A MAGAZINE OF RELIGIOUS FREEDOM

NEW-LOOK BLUE LAWS? | THE POLITICS OF JESUS

LIBERTY®

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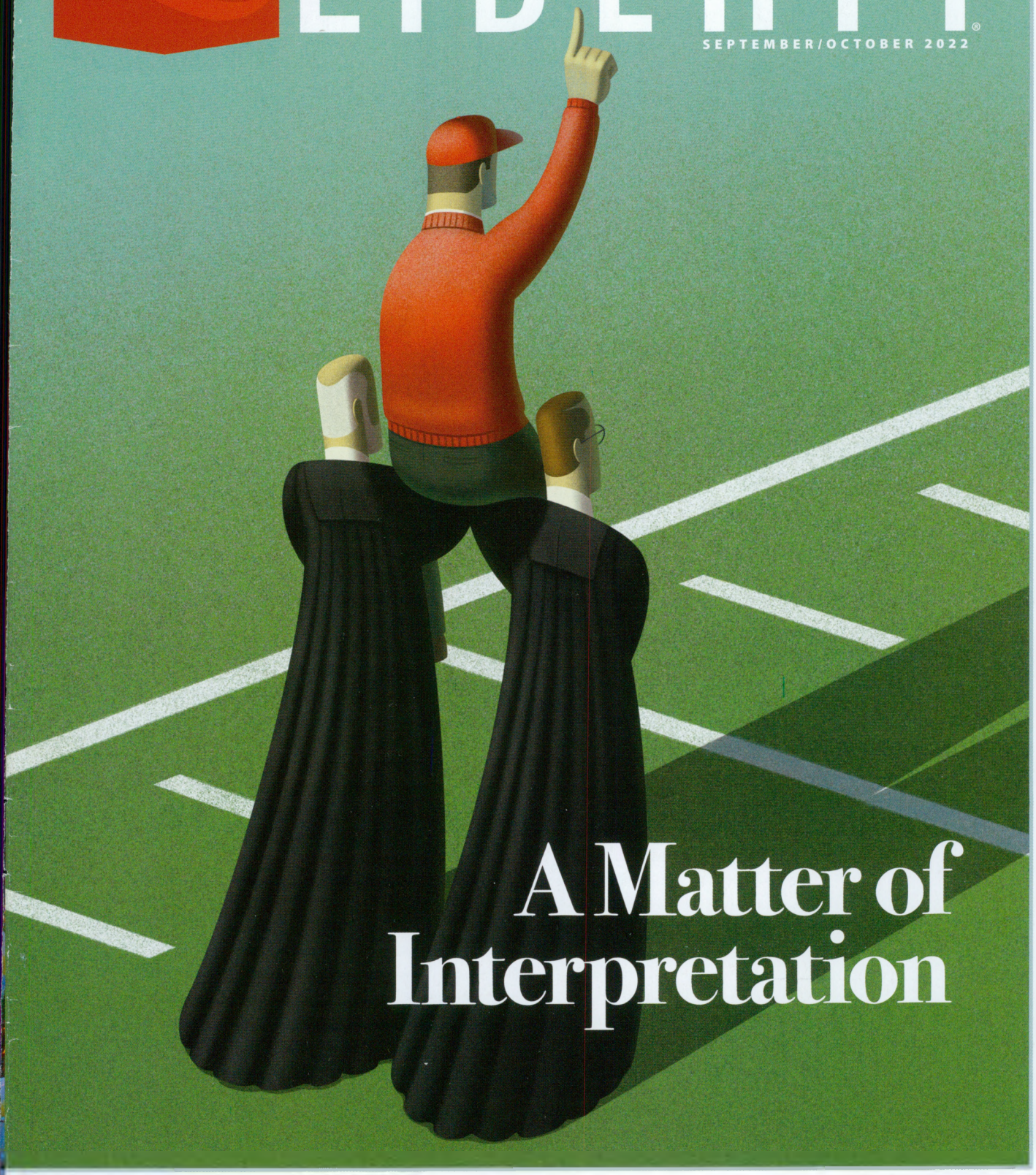
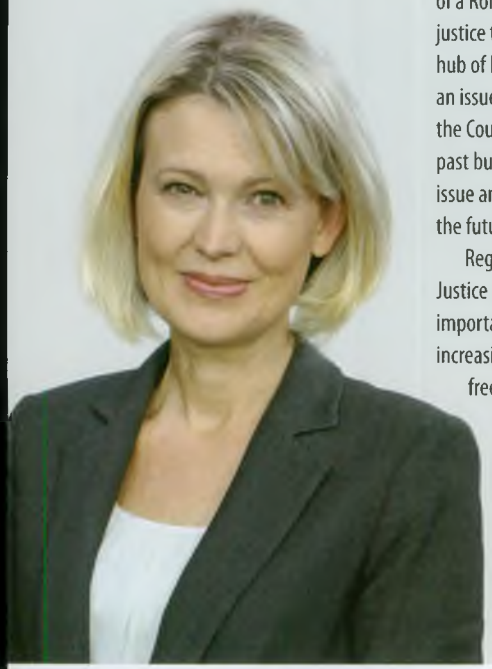


A Matter of Interpretation

WHAT IF RELIGION ISN'T SPECIAL ENOUGH?



Defenders of religious freedom in the United States are walking toward a cliff's edge that most of us don't want to acknowledge is there. In fact, recent events at the Supreme Court make the danger up ahead even harder for us to see.

Consider *Kennedy v. Bremerton School District*, the football coach prayer case. The newly composed conservative majority of the Court delivered what many are applauding as a robust defense of religious free expression rights. Many within the religious freedom community also celebrated the majority's opinion in *Carson v. Makin,* which says Maine can't exclude religious schools from a generally available funding program.[1]

I wonder, though, if we need to consider some longer-term realities.

Associate Supreme Court justice Samuel Alito drew scathing criticism from the left when he traveled to Rome in July to address a conference on religious liberty. In terms of public relations optics, he probably didn't do much for the Court's claims to neutrality. As more than one commentator has pointed out, this was a case of a Roman Catholic Supreme Court justice traveling to the geographical hub of his faith. There he addressed an issue of ongoing importance to the Court, in front of folk who've had past business before the Court on this issue and who probably will, also, in the future.

Regardless of all of this, Justice Alito's speech nailed one very important point. In the context of increasing hostility toward religious freedom within Western liberal democracies, he observed:

> "Polls show a significant increase in the percentage of the population that rejects religion or thinks it's just not all that important," Alito said. "And this has a very important impact on religious liberty, *because it is hard to convince people that religious liberty is worth defending, if they don't think that religion is a good thing that deserves protection*" (emphasis added).[2]

In 1999, 70 percent of Americans reported that they belonged to a church, synagogue, or mosque. Last year it was 47 percent. It was the first time in the eight decades that Gallup has been tracking religious demographics that less than 50 percent of Americans reported belonging to a house of worship.[3]

For now, America remains a religious nation in at least one important sense. More than seven in 10 people still consider themselves affiliated with some type of organized religion. But the reality is that our behavior, measured in actual participation rates, shows that the influence of faith is waning in the everyday life of most Americans.

Does religion merit special treatment in our society? Should religious individuals or institutions, for instance, be granted exemptions from some laws that others are required to obey?

More to the point, how will these questions be answered in the future within an America in which a majority doesn't identity as religious?

A decade ago University of Chicago Law School professor Brian Leiter published a book provocatively entitled *Why Tolerate Religion?* In it he forcefully argued why, from the perspective of a secular person, religion isn't special enough to deserve exemptions from laws that are neutral in their intent and that apply equally to everyone.

"Why, for example, can a religious soup kitchen get an exemption from zoning laws in order to expand its facilities to better serve the needy," he asks, "while a secular soup kitchen with the same goal cannot? Why is a Sikh boy permitted to wear his ceremonial dagger to school while any other boy could be expelled for packing a knife?" We could also ask, Why should a religious adoption agency, or university, or any other religious institution, be exempt from some nondiscrimination requirements? Why should a Seventh-day Adventist employee receive workplace accommodation for Sabbath keeping and not someone else who wants to take Saturday off for a regular family event? Why should the government, and thus the taxpayer, be burdened with the trouble and expense of meeting the special dietary requirements of a Muslim or Jewish prisoner?

The problem boils down to this: If a majority comes to believe that religion isn't special—that there's no distinction between a "thus saith the Lord" and a moral principle grounded in a sincerely held philosophical position—why should religion receive special treatment under the law?

There are many possible rejoinders we can make, including the fact that it's written right there in our Constitution that religion deserves special consideration and protection. But perhaps that fact alone isn't completely reassuring given the recent reminders that neither constitutional interpretation nor the composition of the Supreme Court is static.

Alternately, we could argue that religious freedom is so connected with other fundamental human freedoms, such as freedom of association or speech, that to impair one is to impair all. Or we could argue that religion makes outsized contributions to society in the areas of health

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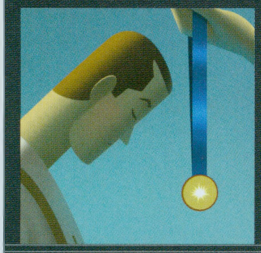


> *No American should be forced to choose between keeping their faith and keeping their job.* P31

care, education, and provision of community resources of all kinds. Or we could emphasize research that shows the unique contributions religiously active people make in American society, helping build healthy families and communities. Or we could argue that protecting the rights of religious minorities contributes to the stability and richness of a society that values diversity. Or we could argue that throughout history, religious belief has cut deeper than any other human allegiance—that in the words of First Amendment scholar Douglas Laycock, religious beliefs carry extraordinary human meaning; they are "important enough to die for, to suffer for, to rebel for, to emigrate for . . ."[4]

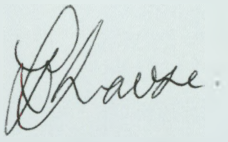
As someone who treasures my faith and my freedom to practice it, I don't need a great deal of convincing on the potential merits of any of these arguments. But an increasing number of people do.

I believe we should be deliberately developing a multilayered case for why religion is special enough for special treatment. We need arguments that hold true even if a majority comes to see the practice of faith as quaintly irrational, or even, at times, incompatible with core secular values.

In making our arguments, though, let's not demonstrate a sense of entitlement. Let's not give the impression that we're intent on playing a zero-sum game and we don't mind if Americans who don't share our religious convictions end up being marginalized in important ways. At the sheer level of pragmatism, let alone principle, such attitudes are unhelpful given religious demographic trends.

Eventually we'll arrive at that cliff's edge where a secular majority will ask, "Why does religion deserve special treatment and special legal exemptions above and beyond other deeply held conscientious beliefs?" Whether or not we have good answers is up to us.

[1] Not everyone considers the outcomes in these cases as unqualified wins for religious freedom. In this issue of *Liberty*, for instance, see Alan Brownstein's analysis of the current trajectory of Supreme Court reasoning on First Amendment religion cases. And in the November-December issue of *Liberty* two attorneys will debate whether the outcome in *Carson* is a win or a setback for religious freedom in America.
[2] A full recording of Justice Alito's address at the 2022 Notre Dame Religious Liberty Summit is readily available on YouTube.
[3] Jeffrey M. Jones, "U.S. Church Membership Falls Below Majority for First Time," news.Gallup.com, March 29, 2021.
[4] Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7 (1996): 317.



Bettina Krause, Editor
Liberty magazine

Please address letters to the editor to editor@libertymagazine.org

DECLARATION of Principles

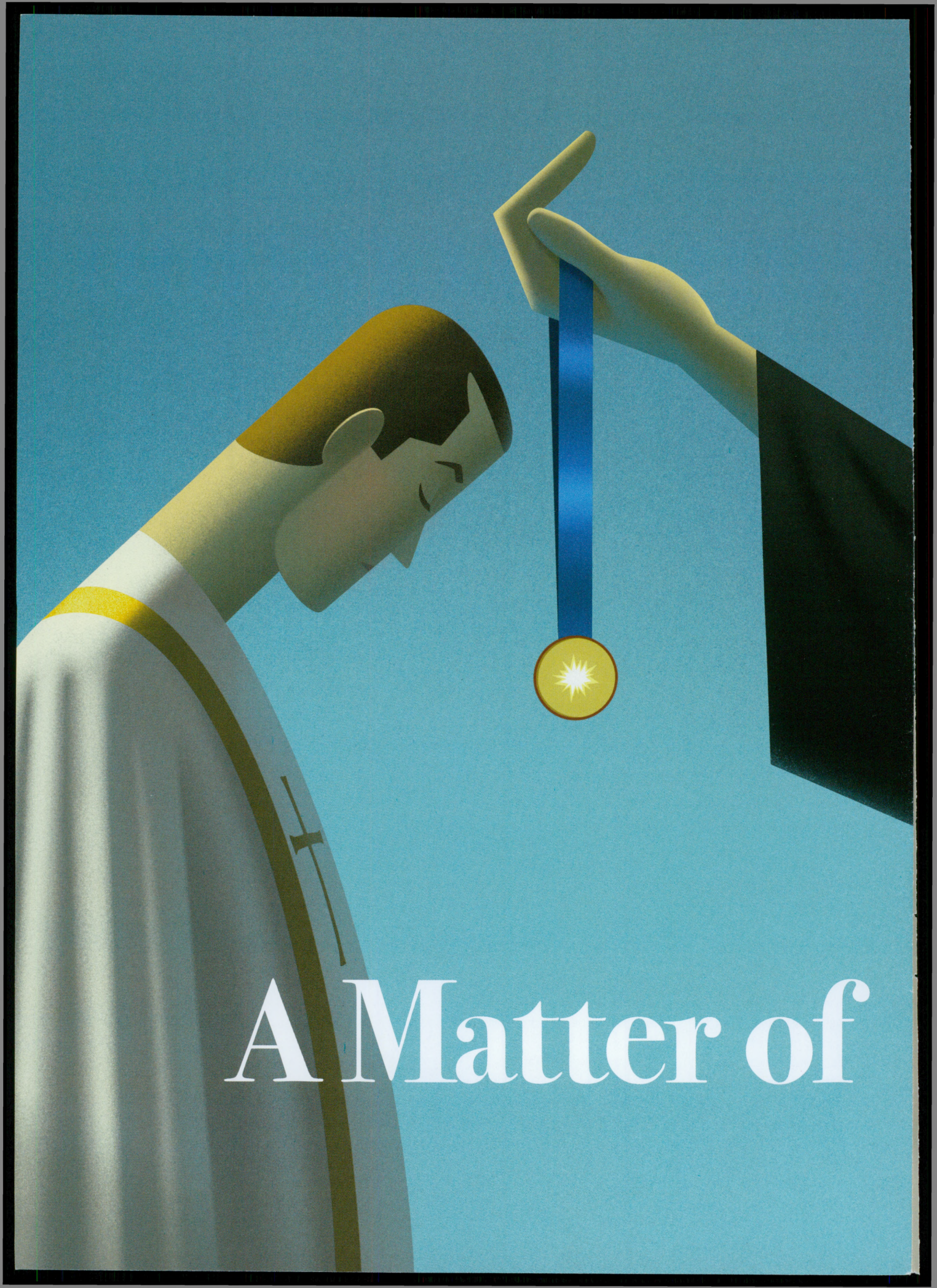
The God-given right of religious liberty is best exercised when church and state are separate.

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.

COVER ILLUSTRATION BY JON KRAUSE


A Matter of

Interpretation

By Alan E. Brownstein
Illustrations by Jon Krause

Examining recent cases and doctrinal developments interpreting the free exercise clause and the establishment clause of the First Amendment reminds me of two lines from Shakespeare's *Macbeth*. Macbeth himself states in the first act, "So foul and fair a day I have not seen." More ominously, the three witches famously exclaim that "fair is foul, and foul is fair."

What do these mixed messages of "fair and foul" have to do with constitutional decisions about religion? Haven't the Supreme Court and lower courts recently been deciding cases in a way that is favorable toward religion? Since the Court's misguided decision in *Employment Division v. Smith*[1] in 1990, the federal courts provided little protection to religious liberty claimants challenging so-called neutral laws of general applicability. Only laws that targeted religion for discriminatory treatment would receive rigorous review. The current Court seems poised to overrule *Smith* and replace the anemic protection it provided to religious liberty with something more forceful.[2]

When it comes to **free exercise** and **establishment clause** doctrine, has the Court delivered a **triumph** or a **tragedy**?

Also, the Court has dramatically revised its understanding of the establishment clause. Under older precedent, the establishment clause prohibited states from subsidizing religious institutions, such as religious schools, that provide secular services while furthering religious goals. Today the Court has held that such aid is not only permissible but that it violates the free exercise clause if religious institutions are denied access to financial support that is available to their secular counterparts.[3]

Moreover, the Court has formally recognized the ministerial exception, a doctrine that shields certain hiring decisions of religious institutions from the enforcement of civil rights laws.[4] Further, the Court has expanded the scope of the ministerial exception beyond the hiring (and firing) of clergy, to include religious school teachers who teach theological tenets in the classroom.[5]

Finally, the Court has upheld stand-alone religious displays expressing majoritarian messages and majoritarian prayers during government activities, such as town board meetings.[6]

For some proponents of religious liberty, all of the above seems far more fair than foul. Where is there a problem with current changes in doctrine? The answer, unfortunately, is just about everywhere. And I write this as someone who has been advocating for, writing about, and working to support religious liberty for the past 30 years or more.

Coercion by Any Other Name

To start, in dismantling long-accepted establishment clause doctrine, the Court has not only eliminated restrictions on state aid to religious institutions, but it has also placed an initial stamp of approval on government involvement with religion that is intrinsically coercive to religious minorities and nonreligious individuals. A court committed to religious liberty would recognize this critical principle: Whenever government actors have substantial discretionary authority to award benefits to or impose sanctions on third parties, it is inherently coercive for that official while—or immediately before or after—performing their duties to direct, invite, or welcome individuals subject to their discretionary judgment to pray with them or to join in other religious activities. Whether we are talking about judges asking litigants and their attorneys to pray before a trial begins, or administrators evaluating eligibility for social services or welfare benefits asking potential beneficiaries to join them in prayer, or teachers offering prayers in a public school classroom, the link between discretion and coercion is unmistakable and chilling. Declining to pray

carries the inherent risk of being denied benefits or being subject to sanctions.

However, this burden was not obvious to the Court in *Town of Greece v. Galloway*.[7] In that case the Court held that it was not coercive for residents attending a town board meeting to petition their representatives on issues of importance to them to be told by invited clergy to stand, bow their heads, and join in a Christian prayer as a preamble to the meeting. Confronted with the challenge that residents attending the board meeting for public comment would naturally fear alienating the board members they were trying to influence by refusing to participate in such a prayer, the Court rejected their claim by disputing the social reality on which it was based. To the Court, standing while a prayer is expressed is a secular act, not an expression of religiosity, ignoring the religions for which standing is an intrinsic act of worship. Further, the Court reasoned, no one would be offended or even notice if residents left the room while the prayer was offered. (Anyone who believes that no one would notice or be offended if a person fails to stand and join in a religious or patriotic activity should talk to Colin Kaepernick.)

Public school students need special establishment clause protection because of the extraordinary discretionary authority exercised over them by teachers, administrators, and coaches.

One can hope the holding of *Town of Greece* will be limited. But I see signs that the doctrinal seeds planted by the Court's myopic failure to see coercion in this case are sprouting in other soil. For example, there is already a constitutional challenge being litigated against a judge asking attorneys and litigants to join in prayer before legal proceedings begin.[8]

The issue of intrinsic coercion is also an important aspect of *Kennedy v. Bremerton School District*,[9] a case before the Court this term. The core question is whether it violates the establishment clause for a public high school football coach to offer prayers on the 50-yard line, joined by many kneeling players on the team, while he continues to be on duty with ongoing responsibilities.

There are important differences between *Bremerton* and *Town of Greece*. One may question, as I do, the Court's contention in *Town of Greece* that standing while a prayer is offered is a secular act. But it would be absurd to extend this argument to kneeling while a prayer is offered. Americans do not kneel to honor their secular leaders. And while kneeling in some circumstances may be a form of secular protest, surely kneeling with others while prayers are expressed is recognized as part of religious worship. Further, there can be no serious question about whether players who failed to pray with their coach and teammates in the center of the field would be noticed.

These factual distinctions, while legally significant, should not distract us from the core constitutional concern raised by this case. High school coaches have extraordinary discretionary authority over student players. They determine who is on the team and whether they will have significant playing time. It is the intrinsic coercive force created by such discretionary authority that makes the coach's conduct here so dangerous to religious liberty. Players will feel that they risk the coach's displeasure and the consequence of decreased playing time or other manifestation of his or her discontent if they do not join the coach in prayer.

The Court has often recognized that students in public schools raise special establishment clause concerns that limit religious activities on school time on the school's premises. Often this constitutional solicitude is justified by reference to the impressionability of public school students, in contrast to adults who are better able to resist religious coercion and imprimaturs by the state. The Court's conclusion about special solicitude is sound and important, but while its concern about the susceptibility to indoctrination may be accurate for very young children, this argument is limited and cannot be extended too broadly. Focusing on the impressionability of students in contrast to adults suggests that religious coercion is problematic only if it is likely to succeed in altering religious behavior. That argument has to be wrong. Religious coercion is constitutionally impermissible whether it is successful in converting its victims or resisted to the death.

The reason students in public schools need special establishment clause protection is that they are subject to extraordinary discretionary authority exercised over their education and well-being by teachers, administrators, and coaches. Students alienate these authorities at their peril. If the Court rules in favor of the coach in the *Bremerton* case, it will be a significant step toward eroding the protection the establishment clause provides to public school students against religion coercion.[10]

The Court's decision in *American Legion* v. *American Humanist Association*[11] to uphold a cross as a public war memorial, albeit in a convoluted opinion, raises both religious liberty and equality concerns. While passive displays are less coercive than prayers to which community participants are welcomed, there is a coercive dimension to these promotions of religion. As the Court explained, I think correctly, in *Engel v. Vitale*,[12] a case striking down state-directed prayer in public schools, such activities are coercive even when participation is formally voluntary. "When the power, prestige and financial

support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[13]

The undermining of religious equality values is even more apparent in these cases. In a religiously pluralistic society the decision by the state to promote the symbols and beliefs of only one or certain faiths involves a mixture of favoritism and discrimination. While earlier decisions recognized the constitutional infirmity of government messages endorsing preferred faiths and sending a message to the adherents of other religions or no religion that they are outsiders and disfavored members of the political community,[14] the current Court seems far less concerned about religious endorsements.

The Court's willingness to permit, and even require, government funding of religious institutions also moves us into treacherous legal and cultural terrain.

These cases diminishing the scope and rigor of establishment clause constraints on government promotion of religion may reflect profound misunderstandings regarding the constitutional foundation of religious liberty and equality in our society. The current Court appears to view secular insensitivity or animosity toward religion as the primary if not exclusive threat to religious liberty. For a Court that claims to be committed to an originalist interpretation of the Constitution, that myopic vision is difficult to justify. As any student of constitutional history knows well, the source of the greatest threats to religious liberty at the time of the adoption of the Constitution and prior decades of controversy was religion itself.[15]

Barbed Benefits

Another potentially egregious error is the Court's apparent comfort with entrusting decisions about religion to government decision makers. Religious debates about the truth and value of religious tenets among private actors, theologians, or competing proselytizers in public fora are valid and protected. When these debates occur in the legislature or among executive officials to determine which faiths are worthy of support, the red line of separation identified by Madison and Jefferson is transgressed.

The Court's willingness to permit, and even require, government funding of religious institutions also moves us into treacherous legal and cultural terrain. This new interpretation of the religion clauses effectively rejects any concern for the taxpayer liberty of those who conscientiously oppose funding faiths other than their own. More important, the now-ignored constraints on public subsidies of religion served important purposes, not the least of which was guaranteeing the independence of religious institutions. The government typically asserts some measure of control over whatever it funds. Even if such formal controls are modest, substantial subsidies create dependency relationships that may well undermine the autonomy of religious institutions relying on the state for financial support.

One possible response to these concerns argues that rigorously enforced free exercise doctrine should protect religious institutions from any conditions accompanying government funding requiring them to violate their faith. Recent cases suggest that many justices on the Court may be amenable to such a position.[16] Here again, however, exemptions for religious institutions from funding requirements that their secular counterparts must obey raise a host of problems.

First, there is a logical conundrum. A key justification for requiring the funding of religious institutions when comparable secular institutions receive financial support is that religious institutions are sufficiently similar to state-subsidized secular institutions to justify their receiving equal public support. But the argument that religious institutions should be exempt from funding conditions that their secular counterparts must obey rests on the contrary foundation—that religious institutions are so distinct from their secular counterparts that they should be treated differently. The inconsistency is hard to avoid. Religious institutions should be equated with secular institutions for state funding purposes, but they should be distinguished from secular institutions in receiving exemptions from regulations accompanying state support. These conflicting premises are particularly blatant when the exemptions free religious institutions from costs that secular institutions must bear.

Second, some funding conditions that religious institutions challenge are anti-discrimination regulations that prohibit the institutional recipients of government subsidies from discriminating in the provision of services and the hiring of staff—even if their faith requires them to do so. While the most prominent of these challenges involve discrimination against members of the LGBTQ community,[17] some cases argue for, and the same principle supports, discrimination by tax-subsidized institutions against otherwise eligible beneficiaries because they hold the wrong religious beliefs.[18] By the sheer weight of numbers, minority faiths will be disproportionately disadvantaged by such exemptions from anti-discrimination requirements.

Third, exemptions for state-funded religious institutions risk distorting the marketplace of ideas in violation of the free speech clause of the First Amendment. A long line of Supreme Court authority[19] holds that religion is a viewpoint of expression. Thus, discrimination against

religion—in denying religious groups access to public property open to nonreligious groups, for example—constitutes viewpoint discrimination, which requires strict scrutiny review.[20] The prohibition against viewpoint discrimination, of course, is not a one-way rachet. If discrimination against religion is viewpoint discrimination invoking strict scrutiny, then discrimination in favor of religion is equally viewpoint discriminatory requiring the same rigorous review.

I take it as a given that many religious institutions are expressive in nature. Certainly this is true of religious schools. Religion is a voice in our society, and religious institutions communicate and espouse their beliefs in myriad ways. This should mean that discrimination in favor of expressive religious institutions and against their secular counterparts constitutes viewpoint discrimination. Accordingly, it is viewpoint discrimination to relieve religious schools of the duty to comply with burdensome regulations that nonreligious schools must obey. If we turned the example around and relieved secular schools from burdensome regulations that religious schools must obey, would anyone doubt that this difference in treatment constituted viewpoint discrimination under the Court's precedents?

This free speech concern applies to both government-funded and privately supported religious institutions. Under an establishment clause regime sharply restricting the state's funding of religious institutions, however, the viewpoint favoritism created by religious exemptions is offset to some meaningful extent by the same institutions' ineligibility for government support. Under an establishment clause regime in which government funding of religious institutions is not constitutionally limited—a regime in which the same religious institution can demand both equal funding from the state and exemptions from regulation by the state—accommodating expressive religious institutions becomes much more difficult to justify.

Exempting tax-subsidized religious institutions from burdensome regulations under this framework does more than protect religion. It privileges religion. Religious institutions can avoid costs, reserve state-subsidized jobs and services for their own communities, and have their voices relatively magnified in public discourse. These are significant secular benefits. One consequence of a legal regime that provides special secular benefits to successful free exercise claimants is that it creates incentives to assert sham claims for exemptions. Increases in sham claims may force government administrators and courts to engage in more rigorous evaluations of free exercise assertions than the anemic sincerity tests that are currently employed to identify those deserving accommodation. Sincerity is a sufficient filter for sham claims when the religious liberty practice at issue has no secular value, such as abiding by kosher dietary restrictions. It is of far less utility in cases in which exemptions provide secular advantages.

Finally, there are cultural consequences to be considered. American history demonstrates that over time constitutional law will reflect our society's cultural understandings, attitudes, and commitments. The privileging of religion creates cultural backlash against religious liberty. Those who experience relative disadvantagement or outright discrimination may come to resent the basic idea of religious liberty accommodations. And an increase in sham claims may convince many people that exemption claims are legal gamesmanship undeserving of respect. The cause of religious liberty has not been furthered by the flippant willingness of those without religious conviction to assert religious liberty claims against vaccine mandates. Ultimately, without cultural support, religious liberty becomes vulnerable to constitutional change and more limited protection.

The words of Macbeth ring true today: "So foul and fair a day I have not seen."

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[1] 494 U.S. 872 (1990).
[2] *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).
[3] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ____ (2017); *Espinoza v. Montana Dept. of Revenue*, 591 U.S ____ (2020). The Court decided *Carson v. Makin*, 596 U.S. _____ (2022), on June 21, 2022, after this articles was written, striking down a Maine statute denying public funding to sectarian schools. In doing so, it held that the state could not refuse to fund private institutions that intended to use public resources for religious activities.
[4] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).
[5] *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____ (2020).
[6] *Town of Greece v. Galloway*, 572 U.S. 565 (2014).
[7] Ibid.
[8] See *Freedom From Religion Foundation v. Wayne Mack*, Case No. 21-20729 (Fifth Circuit, 2021).
[9] 991 F.3rd 1004 (Ninth Circuit, 2021) cert. granted 142 S. Ct. 857 (2022).
[10] The Court decided *Kennedy v. Bremerton School District*, 597 U.S.____ (2022) on June 27, 2022, after this article was written. It ruled in favor of Coach Kennedy, cavalierly dismissing the school district's concerns about intrinsic and implicit coercion in the public school context.
[11] 588 U.S. ____ (2019).
[12] 370 U.S. 421 (1962).
[13] Ibid. at 431.
[14] See, e.g., *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005)
[15] See Steven Waldman, *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom* (New York: HarperCollins 2019).
[16] See *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).
[17] Ibid.
[18] See e.g., *Rutan-Ram v. Tennessee Department of Children's Services* (Chancery Court, Tennessee, April 8, 2022).
[19] See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 US 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
[20] Ibid.

Alan E. Brownstein, a nationally recognized constitutional law scholar and author, is professor of law emeritus at University of California, Davis, School of Law. For more than three decades, his scholarship has focused primarily on church-state issues and free exercise and establishment clause doctrine, but he has also written extensively on freedom of speech, privacy and autonomy rights, and other constitutional law subjects.


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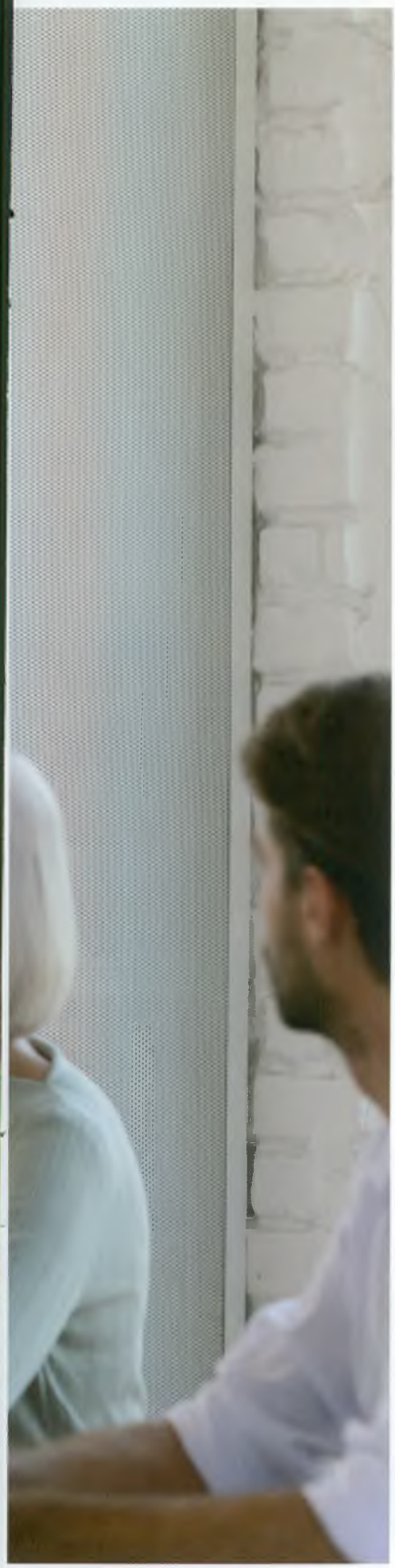


WAVEBREAKMEDIA

Teaching the (Corporate) World to 'Sing in Harmony'

Interview with **Brian Grim**

Some of America's top companies have begun to welcome faith into the workplace as part of their overall diversity initiatives. Intel, Alphabet, Tyson Foods, American Airlines, and Texas Instruments are just a few of the international corporations that have created programs in recent years encouraging employees to "bring your whole self, faith and all, to work."

A central figure in this movement—both in documenting and supporting these efforts—is internationally known social scientist and author Brian Grim, founder and president of the Religious Freedom & Business Foundation. Before establishing the foundation in 2014, Brian was a senior researcher at the Pew Research Center in Washington, D.C., where he directed the largest social science effort ever undertaken to collect and analyze global data on religion. Today he works with governments, Fortune 500 companies, and international organizations such as the United Nations and the European Parliament, advising on the role of faith and religious freedom in promoting human flourishing.

Liberty editor Bettina Krause recently talked with Grim about how promoting a culture of religious diversity and freedom in the workplace pays dividends for both employees and businesses.

Bettina Krause: *Religion is sometimes perceived, righty or wrongly, as a potential source of conflict. It seems coun-*

Brian Grim (left) with business leaders from American Airlines

terintuitive, then, that a company would want to encourage their employees to express their faith in the workplace.

Brian Grim: This is about letting people be who they are. And, in fact, there are multiple benefits for a company when it opens its doors for people to express their faith and their faith identity. When you have a culture like that, it sends a message that everyone is welcome. And that's good not just for recruitment but also for retention.

If people of faith feel that their employer doesn't respect something that's near and dear to them, they'll soon be looking for a company that does. For people of faith, it's offensive to be asked to check your faith at the door when you come in. It's just like telling a woman to stop being a woman when she comes to work, just be a worker. That's not how people are hardwired.

And second, a corporate culture that welcomes faith also improves revenue, and that's an important part of the bottom line of why many companies are opening their doors wide to people of all faiths and beliefs. For some companies there may be a fear of the unknown, a feeling of "OK, let's keep all that outside the door, because we don't know what's going to happen if we let it inside." But the companies that do this, and do it well and thoughtfully, are having tremendous success.

Many companies have set up different faith groups to be a support for employees—to help them have success in the company. These groups don't exist so people can promote their religion or substitute what they do at work for what happens at their church, or mosque, or temple, or whatever their faith background is.

Companies are also not trying to find the lowest common religious denominator around which everybody can say, "OK, we can all agree to that." No, instead they're saying, "We want you to bring your full Christian self or your full Hindu self or your full atheist self to work, and everyone else will respect that and support your right to live and behave according to your beliefs and vice versa."

Bettina: *Are there potential pitfalls?*

Brian: It can go awry when a company doesn't make clear that these groups are for business purposes or if they don't create bylaws so the groups all function in the same way. Another potential issue is if there's any kind of coercion—then, of course, that can backfire. If somebody feels, "Well, if I'm going to get my next promotion, I'd better join this particular group."

The companies that have these groups encourage all their employees to participate in one or more of the groups. And so you can even have somebody who's a Christian being part of the atheist group, just to be an ally and say, "Look, we respect your belief too."

Of course, it's one thing to encourage everyone to participate, and it's another when the boss joins a particular group and then, all of a sudden, everybody thinks, *Oh, if I'm going to get ahead in this company, that's the way to go.*

So to avoid that challenge, these groups are structured as company sponsored but employee led. It's not the boss from C-suite leading them, but more rank-and-file employees or midlevel managers. The people at the top, though, act as executive sponsors. For instance, the executive sponsor of the Muslim group at Texas Instruments is not a Muslim, but that person sponsors the group as a way of showing support for Muslim employees. It's a way of saying, "This may not be my perspective, but I want to be an ally of people who might share a belief that's different to mine." So that's the spirit in which this is done.

Bettina: ***As you're talking, I can't help thinking that this is a model that could have a spillover effect into society at large.***

Brian: Yes, absolutely. And that's actually what my foundation, the Religious Freedom & Business Foundation, is all about. What we're promoting is a model for how society could work. The secret here is that with a business, you have a product or a service you're making or providing, and

everyone's on the team. If you want to make a car or provide an internet service or flip hamburgers—whatever your business is—everybody has a stake in the success of the business. If you're working beside somebody who's different from you—a different gender, a different race, with different beliefs—that doesn't really matter. What matters is that you can work together and produce the best product or service possible.

And so, as an American society, is there something that America has that we all want to join in with and produce? It doesn't matter if we're a Catholic, Protestant, Muslim, Hindu, atheist, or agnostic; all of us share in an American dream. I think we need to gain this sense that America has something to offer the world that's unique and wonderful, and that all people can participate in it, regardless of what their politics or their religion might be.

Bettina: *You've described how corporate faith groups work, but what are some other best practices of a faith-friendly workplace?*

Brian: We have an index called the corporate Religious, Equity, Diversity, and Inclusion index, or the REDI index. We track ten different aspects of religious accommodation and inclusion that are good benchmarks for companies. One aspect, for instance, is what companies emphasize in their messaging. If you look at a company's diversity page, is it all slanted toward one thing? Or does it include religion and other different types of diversity? We also look at whether companies have clear reporting channels for instances of religious discrimination or for requesting a religious accommodation. Do they provide training on religious inclusion and religious diversity?

These benchmarks weren't things that we came up with alone. It was done in consultation with top Fortune 500 companies, asking people who are working in this space, "What do you think are the important benchmarks?"

Another aspect is whether a company provides chaplain care or other kinds of spiritual support. Just think of the psychological and spiritual challenges that were posed by the pandemic or, before that, by the opioid crisis. Companies such as Tyson Foods have chaplains across all their plants in the United States, and many of them are full-time staff members. As the former head of chaplains, Karen Diefendorf—who was a former military chaplain—says, "Life doesn't stop when you come through the factory door. Whatever's going on outside, you bring it right inside the door with you."

Bettina: *As you look ahead, are you optimistic that this idea of building religious freedom through corporate engagement will keep gathering momentum?*

Brian: I'm very optimistic. This is not something I'm out trying to sell to companies; they come to me. I'm just shining a light on what's happening. Top companies, such as American Airlines, Dell Technologies, American Express, and now Google, and many more—they're doing the work. You could say that it's a movement in the making. I have my email box open right now, and I have five emails that came in last Friday from different companies asking, "Hey, can you either put us in touch with somebody who's doing this well, or can we set up a time to talk so we can better understand how we might do this?"

I'm happy to share with anyone, but it's not my mission to go out and get companies to do this. It's more of a company-to-company transfer of information and I play a matchmaking role, you could say.

And once you have the biggest companies engaged, then that has a tremendous social impact. It's similar to how companies use advertising to change the way we look at the world. Do you remember the iconic Coca-Cola advertising jingle from back in the early 1970s? "I'd like to teach the world to sing in perfect harmony." You get a jingle like that stuck in your head. Well, I'd like to teach the world to sing in perfect harmony. Wouldn't that be nice? I believe that as corporations embrace this kind of inclusive, religiously expressive culture—while not minimizing religious differences—it demonstrates a beautiful model of religious freedom in practice.

One of our recent interns at the foundation, a young woman, said recently, "This experience has changed my view of how to build religious freedom. I used to think it was just something lawyers would do, and you'd fight it out in the courts. But this is something every single person can do today."

And so that's why I'm optimistic. Because building a culture of religious freedom isn't something that only specialists can do. This isn't something that just clergy can do. This is something that laypeople of every faith and belief can engage in. We're seeing it happen. And it's being done by people like you and me, just normal people.

You can read more about the work of the Religious Freedom & Business Foundation at www.religiousfreedomandbusiness.org. Brian Grim is on Twitter, @brianjgrim.

A corporate culture that welcomes faith also improves revenue.

New-Look Blue Laws?

For decades religious minorities in America battled state-level Sunday rest laws. Today, are there moves afoot to dust off this old concept of synchronized rest?

By Michael Peabody

If there was any benefit at all to the COVID-19 shutdowns, it was that the world took a much-needed break. Offices, stores, sports, restaurants, and even churches deemed "unnecessary" closed for several weeks. Families spent time at home, getting to know each other, spending more time enjoying nature, and catching up on long-neglected hobbies. Air around the big cities cleared up above the empty freeways. For introverts, it was a gift—no social obligations, just blissful downtime. If it weren't for the devastation of the pandemic, the synchronized, enforced rest was arguably nice.

For people whose faith mandates a weekly rest day, this period felt like an extended Shabbat or Sabbath. For those unfamiliar with the practice of Sabbath, it was a chance to discover the benefits of unplugging and letting the world go by, teaching us that the world doesn't need our constant involvement.

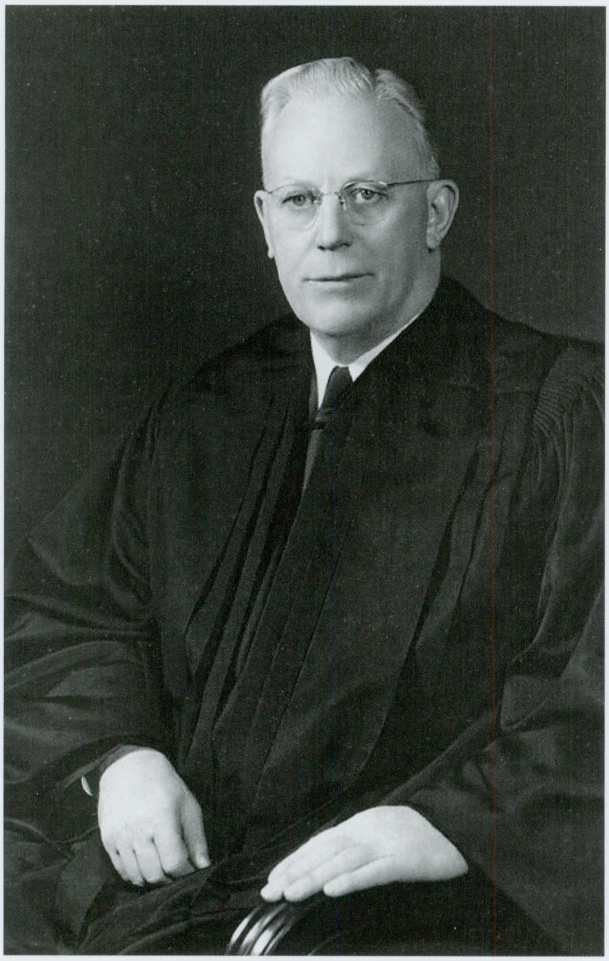
One of the keys to Sabbath observance has been the idea that it is communal; that it is a weekly synchronized event that serves to shift

our focus. As Rabbi Abraham Joshua Heschel wrote in his book *The Sabbath*,[1] "Six days a week we wrestle with the world, wringing profit from the Earth; on the Sabbath we especially care for the seed of eternity planted in the soul. The world has our hands, but our soul belongs to Someone Else."

Yet what happens when one group keeps a different Sabbath from another? Jews and Seventh-day Adventists rest on Saturdays. Muslims recocognize Friday as a special day for prayer. For the vast majority of American Christians, however, Sunday is their day of rest, and it is this reality that has shaped the history of Sunday or "blue" laws in America.

Time-honored Tradition

The reasoning of the late 1800s and early 1900s, when Sunday laws made headlines, went something like this: If a train goes through the town on a Sunday, then there must be people to unload it and care for its passengers. There is increased demand for restaurants, hotels, and taxis. Livestock needs to be moved from place



"The State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility . . ."

U.S. Supreme Court Chief Justice Earl Warren

to place and all manner of other support services provided. But if there is no train for one day a week, the level of service can be reduced. Unnecessary labor can be avoided—not just for reasons of religious obligation but because people naturally enjoy a time of rest.

For centuries America has had a patchwork of Sunday rest laws, and today these laws continue to pop up in surprising places. Many states and localities forbid the sale of alcohol on Sundays. You can't buy a car from a dealership on a Sunday in Nevada, Utah, North Dakota, Michigan, Rhode Island, and Maryland. In Texas, car dealerships must choose whether to shut down on either Saturday or Sunday; sales all weekend long are forbidden. Massachusetts perhaps has the most extended list of restrictions in the United States on Sunday business. Generally, if your business is "nonretail," it cannot operate on Sundays unless you obtain an exemption. Manufacturers are also shut down on Sundays unless they "require continuous operations" for "technical reasons."[2]

Whenever a jurisdiction legislates a day of rest, there must also be exceptions in order to accommodate necessary food service, medical care, and other services. An exhaustive list of dos and don'ts thus becomes essential for the law to be enforced consistently.

In 1961 the Supreme Court considered blue laws in *McGowan v. Maryland*, a case brought by employees of a discount department store in Maryland who were fined for selling specific products, such as floor wax and loose-leaf notebooks, which were prohibited from sale on Sunday. Maryland's detailed law allowed only certain items, such as medications, tobacco, newspapers, and food, to be sold on Sundays.

The employees claimed this law violated their rights under the free exercise clause. But the *McGowan* Court found that the employees had only alleged economic injury—their religious practices had not been infringed by the prohibition against selling certain goods on Sundays. The Court said that even though the blue laws historically aimed to promote church attendance, their purpose was now secular: to improve "health, safety, recreation, and general well-being." That Maryland made the traditional day of worship, Sunday, the day of rest did not mean the state could not use that law to meet secular goals. The Court said that the law did not constitute an establishment of religion.

Justice Earl Warren wrote on behalf of the majority: "The State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days."[3]

Since *McGowan* the Supreme Court has not again addressed the issue of blue laws, and so it remains the law: government-enforced days of Sunday rest are not unconstitutional so long as a religious practice is not compelled or forbidden. The breadth of government authority in compelling businesses to close, and the willingness of most American to comply, was

amply demonstrated during the extended COVID-19 shutdowns, which encompassed all days of the week, including weekends.

An Eco-Sabbath?

It is easy to think of blue laws as a nostalgic relic from simpler times, yet support for government-enforced days of rest is never too deeply below the surface. In one contemporary guise, blue laws are being promoted not from a puritanical religious motive—to keep the community from the sin of Sabbathbreaking—but from an environmental angle, as a way to help remedy a crisis of our age.

The Green Sabbath Project is supported by various religious and environmental organizations and encourages people to take a voluntary weekly day of rest. "Is there *nothing* you can do about the environment?" asks the organization's website. "*Nothing* may be one of the best things you can do. One day every week. Do *nothing*." The group gives the example of the city of Bogotá, Colombia, which has implemented "car-free Sundays."

In 2009 Satish Kumar wrote in *The Guardian* that "using Sunday as a day of rest and renewal would be good for our personal health as well as the health of the planet." Rather than releasing carbon dioxide emissions by shopping, flying, and driving, Kumar said, "We can and should restore Sunday to a day for Gaia, a day for the Earth."[4]

Even Pope Francis was impressed by the changes to the atmosphere during the COVID-19 shutdowns, writing in his September 1, 2020, World Day of Prayer for the Care of Creation proclamation: "In His wisdom, God set aside the Sabbath so that the land and its inhabitants could rest and be renewed. These days, however, our way of life is pushing the planet beyond its limits. Our constant demand for growth and an endless cycle of production and consumption are exhausting the natural world. Forests are leached, topsoil erodes, fields fail, deserts advance, seas acidify, and storms intensify. Creation is groaning! . . . Already we can see how the earth can recover if we allow it to rest: the air becomes cleaner, the waters clearer, and animals have returned to many places from which they had previously disappeared."[5]

Legacy of Compulsion

There is an undeniable, timeless beauty in the concept of a Sabbath rest. Yet attempts to mandate a day of rest—regardless of the rationale—will invariably carry apocalyptic undertones for those whose religious beliefs lead them to worship on a different day.

The issue of Sabbath legislation was a focus of the first issue of *Liberty*, published in 1906. At that time Rev. Bascom Robins was quoted as saying, "In the Christian decalogue the first day was made the Sabbath by divine appointment. But there is a class of people who will not keep the Christian Sabbath unless they are forced to do so. But that can easily be done. . . . If we would say we will not sell anything to them, we will not buy anything from them, we will not work for them or hire them to work for us, the thing could be wiped out, and all the world would keep the Christian Sabbath."

Today renewed enthusiasm for a unified day of rest tends to be less about God's sake and more for the sake of the planet. Yet calls for mandated synchronized rest, whether for reasons of economics, ecology, or even religion, still carry with them the taint and danger of blue laws and their legacy of compulsion.

Calls for mandated rest, whether for economics, ecology, or religion, carry the taint and legacy of compulsion.

[1] Abraham Joshua Heschel, *The Sabbath: Its Meaning for the Modern Man* (New York: Farrar, Straus and Giroux, 2005).
[2] See blue law restrictions listed on the Commonwealth of Massachusetts website, https://bit.ly/3uijyED.
[3] *McGowan v. Maryland*, 366 U.S. 420 (1961).
[4] Satish Kumar, "Slow Sunday: The Simple Solution to Global Warming," *The Guardian*, September 17, 2009.
[5] "Message of His Holiness Pope Francis for the World Day of Prayer for the Care of Creation," September 1, 2020, https://bit.ly/3RiA6GK.

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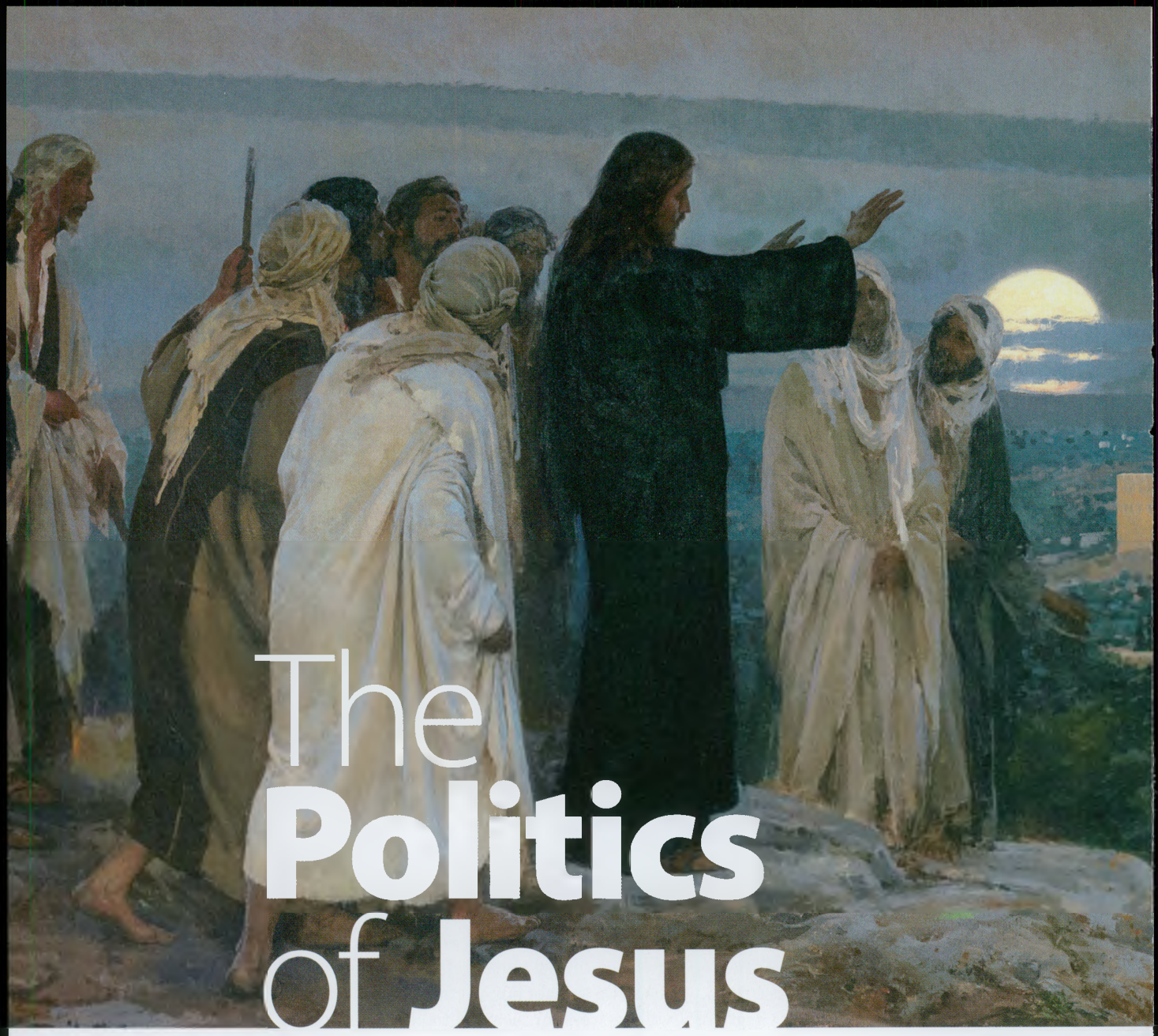


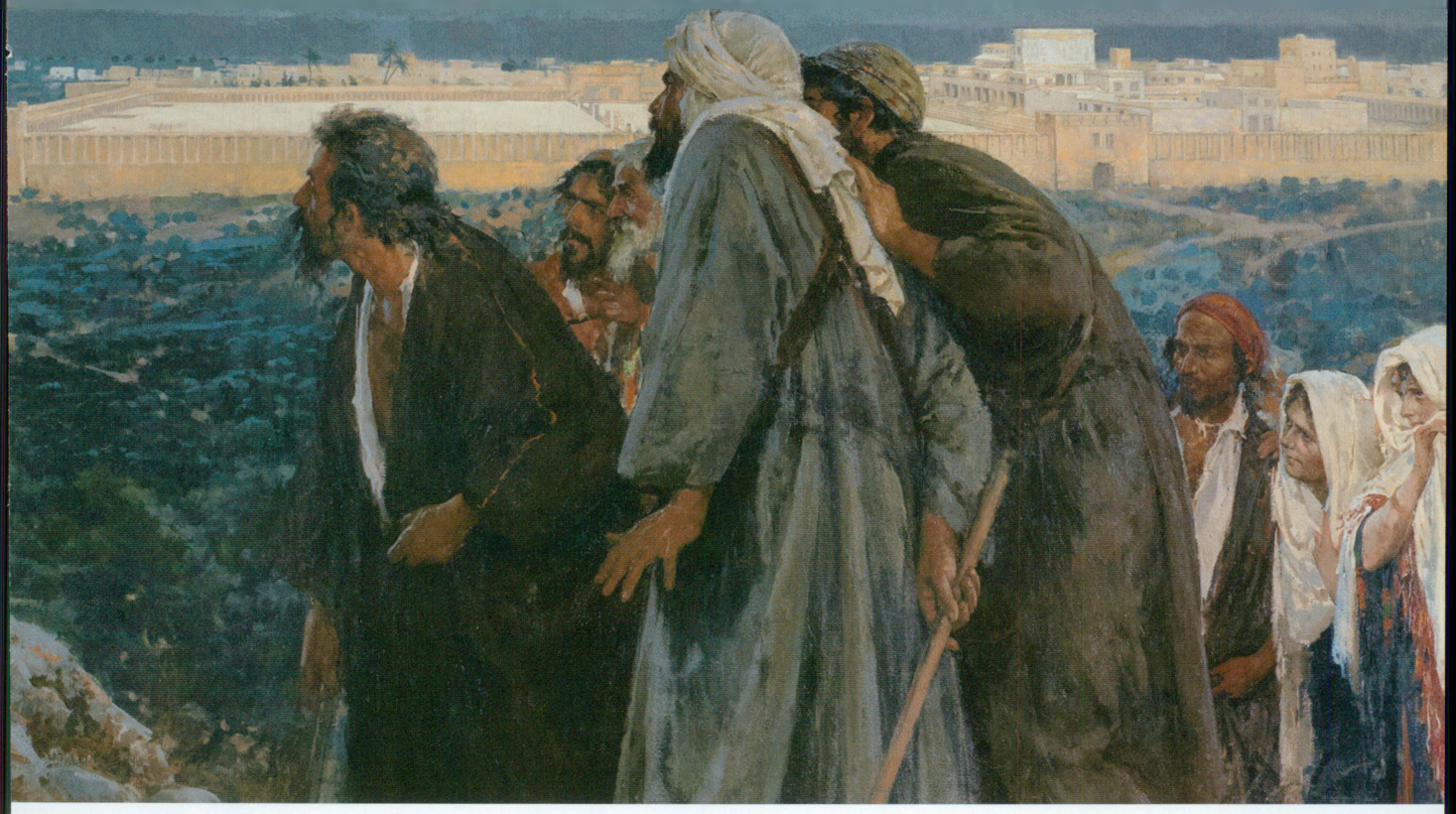
The Politics of Jesus

By Nilay Saiya

How should Christians respond to the spate of terrible events that have shaken American society to its core over the past two years: the Capitol insurrection, multiple police killings of African Americans, sky-high inflation, escalating gun violence, the increasing boldness of White supremacists, political upheaval, a global pandemic, and deeply rooted social division, to say nothing of the ongoing opioid epidemic, endemic poverty and inequality, and the worsening effects of climate change?

Christians have generally sought to address social problems in one of two ways. The first involves the transformation of a country's culture and politics. If the root cause of America's troubles is its abandoning God, then the solution is taking the country back for Him. In the aftermath of the Uvalde school massacre, for example, some Christians blamed the attack on America kicking God out of the public square. Texas congressional representative Louie Gohmert implied that mass killings were the result of removing prayer from public schools.[1] Such folks are fond of prescribing a tonic of repentance and renewal for the ills that afflict America today, quoting 2 Chronicles 7:14: "If my people, which are called by my name, shall humble themselves, and pray, and seek my face, and turn from their wicked ways; then will I hear from heaven, and will forgive their sin, and will heal their land."

Those holding this view call on Christians to redeem and transform—and ultimately control—their political communities for the glory of God.[2] Because God rules over the whole



world, the church must work to manifest this lordship in every area of life, including politics. Christians thus have a responsibility to bring "Christian values" to bear in all areas of life and to engage the world in all its dimensions, including the economic, social, and political arenas by advocating for just laws and policies and developing and ordering social life. Transformationalists thus urge Christians to seek positions of power within the state. By seeking to improve the quality of government and bring cultural mores more in line with Christian principles, Christians will let the light of the gospel shine ever more brightly in a fallen world and advance God's creative and redemptive purposes for it. In this way, they are salt and light.

Perilous Power

Christian transformationalism, however, suffers from a number of problems. For one, the New Testament texts that directly address the subject of civil government uphold the division between the sacred and the secular, a separation that can be traced to none other than Jesus Himself, who, according to Matthew's Gospel, commanded His listeners to "give back to Caesar what is Caesar's, and to God what is God's" (Matthew 22:21, NIV). In like manner, the apostles Paul and Peter distinguished the authority of the state from the responsibility of the Christian, upholding the nonconformist identity of the Christian as radically distinct from the powers of the world.

A second problem arising from the transformationalist view is that Scripture consistently ascribes functional dominion over the kingdoms of the earth to "principalities and powers" (even if God is the ultimate Sovereign of all of life and the time of the powers is circumscribed). While Scripture affirms the foundational purpose of the civil authorities to secure justice and restrain evil, it also consistently reveals their own injustice and brings them under divine judgment. John the evangelist clearly conveys this

American Christian decline has been fueled by the politicization of Christianity.

view to his readers in writing "that the whole world is under the control of the evil one" (1 John 5:17, NIV). In the book of Revelation, John portrays political power in satanic terms, associating the rule of temporal orders with "the angel of the Abyss," "Abaddon," "Apollyon," "the great dragon," "the ancient serpent," and "the devil," who deceives the nations and leads them astray. When Satan tempted Jesus with the prospect of ruling "all the kingdoms of the world and their splendor" (Matthew 4:8, NIV) in exchange for his worship, Jesus bluntly rejected the offer. However, He did not dispute Satan's claim to dominion over the world. When Christians seek to transform the world through power and privilege, they fall prey to the very temptation of Satan that Jesus rejected in the wilderness.

A third problem with the transformationalist view concerns its distorted understanding of salvation and redemption. Transformationalists believe that the Christ event resulted in the redemption of the entire world, including its political orders. To be sure, the New Testament speaks of the work of Christ in wholistic and cosmic terms, but this does not mean that each part of the present world will be redeemed in the new creation. Rather, the New Testament authors speak of people, not political orders, as being the recipients of God's grace and of the church as the only present institution that God redeems. Scripture time and again emphasizes the provisional and penultimate nature of political authority, likening the nations to a "drop from a bucket" and "dust on the scales." Only the kingdom of Christ endures forever. This understanding of salvation suggests that Christians should eschew attempts to transform political institutions in a way that reflects the character of God in the misguided belief that these institutions will carry over into the new creation.

There are practical reasons, too, that Christians should reject the transformationalist paradigm. One is that when transformationalist theologies become wedded to a quest for political privilege and the national identity of states, they have produced decidedly ungodly societal outcomes. For example, Christianity becoming entangled with political power has led to numerous situations in which world leaders have sought the backing of Christian authorities to support their abuses of power. Examples abound: the Catholic Church's support for the Argentine government's Dirty War; the backing of the murderous regime of Guatemala's Pentecostal dictator Rios Montt by American Christians; the church's complicity in the Rwandan genocide; the brutal South African system of apartheid supported by the Dutch Reformed Church; and the Russian Orthodox Church's sanction for Vladimir Putin's war against Ukraine. And this smattering of examples comes from just the past 40 years. Tragically, the church itself has not only acquiesced to but also participated in this violence when it has allied with these regimes.

Second, not only has the Christian quest for political power had devastating political and social outcomes, but it has also had a profoundly negative effect on the church itself. My analysis of global Christianity shows that as Christianity's entanglement with the state increases, the number of Christians declines significantly.[3] This relationship holds even when accounting for other factors that might be driving Christian growth rates, such as overall demographic trends. Christians attempting to transform their political systems become distracted from their missions as they become engrossed in the things of Caesar rather than in the things of God. This "paradox of privilege" can be clearly seen in the countries of Europe, where Christianity once ruled by the sword and was deeply intertwined with the state. Many of the resplendent cathedrals of Christendom have been transformed into tourist sites or remain empty; they powerfully capture the decaying prestige of Christianity in Europe today. The same pattern has occurred, albeit much later, in the United States, where the percentage of the population identifying as Christian has declined precipitously over the past two decades. American Christian decline has been fueled, in large part, by the politicization of Christianity.

An Inward Turn

Some Christians, recognizing the dangers of transformationalism, have opted for the opposite strategy: to isolate themselves from the world. Isolationists, in contrast to transforma-

tionalists, recommend that the church should remain separated from public life in order to keep itself pure from the corrupting influence of the world. This perspective emphasizes individual salvation, evangelism, holy living, and the life hereafter. Spiritual life is a private, inward pursuit that has little to do with public affairs. The world is seen as a sinking ship beyond hope, and the church as a lifeboat whose goal is to rescue as many people from the doomed ship as possible before the world is literally destroyed at the end of history. Christians, therefore, do not have a stake in the ordering of life in the nation-state. In an effort to extricate themselves from the affairs of the world in order to pursue lives of spiritual purity, certain Christian sects throughout history retreated into inwardness and developed literally separated and self-sufficient communities outside normal social structures in which they could live in accordance with their convictions without subjecting themselves to the corruption of the world. A contemporary incarnation of Christian isolation comes in the form of Rod Dreher's "Benedict Option"—the belief that Christians living in a post-Christian age need to preserve their faith and common morality by segregating themselves from the wider society as did the monastic orders of old.[4]

When taken to the extreme, however, a theology espousing isolation risks passivity, cultural indifference, and abrogation of the Christian responsibility to bear witness on social issues of justice and peace—matters central to the gospel message. Indeed, the ministry of Jesus was wholly relevant to the politics and society of His day. Jesus was not indifferent to social realities, but displayed an unrelenting commitment to the health and wholeness of all those He encountered. Not only did He forgive sins and preach the coming of the kingdom of God, but He also healed people of their physical afflictions. Both were spiritual expressions of compassion and love. Through His healing ministry, Jesus demonstrated the power of the gospel to transform lives, and established a model for the church to emulate that was not divorced from lived reality. In this way He began to fulfill the messianic promise of the kingdom of God. Consequently, Christian isolation cannot be reconciled with the example of Christ.

Witness Bearers

In my new book, *The Global Politics of Jesus: A Christian Case for Church-State Separation*,[5] I delineate a third way by which Christians should engage with the world that surrounds them. I call this approach prophetic witness. As depicted in the Bible, the prophets were countercultural radicals who lambasted the values of the surrounding culture and mourned the tendency of the holy people of God to seek accommodation with the world. The prophets are also portrayed as thorns in the flesh of those in power, and, conversely, kings as forces of persecution who fear prophets and put them to death. The Hebrew prophets before Jesus bore witness to those in positions of power on behalf of the downtrodden.

In contrast to transformationalism, prophets do not seek power. Instead, the practice of prophetic witness requires the church to maintain a position of distance from the state and bear witness against the injustices committed by the state, thus often inviting retaliation from the state. It understands the church to be an alternative polity that has its own unique way of addressing social problems. In contrast to isolationism, prophetic witness demands social engagement on the part of the church, especially on behalf of those on the margins of society.

The belief that Christians must choose between transforming politics or living detached from the world represents a false dichotomy between utopianism and pessimism. Christ has called His followers to form an alternative political community that lives in contradiction to the world, yet not aloof from it—to be in the world but not of it. Christians follow in the example of Christ when they stand against injustice by modeling in the life of the church a different reality, one that rejects both the quest for political power and withdrawal from the world. When Christians have remained engaged with the world yet retained their distance from the heights of power, they have maintained their moral credibility and have been empowered to transform lives around the world and contribute in their unique way to healthy societies and polities.

[1] Forbes Breaking News, "Louie Gohmert Implies Prayer Being Removed From Schools Related to School Shootings," video, June 9, 2022, https://bit.ly/3NldBrC.

[2] Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996); James W. Skillen, *The Good of Politics: A Biblical, Historical, and Contemporary Introduction* (Grand Rapids: Baker Academic, 2014).

[3] Nilay Saiya, "Proof That Political Privilege Is Harmful for Christianity," *Christianity Today*, May 6, 2021, https://bit.ly/3ymixgj.

[4] Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (New York: Sentinel, 2017).

[5] Nilay Saiya, *The Global Politics of Jesus: A Christian Case for Church-State Separation* (New York: Oxford University Press, 2022).

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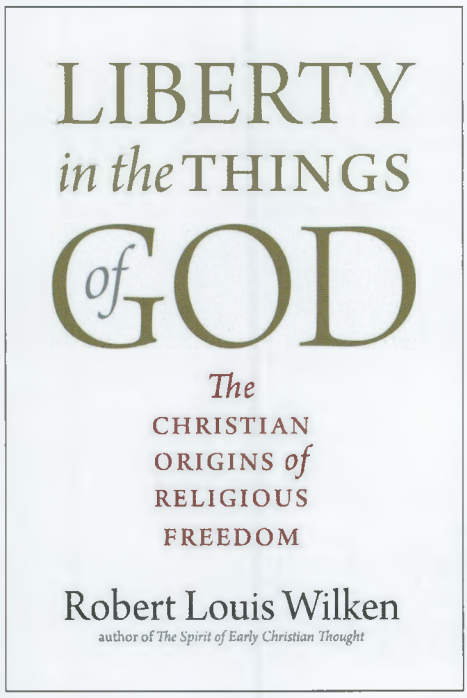

Robert Louis Wilken, *Liberty in the Things of God: The Christian Origins of Religious Liberty* (New Haven, Conn.: Yale University Press, 2019).

Do the modern foundations of religious liberty owe more to early Christianity than to Enlightenment thinking?

By Nicholas P. Miller

In his ambitious book, historian Robert Louis Wilken seeks to reveal the role that Christianity has played in the development of religious freedom in the West. By its own terms, it looks past early modern or Reformation roots of Western religious freedoms to the early periods of Christian history. It seeks to show that post-Reformation developments for religious freedom were rooted in teachings and concepts of Christian thinkers from the early Christian centuries, as well as from the Middle Ages.

In discussing the post-Reformation period, the author pays attention to when and how early modern thinkers referenced and relied on authors from early Christianity and their ideas. There is much valuable material and information in the book for those interested in the development of religious liberty in the West. But in covering such an extended period of time, with a relatively broad thesis—that Christianity has been beneficial to religious liberty—many important people and events have been omitted, and thus many difficult questions ignored or overlooked.

These questions include why, if Christian thought was so clearly on the side of freedom and liberty, did so many Christian people and institutions act in such a coercive and intolerant manner for centuries? Without addressing these historical realities, the central argument offered by the book appears at times simplistic, raising as many questions as it answers.

The author's approach does not really explain why large groups of Christian people supported coercion and intolerance, while others worked for religious freedom. What did this latter group see that the former did not? Why were the latter severely marginalized for 1,000 years, and why did they suddenly become more influential in the sixteenth century? In making an argument for Christianity being responsible for religious freedom rather than the secular Enlightenment, Wilken seems to overlook the fact that the argument over religious freedom was for many centuries carried out between "Christians," rather than being a contest between Christianity and pagan or non-Christian groups.

Early on, the author says he will give an overview of Christian history in relation to religious freedom, and that three themes will provide the focus for his historical account: "First, that religious belief is an inner conviction accountable to God alone and resistant to compulsion; second, that conscience is a form of spiritual knowledge that carries an obligation to act; third, that human society is governed by two powers," Caesar's and God's.

The author accomplishes at least some of what he set out to do. He does indeed review the early centuries of the Christian church, and focuses on the writings of a few authors who spoke to issues of freedom of conscience and religious liberty. A major example is Tertullian, a second-century writer, and Lactantius, who wrote in the third century. These authors are important and underappreciated in discussions of the roots of Western religious freedom, as they are indeed quoted by a number of the early modern religious freedom advocates, as Wilken later demonstrates.

He also talks about the transition into Constantine, where Christianity moves out of the shadows and into a position of influence. He spends meaningful time talking about the religious toleration and freedom extended by the Edict of Milan in 313 by Constantine, but less time on the later moves to formalize the role of Christianity in the empire and to marginalize pagan groups. This becomes a general


Thomas Aquinas

theme of the book, where any move toward or hint of toleration by significant figures is highlighted, but little to nothing is said about contrary arguments and acts of coercion supported or undertaken by the same persons.

A good example of this is the discussion of Augustine, famed author of *The City of God*. Augustine's encounter with the Donatists is mentioned, where he decided coercion and force is appropriate, and uses Christ's teaching in Luke, "compel them to come in," to justify it. But then Wilken asserts that this was essentially an exception to Augustine's approach to the topic, and that in his "preaching and teaching," he had a very different view of coercion. Well, he did have a different view in his earlier life, until his experience with the Donatists, and then he changed. To dismiss the move as exceptional or aberrant is not to deal adequately with the move.

Why did large groups of Christians support coercion and intolerance while others worked for religious freedom?

Similarly, Emperor Justinian is mentioned only in a single sentence in passing, as being the bridge to the Christian Roman Empire. But no mention is made of his famous code in which he installed Christianity as not only the sole official religion of the empire, but made the Roman pontiff supreme over Christianity, and gave him power of life and death regarding heretics and heresy. This is a significant event, especially in light of the two swords/two kingdoms theme that the author views as critical to his argument.

Justinian rules after the two swords distinction is made by papal leadership, and he incorporates the metaphor into his code. The church is not to wield the sword, and the emperor is not to decide religious matters. Yet both are to cooperate, so that the civil ruler will wield the sword on the church's behalf and at its direction, and the civil ruler can help oversee the affairs of the church. The point is that the two swords/two kingdoms approach on its own may support a very intolerant and coercive approach to religion and religious freedom.

Likewise, the discussion of Thomas Aquinas is quite one-sided. He is described as an important voice in the development of the rights of conscience, although it is clear that Aquinas did not believe that erring conscience should receive full protections. Unmentioned is Aquinas' famous comparison of spiritual heretics to counterfeiters, in which he argues that counterfeiters of money are punished, even though they cause only temporal harm, so how much more should counterfeiters of doctrine, who cause eternal harm, be punished by the state.

With Wilken's recounting, one is left wondering why religious freedom ever left Christianity during the Middle Ages. A discussion of this darker side of the thought and thinkers of medieval Christendom is important to a fuller understanding of the story. A book such as this should at least mention the Crusades, the Inquisitions, and the church actions taken against the Waldenses, Lollards, Hussites, and Conversos. It should reveal how these things were justified despite a widespread acceptance of some version of the two swords/two kingdoms model. Instead, the few and rare defenses of conscience are cherry-picked, such as the Las Casas defense of the American Indians. The vast mainstream of opinion that allowed for enforced conversions is left basically undiscussed and ignored.

Meaningful precursors to the Reformation like Wycliffe, Huss, and Jerome, as well as the Waldenses, are mentioned either briefly in passing or ignored altogether. Wycliffe and the Lollards are given two paragraphs in a chapter, oddly enough on Catholics in England. They were indeed Catholics in England, but at a time when that was the only church that existed, and their connection to claims of conscience and religious freedom are not explored.

When the Reformation is reached, Wilken pays insufficient attention to Luther, who writes some of the best and earliest statements on the relation of the temporal and spiritual spheres, the two kingdoms. Luther is hurriedly mentioned in the first couple of paragraphs of chapter 3, then the discussion moves on to other, more obscure figures. He is described in 1521 as "not a 'Lutheran' but a medieval Augustinian monk" who was invoking medieval notions of conscience. There is a discussion of Luther's major writings in this regard only when dealing with a much more obscure figure, a city clerk of Nuremberg, who cites to Luther. This short, backdoor discussion of Luther sets a pattern for the book, which for some reason emphasizes Calvin as the author of the Reformation version of the two-kingdom model.

No, Luther did it first, and was most influential in that regard. Calvin's view was obviously derivative, and much less bold. The book consistently errs by arguing that the Calvinist two-kingdom model was frequently the moving

factor in the growth of toleration, when the opposite largely is true. Calvin created a modified version of Luther's model that justified, rather than opposed, church/state union. This is seen by his own government in Geneva—which burned the anti-Trinitarian Servetus at the stake—the Calvinists in England, and the Calvinist Puritans in New England, who hung Quakers on Boston Common.

Quite simply, the author has not given adequate due to the early Luther point of view on the two kingdoms, the priesthood of all believers, and religious toleration. These contributions are mentioned, but only in passing, and Calvinism is given the lion's share of credit. But this is simply not historically accurate.

Despite these criticisms, there is material here in the early Reformation section that is not well known and highly interesting. The claims of conscience made by various Catholics, including nuns whose priories were being shut down, is very instructive. It shows that the language Luther used about conscience was more widespread in Catholic circles than one might have thought, and it adds usefully to the picture of thought on conscience in early modern Europe across the confessional divide.

Still, one would wish for a more evenhanded approach in these discussions. Thomas More, Lord Chancellor of England, is cited as an example of Catholic conscience, which indeed he is. But nothing is said about More's personal involvement in the prosecution, persecution, and torture of Lutheran "heretics." More's stand on conscience cannot really be meaningfully considered without this larger context.

Again, the discussion of ideas continues with a rather odd slant toward Calvin and Calvinism. In discussing Baptist author Thomas Helwys, Wilken describes his ideas as a "distillation of Calvin's discussion of the duplex regimen in the Institutes." But in reality, Helwys, who began as a Calvinist, rejected central points of Calvinism after he encountered Anabaptists—specific election, the special atonement, infant baptism, and the magistrate's involvement in spiritual matters. In reality, Helwys is rejecting the Calvinist teaching on the two kingdoms, and implementing an early Luther/Anabaptist version. To view this as a "distillation" of Calvin's mature ideas is simply wrong.

In the chapter on the mid-seventeenth-century world (chapter 9), the author gives thoughtful commentary on John Owen, William Penn, and John Locke, though with various misattributions to Calvin continuing as noted above. But a rather glaring omission is the absence of any mention of John Milton, who is one of the earliest mainstream thinkers to propose that the state should not support religious ministers or teachers at all. Milton has two treatises on both religious freedom and anti-establishment that are very robust, and this is before either Penn or Locke write on the topic. Given Milton's profile, it is hard to justify ignoring him.

The book concludes with an overly broad argument that religious liberty is essentially "an inheritance from the Christian past." Yet that past is described broadly, as including early Christianity, the Middle Ages, and the Reformation. Clearly, this past includes many diverse and even opposite things, many of which actually worked against freedom and toleration. In the discussion of Locke and Madison there is an acknowledgment that they are working primarily in philosophical rather than theological categories. And yet, it is argued, the philosophical categories are really prompted by underlying religious insights.

I'm not unsympathetic to this argument, having made a similar one myself. And yet as stated here, it raises more questions than it answers. Religion and faith were used more often in the Middle Ages to justify coercion and oppression than religious freedom. Why did that change? What kind of religion or Christianity supported freedom? The book really does not address, in my view, these fundamental questions. The same can be said of Enlightenment thought, some of which helped bring greater freedom, some of it greater oppression. To simply pit faith and Christianity against the Enlightenment and reason is to overlook the underlying nuance that is found on both sides. There is no meaningful acknowledgment or discussion of these realities, or the interplay between these two kinds of thought.

To end on a positive note, the execution of the book is obviously that of a skilled writer and a broadly capable researcher. There is much new material the author brings to light that adds to the current discussion. The book is written by someone who knows how to colorfully and thoughtfully advance an argument as well as a historical narrative. It is a somewhat flawed yet valuable and useful contribution to our understanding of the development of religious liberty in the West.

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Money Talks

Religion and the economy are two topics not usually discussed together. Yet, America's robust protection of religious freedom has helped foster a flourishing "religion sector" within the American marketplace, with studies showing that religion has a surprisingly outsized economic impact.[1]

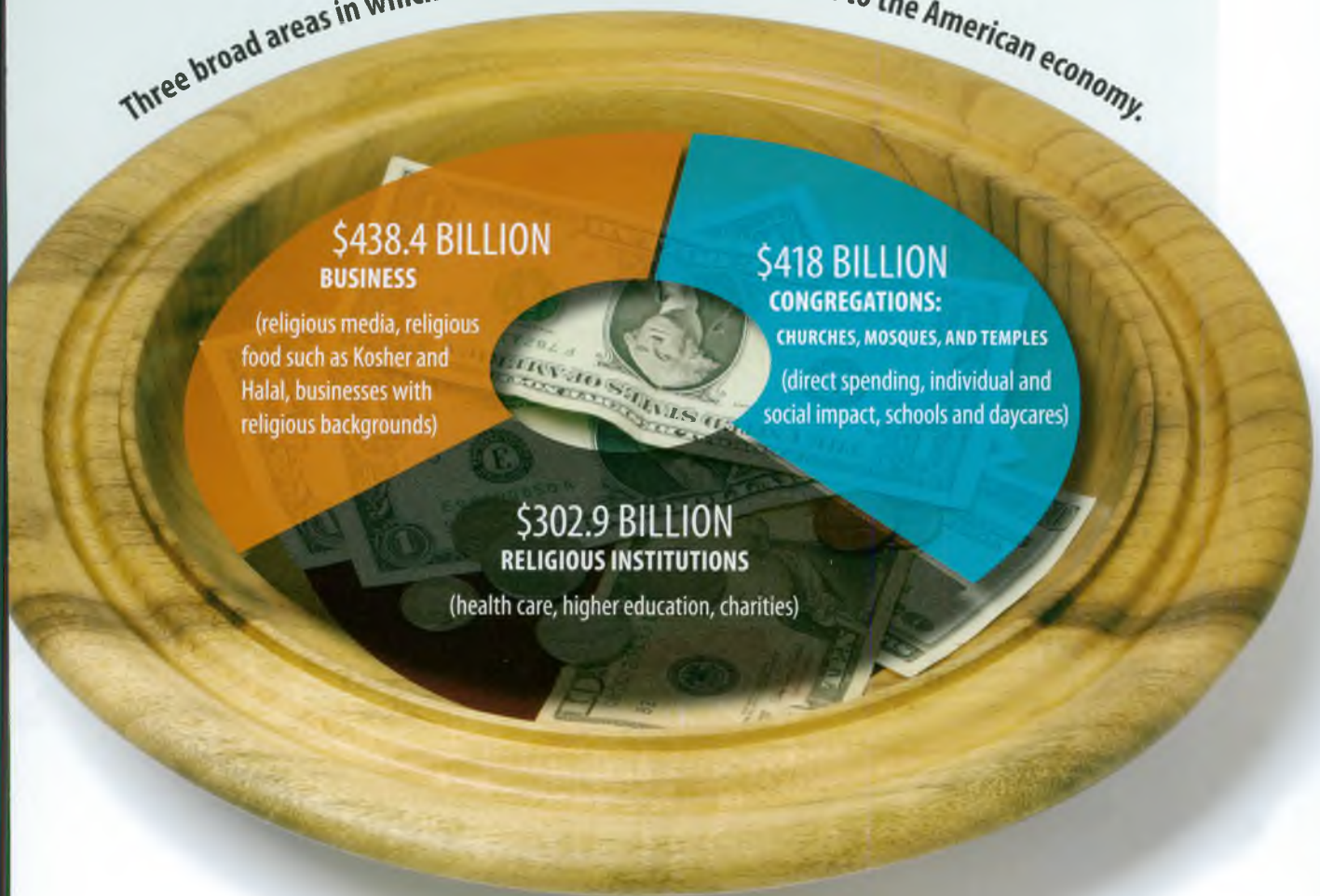
[1] All statistics from "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," a 2016 study by Brian J. Grim (Georgetown University) and Melissa E. Grim (Newseum Institute), published in the peer-reviewed journal, *Interdisciplinary Journal of Research on Religion*, Volume 12, Article 3.

- Religion contributes $1.2 trillion to the U.S. economy each year—more than the annual revenues of the top 10 tech companies, including Apple, Amazon, and Alphabet combined, and over 50 percent more than the global annual revenues of America's six largest oil and gas companies.

- If $1.2 trillion was put into terms of GDP, it would make U.S. religion the 15th largest national economy in the world.

- 40 percent of the top 50 charities in the U.S. are faith based.

- American congregations coordinate 7.5 million volunteers to help run 1.5 million social programs each year.



Mistakes Were Made

Why is there still a gaping hole in antidiscrimination protections for religious employees?

By Melissa Reid

In 1964 the United States Congress passed the Civil Rights Act, sweeping civil rights legislation still considered to be one of the most significant legislative achievements in American history. While lawmakers' primary motivator was the nation's fight against racial inequality, the Civil Rights Act prohibits discrimination more broadly—on the basis of race, color, religion, sex, or national origin.

When it comes to discrimination in the workplace, Title VII of the Civil Rights Act protects employees and applicants from discrimination based on race, color, religion, sex, or national origin. In subsequent decades these Title VII protections have been expanded to include pregnancy, age, and disability discrimination.

The 1972 Equal Opportunity Act strengthened the enforceability of Title VII claims by the Equal Employment Opportunity Commission (EEOC). According to the agency's website, the law "forbids discrimination in every aspect of employment,"[1] including recruitment, application, hiring, job assignments, and promotions.

Shrinking Protection

Taken at face value, the protections offered to religious workers by Title VII seem ample. The law, as amended in 1972, requires an employer to reasonably accommodate an employee's or prospective employee's religious observance or practice unless doing so would cause undue hardship on the conduct of the employer's business.[2]

Unfortunately, just five years later the Supreme Court essentially invalidated the religious accommodation requirement for employers. In the 1977 case *TWA v. Hardison* the Court defined "undue hardship" as anything that requires an employer to bear more than a *de minimis* cost or burden.[3] *De minimis*, a Latin phrase, essentially means anything more than minimal. Unsurprisingly, in the years following *Hardison*, this restrictive definition has been devastating to the workplace rights of people of faith.

What exactly is the problem with a *de minimis* threshold for religious accommodation? For one thing, it almost certainly wasn't the standard envisioned by the discrimination-mindful drafters of the 1964 Civil Rights Act. The ability of individuals to act as conscience dictates is a long-established and deeply cherished value for Americans. Our country's constitutional framers prioritized the free exercise of religion in the nation's Bill of Rights, and religious freedom remains of great importance to Americans today in their selection of government representatives.[4]

The vast majority of Americans, and therefore American workers, are people of faith.[5] Nearly two-thirds of respondents to Becket's 2020 Religious Freedom Index agreed with a description of religious faith as a way of life, while 60 percent agreed that religion for some people is a fundamental part of "who I am" and

Darrell Patterson, a Seventh-day Adventist and dedicated Walgreens employee, had a long-standing agreement with his supervisor to swap out Saturday shifts so he could observe his Sabbath. After six years of employment, Patterson was abruptly fired for refusing to work on Saturday. His nine-year quest for justice ended in 2020 when the U.S. Supreme Court refused to review his case.

should be protected accordingly. Title VII was meant to address conflicts between religion and work, yet the *de minimis* undue hardship standard has left religiously observant workers with little or no legal protection.

In a 2001 *Forward* opinion piece, Nathan Diament, executive director for Public Policy at the Union of Orthodox Jewish Congregations of America, noted that federal courts "have made the threshold for what constitutes 'undue hardship' so low that an employer can claim almost any inconvenience as a hardship that alleviates his obligation to accommodate the employee."[6] This is unconscionable in a nation whose citizens view their faith as a way of life.

The Supreme Court has essentially invalidated the religious accommodation requirement for employers.

Second-class Freedom

Ironically, the *de minimis* standard for workplace religious accommodation results in a tiered standard of rights among individuals protected from discrimination, and relegates religion to a second-class status among other groups protected by anti-discrimination civil rights law. Like the Civil Rights Act before it, the 1990 Americans With Disabilities Act (ADA) requires employers to provide reasonable accommodation to employees with disabilities unless doing so would cause undue hardship on the employer. However, the ADA wisely and appropriately defines undue hardship as an accommodation requiring a *significant* difficulty or expense. The workplace rights of believers shouldn't be prioritized below employees with disabilities or vice versa. Discrimination protection standards should be comprehensive and consistent among the protected classes of race, color, religion, sex, national origin, pregnancy, age, and disability.

Moreover, there is a growing need for strengthened religious protections in the workplace. Although claims of religious discrimination in the workplace are a small percentage of overall discrimination claims filed with the EEOC, these claims have steadily increased over the past several decades. This rise has taken place during a period when we've seen an encouraging decline in race-motivated workplace discrimination claims.[7] Unfortunately, the years directly following the September 11 attacks saw the rate of religious discrimination claims in American workplaces nearly double what they had been in the late 1990s.[8] Unsurprisingly, EEOC religious discrimination claim rates have remained elevated in the years to follow, as most Americans believe religious discrimination occurs in the U.S. today for Muslims, Jews, and Christians.[9]

Failed Fixes

During the past several decades there have been bipartisan, multifaith legislative and judicial efforts to restore a higher standard of workplace accommodation for people of faith. The Workplace Religious Freedom Act (WRFA) has been introduced at various times since 1994. There was a broad push in 2003, for instance, when it was introduced by lead sponsors senators Rick Santorum and John Kerry. Unlikely partners, they worked together to strike an appropriate legislative balance that both respected religious accommodation and ensured that an undue burden was not forced on employers. This proposed law did not offer a blank check of accommodation to religious workers. Instead, WRFA restored the standard of reasonable accommodation by an employer; that is, accommodation is required as long as it does not impose a significant difficulty or expense.[10]

Support for the Workplace Religious Freedom Act of 2003 was broad and diverse in both congressional chambers, with Senate cosponsors including senators Chuck Schumer, Hillary Clinton, Sam Brownback, and John Cornyn. It was championed by a diverse coalition of religious groups who longed for their members to receive reasonable workplace

accommodation for holy days and religious dress. Supporters included such groups as the American Jewish Committee, Family Research Council, National Association of Evangelicals, National Sikh Center, Islamic Supreme Council of America, and the Seventh-day Adventist Church.

However, WRFA also received strong pushback from pro-business advocates. In hindsight, their hostility seems ironic in light of recent studies that have shown the many ways businesses benefit when faith is welcomed in the workplace.[11]

Unfortunately, WRFA didn't make it out of committee during the 108th congressional term, and efforts over ensuing years have also failed to gain momentum. Most recently, in 2019, WRFA was reintroduced in the House of Representatives as part of comprehensive LGBT-religious freedom nondiscrimination legislation, the Fairness for All Act.[12]

Judicial Challenges

During the past few years several workplace religious discrimination cases have reached the U.S. Supreme Court for consideration—*Patterson v. Walgreens*, *Small v. Memphis Light, Gas & Water*, *Dalberiste v. GLE Associates, Inc.*, and *Hedican v. Walmart Stores East, L.P.*. None have been accepted for review.

Current Supreme Court justices Alito, Thomas, and Gorsuch have all called for the *Hardison* undue hardship standard to be reconsidered. In 2021, when the Court declined to review *Small v. Memphis Light, Gas & Water*, Justice Gorsuch, joined by Justice Alito, offered the following pointed dissent:

> "Title VII's right to religious exercise has become the odd man out. Alone among comparable statutorily protected civil rights, an employer may dispense with it nearly at whim. As this case illustrates, even subpar employees may wind up receiving more favorable treatment than highly performing employees who seek only to attend church. And the anomalies do not end there. Under the ADA, an employer may be required to alter the snack break schedule for a diabetic employee because doing so would not pose an undue hardship. . . . Yet, thanks to *Hardison*, at least one court has held that it would be an undue hardship to require an employer to shift a meal break for Muslim employees during Ramadan. . . . With *Hardison*, uneven results like these have become increasingly commonplace."[13]

It's not just conservative members of the Supreme Court who have offered support for a reexamination of *Hardison* in recent years. The Obama-era EEOC filed an amicus brief in *Tabura v. Kellogg* in support of the plaintiff's workplace religious discrimination claim. And yet the unreasonable standard remains.

Time to Act

Our country has championed religious freedom rights since its inception and enacted laws to reflect that priority. And today a majority of American workers say that faith is central to their identity. Given these two realities, it seems obvious that no American should be forced to choose between keeping their faith and keeping their job.

Unfortunately, *TWA v. Hardison*'s restrictive standard for undue hardship has left religious workers with little to no recourse when they experience discrimination in the workplace. As Justice Gorsuch noted in his *Small* dissent, it's past time to correct this mistake.

[1] See U.S. Equal Employment Opportunity Commission, "Prohibited Employment Policies/Practices," https://www.eeoc.gov/prohibited-employment-policiespractices.
[2] Civil Rights Act of 1964 §7, 42 U.S.C. §2000e et seq (1964).
[3] *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).
[4] The Becket Fund for Religious Liberty, "Religious Freedom Index: American Perspectives on the First Amendment," November 2021.
[5] Gregory A. Smith, "About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated," Pew Research Center, December 14, 2021.
[6] Nathan Diament, "Protect Religion Now," *Forward*, October 19, 2001.
[7] See Charge Statistics (charges filed with EEOC) FY 1997 Through FY 2021, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.
[8] Ibid.
[9] David Masci, "Many Americans See Religious Discrimination in U.S.—Especially Against Muslims," Pew Research Center, May 17, 2019.
[10] S.893, Workplace Religious Freedom Act of 2003, 108th Congress (2002-2003).
[11] For insights into the benefits of allowing employees to "bring their whole selves to work"—including their faith—see the interview with Brian Grim, president of the Religious Freedom & Business Foundation, in this issue of *Liberty* magazine.
[12] H.R. 5331, Fairness for All Act, 116th Congress (2019-2020).
[13] *Jason Small v. Memphis Light, Gas & Water*, 593 U.S. _____ (2021), J. Gorsuch dissenting.

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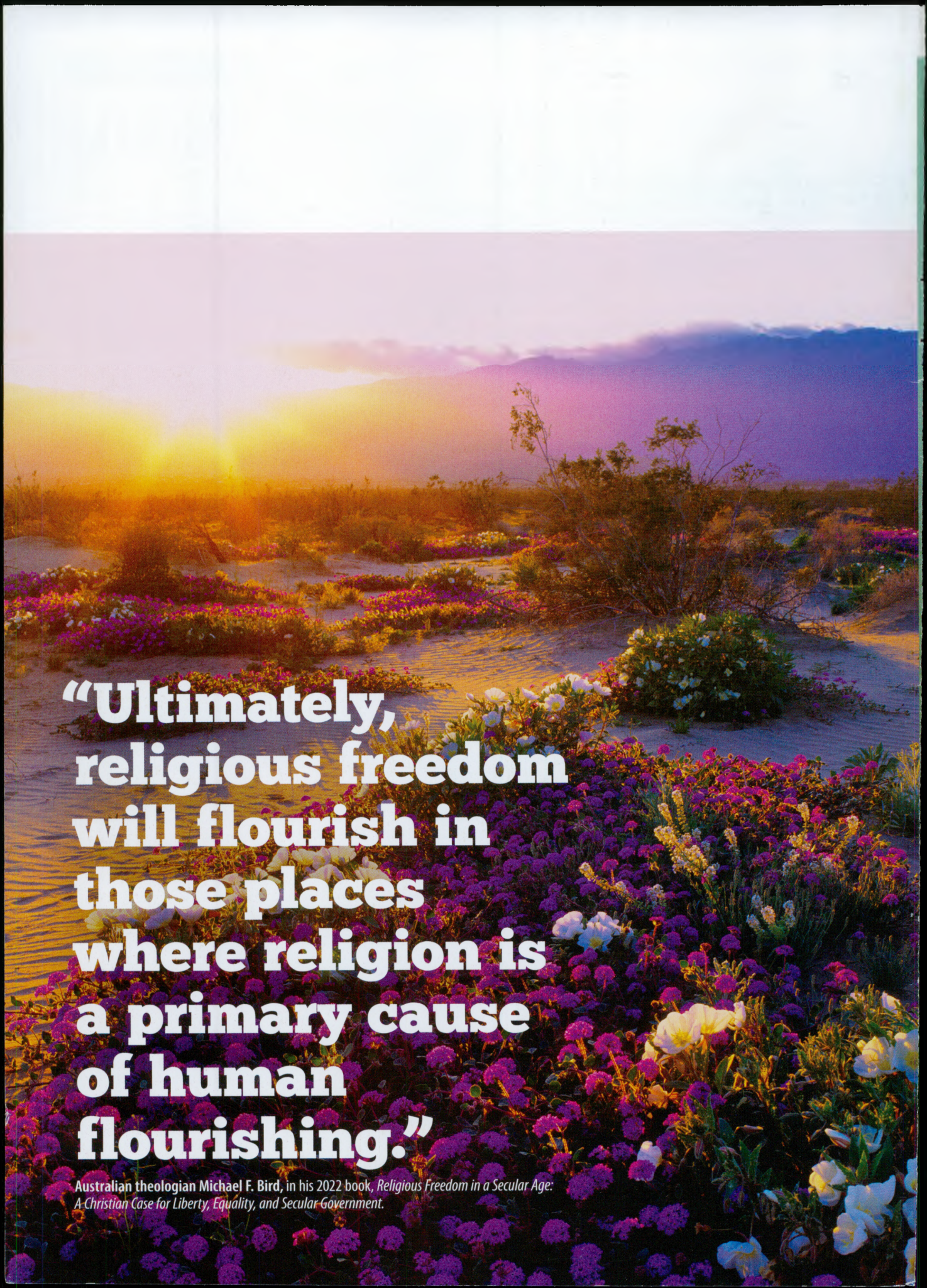

"Ultimately, religious freedom will flourish in those places where religion is a primary cause of human flourishing."

Australian theologian Michael F. Bird, in his 2022 book, *Religious Freedom in a Secular Age: A Christian Case for Liberty, Equality, and Secular Government.*