn to (universal) empire. In this project of coerced transformation, the critical move was for religion to be divested of any of its public power and collective authority and to become instead a matter relegated to private life, subject to individual authority as guaranteed constitutionally by the right to religious liberty.

Chapter Four, on the post-1945 military occupation of Japan, tells a remarkably similar story, in particular in relation to the Civil Liberties Directive of October 1945 and the Shinto Directive of December 1945. As Su notes, the American program of forced reeducation and reorientation could not be achieved by giving the Japanese people civil liberties alone:

The spiritual font of the previous regime must be destroyed. Whereas previously the emperor stood as a deity in whose name military leaders engaged in acts of aggression, he now stood as the unflinching secular symbol of Japanese national unity in the country's march towards democratization and fellowship in the community of nations.<sup>44</sup>

This required two core constitutional reforms: first, inverting the *locus* of sovereign authority from the emperor to the Japanese people; and second, guaranteeing religious freedom and other fundamental rights and freedoms.<sup>45</sup> As stated in the Potsdam Declaration, this strengthening of the “democratic tendencies of the Japanese people” would more closely align with America’s international security goals.

Once again, Su’s description of how these reforms were actually achieved is telling. The idea of the emperor as a direct descendent of the sun goddess Amaterasu was ridiculed in the American press and “[b]reaking the power of the emperor as an incarnate deity in the minds of the Japanese people was [considered] crucial in order to free them from subordination to authority.”<sup>46</sup> Like Wood in the Philippines, General MacArthur effortlessly combined democracy on the American model with Christianity, regarding himself as the liberator of a people “stunted by ancient concepts of mythological teachings” and seeing “no contradiction between propagating Christianity in Japan and upholding the principle of freedom of religion.”<sup>47</sup>

Of critical importance was to separate Shinto from the state by means of a “total severance of state support, endorsement, or participation in any Shinto ritual, reducing it to a voluntary religious organization [and thus] removing Shinto in all its forms altogether from Japanese public life.”<sup>48</sup> The radical transformation of the nature and place of religion

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<sup>44</sup> Id. at 90.

<sup>45</sup> Id. at 91. The Shinto Directive was based on two main principles: first, that all references to state Shinto and the divine origins of the emperor be excised from the Meiji constitution; and second, that there be no references in any official documents to the “allegedly divine origins of the emperor, the Japanese people, and the nation as a source of inherent national superiority.” Id. at 99.

<sup>46</sup> Id. at 93.

<sup>47</sup> “Indeed, the latter could not be possible without the existence of Christian ideals.” Id. at 95.

<sup>48</sup> Id. at 100. As Su further notes, the “extraordinary strictness with which the American drafters of the directive construed the degree of separation allowed in the Japanese context sharply contrasted with the fluid and contested nature of separation between religion and state on the American home front at that time.” Id.

in the Japanese social and political order in this way went hand in hand with the entrenchment of the right to religious liberty.

The final chapter of the book more briefly describes the post-2003 military occupation of Iraq but still offers arguably the most dramatic illustration of these themes. The chapter further provides an example of Koskenniemi's third notion of the hybridization of legal concepts as they travel from the center to the periphery and in their changing use in the hands of the occupied. The intense contestation over the wording of the 2004 Transitional Administrative Law (TAL) again illustrates the struggle between occupier and occupied over the nature and place of Islam in the new Iraqi political order and the constitutional protection of religious liberty. From a complex narrative, I wish to point to just one example: the issue of whether Islam was to be "the," "the foundation," or "a" source of legislation.

As Su remarkably observes, the "fact that U.S. officials even seriously considered omitting any mention of Islam in the TAL, much less prohibiting its establishment as a state religion, seemingly betrayed earlier American declarations that Iraqis would write their own constitution."<sup>49</sup> In reality, there was universal consensus across all Iraqi factions that Islam was the "official religion of the State." The issue of Islam as a "source of law," however, was more contested. Certain Shia groups, particularly members of the Supreme Council for the Islamic Revolution in Iraq (SCIRI), argued that Islam should be "the basic or fundamental" source of legislation. In the course of the negotiations, other modifiers such as "principal" or "amongst other sources of legislation" also found support. The Kurdish representatives, however, advocated that Islam should be only one of several sources. The final formulation of Islam as a "foundation source" was a compromise between the positions of the Shia and Kurdish groups. In a mode characteristic of secular law and governance, this left the hierarchy of sources of law ambiguous, with Islam not necessarily superior to, but standing alongside, other fundamental sources of law.<sup>50</sup>

These shifting dynamics of sovereign power and secular indeterminacy unfolding within this particular context of Iraqi history and culture under a state of military occupation have largely eluded American commentators.<sup>51</sup> From an American perspective, religion cannot be a formal "source" of law. Consistent with the twin principles of popular sovereignty and individual liberty, the rule of law is *by definition* a secular project in which religion is removed from the sphere of public reason and public life and relegated to the

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<sup>49</sup> Id. at 153-54.

<sup>50</sup> There remains confusion regarding the two Iraqi words of "asasi" and "asas." The former is an adjective best translated as "fundamental," whereas the latter is a noun best translated as "foundation." In the U.N. printing of the text, the drafters changed *asasi* to *asas*, hence the current formulation of Islam as "a foundation source." This provision needs to be considered alongside the first of the so-called "repugnancy" or "non-contradiction" clauses in Article 2 which provides in paragraph A that "[n]o law that contradicts the established provisions of Islam may be enacted." Several secular groups opposed this language fearing it connoted too wide-ranging a field of Islamic jurisprudence against which Iraqi law could then be measured and that it could incorporate *fatwas*, or rulings issued by religious scholars, as a type of legal ruling.

<sup>51</sup> For an exception in a different context, see Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?*, 52 *Comp. Stud. Soc'y & Hist.* 1 (2010).

sphere of “private” and “inner” conscience and belief. For the American occupiers, such ideas define not just liberal constitutionalism but the very subject of international law: they are universal whether in the form of America’s fundamental law or natural moral law—what Su early in *Exporting Freedom* refers to as the “American conflation of its national identity with the principle of religious liberty.”<sup>52</sup>

Imposed constitutional reform thus provides the means for Iraq to reenter the community of nations with the same rights and duties as other advanced states. If Islam is to be an official religion of the State and a source of law, it must at a minimum be substantively qualified by, or stand equally with, democratic principles and basic rights and freedoms. As Su perceptively concludes, the fact that “Islam remained the established state religion despite American wishes to the contrary only illustrated the limits, not the ambitions, of American power.”<sup>53</sup>

### *C. Religious Liberty as a Human Right*

The three case studies in section B vividly illustrate American attempts over more than a century to transform the internal identity and political structure of sovereign states in order to make them proper subjects of international law. But *Exporting Freedom* also documents the unilateral and instrumental nature of American efforts over the same time period to shape the normative structure and content of the international legal order itself. This has occurred through two main avenues: first, via international treaties and conventions and related mechanisms of international governance; and second, via unilateral domestic legislation that both asserts extraterritorial jurisdiction and invokes religious liberty as an international legal right. In both cases, religious liberty has been deployed in moral, political and legal contexts as a key instrument of American power and foreign policy.

Chapters Two and Three thus tell the story of how religious liberty came to be part first of the League of Nations minority protection treaties after 1919 and later the post-1945 United Nations human rights instruments. The discussion of Woodrow Wilson’s attempts to entrench national self-determination and the rights of ethnic, linguistic and religious minorities in the minority treaties regime captures the colonial origins of these principles and the varying intentions of the Allied Powers in constructing and imposing the concept of a “religious minority.”<sup>54</sup> Su notes that Wilson’s “conflation of American values with universal values partly explains the resulting confusion surrounding his famous rhetoric of national self-determination.”<sup>55</sup> At the same time, Wilson’s aims and purposes for the League were not only legal but intensely moral and political, as his “be-

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<sup>52</sup> *Exporting Freedom*, supra note 25, at 2.

<sup>53</sup> *Id.* at 161.

<sup>54</sup> For discussion of the tension between notions of “national” and “ethnic, linguistic and religious” minorities, see Peter Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 *J.L. & Relig.* 455, 523-25 (2007).

<sup>55</sup> Wilson thus focused on political liberties, not political independence and rejected the idea that “each racial, ethnic, or language group was entitled to its own nation-state.” *Exporting Freedom*, supra note 25, at 40.

lief in Providence and American exceptionalism became the crucial interpretive keys and how he viewed the role of the United States in the world.”<sup>56</sup>

The predominant role of the United States in drafting and shaping what is today termed the post-Second World War international bill of rights is well-known. In part based on the perceived failure of the minority protection regime and in part on the deep American tradition of individual constitutional rights, Su notes that the codification of religious freedom in the Universal Declaration of Human Rights in 1948 crystallized the two currents of the time: the individual as rights-bearer and international law as guarantor of “human rights and fundamental freedoms.” Eleanor Roosevelt’s notorious assertion that a minority rights provision was unnecessary in the Declaration as “minority questions did not exist in the American continent,” and because assimilation had proved sufficient for “foreign groups residing within its borders,” marked the vast normative shift that had occurred in the inter-war years and reflected the much increased power of the United States to shape the fledgling post-war global legal order.<sup>57</sup> As Louis Henkin once observed, however, this emergent international law of human rights was “for export only.”<sup>58</sup>

Similarly, the story told in Chapter Five of the Jackson-Vanik amendment to the 1974 Trade Reform Act, which conditioned the grant of favorable trade status on the observance of international human rights norms, shows how this Cold War legislation “opened the floodgates for the increased participation of religious actors in the foreign policy arena and reintroduced the protection of religious liberty garbed in the newfound language of human rights as a legitimate foreign policy goal.”<sup>59</sup> Crucially, the U.S. was able to use the notion of religious liberty, now as a right enshrined in international law, “as a weapon against the communist enemy [and thus to] set the stage for the eventual piercing of the walls of state sovereignty, walls that would remain up but nonetheless permeable to this day.”<sup>60</sup> The idea of religious liberty as a human right that sets limits to state sovereignty and justifies accountability across borders (here unilaterally as regards

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<sup>56</sup> *Id.* at 41-42.

<sup>57</sup> *Id.* at 83.

<sup>58</sup> Henkin states that “[f]rom the beginning, the international human rights movement was conceived by the United States as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states).” Louis Henkin, *The Age of Rights* 74 (1990). The attachment of extensive reservations, understandings and declarations to those few human rights treaties actually ratified by the U.S. has further ensured that these have no domestic effect as law.

<sup>59</sup> *Exporting Freedom*, *supra* note 25, at 112.

<sup>60</sup> *Id.* at 113. Moyn has shown how the concept of religious liberty, far from being a secular instrument, served as a weapon during the Cold War against “godless communism” in American and European diplomacy. American and European Christian activists played key roles in shaping Article 18 of the UDHR, suffusing it with a “Christian personalist” ethos that persists in the right’s enshrinement of conscience and belief over other aspects of religion. Similarly the definition of the right to religious liberty has changed depending on the political context in which it is inserted and the national security interests it is made to serve. It is unsurprising therefore that when its target was godless communism during the Cold War, it had a Christian cast, and now that the target is Islam in Euro-American states, religious liberty has come to be cast as a secular principle. See Samuel Moyn, *From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty*, 113 *So. Atl. Q.* 63 (2014).

other states) is arguably the most distinctive feature of modern international human rights law.<sup>61</sup> As Su concludes, the “1970s ended with human rights conditions in states regarded as legitimate matters of international concern, and the provisions of the UDHR and the ICCPR as operationalized by the [Helsinki Final Accords] were now weapons against an ideological enemy.”<sup>62</sup>

This combination of unilateral deployment of American power and instrumental interpretation and application of international norms reached its apex with the enactment of the International Religious Freedom Act of 1998 (IRFA). As discussed in Part II above, regarding the civilized/non-civilized state distinction, the monitoring and enforcement mechanisms of the Act have operated to divide the world among liberal, non-liberal and rogue/outlaw states with “[m]ilitant Islam, alongside communism, [as] the bogeyman of both public and private religious freedom advocates” and the Act justified as “foremost an effort to save persecuted Christians abroad from the scourge of communism and radical Islam.”<sup>63</sup> Unsurprisingly, IRFA was characterized by its supporters in terms of an exceptional “American moral responsibility” and at the same time a universal obligation as reflected in international law “to assert its influence where justice and basic human rights are denied.”<sup>64</sup> As many noted at the time, this created an exceptional hierarchy of human rights in U.S. foreign relations while undermining existing multilateral human rights regimes and forms of international cooperation.

#### IV. Conclusion

*Exporting Freedom* concludes its rich historical vignettes with the simple proposition that the “spread of religious liberty in the international legal order accompanied the rise of American power.”<sup>65</sup> As Su quickly qualifies, however, to see this as purely instrumental is “to fail to comprehend the powerful grip of religious freedom in the American national imagination.”<sup>66</sup> The one unsatisfying aspect of the book perhaps is that it fails to grapple at any theoretical or conceptual level with what this essay has argued is the inscrutable paradox at the heart of the American tradition of religious liberty. To do so would require intellectually untangling the double-structure of first a universal subject that is simultaneously the exceptional subject of Enlightenment-era Protestant theology, and second a universal freedom that is simultaneously the exceptional freedom of a popular sovereign. These two tensions lie internal to and normatively structure the right to religious liberty itself.

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<sup>61</sup> See Joseph Raz, *Human Rights in the Emerging World Order*, 1 *Transnat'l. Legal Theory* 31 (2010).

<sup>62</sup> *Exporting Freedom*, supra note 25, at 133.

<sup>63</sup> *Id.* at 141.

<sup>64</sup> *Id.* at 145.

<sup>65</sup> *Id.* at 159.

<sup>66</sup> *Id.*

The first of these tensions raises critical questions concerning the purported neutrality of the secular towards the religious, while the second raises similar questions concerning the purported universality of the right to religious freedom. The long historical arc of the analysis in *Exporting Freedom* allows us to see how, rather than withdrawal from the religious domain, the project of creating a modern secular state requires massive intervention and forcible reconfiguration of substantive features of religious life, while the idea of a rights-holder with a universal right to religious liberty is seen to rest on seismic theological shifts in notions of normativity and authority. As *Exporting Freedom* richly documents, the career over the last century of these two core features of religious liberty in the hands of American power has been impressive indeed.