

A MAGAZINE OF RELIGIOUS FREEDOM

THE BIBLE AND THE AMERICAN REPUBLIC

A SOCIAL DILEMMA

Center for Adventist Research  
Andrews University  
Berrien Springs, Michigan

# LIBERTY

MARCH/APRIL 2022



## Transcending the **Blame** Game

We Be

EDITORIAL

FREE SPEECH FOR ME, BUT NOT FOR THEE

"If liberty means anything at all, it means the right to tell people what they do not want to hear."

—George Orwell, "The Freedom of the Press," proposed preface to Animal Farm.

In July 1798 President John Adams was making his way with great pomp and ceremony from the then capital, Philadelphia, to his summer retreat in Massachusetts. As his carriage passed through the town of Newark, New Jersey, the president was welcomed with speeches, a parade, and a ceremonial 16-cannon salute.

sive law was one of some 25 similar episodes involving newspaper editors, printers, politicians, and others who criticized the administration's policies.

The supreme irony of all of this, of course, is that the Sedition Act was passed a mere seven years after the ratification of the Bill of Rights, with its lofty affirmation of free speech as a cornerstone liberty. A commitment

simultaneously one of the most unifying and divisive parts of our constitutional birthright. It's unifying because a vast majority of Americans, regardless of their politics, celebrate America's commitment to free speech. In a recent national survey some 99 percent of respondents called it an "important constitutional right."<sup>3</sup>

It's divisive, however, because this idyllic bipartisanship shatters the moment discussion turns to practical questions, such as what type of speech falls beyond the pale and is undeserving of protection, whether constitutional or otherwise.

The problem, of course, is that there will always be a high level of subjectivity in any assessment of speech. One person's legitimate opinion is another person's misinformation. One person's hate speech is another person's deeply held religious belief. So when lines start being drawn between acceptable and unacceptable speech, whose perspective determines where those lines should go?

Increasingly, though, lines are being drawn. There seems to be a growing moral orthodoxy in America that says that in some circumstances censorship is not only acceptable but necessary. According to the Pew Forum, almost half of U.S. adults would like the government to step in to sort out misinformation online—that's an astounding number of Americans who appear comfortable with a direct violation of the First Amendment.<sup>4</sup>

Censorship fever seems even to have reached that bastion of radical free speech advocacy, the American Civil Liberties Union, which in the past has defended the rights of everyone from flag burners to neo-Nazi protesters. According to former ACLU executive director Ira Glasser, ACLU lawyers are now being asked to be

Today freedom of speech is



Luther Baldwin, a skipper of a trash barge on the nearby Passaic River, was seated with friends in a local tavern as the cannons boomed. They were unimpressed. Luther was overheard laughing and making a disrespectful—indeed, downright bawdy—joke about the president and the cannon fire.<sup>1</sup>

Two months later Luther and his cohorts found themselves facing charges under the recently passed Sedition Act, which, among things, forbade speaking "seditious words tending to defame the president and government of the United States."

Duly convicted, Luther and his companions sat in federal prison until they could raise enough money to pay their court-imposed fines. Their run-in with this repres-

to free speech, the founders believed, would help distinguish the new American republic from the monarchical authoritarianism of the Old World. Yet just a few years later President Adams saw fit to approve a politically driven law suppressing speech, ushering in what a later Supreme Court justice would characterize as one of our nation's "sorriest chapters."<sup>2</sup>

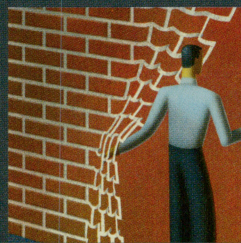
It's easy to forget that America's founders were very much like us, with a sometimes-inflated confidence in their own political views and an all-too-human aversion to criticism.

Tolerating criticism or dissenting opinions isn't easy. If it were, Twitter would be a haven of reasoned and pleasant debate. For most of us, though, the "wrongness" of others triggers a response that's more emotional than rational.



PEOPLE of the United States, in order to form a more perfect Union, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby constitute and establish this Constitution for the United States of America.

IN THIS ISSUE



We live in a secularized world that wants to sanitize religion from culture. P21

4 THE POLITICAL BLAME GAME

Toward a spiritual reckoning

10 FREE EXERCISE RENAISSANCE

Three decades of change

16 BUILT ON FAITH

The Bible and the American Republic

9 | THE WALL OF SEPARATION

22 | RELIGION ON DEATH ROW

26 | A BATTLE NEVER WON

28 | A SOCIAL DILEMMA



“advocates for progressive values” by defending free speech only when it “doesn’t offend or threaten other civil liberties values.”<sup>5</sup>

This growing comfort with suppressing uncomfortable speech is both a progressive and conservative phenomenon. When a Georgetown Law School professor recently tweeted a poorly worded criticism of President Biden’s vow to appoint a Black woman to the Supreme Court, saying all options should be considered regardless of race, he tweaked the tail of a Twitter mob, which came after him en masse. Within days he was placed on administrative leave. On the other end of the political spectrum, individuals unsettled by ideas raised in critical race theory have introduced anti-CRT legislation in 22 states at last count. A number of these bills attempt to suppress discussion of CRT in ways that go beyond merely regulating a K-12 school curriculum.

Why does any of this matter for religious freedom?

It matters because the fate of religious freedom in America is utterly dependent on the fate of free speech. The two rights exist together or not at all.

In my work in international religious liberty advocacy, I’ve witnessed what happens in countries in which the majority decides what speech is “dangerous” or “offensive.” Whether it’s Pakistan’s anti-blasphemy laws or China’s high-tech regulation of anti-Communist ideas, religious minorities bear a brutal burden—legally and socially—when free speech is impaired.

So when the “wrongness” of others becomes unbearably irritating, the remedy isn’t to try to silence difficult voices. When we attempt to coercively suppress uncomfortable speech, we’re chipping away at the bedrock of our religious freedom. Instead, we have a better response at our disposal. We can speak.

<sup>1</sup> There are many accounts of this incident online, or you can read Charles Slack’s fine discussion of the Sedition Act in his book *Liberty’s First Crisis: Adams, Jefferson, and the Misfits Who Saved Free Speech* (New York: Atlantic Monthly Press, 2015).

<sup>2</sup> *Watts v. United States*, 394 U.S. 705 (1969), J. Douglas concurring.

<sup>3</sup> Knight Foundation-IPSONS, “Free Expression in America Post-2020,” January 6, 2022.

<sup>4</sup> Amy Mitchell and Mason Walker, “More Americans Now Say Government Should Take Steps to Restrict False Information Online Than in 2018,” Pew Research Forum, August 18, 2021, <https://pewrsr.ch/37Tynf>.

<sup>5</sup> Andrea Cavallier, “Former ACLU Head Blasts Organization,” *DailyMail.com*, January 31, 2022, <https://bit.ly/3uRXDW1>.

Bettina Krause, Editor  
*Liberty* magazine

Please address letters to the editor to [editor@libertymagazine.org](mailto:editor@libertymagazine.org)

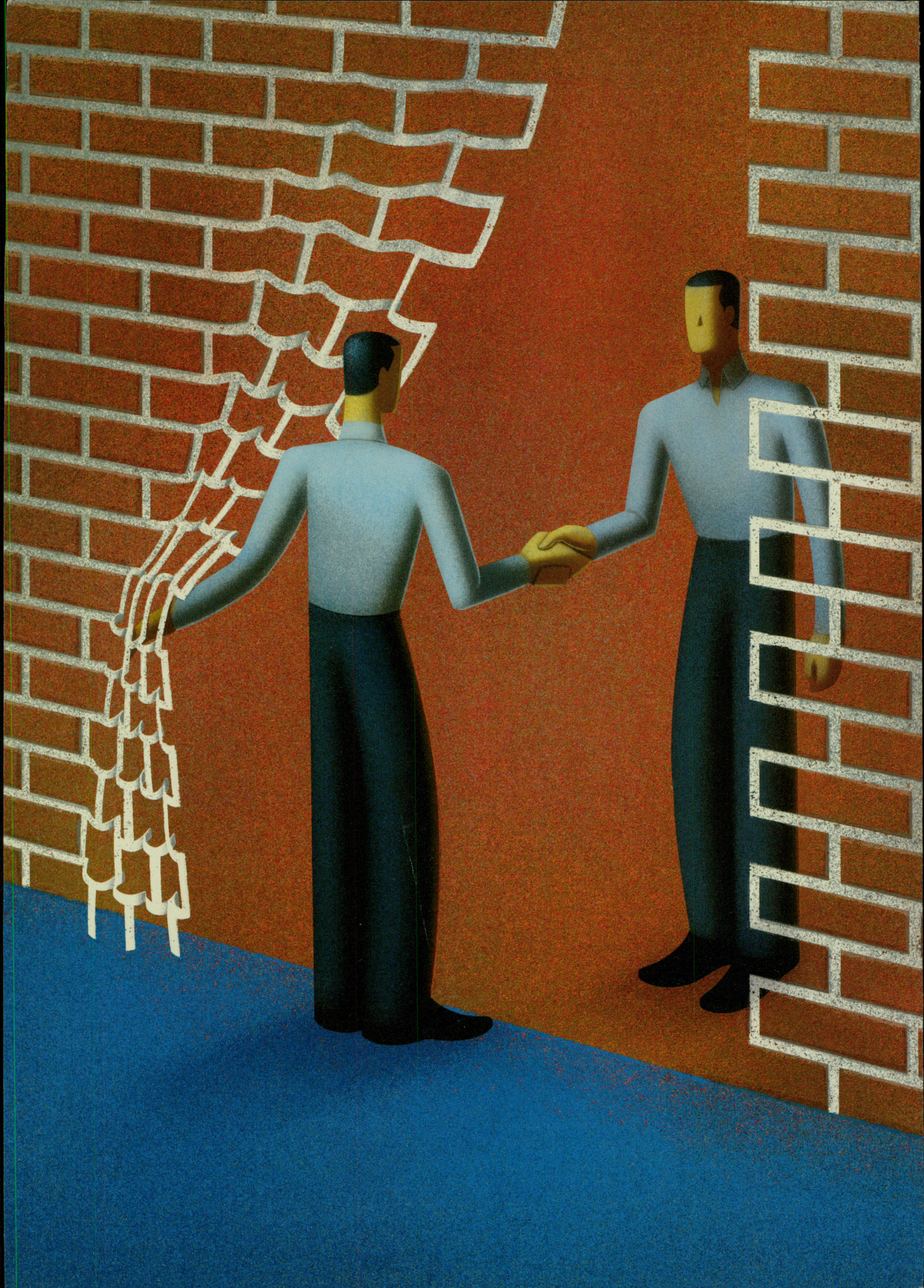
DECLARATION  
*of Principles*

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God’s agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice, and promulgate religious beliefs, or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights, and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen’s duty but the essence of the golden rule—to treat others as one wishes to be treated.



**Fact-blindness, unreasoning partisanship, and a fast-growing deficit of compassion. Can people of faith help forge a path through our current political morass?**

# Transcending the Blame Game

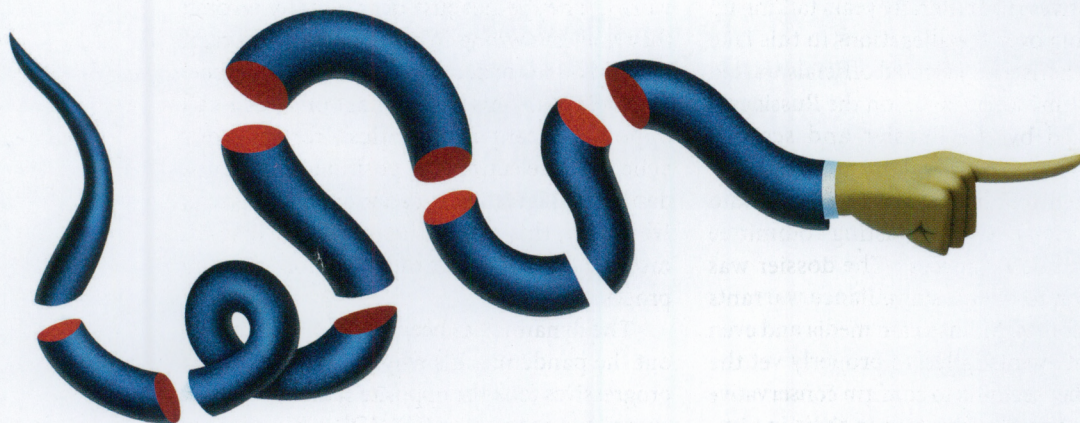
BY JUSTIN E. GIBONEY  
ILLUSTRATION BY JON KRAUSE

**M**ore than 100,000 Americans have died of drug overdoses in a 12-month period,<sup>1</sup> overall life expectancy is falling,<sup>2</sup> and our immigration system is, by all accounts, a catastrophe. But instead of our finding common cause and policy solutions, finger-pointing and name-calling have become the focus of American politics. In our petty game of political one-upping, solving problems has become a secondary goal at best.

The pride and contempt that often motivate our civic engagement today are dismantling American democracy. They've

lured us away from two of the values a healthy society needs—self-examination and compassion. Regrettably, many of our partisan institutions discourage internal scrutiny and out-group empathy. And our rhetorical devices are mostly used to end conversations instead of inviting healthy debate.

On cultural and social issues, neither side is open to an intellectually honest and civil dialogue. With hardened hearts we've closed our ears to facts and sound logic. Our ideological tribes will not suffer disagreement. For example, nothing draws the ire of some conservatives like a piercing factual critique of American history. While America has achieved some exceptional



feats, a romanticized view of the country's past only preserves a fictional legacy and avoids a reckoning on issues like racial justice.

Likewise, nothing will get one canceled by secular progressives quicker than pointing out the contradictions in social constructs, such as gender identity. Since the public can't be persuaded that biological men should play women's sports, it must be compelled.

Furthermore, each group has an arsenal of scornful and dismissive labels they stick on those who step into heretical territory, such as "Marxist" or "bigot." Surely Marxists and bigots exist, but the scope of those terms is ever-expanding, which, by design, limits the public discourse and fosters division. These groups silence dissenters and try to unilaterally enforce their will because many of their positions are indefensible.

### Mutual Blindness

In our contempt for one another, we're constantly looking for examples that prove the other side is just as unintelligent or evil as we thought. We expect the worst and have trouble hiding our pleasure when we are proved right. This distracts us from addressing such issues as America's steep fall in the international well-being index<sup>3</sup> and prevents us from recognizing our own lapses from thoughtfulness and good faith.

For instance, in the minds of many progressives, the Big Lie about Donald Trump losing the 2020 presidential race because of election fraud seems to confirm many of the ugliest

things they believe (and desperately want everyone else to believe) about conservatives. Namely, that conservative leaders are evil enough to perpetuate such a lie and the rank and file are foolish enough to believe it.

Racism was also implied, since many of the areas where fraud was alleged are heavily populated by people of color. Therefore, the storyline further conceived that conservatives were indicting majority Black communities on charges of corruption. To cap it off, the Big Lie also led to the January 6 U.S. Capitol attack, where "Jesus Saves" flags waved while law and order were disregarded, and people died. That day of delusion and chaos won't soon be forgotten, nor should it be.

For the left, the Big Lie became a clear example through which they could triumphantly reassert so many of the condemning narratives at the core of their contempt for the political right. It's difficult to argue that these charges of disregard for American democracy and gross incredulity are without merit. After all, the claim of mass election fraud has even been shot down by Trump-appointed judges<sup>4</sup> and disavowed by some Republican lawmakers.<sup>5</sup> Moreover, Trump's lawyer was sued over the allegations, and her defense was that no reasonable person would believe what she told the American people with a straight face.<sup>6</sup>

Yet so many of the progressives who were castigating conservatives for the Big Lie fell for all the false accusations in the Steele Dossier and suggested Trump and Putin had rigged the 2016 election. The Steele Dossier, compiled by

a former British Intelligence agent, embarrassingly brought some to believe Trump was a Russian agent and that his presidency was illegitimate. Outlets who promoted it had to admit the document was false, and the primary source has been charged with lying to the FBI.

Progressives spent literally years talking up and obsessing over the allegations in this fake report. Journalists and elected officials wasted tons of our time weighing in on the Russiagate story incited by the dossier and scaring Americans with creative doomsday scenarios. Many of the discredited claims were read into the *Congressional Record*, wasting committee time and public resources.<sup>7</sup> The dossier was also relied on to obtain surveillance warrants from FISA courts. Mainstream media and even government agents failed to properly vet the report, further seeming to confirm conservative claims about progressive bias in their institutions (think “fake news” and “the Deep State”). Trump and his campaign team did obstruct justice and had some unsavory business dealings, but none of this justifies what’s been called “one of the most egregious journalistic errors in modern history.”<sup>7</sup>

### Corrosive Contempt

If your knee-jerk reaction is focused in on some type of false equivalency between these two examples, then you’ve missed the point. The lesson here isn’t based on these instances being equally bad. Rather, this is about what makes us so susceptible to consuming detectable lies and how contempt compromises our judgment. From the Jussie Smollett hoax to QAnon, our eagerness to demonize the other side has left us hoodwinked time after time. One could make an argument that the impacts of the dossier were much less harmful than the Big Lie, but does it justify leaving that massive failure unexamined and uncorrected? No, wrongdoing is not justified in view of a greater wrong.

In fact, morality by comparison is a major part of the problem. Contrary to what partisans might have us believe, we’re not right or righteous just because our opponent is more wrong. Judging ourselves based on the worst acts of others is moral folly and results in a wicked form of self-justification. Sadly, it’s the rule, not the exception, in our sociopolitical discourse. And it’s created a bottomless pit, where our standards fall lower and lower. We should not excuse our own wrongdoing in view of what we believe is a bigger and ever-growing evil on the other side. We should not allow whataboutism<sup>8</sup> to prevent self-examination and accountability.

Through cable news, talk radio, and social media, many Americans have been indoctrinated to believe that our political opponents’ every word and action are meant to either harm, deceive, or control us. We’ve come to believe they’re virtually incapable of sincerity and good works. They’re not just occasionally wrong; they’re always wrong. Which means what’s right is found on the opposite side of their every belief and opinion. This is the heart of what I call opposition-centered politics—forming our beliefs and selecting our positions based on a desire to disagree with or attack a certain group. Ironically, this places the people we disdain most at the center of our decision-making process.

The dynamic has been on display throughout the pandemic. It’s why conservatives and progressives took the opposite stance on almost every issue concerning COVID-19. It’s why they both continually become more extreme. Widening the divide is the point. We’re signaling our virtue by creating as much distance between us as possible. Opposition-centered politics quickly pulls us into the realm of absurdity because neither truthfulness, compassion, nor integrity is the objective. It’s no way to solve problems or build character.

It also pulls us into empty defiance, where we harm or defile ourselves trying to spite the

## A New Religion?

Political divisions and animosities have played out in the public space from the very founding of the American republic. But is today’s political polarization somehow different from that of previous decades? According to a group of scholars who published their research in the journal *Science*, the answer is yes. But this is not necessarily because Americans are further apart on major public issues. Instead, these researchers argue, it’s because data now shows that our hostility toward our political opponents is greater than the warmth we feel toward our political allies. In other words, “out-party hate” has become more powerful than “in-party love.”\*

The researchers also offer a breakdown of the key components of this type of hyperpolitical sectarianism. They suggest that “political sectarianism consists of three core ingredients: othering—the tendency to view opposing partisans as essentially different or alien to oneself; aversion—the tendency to dislike and distrust opposing partisans; and moralization—the tendency to view opposing partisans as iniquitous. It is the confluence of these ingredients that makes sectarianism so corrosive in the political sphere. Viewing opposing partisans as different, or even as dislikable or immoral, may not be problematic in isolation. But when all three converge, political losses can feel like existential threats that must be averted—whatever the cost.”

The writers also suggest that “the foundational metaphor for political sectarianism is religion”—a religion fueled by “strong faith in the moral correctness and superiority of one’s [political] sect.”

\*All quotes are from Eli J. Finkel, Christopher A. Bail, Mina Cikara, et al., “Political Sectarianism in America,” *Science* 379, no. 6516 (October 30, 2020): 533–536.

**We've fooled ourselves into believing that our idols are stainless and our opponents are irredeemable villains.**

other side. This concept was at work when some conservatives refused to follow any CDC guidance and when progressives sought to defund the police in high crime areas. In both cases, people were potentially placed in harm's way while partisans tried to prove a very empty point. Sometimes these efforts are based on true belief, and in other cases they're more motivated by an addiction to provocation, but empty defiance is usually somewhere near the root.

Sadly, neither side is either self-reflective or honest enough to admit that our contempt is eating us alive. We don't recognize that we're not only harming the country but harming ourselves. And curiously, our unwillingness to correct ourselves makes us look more like the caricatures others have created of us. It's a self-perpetuating disaster.

### **A Spiritual Reckoning**

Worst of all, Christians have not been an exception within this phenomenon. We're just as partisan and divided as everyone else. When we're not leading the charge in one of these ideological tribes, we're silently going along for the ride. You'd think that a group of people committed to imitating Jesus would be unified in trying to guide our peers toward self-examination and compassion. But unfortunately, we generally have not played the role of peacemakers. We have not shed light on the dark arts that brought us to this point. We haven't often enough brought facts and discernment to our tribe's baseless conspiracy theories. And we certainly haven't emphasized the *imago Dei* in the racists, criminals, and pleasure-seekers among us.

Christian convictions concerning truth, compassion, and self-examination should make our conformity with and participation in this nasty back-and-forth unthinkable. Instead, we've used our public witness to carve and chisel images in our own likeness. We romanticize history to glorify ourselves and our cultural history. We deify our ethnic identity to justify ourselves and place the blame on others. We've fooled ourselves into believing that our idols are stainless and our opponents are irredeemable villains.

The answer to this contemptuous and truth-deficient moment is moral imagination, which is the application of faith to restore clarity, purpose, and hope in the most dire situations. Moral imagination is the ability to see not just what has been historically or what is in the present. It's the ability to see and pursue what ought to be, and what should be in the future.

It's seeing God's will and design in the midst of all the brokenness in and around us. It replaces pride and contempt with humility and compassion.

Moral imagination decenters us and our opponents and centers God. Consequently, it makes our civic engagement about glorifying God, not settling the score. Our opponent's redemption becomes more desirable than their punishment (without precluding necessary punishment). It reveals that human dignity isn't scarce, so we don't have to fight each other for it. Moral imagination makes it clear that there are no irredeemable villains or stainless idols. No one is below God's grace, and we aren't justified by our own constructs.

Moral imagination compels us to examine ourselves, repent, and apologize publicly even if it isn't in our immediate self-interest. Admitting fault is no longer considered a loss because our honesty connects us to a greater victory. It cures our myopic tendency to be controlled by the moment. Our social action is guided by greater principles, not hasty reactions to our current pain or anger.

This spiritual disposition will bear fruit in our social and political context. It doesn't blind us to the wrongdoing of others or render us unable to fight tenaciously when necessary. But it does compel us to promote moral order and social justice honorably and without turning other image bearers into political abstractions. Moral imagination is our only hope of getting past our differences and hang-ups, finding common cause, and getting to solutions.

<sup>1</sup> Centers for Disease Control and Prevention, "Drug Overdose Deaths in the U.S. Top 100,000 Annually," November 17, 2021, <https://bit.ly/32RPS6P>.

<sup>2</sup> Laurel Wamsley, "American Life Expectancy Dropped by a Full Year in 1st Half of 2020," *National Public Radio*, February 18, 2021, <https://n.pr/3pUScmk>.

<sup>3</sup> Nicole Lyn Pesce, "The U.S. Dropped Majorly on the Index That Measures Well-being—Here's Where It Ranks Now," *MarketWatch*, September 11, 2020, <https://on.mktw.net/3FXFo4r>.

<sup>4</sup> Aaron Blake, "The Most Remarkable Rebukes of Trump's Legal Case: From the Judges He Hand-picked," *Washington Post*, December 14, 2020.

<sup>5</sup> Burgess Everett, "Sasse, Romney Pan Trump Campaign's Tactics in Contesting Election," *Politico*, November 19, 2020, <https://politi.co/32REHev>.

<sup>6</sup> Tom McCarthy, "Pro-Trump Lawyer Says 'No Reasonable Person' Would Believe Her Election Lies," *The Guardian*, March 23, 2021, <https://bit.ly/3JjY7h>.

<sup>7</sup> Sarah Fischer, "The Media's Epic Fail," *Axios*, November 14, 2021, <https://bit.ly/32JmEqZ>.

<sup>8</sup> "Whataboutism" was added to the *Merriam-Webster Dictionary* in October 2021. It's defined as "not merely the changing of a subject . . . to deflect away from an earlier subject as a political strategy; it's essentially a reversal of accusation, arguing that an opponent is guilty of an offense just as egregious or worse than what the original party was accused of doing, however unconnected the offenses may be." <https://bit.ly/3EVxneY>.

Justin E. Giboney is an attorney, political strategist, and president of the AND Campaign, an organization that aims to educate and organize Christians for civic and cultural engagement. He is coauthor of the book *Compassion (&) Conviction: The AND Campaign's Guide to Faithful Civic Engagement*.



# Still Standing?

## The Wall of Separation

Every issue of *Liberty* magazine includes a declaration of principles, which begins with this statement: "The God-given right of religious liberty is best exercised when church and state are separate."

A recent survey by the Pew Research Center provides an intriguing snapshot of current beliefs about what role Christianity—and religion in general—should play in civic life.\* The takeaway? A majority of Americans still support the principle of separation of church and state.

\* All statistics are from: Pew Research Center, "In U.S., Far More Support Than Oppose Separation of Church and State," October 28, 2021.

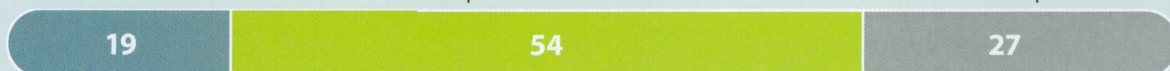
### % of U.S. adults who say . . .

#### FEDERAL GOVERNMENT SHOULD . . .

Stop enforcing separation of church and state

Enforce separation of church and state

Neither/no opinion/refused



#### CITIES/TOWNS SHOULD . . .

Be allowed to put religious symbols on public property

Keep religious symbols off public property

Neither/no opinion/refused

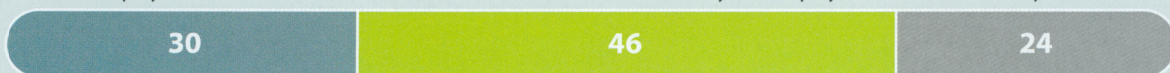


#### PUBLIC SCHOOL TEACHERS SHOULD . . .

Be allowed to lead students in Christian prayers

Not be allowed to lead students in any kind of prayers

Neither/no opinion/refused



#### U.S. CONSTITUTION WAS . . .

Inspired by God, reflects God's vision for America

Written by humans and reflects their vision, not necessarily God's vision

Neither/no opinion/refused



#### FEDERAL GOVERNMENT SHOULD . . .

Declare U.S. a Christian nation

Never declare any religion as official religion of U.S.

Neither/no opinion/refused

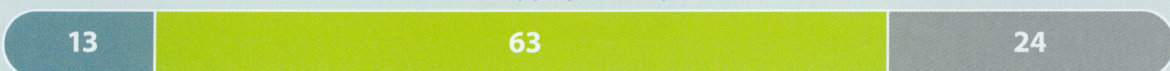


#### FEDERAL GOVERNMENT SHOULD ADVOCATE . . .

Christian values

Moral values shared by people of many faiths

Neither/no opinion/refused



# Reflections

on a

# Free Exercise Renaissance

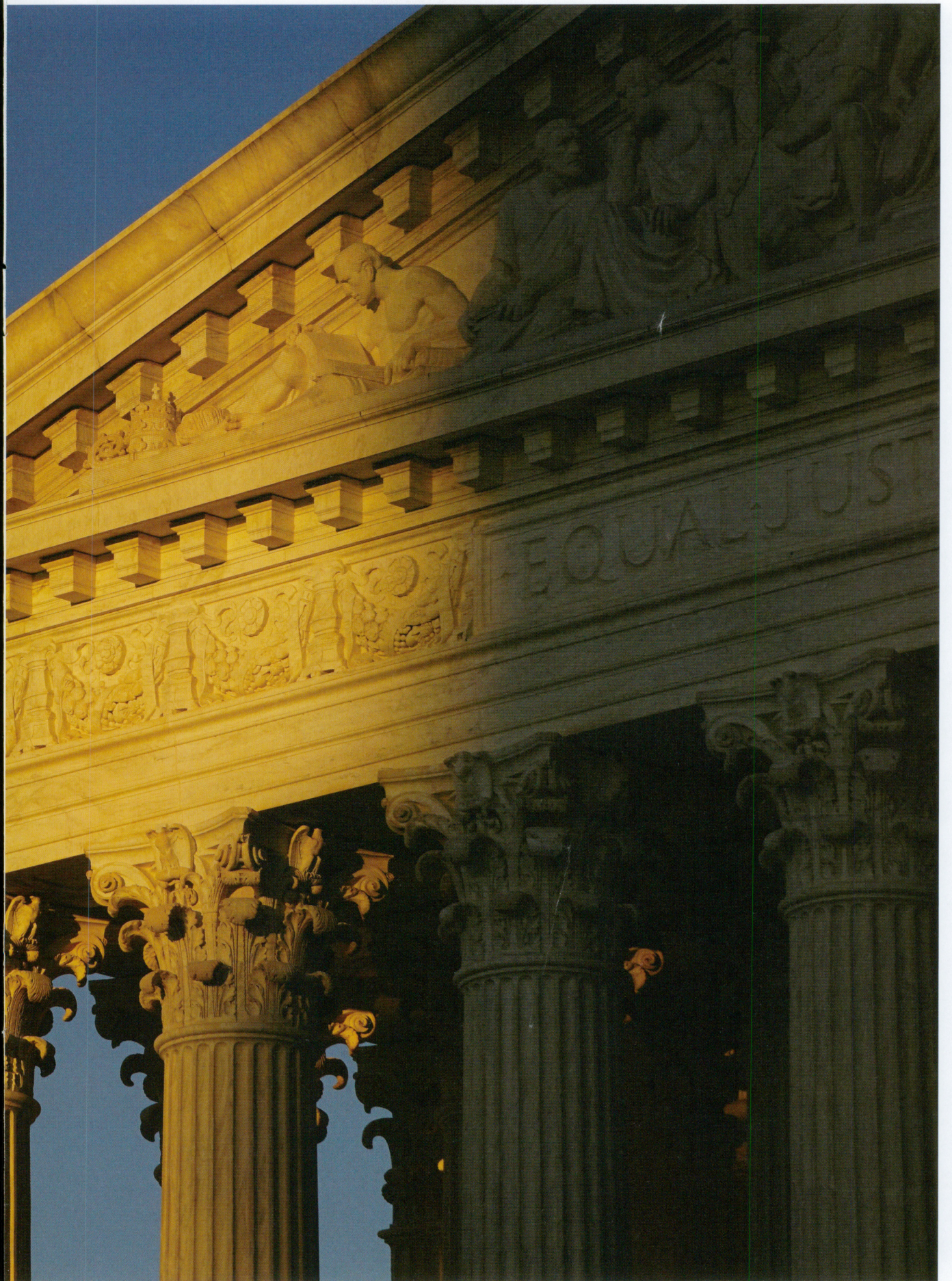
Today's national conversation around religious free exercise is radically different in both character and scope from that of three decades ago. What has changed, and why? A former special counsel for religious discrimination in the U.S. Department of Justice provides a front-seat perspective on 35 years of transformation.

BY ERIC TREENE

When I was a law student in the late 1980s, religious liberty was a quaint backwater of constitutional law. Yes, there had been some big Catholic school funding decisions in the Supreme Court in the past decade, some more recent cases about how many reindeer neutralized a crèche in a holiday display, and some important unemployment compensation cases involving persons fired for holding to religious conscience. But compared to the powerhouses of free speech, due process, or equal protection, the religion clauses seemed to be barely a blip on most Supreme Court watchers' radars.

That was certainly the case with my fellow law students. I vividly recall when we were discussing the just-decided case of *Lyng v. Northwest Indian Cemetery Protective Association*, a challenge by Native Americans to a National Forest Service logging road through sacred lands. The Native Americans lost their free exercise clause challenge, but what was particularly notable was *how* they lost. Since the government owned the land in question, the Supreme Court reasoned, it did not have to balance in any





way the importance of its interest in building the road versus the magnitude of the harm to the plaintiffs' religion. That struck me as wrong. Where the ability to exercise one's faith lay completely in the hands of the government, it seemed the free exercise clause required the government at least to give *some* reason justifying its actions. Justice Brennan, the Court's liberal stalwart, who had been a hero of my classmates as we discussed the free speech clause, wrote an impassioned dissent. But when the professor asked if anyone thought the Court got it wrong, mine was the lone hand raised in the lecture hall. Somehow, the free speech hawks in the class, quick to ask the government to shoulder all sorts of burdens to allow dissenting voices to be heard, were not willing to burden the government at all to accommodate religion.

### Low Ebb

Some religious communities had long been acutely aware of the need for protection of free exercise. Jehovah's Witnesses, whose door-to-door solicitation and evangelism in public places were often targeted by officials, appeared frequently in Supreme Court cases. Faiths that strictly observe the Sabbath, including Jews and Seventh-day Adventists, knew all too well how the law fell short, and had been involved in pushing for Sabbath accommodation since the enactment of Title VII in 1964. Orthodox Jews were disappointed that the Supreme Court in 1986 had ruled that an Air Force psychologist could be forced to remove his yarmulke while in uniform (Congress subsequently passed a legislative fix). But free exercise of religion did not seem to capture the imagination of the broader religious community, the legal community, or society generally.

The low-water mark for free exercise came with the *Employment Division v. Smith* decision in 1990. There the Supreme Court rejected the claim of an Oregon Native American who lost his job as a drug counselor for using peyote, a controlled substance used by many Native Americans in religious ceremonies. While acknowledging that enforcement of general laws like drug laws may cause very significant burdens on certain faiths, the Court held that as long as such laws didn't target religion and applied equally to everyone, they didn't violate the free exercise clause.

*Smith* prodded religious and civil rights groups to action on free exercise to an unprecedented degree. Groups from across the religious and political spectrum advocated for, and obtained by a unanimous vote in the House and

a 97-3 vote in the Senate, passage of the Religious Freedom Restoration Act (RFRA) in 1993. Depending on whom you speak with, RFRA either restored the pre-*Smith* law or expanded it. In any event, RFRA required that government action imposing a "substantial burden" on religious exercise be justified by a compelling government interest, pursued through the least restrictive means possible on religious exercise.

### Expansion

The renewed attention to free exercise of religion that RFRA represented came at a time of demographic change in the United States. The Christian cultural consensus, which had long maintained such things as Sunday closing laws, In God We Trust on currency (added in the 1950s), and Bible readings in public schools, was fracturing. Increasing numbers of people had no religious affiliation, and membership in the largest Protestant denominations that had been bulwarks of the establishment was in decline. At the same time, evangelical Christians had risen in number and prominence, with a more urgent view of religion in their daily lives than had previously been the norm. A range of diverse religions, including Islam, Sikhism, and Hinduism, grew as well, along with unfamiliar needs for accommodation of religious holy days, dress, and practices. Orthodox Jews, with strict needs to observe the Sabbath, kosher laws, and other observances, had increased as a percentage of American Jewry. Thus while there was no longer a general assumption that religion, or at least Christianity, would be broadly assumed and acknowledged in civic and working life, there were growing demands by significant minorities of Christians and members of numerous other faiths for meaningful accommodations.

In addition to the passage of RFRA, the 1990s saw a number of moves toward greater protection of free exercise, driven largely by two factors. First was the increasing demand for accommodation, especially by religious minorities. The second was the complaint by many Christians that in removing establishment clause problems like school-sponsored prayer, *personal* religious expression had been needlessly suppressed as well. The Clinton Administration took two significant actions in response. First, the White House issued an executive order on religious expression in the federal workplace, requiring religious speech by employees with coworkers and religious symbols in personal work space to be treated equally with other types of personal speech. The Department

of Education likewise issued guidelines for religious expression in public schools, explicitly allowing students gathering to pray before school, sharing religious observations in assignments, and other personal expressions that occur while at school or participating in school events. This expanded the principle of the more modest Equal Access Act of 1984, which had required high schools with noncurricular clubs to give equal opportunity for student-initiated religious clubs, to a much broader range of activities and covering all student age groups. At the same time, Supreme Court and lower federal court decisions were constitutionalizing this equal access principle in a wide range of contexts.

In 1997 the Supreme Court held that while RFRA was valid against the federal government, Congress lacked authority to extend it to the states. Despite this blow, religious communities continued to advocate for greater protections for religious freedom from infringement by state and local governments. In 2000 Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) by unanimous consent. RLUIPA's land use provisions protect the ability of places of worship, religious schools, and faith-based social service providers to build, own, and rent property without discrimination or unjustifiably burdensome regulation. RLUIPA's institutionalized persons provision applies the RFRA standard to prisoners and other persons in government institutions, thus protecting access to religious diets, opportunities for worship and religious education, and other accommodations.

#### Off the Sidelines

Religious communities also continued to press for equal access to public meeting spaces and to equal access for governmental funding in various ways. A string of Supreme Court decisions, culminating in *Good News Club v. Milford* in 2001, established that religious groups could not be turned away from renting facilities after school because of their religious expression. A coalition of Catholic and evangelical parents and economic libertarians advocated for school choice—the idea that while the government may not fund religious schools directly, the Constitution permits giving funds to parents in vouchers or scholarships who can then give them to the school of their choice, whether religious or nonreligious, private or public. The Supreme Court upheld such a program in 2002. These access cases and school choice cases, along with the Clinton Administration guidelines, marked a sharp shift



President Clinton signing the Religious Freedom Restoration Act (RFRA) on the South Lawn at the White House, November 16, 1993.

RFRA required that government action imposing a “substantial burden” on religious exercise be justified by a compelling government interest, pursued through the least restrictive means possible on religious exercise.



On September 22, 2000, President Bill Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA) into law.

RLUIPA's land use provisions protect the ability of places of worship, religious schools, and faith-based social service providers to build, own, and rent property without discrimination or unjustifiably burdensome regulation.

from the Christian cultural consensus of 50 years earlier. Public schools were no longer reflective of the majority Christian religion in various nominal and watered-down ways, something that was unfair and often oppressive to religious minorities and the nonreligious, and that were, at best, a lukewarm inspiration of faith for Christians. Schools instead simply made room for religious expression by students, allowing religious groups to participate in the civic life surrounding the school, such as after-school activities. And they were part of a public education system that increasingly made more room for authentically religious private schools.

A related equal-access development was President George W. Bush's Faith-Based and Community Initiative, which provided that religious organizations be allowed to compete equally for federally funded social service grants. Under the initiative, direct grants to religious organizations must be used only for religious organizations and must serve all persons regardless of religion. However, it is different for voucherized programs, where recipients are able to freely choose which program to go to, with the funds simply following their choices. In these programs the religious organization can fully integrate religion into its services, thus allowing, for instance, faith-based residential drug treatment programs. The Obama Administration continued this policy, as have subsequent administrations. That this approach has now become routine highlights the degree to which society has come to embrace a pluralistic religious model, where the government leverages faith-based groups to provide societal needs but does not directly fund religious programs and thereby pick approved religious winners and disapproved religious losers.

Another notable development in the 2000s was the response to the backlash against Muslims and Sikhs following the September 11 terror attacks. I was at the Department of Justice at the time, and we saw a sharp increase in hate crimes against these groups, along with employment discrimination and accommodation claims involving members of these groups. RLUIPA land use cases involving mosques also increased. By 2010, 13 percent of the Department of Justice's RLUIPA land use investigations involved Muslims (mostly mosque construction cases), despite their making up about 1 percent of the population. By 2016 the percentage of these investigations had climbed to 38 percent.<sup>1</sup> Muslims have also featured

prominently in recent Supreme Court decisions on religious freedom, including a 2014 RLUIPA decision upholding a Muslim prisoner's right to wear a short beard, and a 2015 Title VII decision requiring a retail employer to accommodate a Muslim woman's headscarf.

Perhaps the development highlighting just how much religious freedom issues have become part of public discourse and the legal landscape is the sheer volume of cases now being heard by the Supreme Court. In the Court's 2019 term it decided a RFRA case and two free exercise cases on its regular docket: a contraceptive mandate case, a case involving religious schools hiring for ministerial positions, and a school choice case. It also decided two cases involving emergency challenges to COVID restrictions on worship, and vacated a free exercise case concerning the Catholic Church in Puerto Rico. In the 2020 term the Court decided three religious liberty cases: a free exercise case involving a Catholic social service agency, a case concerning a college student's religious expression, and a RFRA case regarding damages for violations. The court also vacated a RLUIPA case involving Amish religious objections to septic regulation, and issued four more opinions on COVID restrictions. The 2021 term so far is following the same pattern, with three religion cases so far on the docket, including a RLUIPA case involving the access of pastors to an execution chamber, a school choice case in Maine, and a religious expression case involving Boston City Hall.

### Evolving Challenges

Since I was in law school, religious liberty has become a more significant constitutional and social issue, and the increase of protections for diverse faiths is palpable. In many ways, though, there has been a leveling off of key disputes: government-endorsed religion, outside of ceremonial legislative prayer and historic monuments, is in decline. Schools have adopted a healthy avoidance of official religious endorsement while protecting student expression, and accordingly the number of student religious expression disputes has decreased. The concept of equal access for religious groups appears to have reached a point of fairly broad acceptance and dwindling controversies.

This does not mean issues of religious liberty are going away. Indeed, since deeply held convictions such as faith will inevitably come into conflict with other societal interests, disputes and legal cases will continue. Cases

involving federal land impacts on Native Americans remain common, and the *Lyng* case I encountered in law school remains the rule today. Workplace accommodations also continues to be a pressing issue. The Workplace Religious Freedom Act (WRFA), which would strengthen Title VII's currently weak religious accommodation obligation for employers, has been introduced in numerous Congresses, but has yet to advance.

One area of particular friction is the intersection of religious liberty and LGBT rights. As noted, objections to religious groups using public spaces just because they are religious have dwindled. The conflicts that arise today are more likely when *particular* religious viewpoints conflict with LGBT equality. In one case being litigated in California, the Fellowship of Christian Athletes was excluded from equal access at a public high school not because it is religious, but because FCA will not hire LGBT persons as leaders and therefore violates the school's views on inclusion. These issues undoubtedly will remain significant sources of debate and litigation in the coming years.

The trajectory of religious liberty since I was in law school has been a positive one, both for faith and for maintaining a pluralistic democracy. We have moved away from the old model where many looked to the government to make symbolic but often awkward gestures toward faith that inevitably left some people out, to a model where the government has taken substantial steps to create space for the authentic religious exercise of individuals and groups. In place of public school teachers leading generic monotheistic prayers, we protect students' right to pursue their faith whether alone or with others. RLUIPA protects our right to build places of worship and religious schools; RFRA protects against a wide range of infringements; religious groups have equal access to public places and resources for social services and education; and courts are increasingly protecting the free exercise of persons of diverse faiths. I've followed these issues for 35 years, and it seems to me that religious liberty is now getting the attention it deserves in our constitutional order.

<sup>†</sup> See Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act (September 2010); Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016 (June 2016).

Eric Treene is an attorney in Washington, D.C., and teaches at the Catholic University of America and Reformed Theological Seminary in Vienna, Virginia. He served for 19 years in four administrations in the U.S. Department of Justice as special counsel for religious discrimination.

## INTERVIEW

# Built on Faith: The Bible and the American Republic

## A new museum in the birthplace of American democracy highlights a neglected history

**I**t's a high-tech, \$60 million, twenty-first-century museum devoted to values extracted from an ancient book. The American Bible Society's Faith and Liberty Discovery Center in Philadelphia, Pennsylvania, opened in May 2021 and sits in the middle of America's "most historic square mile." From the museum's entrance you can look left toward Independence Hall, a UNESCO World Heritage site where the Declaration of Independence and United States Constitution were debated and adopted. Look right, and the view extends down Independence Mall toward the National Constitution Center. Inside, the interactive exhibits were designed by Local Projects, an award-winning Manhattan-based media and design company known for its high-profile projects around the globe.

But from the very beginning, the key challenge for the American Bible Society was not location or design—it was content. For five years leading up to the opening of the museum, an international group of some 30 scholars, representing a cross-section of religions and perspectives, helped shape the story the museum would tell. Their task? To engage visitors—of all faiths and none—in a narrative that's increasingly overlooked in discussions of America's history: the influence of the Bible on the social, legal, and political character of the American republic.

*Liberty* editor Bettina Krause recently talked with Alan Crippen, senior advisor for the museum, about the challenges of explaining the role of faith in the American experiment.

**Bettina Krause:** Congratulations on the opening of the center. Can you tell me more about the American Bible Society and how this project came about?

**Alan Crippen:** Well, the American Bible Society was founded 205 years ago, and some of our founders were also founders of the American republic. Our first president was Elias Boudinot, who was one of the presidents of the Continental Congress. He's not a household name like Jefferson, Adams, Madison, or Washington, but when you dig into his history, you see he's a major player. He mentored Alexander Hamilton, for instance. The second president of the Bible Society was John Jay, which is a name you know—a very influential American founder. Supreme Court Chief Justice John Marshall was also one of the early vice presidents of the Bible Society, as was John Quincy Adams.

The Bible Society movement began in England with the British and Foreign Bible Society. The American Bible Society was patterned after that and had the goal of distributing the Scriptures throughout the emerging American republic. Obviously, the primary mission of the society was to share the eternal verities of Scripture, eternal truths, and to nurture the salvation of souls. But there was also a secondary mission, particularly given the American context where we have a disestablished church. In England, there's a state church that, in a sense, provided the moral, spiritual, and ethical ballast for the state. That's the





FAITH  
AND  
LIBERTY  
DISCOVERY  
CENTER

FAITH AND L



European model. But in America the church is disestablished, so we depend then on voluntary associations to provide that ballast. I think that's why so many American founders were interested in an American Bible Society. They saw the Bible as a source of public virtue, the kind of virtue that's necessary to sustain and perpetuate liberty, along with the republican—small “r” republican—forms of government.

I say all this to give context. Both this religious and civic mission is in the DNA of the American Bible Society. In 2015, after 199 years in New York City, the society moved its headquarters to Philadelphia. And this locus was not lost on the leadership of the society. We looked at the piece of property we'd acquired—in the historic district—and we asked the question: “Is there something we can do that's appropriate, that would involve outreach, that would tell the story of the Bible in America and its role in our republic's origin and development?”

In wrestling with that question came a vision for establishing an outward-facing institution that would invite people of all faiths, or of no faith, to come in and to explore. To see what the Bible is all about and how it relates to this country we call America.

**Bettina:** So when someone walks through the doors of this museum, what are they going to experience? What are they going to learn? How will they interact with the exhibits?

**Alan:** Well, let me start back with our thesis statement. Our thesis is that faith guides liberty toward justice. That is what I would hope visitors walk away with—an appreciation that liberty, at least in the American experience, has been influenced, shaped, and directed by faith.

There were two major revolutions in the eighteenth century: the French Revolution and the American Revolution. The American



**We had to  
acknowledge that  
even history has  
been politicized.**

Revolution, it was bloody; it was hard fought and hard won. But it produced a pretty stable republic that has endured. The French Revolution is another story. The French Revolution was also a revolution committed to liberty, but it devolved into a horrendous bloodbath, with the horror of the guillotine, executions, martyrs, and tyrants. It ended with the global wars led by Napoleon Bonaparte that left some 7 million people dead, all in the name of liberty. And the constitutional order it produced was not as stable. I think we're on republic number five in France.

There were both contemporary and later scholars who asked, "What was the difference between the French and American revolutions?" Alexis de Tocqueville, of course, was one of a number who identified faith as one of the key differences. In the 1830s Tocqueville came to America and wrote a book called *Democracy in America*. He had some interesting things to say about faith and its role in sustaining and

perpetuating the American constitutional order.

So, in big-picture terms, that's what we are saying. The Bible, we would argue, is essentially a freedom book. The Scriptures are fundamentally about spiritual freedom, but its principles are also about these other freedoms that we enjoy as Americans: religious freedom, economic freedom, political freedom, civil freedom, civil rights.

**Bettina:** How are these ideas reflected in the museum's exhibits?

**Alan:** When we built the Faith and Liberty Discovery Center, we designed it to have six galleries, with each one dedicated to a different virtue. We start with faith, and then we go to liberty and then justice, hope, unity, and love. We picked these values as American values, values that have united us as Americans and that were central to the founding. We also have



# Justice

*Defend the poor and fatherless:  
do justice to the afflicted and*

PSALM 82:3

...of anyone with power,  
of government rests  
...ation from the ideals of  
...ce and the blueprints  
...on has often involved  
... difficult. The task is  
...ights compete, when  
... feel threatened.  
... we live

In matters like these, with America's core values  
at stake, many Americans have looked to the Bible  
for guidance. There they found encouragement to  
act justly and to love mercy. Beyond simple fairness,  
biblical justice includes righting wrongs and  
restoring harmony. The result: Each person is  
valued equally by God. The biblical writers even  
measure the success of nations and people by their  
treatment of those who are poor or vulnerable.

We can explore the struggle for justice in America  
through three lenses—the individual, the community,  
and the nation—as the nation has worked to get  
beyond self-interest to pursue the common good.

STR



a Welcome Gallery, where there's a graphic exhibit that focuses lenses on foundational documents, ranging from the Declaration to the Constitution to the Articles of Confederation, to Pennsylvania's early Colonial constitution, and the correspondence of various founders. And from these documents, the values—literally, the words—are picked out and lifted up. What we're trying to say is that these values, which we build our galleries around, are foundational to American order, and they were present at the beginning.

Our hope is that people of all faiths or no faith will come and visit, and they'll at least discover that the Bible had a positive role in inspiring leaders, reformers, and other great Americans, known and unknown. We would like the visitor to imagine, "What would America be without the Bible?" Would, for instance, the American Revolution have happened? Probably not. Or if it had, maybe it would have been more like France's. Where would the abolitionist movement have been without the Bible? Where would the civil rights movement have been without a Martin Luther King Jr.?

**Bettina:** It's a difficult project you're attempting when it comes to someone who doesn't come from a Judaic or Christian background. I'm sure you've heard the criticism that the Discovery Center is an attempt by a Christian organization to lay claim to America's history. I know that that's not the intent, but how do you respond to someone who is coming to this topic from a profoundly different worldview?

**Alan:** Well, we've designed the Faith and Liberty Discovery Center to be a history museum. It doesn't have an explicit religious purpose. The Bible Society does—it's one of America's oldest religious nonprofits with a religious mission. But the Faith and Liberty Discovery Center has an educational mission, and its content deals with religion in American history. I guess people might construe it as having a religious mission, but that isn't the case. The reality is that you really can't understand America's political, social, and cultural history without some reasonable working knowledge of the impact of Judaic and Christian faiths. So that's our posture and our approach.

I think some people have a hard time understanding that because we live in such a secularized world that wants to bifurcate religion from culture, that wants to sanitize religion from culture. You really can't do that. It's just not the human experience. They go together and we need to understand that.

**Bettina:** The Bible Society is nonpolitical and has been for more than two centuries. But how can you tell the story you're telling without playing into current political realities? I'm thinking, for instance, of the Christian nationalism on display during the January 6 attack on the Capitol. How do you tell this important story of the role of the Bible in American history without playing into those combustible narratives?

**Alan:** I liked the way you describe it. Yes, political narratives in America couldn't be more combustible, and this was a reality that was already well advanced when we started on this project. We were conscious that we had the opportunity to speak into this reality, hence our focus on the values that unite us. One of our galleries is devoted to unity, illustrating that these are the *United States*, and the Constitution exists to create a more perfect union. Not a perfect one, but a *more* perfect union.

But you're right. The Bible Society is absolutely apolitical, yet in creating a history museum we had to acknowledge that even history has been politicized. So we have worked very hard to be apolitical. Faith must transcend politics. We're trying to tell the story of how the Bible has influenced individuals in key historical and personal moments without being political.

Now, we do have to deal with political material, because it's a museum about civic and political history. We talk, for instance, about how Martin Luther King Jr., and other civil rights leaders took inspiration from the Bible and advanced Herculean political reforms. The same holds true for abolitionists or even those who took part in the American Revolution. But we have intentionally avoided any contemporary issues. We don't want to create obstacles for people to trip over and miss the larger point.

Now, that said, I think it's impossible for any thinking person to walk through the Faith and Liberty Discovery Center and not begin to connect dots with some current contemporary issues. We want that. We want people to be able to reflect, to consider and apply, to reason, to engage in civil dialogue with one another and deescalate the combustible atmosphere that we have. We have installed what we call "conversation booths," where the visitor who wants to connect these dots can go into these booths and hit a record button. They're guided in sharing their thoughts on whatever they want to talk about. That then becomes material we can curate and use for future exhibits. Again, our goal is to create a place for engagement, for reflection, and for conversation without being politicized.

# Religious Freedom in the Execution Chamber

**A condemned prisoner wanted spiritual comfort in his last moments. The state said no. In *Ramirez v. Collier*, the U.S. Supreme Court again engages with religious freedom on death row.**

Editorial note: When this issue went to press the Court's decision in *Ramirez v. Collier* was still pending, although expected imminently.

BY HOLLY  
HOLLMAN

Studying sacred texts, attending weekly services, praying with fellow believers, and receiving advice from faith leaders are commonplace in the United States as people practice their religion freely. Though lawyers and judges debate the precise meaning of our laws, few question that our country prizes religious freedom or that religious activities are welcome. Religion thrives without our government telling us when or how to practice our faith.

But for those who serve time in prison, the government must play a far greater role. Order and security are paramount state interests when running a prison. In the prison system every aspect of a prisoner's life is a matter of state control, and the practice of religion can get complicated. Recent religious liberty claims of death-row prisoners illustrate the challenges in balancing the religious needs of prisoners and the government's interests in running prisons safely and securely.

During this term the U.S. Supreme Court is considering a case called *Ramirez v. Collier*, which has the potential to impact how such challenges should be handled. The issue arose when prisoner John Ramirez sought approval from the state to have his pastor lay hands on him and pray audibly at the moment of his execution. The state of Texas rejected his request, as did the courts that heard his claims, but the Supreme Court granted a stay of execution and ordered an expedited review. By grant-

ing review of the case, the court has the opportunity to provide clearer guidance for interpreting laws that protect religious freedom in prisons and elsewhere.

The *Ramirez* case involves several issues impacting people of faith. For many religions it is a moral imperative to care for "the least of these," which includes those who are incarcerated. And for those of us who value religious liberty for all, we must insist that everyone has the right to practice their chosen religion, including by supporting laws that aid those who are incarcerated. For us to understand what is at stake, it is important to review the federal statute at the center of the case and how we got to this point.

## A Balancing Act

At issue in *Ramirez v. Collier* is the application of a federal law, the Religious Land Use and Institutionalized Persons Act (RLUIPA). It is designed to alleviate government burdens on religious exercise in two specific contexts: religious congregations facing local zoning regulations and individuals confined in government institutions, such as prisons. RLUIPA was enacted to enhance the free exercise of religion for these two populations. The statute was unanimously passed by Congress in 2000 and supported by an extremely diverse coalition of more than 50 religious and civil liberties groups led by the Baptist Joint Committee for Religious Liberty (BJC). Under RLUIPA the government



may not impose substantial burdens on the exercise of religion in these contexts unless it is able to demonstrate that, in doing so, it has used the least restrictive means to further a compelling governmental interest. Often in these cases, that compelling government interest is keeping prisons secure. In short, the government has a responsibility to protect religious exercise even where impositions on religion were not intended to restrict religion.

Since its passage, RLUIPA has rarely been considered by the Supreme Court. In 2005 the court upheld the constitutionality of Section 3 of RLUIPA—the provision protecting prisoners' rights (*Cutter v. Wilkinson*). The court held that Congress had the authority to pass laws that create special protections for the religious practice of institutionalized persons without violating the establishment clause of the First Amendment. In *Cutter* the court recognized that sometimes religious practice calls for an accommodation, particularly the removal of a government-imposed burden. While our laws tend to accommodate the religious majority, adherents of minority faiths, particularly non-mainstream religions, often need special treatment to obtain authentic religious freedom. The court noted that the "exercise of religion" involves not just beliefs but physical acts. At times the physical acts of religious practitioners rely on accommodation from the government. RLUIPA was designed to meet that need.

Ten years later the Supreme Court again took up a prisoner's claim under RLUIPA in *Holt v. Hobbs* (2015). In that case the court considered the claim of a Muslim inmate in Arkansas, Gregory H. Holt (also known as Abdul Maalik Muhammad), to grow a one-half-inch beard in accordance with his faith despite prison policies prohibiting beards. The state refused to accommodate Holt, arguing that he could express his faith through other practices. Holt sued the Arkansas Department of Corrections, and the case eventually made its way to the Supreme Court. The Supreme Court ultimately ruled in Holt's favor that RLUIPA protected his right to have a religiously mandated beard while incarcerated. The decision hinged on the fact that the state could not show that the reasons it gave for its rule—namely, to ensure identification and security—required its "no beards" policy.

*Holt v. Hobbs* provides a good example of how RLUIPA requires a proper balancing of the free exercise of religion with other government interests. While both sides may agree that

prison officials have a strong interest in maintaining security, the proper question under the statute was whether the state's refusal to allow a religious exemption for Holt's requested beard was the least restrictive means of furthering that interest. The court ruled that it was not. In an amicus brief filed by former prison wardens on behalf of Holt, the wardens expertly noted that while security concerns in penitentiaries are certainly a compelling interest of the government, not all measures are warranted. Like the congressional sponsors of RLUIPA, the wardens who have been on the front lines of running prisons recognized that "prison officials sometimes impose frivolous or arbitrary rules" that unnecessarily restrict religious liberty. In the view of these former wardens, this case illustrated "precisely the type Congress was concerned about—where vaguely articulated security concerns are being used to justify an outdated and unwarranted policy depriving an inmate of his religious rights."

### Shifting Policies

*Ramirez v. Collier* allows the Supreme Court to more fully consider an area of religious exercise in prison that has been brought up in other recent cases: the presence of spiritual advisers in the execution chamber. This case marks the fifth time in the past two years that a case involving this context has reached the Supreme Court. In February 2019, in *Dunn v. Ray*, the Supreme Court denied Alabama prisoner Domineque Ray's request to have his imam at his side during his execution—the state of Alabama would allow only the state's Christian chaplain to be present. This alarming decision that denied a request for the prisoner's religious exercise and demonstrated Christian preferentialism during the last moments of Ray's life was immediately criticized by legal scholars and religious leaders. The next month the Supreme Court was faced with another claim of religious discrimination in a similar policy in Texas. In March 2019 the Court granted a stay of execution to Buddhist prisoner Patrick Murphy who had requested a Buddhist priest to be by his side in the death chamber. The state had denied his request since only state-employed chaplains were permitted in the execution chamber and at the time the state employed only Christian and Muslim chaplains. This decision seemed to directly contradict the Court's decision in *Dunn v. Ray*. In a concurring opinion Justice Brett Kavanaugh explained his concern was that the state seemed to have



different treatment for prisoners of different faiths in the execution chamber.

After the Court ruled in Murphy's favor, Texas and Alabama responded by updating their policies to prevent the presence of *any* spiritual advisers in the death chamber during execution. This move to exclude all clergy seemed to follow Justice Kavanaugh's suggestion that equal treatment based on religion required allowing either a spiritual adviser of the prisoner's faith or no spiritual adviser at all. Catholic prisoner Ruben Gutierrez challenged the new no-clergy policy. After his case made its way up to the Supreme Court in June 2020 and then back down to the lower courts to be reevaluated, Texas changed the policy again to allow spiritual advisers in the execution chamber.

Most recently, Willie Smith, who was scheduled to be executed February 11, 2021, challenged Alabama's new policy that banned spiritual advisers of any faith in the execution chamber after he was denied his request to have his pastor accompany him. The Supreme Court affirmed Smith's stay of execution, and his pastor was ultimately allowed to be at Smith's side and hold his leg to provide spiritual comfort in his final moments.

### Key Questions

In *Ramirez v. Collier* Texas finds its execution chamber policies in the spotlight once again. However, the facts in *Ramirez* go beyond the issue of whether a state must allow the presence of a spiritual adviser of the prisoner's faith in the execution chamber. The case addresses what role the spiritual adviser may play once inside. In *Ramirez* Texas granted John Ramirez his request to have his pastor accompany him in the execution chamber but denied his request that his pastor be able to lay hands on him and to sing, pray, or read Scripture over him as Ramirez is executed. Ramirez appealed his case to the Supreme Court, which heard oral arguments in November. The questions the Court considered include: How does the Court gauge a prisoner's sincerity when requesting religious accommodations that would interfere with execution? What is the government's precise interest that conflicts with a prisoner's religious exercise to have a spiritual adviser in the execution chamber? At what point does an inmate's religious exercise, in this case through spiritual comfort of touching and audible prayer, compromise that interest?

Under RLUIPA the state of Texas is required to present specific evidence concerning its stated interests supporting its policy. Such evidence would need to show how allowing

Ramirez's pastor to lay hands on him and pray audibly would harm the state's interest in ensuring security in the prison. Citing generalized assertions and speculation of security concerns fails to fulfill RLUIPA's requirement.

During the oral arguments in *Ramirez* several justices seemed focused on the precedent this case would set for other inmates who might use religious claims to delay their executions. Justices Stephen Breyer and Elena Kagan, however, pointed out that where physical touch and audible prayer have been allowed in the death chamber in Texas previously (and other jurisdictions currently), no disruptions of the executions have occurred. This begs the question: If other jurisdictions allow this practice safely, why can't Texas? If the issue is the size of the death chamber or limited security in comparison to other states, Texas should present relevant evidence of those concerns. So far, Texas has not done so.

### A Moral Imperative

RLUIPA is based on an understanding that religious liberty is vital and must be protected, including for those who are incarcerated. Many religious groups lobbied for its passage out of religious obligation to care for those most in need. The law provides a mechanism for evaluating the legitimate state concerns of prison security and administration while upholding the basic rights of people in government custody. Congress recognized that prison officials, if left unchecked, had a tendency to present overly broad or exaggerated security claims that would unduly restrict the religious liberty of inmates. In the recent string of Supreme Court cases involving prisoners on death row, it is overwhelmingly evident how necessary the balance between prison security and the religious freedom of inmates continues to be. The balancing test that RLUIPA provides makes the following clear: If the state of Texas is allowed to burden Ramirez's right to religious freedom without proper justification in the name of vague security concerns, a dangerous precedent that disregards RLUIPA's proper application and interpretation will be set. We have a moral imperative to protect the standard that RLUIPA set, not only for this necessary balance of prison security and religious freedom, but for the treatment of "the least of these" in our prison system.

Holly Hollman serves as general counsel and associate executive director of the Baptist Joint Committee for Religious Liberty, where she provides legal analysis on church-state issues that arise before Congress, the courts, and administrative agencies. She is a member of the U.S. Supreme Court, D.C. and Tennessee bars.

**If others safely allow touch and audible prayer in the death chamber, why can't Texas?**

# A Battle Never Won

**Book Review: *Free Speech: A History from Socrates to Social Media*, by Jacob Mchangama. New York: Hachette Book Group, Inc., 2022.**

BY GRACE  
MACKINTOSH

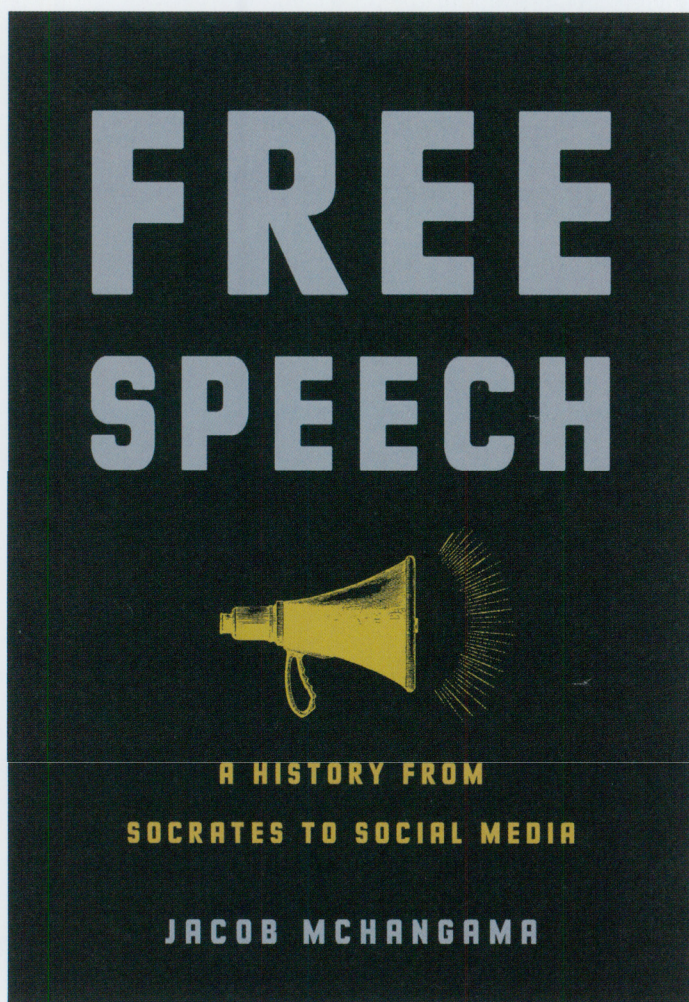
It is axiomatic that an idea established by silencing every voice of opposition is inevitably on the wrong side of history. In his book *Free Speech: A History from Socrates to Social Media* author Jacob Mchangama, a Danish lawyer and social commentator, sets out a sweeping history of free speech; a fundamental human right that, along with freedom of association, Mahatma Gandhi once called the “lungs of a country.” From cover to cover, Mchangama

argues that the right of free speech animates all other human rights and that when freedom of expression and assembly are restricted, other rights become merely notional. He points, for instance, to the era of slavery in the United States, when southern states practiced the “most draconian laws against free speech in the history of America.” Through this and many other case studies Mchangama makes his point clear: free speech accompanies civil liberty and, conversely, its demise marks oppression.

The later chapters of the book focus on the often-contested contours of free speech, especially given the challenges posed by new technology. In one of many examples, Mchangama points out the absurdity of Facebook blocking a *Time* magazine article written by comedian Sacha Baron Cohen. Baron Cohen’s article mocked COVID-19 counter-narratives, the very messages Facebook was attempting to remove from its platform. But ironically, Facebook *also* removed Cohen’s piece because it was accompanied by a picture of a man wearing a facemask stating: “COVID-19 IS A HOAX.” Ultimately, though, Mchangama’s position on the complexities of social media content moderation remains equivocal. He highlights but does not answer a number of questions raised by recent trends toward stricter policing of false narratives or other dangerous speech—real or perceived.

Mchangama is unambiguous, however, in one warning that he weaves throughout his book: the rights of free expression and assembly are infinitely more vulnerable during times of emergency, such as war or a pandemic. Thanks to Mchangama’s erudite research, we are forearmed. When faced with competing claims and interests, if we know nothing else other than that freedom of expression is under assault, we can instinctively understand that evil has taken a side and align ourselves on the opposite boundary.

Grace Mackintosh is Legal Counsel and Director of Public Affairs and Religious Liberty for the Seventh-day Adventist Church in Canada.



Excerpt from *Free Speech: A History from Socrates to Social Media*, by Jacob Mchangama.

The commander in chief had had it with the press. He'd spent his time in the highest office of the land trying to do the best for his people, but all the press did was undermine him and endanger the nation. There he was, making the country great again, and what did they write about? His marriages, his divorces, his children, even his weight! It was time the purveyors of fake news paid the price for their slander, sedition, and outright treason. The most powerful man in the country decided it was time to push back, launching a 136-character broadside banning

writings and books, as well imprinted as other in which such writings and books many open and manifest errors and slanders are contained.<sup>1</sup>

The story of England's mercurial Henry VIII (who else?) sounds contemporary because it is. "Free Speech" is never ultimately won or lost. Ask a college student when the fight for free expression began, and you might get any one of a number of responses. Some Americans would say it started with the ratification of the First Amendment in 1791. A European might point to the 1789 French Declaration of the Rights of Man and of the Citizen. A British person might cite John Milton's *Areopagitica*, published in 1644. Whatever their differences, most would describe freedom of speech as a uniquely Western concept born somewhere around the Enlightenment. The reality is far more complex.

In truth, the roots of free speech are ancient, deep, and sprawling. The Athenian statesman Pericles extolled the democratic values of open debate and tolerance of social dissent in 431 BCE. In the ninth century CE, the irreverent freethinker Ibn al-Rāwandī used the fertile intellectual climate of the 'Abbāsīd Caliphate to question prophecy and holy books. In 1582 the Dutchman Dirck Coornhert insisted that it was "tyrannical to . . . forbid good books in order to squelch the truth."<sup>2</sup> The first legal protection of press freedom was instituted in Sweden in 1766 and Denmark became the first state in the world to abolish any and all censorship in 1770.

Yet, almost invariably the introduction of free speech sets in motion a process of entropy. The leaders of any political system—no matter how enlightened—inevitably convince themselves that *now* freedom of speech has gone too

far. Autocratic oligarchs disdainful of sharing power with the masses twice overthrew the ancient Athenian democracy, purging proponents of democracy and dissent along the way. Hardening laws against apostasy and blasphemy curtailed the most daring freethinking in medieval Islam. In the Dutch Republic of the sixteenth century, Dirck Coornhert was exiled and his writings banned on several occasions. Both Sweden's and Denmark's experiments with press freedom were short-lived as absolutist rulers took back control of the printing presses. This phenomenon of free speech entropy is as relevant today as it was 2,500 years ago, and when looking closer, the justifications for limiting free speech in the twenty-first century have more in common with those used many centuries past than perhaps we would like to admit.

The global club of free democracies is shrinking fast. As in ancient Athens, aspirational autocrats—from Viktor Orbán in Hungary to Narendra Modi in India—view freedom of speech as the first and most important obstacle to be cleared on the path to entrenching their power. In parts of the Islamic world, blasphemy and apostasy are still punishable by death, whether enforced by the state or by jihadist vigilantes. The global free speech recession even extends to liberal democracies, who—not unlike Henry VIII—are fearful of the consequences of disinformation and hostile propaganda spreading uncontrollably among the masses through new technology.

Free speech entropy is not merely political, but deeply rooted in human psychology. The drive to please others, the fear of outgroups, the desire to avoid conflict, and everyday norms of kindness pull us in the direction of wanting to silence uncomfortable speakers, whether on digital platforms, at college campuses, or in cultural institutions. Like a massive body in outer space pulling in all the matter close to it, censorship draws us all in. It is therefore all the more vital to actively foster and maintain a culture of free speech to ensure that this freedom continues. Laws are not enough on their own.

Excerpted with permission from *Free Speech: A History from Socrates to Social Media* by Jacob Mchangama. Copyright © 2022. Available from Basic Books, an imprint of Hachette Book Group, Inc.

<sup>1</sup> D.M. Loades, "The Theory and Practice of Censorship in Sixteenth Century England," *Transactions of the Royal Historical Society* 24 (1974): 147.

<sup>2</sup> Dirck Coornhert, *Synod on the Freedom of Conscience (1582)*, trans. and ed. Gerrit Voogt (Amsterdam: Amsterdam University Press, 2008), 176.

**The global free speech recession even extends to liberal democracies.**



Jacob Mchangama

# A Social Dilemma

BY ANDRE  
WANG

One morning a few months ago I scrolled through my Facebook feed and came across a post by a good friend regarding the origin of the COVID-19 virus. It was not a politically charged post, but a scholarly article on the virus, its purported connection to China, and the pandemic that has held the world captive for more than two years.

Having a shameless—and perhaps shameful—sense of humor, I tapped out the following comment on my phone: “*As one of Chinese heritage, I rather enjoyed the kung pao bat I had for breakfast.*” I clicked send and kept perusing my feed.

Within 10 seconds an alert message appeared declaring that my comment violated Facebook’s community standards and my account was subject to a seven-day suspension. There was a link in the message informing me of the process to appeal the decision and that my account was suspended immediately, even while pending any appeal. Conspicuously missing was any information on my infraction and why the penalty was warranted. Was it my mention of being Chinese on a COVID-related post—or inferring that the virus came from China? Was it the mention of a bat—or that I ate and enjoyed it?

Not knowing *what* to appeal, I decided pursuing it would be futile and more aggravating than spending one week in Facebook jail. I further reasoned that the social media hiatus would be good for me anyway.

After seven days my account was reactivated. However, emblazoned on my account settings page is this ominous warning: “People who repeatedly post things that aren’t allowed on Facebook may have their accounts permanently disabled.” The scarlet message (it’s actually more orange) remains there today.

This experience has raised questions about corporate ethics, social responsibility, and civil-

ity in public discourse. What I learned made me realize the implications of being connected on the world’s most popular social media platform.

## The Rules

While in exile, I combed through Facebook’s user agreement to understand what is allowed and what isn’t. The agreement references the now-famous community standards, the list of official rules written in verbose legalese that outlines the types of posts that can get a user banned from the platform. It also identifies the types of users that are not allowed to post.

The guidelines define the six categories of unacceptable posts and content:

- 1 Violence and Criminal Behavior:** Facebook bans any threats and advocating violence. The standards also mention that efforts are made to determine the difference between “casual statements” and “credible threats to public or personal safety.”
- 2 Safety:** Facebook will remove content where there is a “genuine risk of physical harm or direct threats to public safety,” including cyberbullying and posts involving suicide and self-harm. Interestingly, the anti-bullying policies “do not apply to public figures, because we want to allow discourse, which often includes critical discussion of people who are featured in the news or who have a large public audience.” However, content that constitutes hate speech or advocates violence against a public figure will be removed.
- 3 Objectionable Content:** Specifically mentioned in this category are hate speech, graphic violence, pornography, and cruel and insensitive content.
- 4 Integrity and Authenticity:** This is content that falls outside of the other categories,



including spam and misrepresentation (i.e., users must be real and verifiable). Of note, Facebook states that it tries to reduce “false news,” yet satire is allowed. “For these reasons, we don’t remove false news but instead significantly reduce its distribution by showing it lower in the news feed,” the standards state.

- 5 **Respecting Intellectual Property:** Users are restricted from posting content that is owned by someone else, including anything with “copyrights, trademarks, and other legal rights.” And contrary to widespread misconception, the community standards state that users own everything they post. For example, when you post a picture that you took, Facebook cannot and does not claim any rights to it.
- 6 **Content-related Requests:** Facebook will remove accounts upon the request of an authorized representative, such as an immediate relative that is deceased or incapacitated. It also adds that for the protection of minors, it will remove accounts of users that are under 13 years old, as well as requests by their parents, legal guardians, or the government.

Regarding the enforcement of these standards, both the user agreement and the community guidelines suggest that violations are adjudicated by sentient, thinking human beings at Facebook, with references to “our team.” But my experience indicates otherwise.

### The Algorithm

When I posted my ill-fated comment on my friend’s post, the notification of the community standards violation appeared almost instantly—definitely too fast to have been done by human hands. For instance, a user would have had to read my comment (and been offended) and reported it to Facebook. The comment would have then had to be reviewed by a Facebook employee, who would have rendered a community standards judgment on my comment and, if there was a violation, the length of my penalty. It is impossible for that sequence of events to occur within 10 seconds.

When Mark Zuckerberg testified before Congress in April 2018, he disclosed that Facebook was developing artificial intelligence (“AI”) to address the platform’s security, privacy, and user issues. In short, user activity and content would be monitored by robots.

People can report anything to Facebook. According to Guy Rosen, vice president for product development, Facebook receives tens of millions of reports per week about potentially objectionable content. These reports are employed as a data set to train Facebook’s AI systems to automatically detect such content. Rosen says, “The objective is how to automate the process so we can get to content faster, and get to more content. It’s about learning by examples. And the most important thing is to have more examples to teach the system.”

## Catch-22: International Religious Freedom and Social Media

Facebook and other social media companies face a daunting challenge globally when it comes to dealing with religious speech on their platforms. On one hand, these platforms can be used to mobilize violence, discrimination, and hatred toward vulnerable religious communities. On the other hand, as social media platforms engage in content moderation, they’re regularly accused of censoring unpopular or minority religious views.

The U.S. Commission on International Religious Freedom (USCIRF) summed up this dilemma in a fact sheet released late last year, writing: “Governments’ and social media companies’ insufficient responses to online hate can result in grave human rights violations, as illustrated by Facebook’s failure to address incitement against Rohingya Muslims in

Myanmar. At the same time, social media platforms have become the primary forum for public and private expression in many contexts. Removing or censoring protected speech online can also impede human rights.”\*

Facebook and other platforms have been used in India, Pakistan, Myanmar, and many other countries by adherents of a majority religion or ethnic group to drive violence—and even genocide—against religious minorities. In December last year, for instance, a Buddhist man from Sri Lanka was lynched and burned by a frenzied mob in Pakistan. The mob had formed after videos circulated on social media that purported to show the man “blaspheming” Islam by taking down a poster with religious content.

The sheer scale of social media’s reach

and activity, however, means there are no easy remedies. As USCIRF acknowledges, “The volume of speech, and hate speech, being shared and regulated online is astonishing. Facebook, for instance, governs more communication than any government and removes 3 million pieces of hate speech a month, or more than 4,000 an hour.” Filtering out dangerous religious speech and leaving legitimate religious speech untouched is a task that social media platforms perform imperfectly—neither artificial intelligence nor human content moderators have the capacity to make the accurate, timely decisions necessary.

\*All quotes are from United States Commission on International Religious Freedom, *Protecting Religious Freedom Online Factsheet*, December 2021.

The AI is taught to identify low-hanging fruit: nudity, graphic violence, terrorism, spam, and hate speech. But what robots cannot be taught is nuance. While my comment could be interpreted as a slur on its face, in context it was self-referential and self-deprecating. If the AI was really on the ball, it would have picked up on my obvious Chinese surname.

### The Sandbox

Despite my experience, my philosophy toward the Facebook behemoth remains unchanged: As a private business, Facebook has the right to regulate, ban, or censor whatever content or users they host on their site and, further, legally use user data however they choose. If they don't want me making comments about eating bats, that's their absolute prerogative. It's their sandbox and their rules. I just play in it.

On the other hand, there now percolates a bigger social ethic. Many point to Facebook's domineering role in public discourse and, by extension, the public trust—that users are exploited by the Orwellian algorithm to intensify doubts, fears, and insecurities. The polarization of virtually everything—from political candidates to vaccines to pineapple on pizza—gains breakneck momentum on social media.

In October 2021 ex-Facebook data scientist Frances Haugen testified before Congress, presenting internal research that her former employer knowingly engaged in practices that harmed children, sowed division, and undermined democracy in pursuit of “astronomical profits.” She revealed that the algorithms reward engagement, which boosts sensational content such as posts that feature rage, hate, or misinformation.

There is currently a proposal to have social media companies regulated like a public utility, where it operates as a private company but with government oversight. But when it comes to a platform that is so integral to public discourse, the “I'm from the government and I'm here to help” approach is a dangerous proposition. Oversight can become overreach seamlessly. So while Facebook executives and the government quarrel over what Facebook is and what it means to our democracy, today's reality is that any user can be penalized because a turn of phrase offended a robot.

### A Word on Civility

Civility in discourse is a lost attribute. Somewhere along the way, our culture abandoned civility and today people are demeaned, derided, and ridiculed for who they are or what they believe. People have gotten bitter and angry—and not just bitter and angry with those who don't agree with them. They get bitter and angry with those that aren't as bitter and angry as they are.

*Civility* is defined as “politeness and courtesy in behavior or speech.” It has its etymology in the Latin word *civilis*, meaning citizen or person, hence the term *civilization*. By its very origin, civility recognizes the inherent respect and dignity of the individual and where we derive the basic code of social interaction.

Civility in discourse requires an immense humility. It is not only an acknowledgment that there is another perspective but that we could be wrong. But it goes further than that. Humility mandates that we view our counterparts as our moral and intellectual equal.

In his letter to the church in Ephesus, Paul sought to quell a political conflict raging among the citizenry. In his plea for civility in discourse, he wrote:

“I urge you to live a life worthy of the calling you have received. Be completely humble and gentle; be patient, bearing with one another in love. Make every effort to keep the unity of the Spirit through the bond of peace. There is one body and one Spirit, just as you were called to one hope when you were called. One Lord, one faith, one baptism; one God and Father of all, who is over all and through all and in all” (Ephesians 4:1-6, NIV).\*

Whether my bat-eating comment warranted punishment will never be settled. But it doesn't matter. A private company can make the rules under which its consumers must play. What does matter is that in every position that I espouse and in every interaction that I have, civility is what binds us and keeps our democracy healthy. May we all “live a life worthy of that calling.”

\*Bible texts credited to NIV are from the *Holy Bible, New International Version*. Copyright © 1973, 1978, 1984, 2011 by Biblica, Inc. Used by permission. All rights reserved worldwide.

Andre M. Wang serves as general counsel and director of public affairs and religious liberty for the North Pacific Union Conference of Seventh-day Adventists. He continues to post musings on Facebook, Twitter, and Instagram.



- Chairman, Editorial Board **Alex Bryant**
- Editor **Bettina Krause**
- Associate Editor **Melissa Reid**
- Administrative Assistant **Lori Bryan**
- Consulting Editors **Ganoune Diop**  
**Alex Bryant**  
**Orlan Johnson**  
**Ted Wilson**
- Consultants **Amireh Al-Haddad**  
**John Ashmeade**  
**Stephen E. Brooks**  
**Walter Carson**  
**Charles Eusey**  
**Kevin James**  
**Bettina Krause**  
**Grace Mackintosh**  
**Nicholas Miller**  
**Alan Reinach**  
**Dennis Seaton**  
**Andre Wang**  
**Jennifer Gray Woods**  
**Ivan Williams**
- Art Direction/Design **Bryan Gray**  
**Types & Symbols**
- Website Design **Andrew King**
- Treasurer **Judy Glass**
- Legal Adviser **Todd McFarland**

[www.libertymagazine.org](http://www.libertymagazine.org)

*Liberty*® is a registered trademark of the General Conference Corporation of Seventh-day Adventists®.

*Liberty*® (ISSN 0024-2055) is published bimonthly by the Pacific Press Publishing Association for the North American Division of the Seventh-day Adventist Church. Periodicals postage paid at Nampa, ID.

POSTMASTER: send changes of address to Liberty, PO Box 5353, Nampa, ID 83653-5353. Copyright © 2021 by the North American Division.

Printed by Pacific Press Publishing Association, PO Box 5353, Nampa, ID 83653-5353. Subscription price: U.S. \$7.95 per year (\$15.95 for non-U.S. addresses). Single copy: U.S. \$1.50. Price may vary where national currencies differ. For subscription information or changes, please call (800) 545-2449. Vol. 117, No. 2, March/April 2022

### Moving? Please notify us 4 weeks in advance

Name \_\_\_\_\_

Address (new, if change of address) \_\_\_\_\_

City \_\_\_\_\_

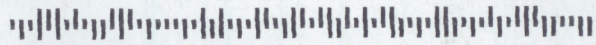
State \_\_\_\_\_ Zip \_\_\_\_\_

### New Subscriber?

ATTACH LABEL HERE for address change or inquiry. If moving, list new address above. Note: your subscription expiration date (issue, year) is given at upper right of label. Example: 0303L1 would end with the third (May/June) issue of 2003. To subscribe to *Liberty* check rate below and fill in your name and address above. Payment must accompany order.

1 year \$7.95

Mail to: *Liberty* subscriptions,  
PO Box 5353, Nampa, ID 83653-5353  
**1 (800) 447-7377**



LAST ISS: 3/01/22  
2T7DLCXA 880340 LIBERTY LIB 44621 #0880340LIB20301  
56291\*\*\*\*\*CAR-RT LOT\*\*C-000  
ANDREWS UNIVERSITY -582 #  
JAMES WHITE LIBRARY  
4190 ADMINISTRATION DRIVE  
BERRIEN SPRGS MI 49104-1440

**“No one is born hating another person because of the color of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.”**

Nelson Mandela,  
*Long Walk to Freedom* (1994).

