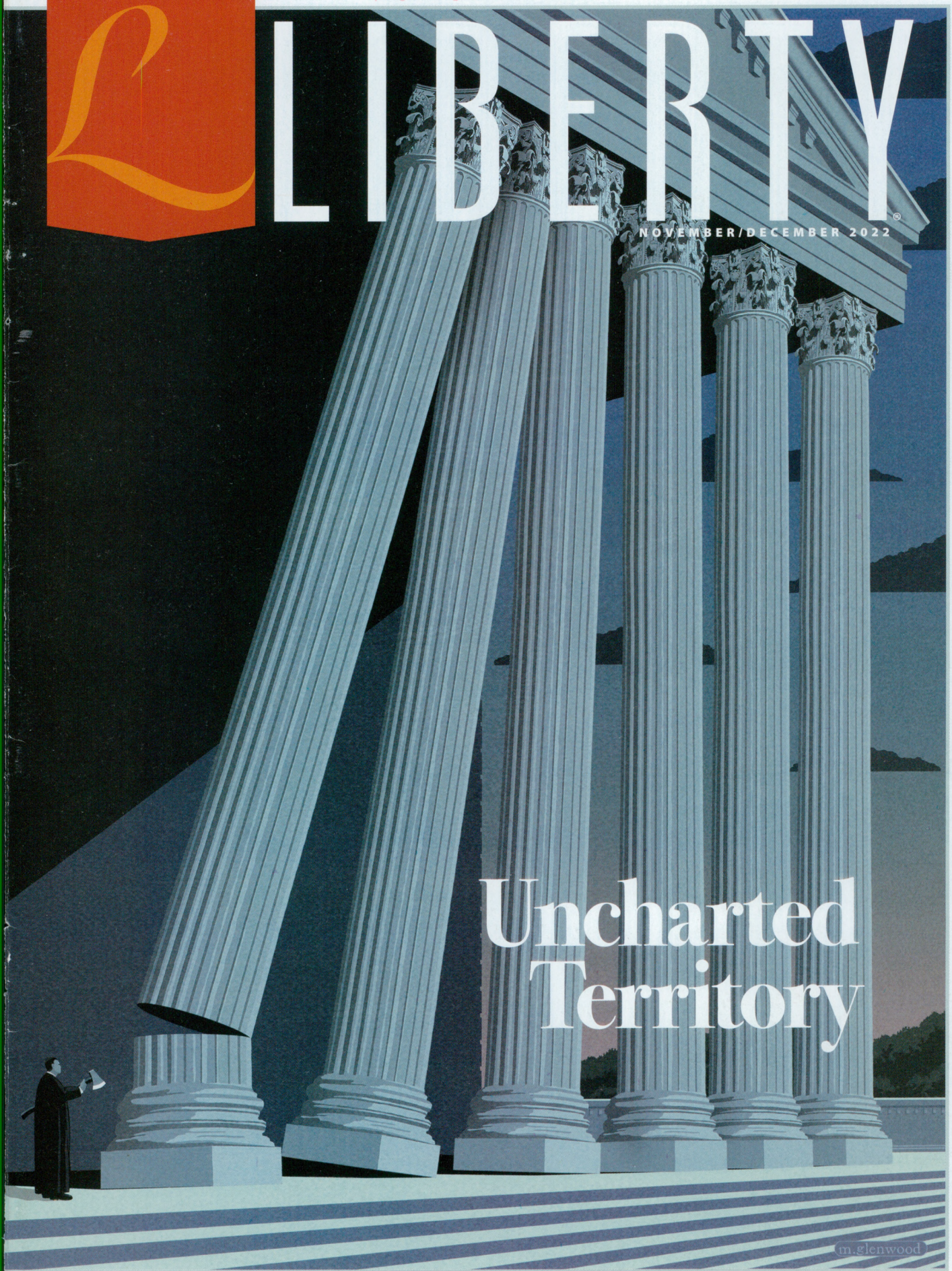
A MAGAZINE OF RELIGIOUS FREEDOM

THE CRIME ABOVE ALL CRIMES | FAITH, FACTS, AND FOOTBALL

LIBERTY®

NOVEMBER/DECEMBER 2022



Uncharted Territory

m.glenwood

BLANK CHECK DANGER

Regardless of what you thought of his politics, there was something seductive about Paul Harvey's style of storytelling. As an American radio icon for more than a half century, Harvey's specialty was taking stories and finding an unanticipated twist that transformed the mundane into the intriguing. He demonstrated this skill most clearly in his long-running series "The Rest of the Story."

I had a Rest of the Story moment recently when I came across a short article on a local Maine news website about one of this summer's landmark Supreme Court decisions—*Carson v. Makin*. In *Carson* the Court's majority sidestepped First Amendment establishment clause concerns and precedent. Instead, it gave a forceful turn of the faucet in favor of increasing the flow of state funding to religious schools.

Many Christians celebrated. Understandably, they saw it as a victory for religiously affiliated schools, both in Maine and throughout the country. So I was surprised to read what happened in the months following the decision.

Of all the religious schools in Maine now eligible to participate in the state tuition reimbursement program, the number that have applied for the current school year comes to a grand total of . . . one. Even Bangor Christian School, which was at the center of the case, chose not to apply to participate.

Why? Their reluctance can perhaps be explained, in part, by comments from Maine's attorney general Aaron Frey. Soon after the Carson decision Frey said: "I intend to explore with Governor Mills' administration and members of the legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry."

Translation: Religious schools in Maine that participate in the tuition reimbursement program and that hold certain religious beliefs—especially those related to human sexuality—will eventually face a dilemma. They can conform to state demands and abandon religious teachings and practices the state finds objectionable. Or they can forfeit state funds.

The Temptation

We're living in an extraordinary moment when it comes to First Amendment religion clause jurisprudence. Research conducted prior to the creation of the current conservative "supermajority" on the Court shows a marked trend in recent decades in favor of religious claimants.

From 1953 to 1969 the Court found in favor of the religious interest 46 percent of the time. Under Chief Justice Warren Burger, from 1969 to 1986, that grew to 51 percent. Under Chief Justice William Rehnquist, from 1986 to 2005, the religious claimant won 58 percent of the time. During the past 17 years that figure has grown to 81 percent under Chief Justice John Roberts.

And today? There's a heady sense among some within the religious community that this new pro-religion Court offers a blank check. This tempts many to ask, What else could we write on that check? How far can we go in expanding religious free exercise in ways that minimize establishment clause restraints?

Before we cash in, though, perhaps we should consider some potential downstream consequences.

The Rest of the Story

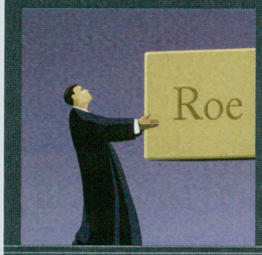
As Maine's religious school discovered, forcing open the faucet of state funding inevitably creates pressure for religion, and religious institutions, to change. That pressure may come immediately or further down the track. And an institution that comes to rely on state dollars will tend to look for ways to keep that support coming, whether by adjusting beliefs, or codes of conduct, or hiring practices, or perhaps simply toning down its religious mission.

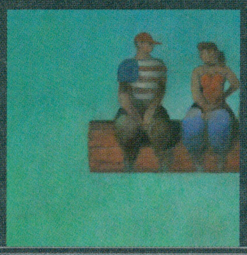
Contrary to what many believe, the establishment clause protects religion. A recent international study looked at nations in which Christian denominations receive significant state privileges and found a disturbing paradox: a privileged Christianity is a less spiritually healthy Christianity.[1] The Church of England provides a case in point. If you saw any of the pageantry around the funeral of Queen Elizabeth II and the ascension of King Charles III, you'll have noticed that religious identity and practice is fused with Britain's political institutions. The monarch serves as head of the state church—a faith that, not so incidentally, has experienced one of the fastest declines in attendance and participation of any mainline Western denomination.[2]

There's another reason for treating the blank check with caution. It may irreparably harm the very institution that's currently providing legal wins for religion.

In 1835 the French political thinker Alexis de Tocqueville tried to describe

IN THIS ISSUE





We can keep our public institutions free of religious coercion without banishing all evidence of religion.

P31

the unique role the U.S. Supreme Court plays within American society. He wrote that "the peace, the prosperity, and the very existence of the Union" are vested in the hands of the justices of the Supreme Court. He understood that the legitimacy of the Court—as a tribunal of last resort on constitutional questions—is an essential load-bearing pillar of the American republic.

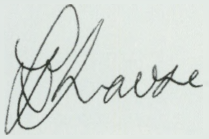
But this pillar isn't invulnerable. Retired Supreme Court Justice Stephen Breyer recently restated an obvious but significant fact: the Court's power relies entirely "upon the public's willingness to respect its decisions, even those with which they disagree."[3] Perhaps surprisingly, for the past 246 years Americans *have* been willing to accept the dictates of this unelected body that, as Alexander Hamilton famously pointed out, controls neither the sword nor the purse.

Today, though, the Court is seen as more politically and religiously partisan than ever before. Only 25 percent of Americans have "quite a lot" or "a great deal" of confidence in the Supreme Court, according to the most recent data from Gallup. This is an 11 percent drop in public trust in the Court since last year and the largest one-year drop in the Court's rating since the poll began in 1973.

Taking a bullish attitude to religious free exercise rights—expanding these in ways that diminish vital establishment clause protections—will only contribute to plummeting public faith in the Court. More than one troubled democracy around the world can attest to what happens when this essential pillar of trust in a nation's constitutional court erodes beyond repair.

Should we stop seeking legal remedies for religious freedom issues? Of course not. Defending the free exercise rights of Americans has never been more important. But doing so in a way calculated to diminish establishment clause restraints will result in a "rest of the story" that will satisfy no one. Least of all those who care about the long-term health of religious freedom—and of religion.

[1] Nilay Saiya, Stuti Manchanda, "Paradoxes of Pluralism, Privilege, and Persecution: Explaining Christian Growth and Decline Worldwide," *Sociology of Religion*, April 7, 2021.
[2] John Hayward, Growth, *Decline and Extinction of UK Churches*, Church Growth Modelling, May 15, 2022, https://bit.ly/3MXB9tK.
[3] Stephen Breyer, *The Authority of the Court and the Peril of Politics* (Cambridge, Mass.: Harvard University Press, 2021), p. 1.



Bettina Krause, Editor
Liberty magazine

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

DECLARATION of Principles

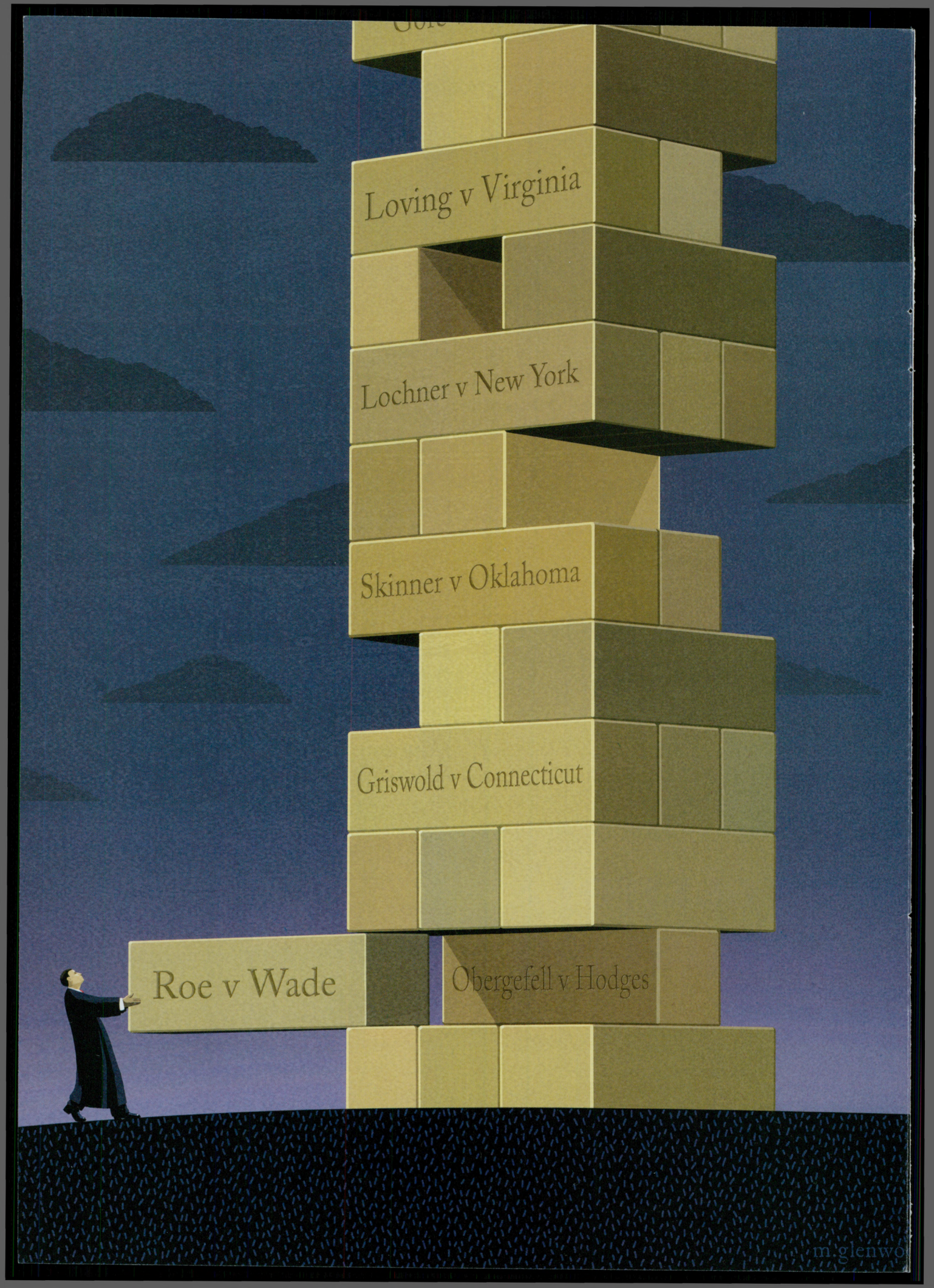
The God-given right of religious liberty is best exercised when church and state are separate.

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 MICHAEL GLENWOOD


Loving v Virginia
Lochner v New York
Skinner v Oklahoma
Griswold v Connecticut
Roe v Wade
Obergefell v Hodges

Every so often a Supreme Court case comes to define a cultural moment. This year's abortion-rights decision, *Dobbs v. Jackson*, will likely go down in history as just such a case. What will be the ripple effects of this landmark constitutional decision?

Uncharted Territory

Abortion, History, and Constitutional Interpretation

By Michael Peabody
Illustrations by Michael Glenwood

This summer the Supreme Court held in *Dobbs v. Jackson* that individual states can decide whether to permit or limit abortion within their borders. While politicians and the media have focused on the immediate, practical impact of this decision, there's another question that deserves our serious attention. What are the longer-term consequences of the majority's reasoning in the case, which shifts constitutional interpretation from substantive due process to strict originalism colored by "history and tradition"?

In short, the rationale in *Dobbs* is that the Supreme Court must be silent on abortion because it is not specifically referenced in the Constitution. As Justice Brett Kavanaugh said in his concurring opinion: "The issue before this Court . . . is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion."

But the Constitution is also silent on a number of rights that the Supreme Court has determined to properly exist. Through the years the Court has found that people have freedoms not specifically mentioned in the Constitution—freedoms that states have, at various times, tried to take away. These include the right of workers to contract with employers (*Lochner v. New York*, 1925), the right to have children (*Skinner v. Oklahoma*, 1942), the right to use contraceptives as birth control (*Griswold v. Connecticut*, 1965), the right to interracial marriage (*Loving v. Virginia*, 1967), the right to freedom from excessive punitive damages (*Gore v. BMW*, 1996), and the right to same-sex marriage (*Obergefell v. Hodges*, 2015).

In these decisions the Court overturned state laws by relying not on specifically granted constitutional rights but on general principles in the Constitution.

Substantive Due Process: A Complex Legal History

The exact definition of the substantive due process doctrine has been the subject of much debate. In simple terms, though, it says that a court is justified in bringing close scrutiny to bear on government actions that infringe on certain fundamental rights—even if these rights are not specifically spelled out in the Constitution.

This doctrine stems from the Fifth Amendment to the Constitution, which says, "No person shall . . . be deprived of life, liberty or property, without due process of law." While this was intended only to apply to actions of the federal government, in large part to allow for slavery, this changed after the Civil War. The states also had to agree to abide by this provision via the post–Civil War Fourteenth Amendment (1868), which explicitly applied to the states. The Supreme Court has since interpreted this to mean that states also must honor many other portions of the Bill of Rights. This is known as the "incorporation doctrine."

Substantive due process has been much disputed because it embraces the idea that the original language of the Constitution itself is not set in stone and is not sufficient to provide for all the freedoms that people currently enjoy. Originalists, who adhere only to the specific language

of the Constitution, argue that it can only be legitimately interpreted based on what its authors intended when it was written. Originalists argue that courts cannot add to the Constitution any rights, no matter how attractive, if these rights are not found within the 7,591 words of the document, including its amendments and signatures.

Originalists will claim they understand the "true meaning" of the Constitution and are therefore more objective. Yet their interpretation of what the authors intended to say is filtered through a subjective, broad-based view of "history and tradition."

The Court in *Dobbs* could have merely taken a scalpel to *Roe v. Wade*. Instead, it threw a grenade into the heart of substantive due process.

The Court in *Dobbs* could have merely taken a scalpel to *Roe v. Wade* by allowing, for instance, Mississippi's 15-week-ban on abortion to stand or even deciding that the Fourteenth Amendment extended rights to the unborn. Instead, the Court threw a grenade into the heart of "substantive due process" and created a new precedent that embraces originalism. If a right is not explicitly listed in the Constitution or cannot be construed to be part of the "original intent," it does not exist.

Justice Clarence Thomas issued a concurring opinion that makes the threat to substantive due process even more clear. He writes, " 'Substantive due process' is an oxymoron that lacks any basis in the Constitution." He laments that although *Dobbs* focuses on abortion, other Court-established rights should be revisited, including, among others, same-sex conduct and marriage, and contraception.

Originalism Versus History and Tradition

While parading a strict adherence to the specific language of the Constitution, the Court in *Dobbs* allows itself a massive exception called "history and tradition." Writing for the majority, Justice Samuel Alito says, "The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of common law until 1973."

In combination, subjective "history and tradition" coupled with an ostensibly "objective" originalism can create unfortunate case law.

In what was arguably the worst Supreme Court decision of the 1800s, Chief Justice Roger Taney issued a decision in 1857 intended to declare forever that enslaved people were property, with no rights under the Constitution. Taney wrote that Dred Scott, who had sued for his freedom because his enslaver had transported him through a "free" state, had no right to sue. In fact, Taney wrote, Congress's passage of the Missouri Compromise allowing for free states and slave states acted to deprive enslavers of their "liberty" and "property." Thus, he claimed, the Missouri Compromise "could hardly be dignified with the name of due process of law." Taney argued that a person who had slaves should be able to move freely between the states without losing that "property" right.

Relying on a claim to "history and tradition," Taney wrote that "the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument."[1]

Even if the Founders may have felt personally opposed to slavery, they had created a document born of compromise. It gave states the power to decide whether to allow slavery within their borders but included language that, should an enslaved person escape, free states may have to return them to the "Party to whom such Service or Labour may be due."[2]

To be sure, this fugitive slave clause had some legal gaps that allowed "free" states significant judicial discretion in whether they would return escapees. But the *Scott* decision federalized slavery by requiring all states to return escapees to slaveholders. In short, the Underground Railroad now had to expand to Canada because escaping to Northern states was no longer sufficient.

Some scholars, including originalist Robert Bork, have argued that Taney's approach to slavery was an early approach to "substantive due process." Bork famously contended that "who says *Roe* must [also] say . . . *Scott*."[3]

But it can also be argued that Taney's approach arises from a hybrid of originalism and "history and tradition." In claiming slavery was protected by the Constitution where no such language existed, Taney's primary argument was that slavery had existed for hundreds of years and was not excluded by the Founders.

The *Scott* decision sent shock waves across the country and ultimately became a catalyst for the Civil War. During the years of Reconstruction after the Civil War, as a condition of rejoining the Union, Confederate states agreed to sign three new amendments to the Constitution: outlawing slavery (Thirteenth), applying the due process

clause to the states (Fourteenth), and allowing formerly enslaved people to vote (Fifteenth).

Confederate states grudgingly signed on to these amendments, claiming they had little choice. Yet many of these rights remained ignored and neglected until, almost a century later, they gained new life through the civil rights movement of the 1950s to 1970s.

Griswold and *Roe* and the Right to Privacy

In 1965 the Supreme Court heard a case in which the state of Connecticut had prosecuted a director of Planned Parenthood, Estelle Griswold, for providing married couples with contraception in violation of an 1879 state Comstock Law banning birth control. The state argued that the law was necessary because it prevented extramarital sexual relations, presumably by punishing unwed couples with pregnancy.

The Court found that there is a "zone of privacy" in the bedroom free from state interference.

Most of the justices thought Connecticut's Comstock Law was ridiculous, and even dissenting Justice Potter Stewart noted that the law was "uncommonly silly" and "obviously unenforceable." But, hewing to a strict originalist approach, Stewart said that the Court should not come up with a new "right to privacy" on its own but should instead overturn the law based on a due process right found within the Fourteenth Amendment. Stewart also joined Justice Hugo Black's dissent that, absent a specific right to privacy in the Constitution, the Court had no basis or jurisdiction for finding the state law unconstitutional.

The 1973 case *Roe v. Wade* built on *Griswold* to expand the right of privacy to the right to an abortion. In the decision Justice Harry Blackmun wrote that there was nothing in the Constitution, including the aforementioned fugitive slave clause, that expanded the rights of personhood to the unborn. Blackmun wrote, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[4]

The majority found that despite the lack of clear language in the Constitution that allowed for abortion, there was a "right to privacy" that allowed for abortion, just as it allowed for contraception.

What About Fetal Personhood?

Although *Roe* was based on the idea that there is a "right to privacy" that allows for abortion, there was no absolute right to abortion free from state intervention. Without a clear scientific basis, the Court decided on a trimester system that would allow a woman sole discretion to have an abortion in the first trimester, a state could regulate abortions in the interests of the mother's health in the second trimester, and in the third trimester, the state could regulate or outlaw abortion unless it was necessary to preserve the life or health of the mother.

In *Roe* Blackmun addressed the argument raised by Texas and *amici* that the fetus might have Fourteenth Amendment rights. He wrote, "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."

States have long treated fetuses who are candidates for birth very differently from candidates for abortion, even if there is no objective difference between them. Under *Roe* the rights of a fetus did not hinge on an overarching Fourteenth Amendment right to life, liberty, and the pursuit of happiness. At least during the first trimester they hinged, instead, on the pregnant woman's decision as to what value that life may have.

For instance, the state of California will pay for abortions for unwanted babies, and it will also pay for prenatal care. California's abortion law was written into the Penal Code in 1967 as an exception to the homicide law. This law begins with language defining murder as "the unlawful killing of a human being with malice aforethought." Then it says that the very same act is not prohibited if performed by a physician to save the life of the woman or if the "act was solicited, aided, abetted, or consented to by the mother of the fetus."[5]

Killing a fetus without consent will lead to a homicide charge, as in the 2003 case of Scott Peterson, who killed his wife, Laci, who was pregnant with son Conner. Both died, creating the "double homicide" "special circumstance" that led to Peterson initially being sentenced to death.

Another example is from Florida, where in 2014 John Andrew Welden was first charged with first-degree murder for killing his unborn child after tricking his pregnant girlfriend into taking abortion pills.

Although religion and philosophy might answer that a fetus becomes alive after it first moves (the so-called quickening) or takes its first breath of air using its mouth rather than the umbilical cord, the scientific definition is that life starts when sperm meets a cell leading to the formation of a fertilized ovum or zygote. "The time of fertilization represents the starting point in the

S·C·O·T·U·S

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion,

life history, or ontogeny, of the individual."[6]

Christopher Hitchens, an atheist, wrote in his book *God Is Not Great: How Religion Poisons Everything*: "As a materialist, I think it has been demonstrated that an embryo is a separate body and entity, and not merely (as some really used to argue) a growth on or in the female body. . . . The words 'unborn child,' even when used in a politicized manner, describe a material reality."[7]

The *Dobbs* decision, however, sidestepped this issue of fetal personhood. It did not establish that the fetus is, in fact, a person with constitutional rights, but instead threw the issue of abortion to the states.

What Next?

Some states will develop their own substantive due process rules. Some states may expand abortion rights to new extremes, discounting any legal interest in the value of prenatal human life.

Other states will move in the other direction. Some may find new ways to impose restrictions, such as electronically tracking women who travel to another state for an abortion.[8] Some women may be forced to carry to term undeveloped fetuses who have died in utero. Pregnant children who are, by definition, rape victims may be forced to carry their babies to term, and a host of other issues may arise in the coming years that are not even contemplated now.

On the other end of life, assisted suicide and emerging discussions on euthanasia, along with rising costs of health care, mean that society's understanding of the value and meaning of human life are changing. Thus, settling the question of whether a fetus is a human being may not provide the open-and-shut argument against abortion that people once thought.

So what do to? It's easy to tell someone that they must "bear the consequence of their actions." But what does this mean in practice? Should the male responsible for an unwanted pregnancy be prosecuted? Should promiscuous teenagers be dragged before magistrates? Should society incarcerate those who attempt to have an abortion and restrain them until they give birth in a prison hospital?

In a perfect world I would be able to wrap up this article with a clear conclusion and make a strong argument for or against *Dobbs* and plant a battle flag. But the reality is, I can't.

Everything about the subject of abortion is complex and messy. It's an issue with which the *Roe* Court clearly struggled. And we cannot expect the courts and legislatures today to fix it. Once the dust settles from *Dobbs*, society will need to figure out how to handle the issues that arise. I would propose that the quest for a workable solution will need to start with a society that protects the vulnerable, cares for the pregnant, the newborns, and for children. Advocates on all sides of the issue will need to stop judging from the sidelines and get involved in providing for the health of all involved.

Unmapped Legal Terrain

Beyond the issue of abortion, perhaps the most significant consequence of *Dobbs* is the new form of jurisprudence it has created. It's an approach based on a hybrid of allegedly objective originalism and coupled with the subjectivism of "history and tradition."

When drafted, the Constitution was intended to protect people from an overbearing government while at the same time protecting the ability of states to enslave people. It took a Civil War, and the post-War amendments, to require states to recognize that all human beings had federally guaranteed rights. The approach that *Dobbs* takes, rolling back the applicability of substantive due process rights under the Fourteenth Amendment, may allow almost any state-level restriction on unlisted freedoms to be upheld against a narrowing interpretation of the Bill of Rights.

The approach that Dobbs takes may allow almost any state-level restriction on unlisted freedoms to be upheld against a narrowing interpretation of the Bill of Rights.

For those who would argue for the human rights of the unborn, *Dobbs* made those rights more tenuous, as they are now subject to individual state laws. For those who argue that this is a human rights issue for the pregnant woman, this also leaves it up to the states. State restrictions, no matter how unreasonable or onerous, will be upheld by the Court, which will now take a hands-off approach for the foreseeable future.

In short, the approach seen in *Dobbs* has the potential to undo decades of civil rights advances, as courts apply a strict formalism to rights and chip away at hard-won freedoms.

---

[1] *Dred Scott v. Sanford*, 60 U.S. 393 (1857).
[2] Article IV, Section 2, Clause 3, repealed by the Thirteenth Amendment.
[3] R. H. Bork, *The Tempting of America* (United Kingdom: Free Press, 2009), p. 32.
[4] *Roe v. Wade*, 410 U. S. 113 (1973).
[5] P.C. section 187.
[6] Bruce M. Carlson, *Patten's Foundations of Embryology*, 6th ed. (New York: McGraw-Hill, 1996), p. 3.
[7] C. Hitchens, *God Is Not Great: How Religion Poisons Everything* (Toronto: McClelland & Stewart, 2008), p. 220.
[8] Proposed Oklahoma law—SB 1167—would reportedly create a government-run database that would track pregnant people looking into abortion.

Michael D. Peabody is an attorney in Los Angeles and the president of Founders' First Freedom, a nonprofit organization dedicated to educating the public about current religious liberty issues. He blogs at www.religiousliberty.tv.

PHOTOS COURTESY OF DAVID ALTON

The Crime above All Crimes

A conversation with Britain's Lord Alton of Liverpool about genocide, human rights, and international apathy

David Alton, Baron Alton of Liverpool, is an academic, author, and member of the British House of Lords, where he serves on the International Relations and Defence Select Committee.

He began his career as a teacher in England's northwestern port city of Liverpool. In 1972, while still a student, he was elected to Liverpool City Council as Britain's youngest city councilor. In 1979 he became the youngest member of the House of Commons, and he continued as an elected member of Parliament for almost two decades.

Yet the role for which Lord Alton is best known internationally is that of human rights campaigner—and particularly, for the relentless spotlight he continues to shine on the crime of genocide.

In 1997, when he accepted a life peerage from Queen Elizabeth II, Lord Alton turned to Scripture for the motto to accompany his coat of arms. He selected a phrase from the book of

Deuteronomy, "Choose Life." It's a poignant motto given the amount of time Lord Alton has spent in recent years visiting sites of past mass atrocities. In places such as Burma, Rwanda, Darfur, North Korea, and China, he has helped gather firsthand accounts from those affected by genocide and other crimes against humanity.

Liberty editor Bettina Krause recently interviewed Lord Alton about his efforts to engage the international community in the prevention and prosecution of what has aptly been called "the crime above all crimes."

Bettina Krause: ***I've heard you say in other settings that "genocide" isn't a word that should be used lightly or inaccurately, but that we should never hesitate to use it when the threshold has been met. So what exactly is genocide?***

Lord Alton of Liverpool: Genocide is a crime perpetrated against a national, ethnic, racial, or religious group with the intent to destroy that group, in whole or in part. It's defined in Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which sets out prohibited acts.

Killing members of the group is one of the prohibited acts. However, other prohibited acts include causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

So the crime of genocide is a crime targeting a group and its existence—not an individual.

Genocide is often referred to as the crime above all crimes because of what genocide attempts—the destruction of a group in whole or in part. We saw it with the Nazi atrocities during the Holocaust of the Jews, and we've seen many other instances of genocide since.

In 1941, as the Nazis were killing Jews and destroying all signs of their existence, Winston Churchill said that this was a crime without a name. Raphael Lemkin, a Polish-Jewish lawyer, later coined the word "genocide" from Latin words *genos*, tribe or race, and *cide*, or killing. He also conceptualized the crime of genocide and worked toward an international treaty on genocide and domestic provisions criminalizing it.

Krause: ***So if we have an international framework for understanding genocide and, theoretically, for responding to it, why does "never again" keep happening?***

Alton: We have an international treaty that imposes obligations on states to prevent and punish the crime of genocide, but not much more than this. It's a treaty without teeth and is often used as a fig leaf to cover up the persistent lack of a coherent or concerted response.

In addition to the treaty, many states have introduced laws criminalizing genocide, but they are often reluctant to actually investigate and prosecute the crime.

In relation to their duty to *prevent* genocide, during seven decades since the United Nations treaty was adopted, states still don't appear to understand what that duty means, and what it requires them to do. They don't have foundational mechanisms that would enable them to implement this duty. As such, by default, states fail to prevent the wretched recurrence of genocide.

Hitler reputedly asked, "Who now remembers the Armenians?" as plans were laid for the "Final Solution."

Lord Alton meeting in 2019 with Baba Sheikh, then spiritual leader of the embattled Yazidis in northern Iraq.

Krause: ***You've recently written a book, along with Dr. Ewelina Ochab, called*** State Responses to Crimes of Genocide. ***What spurred you to take on that project, and what do you hope a book such as this will achieve?***

I saw the skeletons of those murdered while peacekeepers did nothing. I saw a mass grave turned into a football pitch for soldiers.

Alton: We both feel passionately that we need a change in our responses to genocide, and that if we want to be able to prevent future genocides, this change is urgently needed.

I've visited and interviewed victims and documented genocides in places like Darfur and northern Iraq. But in speaking about genocide after genocide, and focusing on the risk factors and early warning signs to full-blown genocides, I've met with a depressing lack of political will.

I thought it was time to set out the story of genocide and its effects on those who have suffered so grievously—from the Armenians to the Yazidis, from the Rwandans and Bosnians to the Rohingya and many others. I was fortunate to be able to work with Dr. Ewelina Ochab in drawing together the many strands and threads, and especially in examining the granular detail of what the law does and what it fails to do.

Krause: *The House of Representatives here in the US recently passed a resolution recognizing the Armenian genocide—something that took place more than a century ago, and that modern-day Turkey still adamantly denies ever happened. Some may think resolutions such as this don't serve any practical use. They're merely words. But what are your thoughts?*

Alton: Recognizing past genocides for what they are may appear to be "only words," but it is far from the case and hugely important.

Adolf Hitler reputedly asked scornfully, "Who now remembers the Armenians?" as horrendous plans were being laid for the "Final Solution." Recognizing past genocides is crucial for survivors and their families, but it's also crucial if we are to prevent future atrocities.

Past atrocity crimes and the perpetrators' impunity for such crimes—who are seen to be getting away with genocide—is a crucial risk factor in future atrocities. Along with other risk factors and early warnings signs, we should always recall what has happened before. We'll succeed only if we have a comprehensive analysis of the serious risk of genocide.

Genocide does not happen overnight. It's a crime that is planned and implemented step by step. Before genocide is committed, there *are* early warning signs and risk factors. For example, the UN has created a framework for analysis of atrocity crimes that include several risk factors that could help states to analyze situations at risk of genocide or other atrocity crimes.

Krause: *When we look back at different genocides such as the Holocaust, or what happened in the Balkans or Rwanda, I wonder if some of us have a false sense of security that these are things that belong to history, or that happen only somewhere else.*

Alton: Genocide may be seen as a crime perpetrated "somewhere else," but this is far from the truth. The Nazi atrocities were perpetrated on European soil. The Srebrenica genocide as well. The Daesh [or ISIS] genocide was joined by willing participants from more than 80 countries around the world, including the US, the UK, Germany, France, and Belgium.

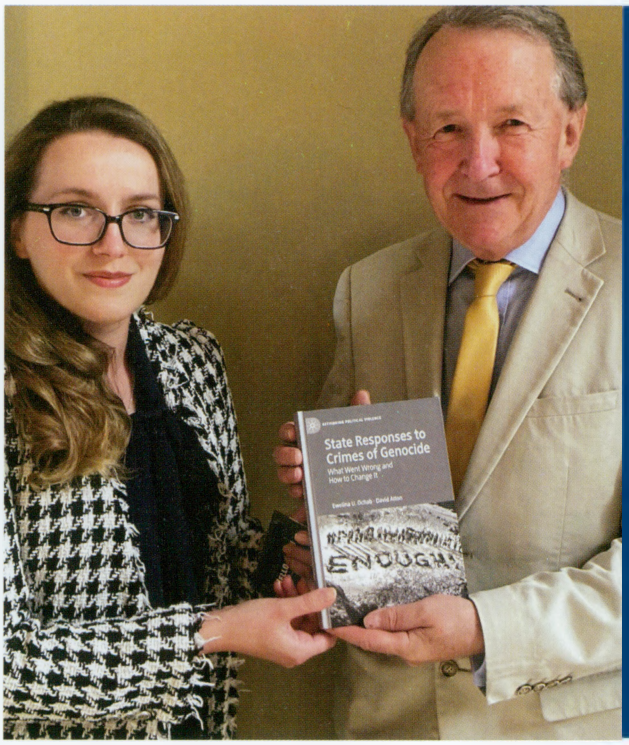
Now we're talking about the incitement to genocide and the atrocity crimes in Ukraine—as perpetrated by Putin and his army. In the Horn of Africa, also, there's chilling evidence coming out about the systematic targeting of Tigrayans.

Krause: *Through the years you've traveled to a great many different genocide sites, you've visited with those whose lives and families have been devastated, you've seen the impact of these atrocities on communities. How has this affected you personally?*

Alton: I visited the genocide sites in Rwanda, meeting with orphaned children and traumatized families, and I was deeply shocked to be taken to a former technical college where Tutsis had gathered to seek protection from the international soldiers garrisoned nearby. I saw the skeletons of those who had been murdered while the peacekeepers did nothing. I saw a mass grave that had been covered over and turned into a football pitch for the soldiers.

With my friend Rebecca Tinsley I traveled from that visit to Rwanda to Darfur. We collected evidence and witness statements that demonstrated that the same thing was happening all over again. I wrote about it for *The Independent* newspaper, and my account appeared under the headline "If This Isn't Genocide, What Is?"

Ultimately the International Criminal Court agreed and named the Sudanese head of state and others as responsible for genocide. But not before 300,000 people were dead and 2 million displaced. The perpetrators and those



David Alton and Ewelina U. Ochab, *State Responses to Crimes of Genocide: What Went Wrong and How to Change It* (London: Palgrave Macmillan, 2022).

"Whenever a genocide has taken place, there is a collective wringing of hands; world leaders repeat the tired and pious platitude that 'Never Again' must not be allowed to happen all over again. In reality, the promise to break the relentless and devastating cycles of genocide has not been kept. In recent years, things have arguably deteriorated."

So write authors Lord David Alton and Dr. Ewelina Ochab in their introduction to what is a sobering and unsparing examination of the broken international mechanisms for recognizing and preventing the horrors of genocide. This is a book for anyone who wants to understand why our news headlines regularly herald new mass atrocities around the globe. It's an eye-opening account of why risk factors for genocide are frequently ignored and why state responses are usually too little, too late. More importantly, the authors draw on their wealth of personal experience to analyze recent instances of genocide and to suggest concrete ways individual states and the international community can improve their responses to this crime above all crimes.

who gave the orders are indicted, but still not tried or convicted.

I could repeat the same stories from visits elsewhere—in Burma and northern Iraq, for instance. But beyond the horrific accounts and the numbing statistics, the individuals who have suffered such inhumanity and savagery demand a more effective response from those of us who can make our voices heard.

Krause: ***As you look to the future, what are your thoughts about the international community's ability to significantly improve its response to the crime of genocide. Are there any reasons to be optimistic?***

Alton: There are no reasons to be optimistic unless we actually do something to change the current inaction. It's no good just hoping for the best or hoping, like [Charles Dickens' character] Mr. Micawber, that "something will turn up." As I explain in the book, those who perpetrate genocide think they can get away with it. And too many states are unwilling to admit that they are not equipped to prevent genocide.

We've allowed the biggest authoritarian actors to show utter contempt for the rule of law, and smaller players then believe they can do the same. Take what is happening in western China as an example.

I've been personally sanctioned by the Chinese Communist Party for, among other things, denouncing the genocide under way against the Uyghurs in Xinjiang. A chapter in the book is dedicated to setting out their story.

The previous and current US administrations have both declared there to be a genocide against the Uyghurs. The UK's foreign secretary [now prime minister] Liz Truss agrees and says it is a genocide.

Krause: ***So, when are the UK, the US, and other democratic nations going to raise this at the UN Security Council?***

Alton: Clearly it will get nowhere at the UN Security Council, because China or Russia will use their veto. Yet forcing them to veto a referral to the International Courts would itself speak volumes—and might even begin a long-overdue movement to remove the right of veto in the case of genocide.

States must recognize the flaws in their responses and introduce comprehensive mechanisms that will enable them to identity situations at risk of genocide and act. Until then, we will see more attempts to annihilate whole communities.

You can find out more about Lord Alton's humanitarian work on his personal website www.davidalton.net, and you can follow him on Twitter, @DavidAltonHL.

A surprising take on the dynamics between religion and right-wing populism

Fuel or Immunity?

By Tobias Cremer
Illustrations by Brad Holland

Is religion a fuel for, or a barrier against, the rise of right-wing populist politics in the West? This question is preoccupying faith leaders, politicians, and commentators alike on both sides of the Atlantic as right-wing populists make conspicuous use of Christian language and symbols.

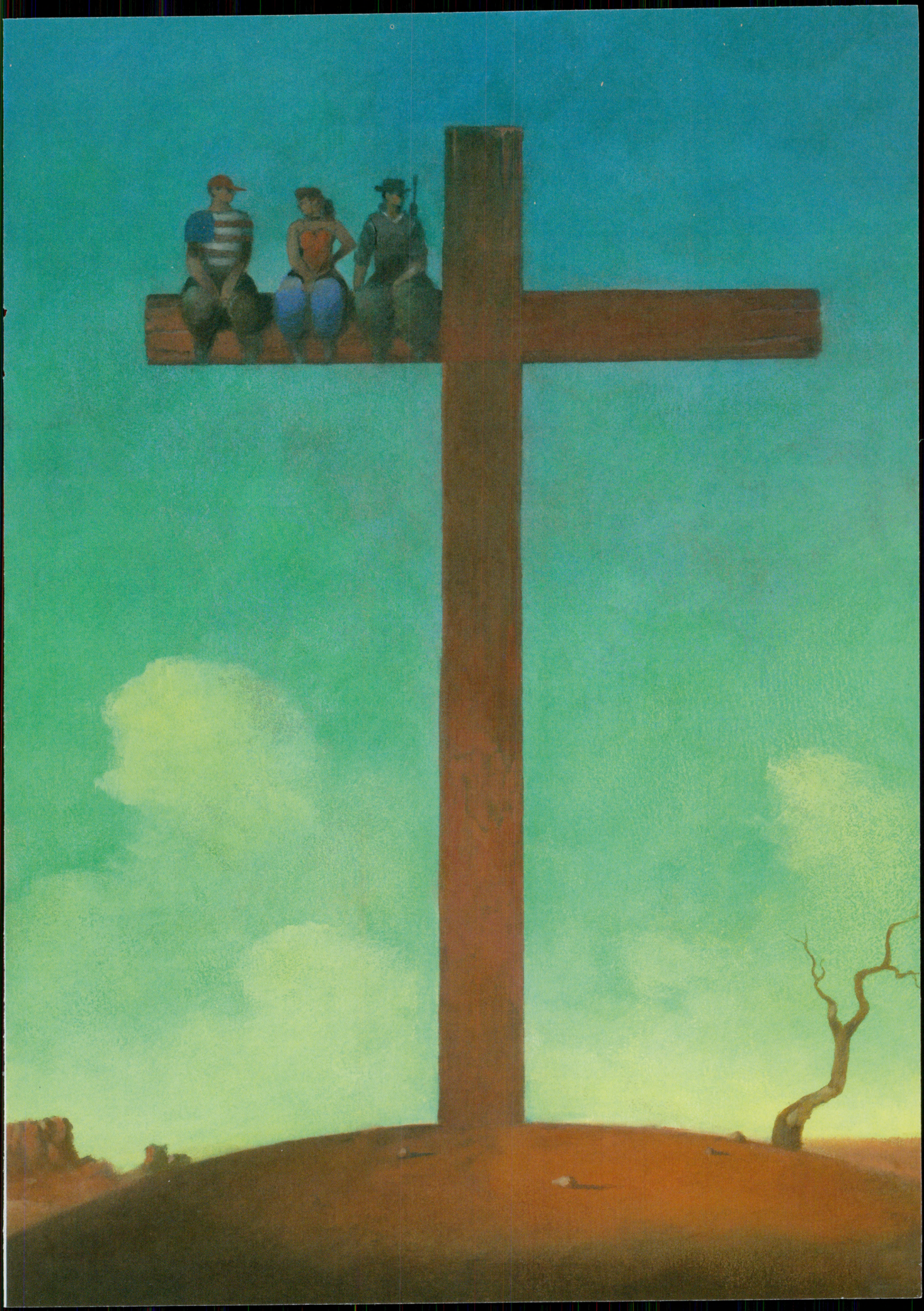
In Germany, for example, the anti-Islamist Patriotic Europeans against the Islamization of the West (PEGIDA) paraded oversized crosses in Germany's national colors at their demonstrations. Another right-wing populist group, Alternative für Deutschland (AfD), inserted a defense of Germany's Judeo-Christian heritage into its party manifesto.

In France the Rassemblement National (RN) challenged the rules of *laïcité*—the foundational French principle of secular governance—by pushing for Nativity scenes in public spaces. At the same time, far-right firebrand Éric Zemmour proclaimed that Catholicism has a "birth right" to cultural hegemony in France.

Meanwhile, in the United States, President Trump styled himself as the defender of Christian America by posing with a Bible in his hand in front of St. John's Church in Washington, DC, and some of his supporters paraded oversized crosses and Jesus flags during the storming of the U.S. Capitol in January 2021.

Given the centrality of Christian symbolism in right-wing populist rhetoric, many observers have assumed close ties between conservative Christianity and the populist right.[1] However, several studies, focusing on the motives, strategies, and policies of right-wing populist leaders and movements, have argued otherwise. They contend that when right-wing populists make reference to Christianity, it primarily reflects a culturalized but largely secular "civilizationism." Thus, right-wing populists "hijack" Christianity to serve as an exclusivist identity-marker against Islam without necessarily embracing Christianity as a faith.[2]

For instance, in spite of its prominent references to Christianity, the AfD has been shown to be one of Germany's most secular parties in terms of its leadership and membership.[3] It has openly attacked German churches



Why did American Christians diverge so strongly from their European brethren in their support for the populist right?

that have welcomed refugees, demanded the abolition of church privileges in taxation or education, and pushed for an overhaul of Germany's church-friendly constitutional settlement of "benevolent neutrality."[4]

Similarly, in France the RN has remained absent from the Catholic grassroots demonstrations against same-sex marriage, while styling itself as the main champion of a strictly secularist reading of *laïcité* and defender of women and LGBTQ rights against conservative religion.[5]

Even in the United States, where the Trump administration sought to balance clashes with America's churches on immigration and race relations by catering to the Christian right on social issues, observers have argued that Trumpism has been primarily driven by the rise of a "post-Christian right," which is less socially conservative but more radical in its opposition to immigration, Islam, and racial equality.[6]

Given this apparent tension between right-wing populists' religion-laden rhetoric and some of their seemingly less Christian policy positions, the question arises as to how these parties' politics are perceived by Christian communities themselves.

Religious Vaccination?

At first glance, a review of election results, survey data, and existing quantitative studies suggests a high degree of variation in the responses of Christian communities to right-wing populist politics across Western countries. In the US, Christians—and White Evangelicals in particular—are among Donald Trump's most loyal supporters: more than 80 percent of White Evangelicals and strong majorities of White Catholics and other Protestants voted for Trump in 2016 and 2020, leading observers to interpret Trumpism as the latest expression of America's tradition of White Christian nationalism.[7]

In Western Europe, however, scholars have identified a "religion gap" or "religious vaccination effect" among Christian voters *against* voting for right-wing populists.[8] In Germany, for instance, the AfD has consistently performed almost twice as well among irreligious voters as among Catholics and Protestants. In France the FN/RN has traditionally performed significantly worse among churchgoing Catholics compared to other parts of the population. In the 2012 presidential election, for instance, only 4 percent of practicing Catholics chose right-wing populist candidate Marine Le Pen, compared to 18 percent of the general population.[9] Similar trends have been observed in other European countries, ranging from Denmark to Italy, Austria to Portugal.

On the surface there is a high level of variation in electoral outcomes between Christians in Western Europe and Christians in America. Yet a closer inspection of attitudes and sociodemographic backgrounds reveals a more uniform development underneath: namely, a growing schism between the traditional religious right and a new secular right. For instance, the 2016 GOP primary results showed that Donald Trump's earliest and most solid supporters were not the most pious. Rather, they were religiously unaffiliated voters, among whom he performed almost twice as well as among frequent churchgoers (57 percent versus 29 percent).[10]

This observation is symptomatic of a schism in the Republican electorate, as America's Christian congregations are becoming more global in outlook and racially diverse in their membership. At the same time, Donald Trump's core base of working-class White people has undergone a process of rapid secularization in recent years.[11] The latter process has led to the emergence of a growing number of nonpracticing "cultural Evangelicals." who might culturally identify as "Christian" or "Evangelical," but who are increasingly dissociated from churches, congregations, and evangelical beliefs.[12] Like their European counterparts, these nonpracticing "cultural Christians" often prove more sympathetic

toward right-wing populist positions and candidates than their churchgoing brethren.[13]

American political commentator Peter Beinart has suggested a reason for this: "When cultural conservatives disengage from organized religion, they tend to redraw the boundaries of identity, deemphasizing morality and religion and emphasising race and nation."[14]

But why, then, did American Christians diverge so strongly from their European brethren in their support for the populist right? Why did they embrace Donald Trump after the GOP primaries, whereas churchgoing Europeans continued to vote for far-right parties at much lower levels?

(A Lack of) Christian Alternatives

One key factor in this context is the political competition faced by right-wing populists' and especially the role of conservative and Christian democratic parties. The underlying logic here is that religious immunity against populism is indirect. It rests on the mechanism that, in countries with strong Christian democratic parties, Christian voters are simply "not 'available' to these [right-wing populist] parties, because they are still firmly attached to Christian Democratic or conservative parties."[15]

In the case of Germany, for instance, the powerful Christian Democratic party (the CDU/CSU) has ownership over key Christian issues and provides a political home for Christian voters. This, scholars have argued, is a key explanatory variable for the strength of the religious immunization effect against the populist right.[16]

Similarly in France, the center-right Les Républicains (LR) has for many decades provided French Catholics with a fixed political home. Initially, the 2017 presidential election seemed to confirm this rule. In the first round of voting, 46 percent of practicing Catholics and 55 percent of the most frequent churchgoers cast their vote for the LR candidate François Fillon, compared to only 20.1 percent of the general population.[17]

While this support demonstrated French Catholics' continued attachment to the center right, however, it also epitomized a new dilemma for Catholics. The Catholic turnout was insufficient to enable Fillon in 2017 (or his successor, Valérie Pécresse, in 2022) to enter the second round of the presidential elections. Thus, Catholics were left with the choice between Emmanuel Macron's socially liberal LREM and Marine Le Pen's right-wing populist RN.

Given Macron's party's embrace of liberal positions on social issues such as embryo research, assisted suicide, surrogacy, and assisted reproductive technology for same-sex couples, this boiled down to what one Catholic commentator called a choice between the "chaos" of the RN and the "decay" of Emmanuel Macron's socially liberal agenda.[18] As result, in both the 2017 and 2022 runoffs, religious immunity markedly eroded as politically "homeless" Catholics voted for Marine Le Pen's RN at similar or even higher rates than their secular neighbors.

Party loyalty and a perceived lack of alternatives also emerged as key factors in shaping Donald Trump's ability to attract many initially sceptical Christian voters in the US—albeit in different ways. For one, American faith voters have a long-standing attachment to "God's Own Party." Thus, rather than strengthening faith-based inhibitions against right-wing populism by binding Christians to a competitor party, this helps explain why many Christians voted for Trump during the general election even if they had opposed him during the primaries.

Indeed, White Evangelicals were the most likely group to say that they supported Trump mainly because he was the Republican nominee (38 percent of them gave this reason, compared to 28 percent of GOP voters in general and 13 percent of irreligious Trump supporters).[19]

Perhaps even more important than Christians' loyalty to the Republican Party (positive partisanship), however, was apparently their rejection of the Democratic alternative (negative partisanship). Pew Research found, for instance, that among Catholic, Evangelical, and mainline Protestant Trump voters, Trump's single most attractive feature was that "he is not Hillary Clinton," with 76 percent of White Evangelicals citing this as a "major reason" for supporting Trump in 2016.[20]

Faith Leaders and the Social Firewall

Yet the lack of party alternatives alone cannot fully account for the ability of right-wing populists to co-opt religion for political gain. Instead, a second important yet often overlooked factor is the role of faith leaders and institutional churches. Their willingness and ability either to condone and legitimize or to challenge and socially taboo the religious references of right-wing populists appears to correlate directly with the strength of religious immunity.[21]

Scholars have long emphasized the importance of social taboos established by elite actors in determining social and political behavior in general, and in voters' reaction to right-wing populist movements in particular.[22] Mainstream parties or the media are, for instance, central

actors in establishing social taboos around right-wing populists through a *cordon sanitaire* of noncooperation or non-reporting.

Church leaders may play a similar role within congregations through public statements, sermons, and social-norm setting. In Germany, for example, the churches' consistent and unambiguous public opposition to the AfD has often been credited with creating a strong "social firewall' in religious communities against the populist right.[23] Both the Protestant and Catholic church leadership condemned AfD rhetoric as "hate speech,"[24] declared the positions of the AfD leadership to "stand in profound contradiction to the Christian faith," and spoke out in favor of welcoming refugees.[25] Given this clear public demarcation, disaffection to the AfD has become associated with significant social costs among church members.

"Cultural Christians" often prove more sympathetic toward right-wing populist positions than churchgoing Christians.

For decades France's Catholic Church was no less pronounced in its public opposition to the FN/RN. Its repeated interventions included warning Catholics that the FN's positions were "incompatible with the gospel and the teaching of the church" (Cardinal Decourtray), individual clergy denying FN politicians the holy sacraments, and ubiquitous sermons against the FN. The institutional church appeared committed to maintaining a strong social taboo against support for the FN. According to some scholars, this led to an "institution effect" and a "Pope Francis effect," and thus whenever church authorities publicly spoke out in favor of immigration or against the populist right, sympathies with the latter decreased among practicing Catholics in France.[26]

In the second round of the 2017 and 2022 presidential elections, however, Catholic authorities ceased to make use of this authority. Unlike in previous elections and in contrast to their Protestant, Muslim, and Jewish colleagues, in 2017 and 2022 the Catholic hierarchy gave no voting instructions against the FN/RN, but referred voters to "their own discernment."

The reasons for this silence were linked primarily to a broader retreat of France's episcopate from public life in the wake of sexual abuse scandals. The consequences, however, were highly political, undermining the social taboo around the RN by discouraging clergy from using their authority to criticize the RN. This further separated religion from politics, and thereby implicitly undermined the church's moral authority in political issues in general.

In the long run, some Catholic leaders publicly cautioned that such developments may contribute to a situation in France, similar to that in the US, where the inability or unwillingness of US faith leaders to create a social taboo around Trumpism appears to be a key variable in understanding the lack of religious immunity there.

As in France, the comparative lack of social taboos around right-wing populism in the US is not necessarily a result of the faith leaders' affinity with Trumpism. On the contrary, my own research as well as data from the National Association of Evangelicals has shown that most of their leaders were initially highly critical of Trumpism. Similarly, senior representatives of American Catholicism and mainline Protestantism have repeatedly and publicly condemned Trump's politics.

In trying to understand why faith leaders' scepticism did not translate into the same social taboo among their flock as had been the case in Europe, two factors are particularly important. First, the decentralized structure of the American religious landscape limited Christian leaders' *ability* to "speak for Christianity" publicly. America's religion-friendly separation of church and state has created a religious marketplace full of diversity and vitality. Yet the same diversity also means that no single set of leaders can speak with the level of authority for American Christianity,

as, for instance, an alliance of Protestant and Catholic Bishops could in Germany or France. Such dynamics are exacerbated by an accelerating crisis of religious hierarchies and shift toward non-denominational churches in America in recent decades.[27]

A second key factor amplified these structural limitations to American faith leaders' *ability to be heard*; that is, a reported lack of *willingness to speak out* against Trumpism. Indeed, surveys show that half of American pastors felt limited in their ability to speak out on moral and social issues, and that only one in five (21 percent) felt comfortable speaking out about specific political actors.[28]

In my conversations with faith leaders, many of them confirmed that Trumpism was a particularly delicate topic. Many conservative pastors who were alarmed about Trump said they did not dare speak out because of fear of running into conflict with congregants or donors.

As a result, the silence of American faith leaders emerges as a crucial factor in accelerating many American Christians' "conversion" to the populist right, whereas the outspoken opposition of German and French faith leaders had a significant impact in bolstering Western European Christians' religious immunity to right-wing populism.

Future in the Balance

These findings—about the potential for religious immunity against the far right, as well as its dependence on the behavior of political and religious elites—are significant. They are important not least because they challenge traditional assumptions about the nexus between conservative Christianity and the populist right.

Thus, right-wing populism is not merely a revival of America's old religious right and its expansion to Europe. It appears, instead, to be linked to the processes of secularization and the resulting rise of a new post-religious right in Western Europe and America. This new post-religious right is distinct from Christian beliefs and institutions and is often politically, culturally, and sociodemographically opposed to them as well.

Whether or not the old religious right and the new secular right might clash or cooperate will depend on the behavior of faith leaders and political elites. Far from being helpless bystanders, these actors play an outsized role as the populist wave breaks over the West. They will help shape not only the electoral fortunes of right-wing populists but also what role religion will come to play in Western societies going forward.

[1] Andrea Althoff, "Right-Wing Populism and Religion in Germany: Conservative Christians and the Alternative for Germany (AfD)," *Zeitschrift für Religion, Gesellschaft und Politik* 2, no. 2 (2018): 335-363; Philip S. Gorski and Samuel L. Perry, *The Flag and the Cross* (New York: Oxford University Press, 2022); Andrew Whitehead and Samuel Perry, *Taking America Back for God* (New York: Oxford University Press, 2020.

[2] Rogers Brubaker, "Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective," *Ethnic and Racial Studies* 40, no. 8 (2017): 1191-1226; Nadia Marzouki, Duncan McDonnell, Olivier Roy, *Saving the People: How Populists Hijack Religion* (London: Hurst, 2016).

[3] David Elcott et al., *Faith, Nationalism, and the Future of Liberal Democracy* (Notre Dame: Notre Dame University Press, 2021).

[4] Tobias Cremer, "A Religious Vaccination? How Christian Communities React to Right-Wing Populism in Germany, France and the US," *Government and Opposition*, (2021): 1-21.

[5] Dimitri Almeida, "Exclusionary Secularism: The Front National and the Reinvention of laïcité," *Modern & Contemporary France* 25, no. 3 (2013): 249-263; Marzouki, McDonnell, Roy.

[6] Eric Kaufmann, *Whiteshift: Populism, Immigration and the Future of White Majorities*, (London: Penguin, 2018); Timothy Carney, *Alienated America: Why Some Places Thrive While Others Collapse* (New York: HarperCollins, 2019).

[7] Gorski and Perry, *op cit*; Whitehead and Perry, *op cit*.

[8] Tim Immerzeel, Eva Jaspers, and Marcel Lubbers, "Religion as Catalyst or Restraint of Radical Right Voting?" *West European Politics* 36, no. 5 (2013): 946-968; Pascal Siegers and Alexander Jedinger, "Religious Immunity to Populism: Christian Religiosity and Public Support for the Alternative for Germany," *German Politics* 30, no. 2 (2021): 149-169; Cremer 2021a.

[9] P. Siegers and A. Jedinger, "Religious immunity to populism: Christian religiosity and public support for the alternative for Germany," *German Politics* 30, no. 2 (2021): 149–169.

[10] Carney, *Alienated America*, p. 121.

[11] W. Bradford Wilcox et al., "No Money, No Honey, No Church: The Deinstitutionalization of Religious Life among the White Working Class," *Research in the Sociology of Work* 23 (2012): 227-250; Carney.

[12] Ryan P. Burge, "So Why Is Evangelicalism Not Declining? Because Non-Attenders Are Taking On the Label," Dec. 10, 2020, religioninpublic.blog.

[13] Emily Ekins, "The Liberalism of the Religious Right: Conservatives Who Attend Church Have More Moderate Views Than Secular Conservatives on Issues Like Race, Immigration, and Identity," Sept. 19, 2018, Cato.org.

[14] Peter Beinart, "Breaking Faith," *The Atlantic*, April 2017.

[15] Kai Arzheimer and Elisabeth Carter, "Christian Religiosity and Voting for West European Radical Right Parties," *West European Politics* 32, no. 5 (2009): 985-1011.

[16] Siegers and Jedinger.

[17] French Institute of Public Opinion (2017).

[18] Samuel Pruvot, *Les Candidats à confesse* (Monaco: Editions du Rocher, 2017).

[19] Gregory A. Smith, and Jessica Martinez, "How the Faithful Voted: A Preliminary 2016 Analysis," *FactTank Newsletter*, Pew Research Center, Nov. 9, 2016.

[20] Ibid.

[21] Tobias Cremer, "Nations under God: How Church–State Relations Shape Christian Responses to Right-Wing Populism in Germany and the United States," *Religions* 12, no. 4 (2021): 254.

[22] Léonie de Jonge, "The Populist Radical Right and the Media in the Benelux: Friend or Foe?" *International Journal of Press/Politics*, Dec. 29, 2018; Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Vintage, 2012).

[23] Andreas Püttmann, "AfD und Kirche: Abgrenzen statt annähern," *Die Zeit*, May 24, 2016; Cremer 2021b.

[24] Deutsche Bischofskonferenz, "Bischöfe: AfD nicht mit christlichem Glauben vereinbar," Deutsche Bischofskonferenz (2016), www.dbk.de.

[25] "Bedford-Strohm: AfD-Spitze im 'Widerspruch zum christlichen Glauben,'" (2016), www.Evangelisch.de.

[26] Vincent Geisser, "L'Église et les catholiques de France face à la question migratoire: le grand malentendu?" *Migrations Societe* 3 (2018): 3-13.

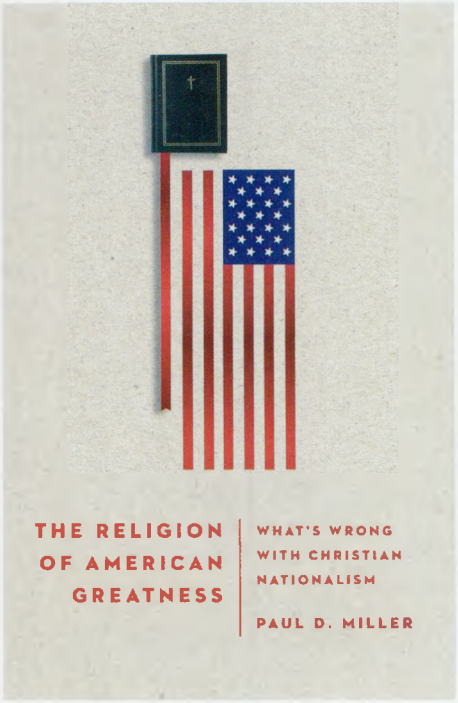
[27] Mark Chaves, *American Religion: Contemporary Trends* (Princeton. NJ: Princeton University Press, 2011); David E. Campbell and Robert D. Putnam, "America's Grace: How a Tolerant Nation Bridges Its Religious Divides," *Political Science Quarterly* 126, no. 4 (2011): 611-640.

[28] Barna Group, *Faith Leadership in a Divided Culture* (Ventura, CA: Barna, 2019).

Tobias Cremer is a junior research fellow at Pembroke College, Oxford, United Kingdom. He holds a PhD in Politics and International Relations from the University of Cambridge, an MPP from the Harvard Kennedy School, an MPhil in Politics and International Studies from Cambridge University, and a BA in Politics, Philosophy, and Economics from Sciences Po (The Paris Institute of Political Studies). His research focuses on the relationship between religion, secularization, and the rise of right-wing identity politics throughout western societies. You can follow him on Twitter, @cremer_tobias.

The *Liberty* List

Welcome to *Liberty* magazine's inaugural year-end roundup of outstanding books exploring the thorny intersection of religion, law, politics, and culture.



The books listed here address many different topics and represent a variety of political and religious perspectives. Some of these books are written by scholars, others by lawyers or theologians. Some are aimed at a professional or academic audience. Others speak more to interested laypeople.

Yet all share common threads: excellent writing, solid academic foundations, a balanced approach, and the ability to engage with challenging, often divisive, subjects with both integrity and grace.

1 An Unholy Brew: Religion and National Identity

Paul D. Miller, *The Religion of American Greatness: What's Wrong With Christian Nationalism* (InterVarsity Press, 2022).

It's been a difficult time for America. The disarray of the 2020 election, the stunning events at the U.S. Capitol, and the trauma of the COVID wars have prompted a slew of books that attempt to diagnose a sickness at the heart of American politics. The upshot is that Christian nationalism has become an issue *du jour* for sociologists, political writers, and cultural critics.

Professor Paul Miller's book on this subject, however, stands out from the pack. It tops the 2022 *Liberty* List for the way it handles this complex and often confronting topic with clear analysis, a balanced tone, and an engaging style.

This book isn't written by someone who's coolly examining the phenomenon of Christian nationalism like a scientist poking around in a petri dish. Miller is an "insider." The book's foreword, written by David French, describes him as conservative, both in his style of Christianity and his politics.

This conservative identity allows Miller to connect with those who may be far beyond the reach of other writers. He addresses his readers with neither the condescension nor the contempt that other authors on this topic sometimes betray. At the same time, Miller pulls no punches with his unapologetic criticism of this ideology and its apostles.

Some of Miller's arguments and assumptions may rankle those who lean more toward the progressive end of the political spectrum.

However, this book is important for *whom* it has the potential to reach—those most vulnerable to the corrupting influence of Christian nationalism.

In fact, regardless of one's politics, anyone who counts themselves as both a person of faith and a patriot will find useful tools here for navigating the extremist rhetoric of our current political age.

2 The Difficult Dance of Secularism and Faith

Michael F. Bird, *Religious Freedom in a Secular Age: A Christian Case for Liberty, Equality, and Secular Government* (Zondervan, 2022).

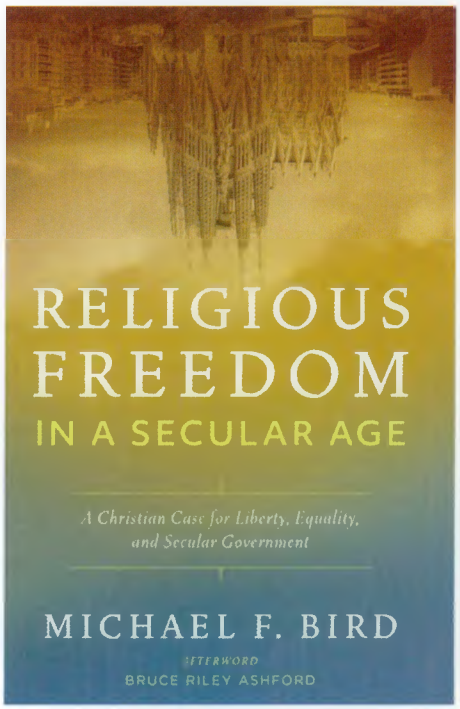
If we want a preview of future religious freedom challenges in the United States, we'd do well to observe current trends in places such as Britain, France, Germany, and Australia. In these more secular Western democracies, most people don't actively identify with any organized religion. Thus, these countries serve as "canaries in the coal mine" for an America that's moving along a similar demographic trajectory, albeit more slowly.

For that reason, this book by well-known Australian theologian and social observer Michael Bird is both relevant and timely. Bird, a former atheist and now an Anglican priest, makes an impassioned plea for Christians to renew their support for the often-misunderstood principle of secular governance, or separation of church and state. This principle, he believes, offers the best way to preserve religious liberty and to mediate between competing needs in an ever-more-complicated and less religious society.

Bird argues persuasively that the historical development of secular governance owes much to Christian theology and philosophy. Yet Bird also traces the rise—in our post-9/11 world—of a new, more militant version of secularism, which is hostile to many of the core values of the classically liberal secular state.

Bird's writing is clear and his analysis compelling. And the final third of his book, which argues for a radically new approach to Christian apologetics in today's secular world, is a good enough reason alone to read this book.

Another excellent book tackling similar themes is ***The Global Politics of Jesus: A Christian Case for Church-State Separation*** (New York: Oxford University Press, 2022). Author Nilay Saiya, an academic and researcher, is known for his prior global study of the impact of Christian privilege. This research found that when the church enjoys state or social privilege within a country, the overall health of the church and its witness declines. Although both Bird and Saiya come to similar conclusions on issues of church-state relations, Saiya's lengthier book brings more layers to the discussion and is worth the time for someone who wants to go deeper into this topic.



3 Escaping the Echo Chamber

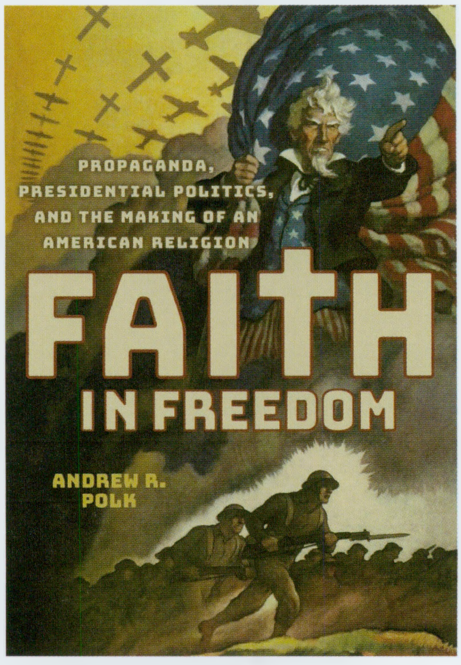
Jason Thacker, *Following Jesus in a Digital Age* (B&H Publishing Group, 2022).

Why is a book about technology, media, and Christian discipleship listed with books about religious liberty? Simply because all public discourse today, regardless of the topic, is profoundly shaped by the digital media through which it's filtered. In this engaging book Jason Thacker reveals how our digital habits are molding our political—and religious—attitudes to a degree that's both surprising and frightening.

In an appendix addressed to Christian leaders, for instance, Thacker flags a report from Facebook's research team that identified "troll farms"—groups of users or "bots" organized to sow disinformation and inflame social tensions—that were operating prior to the 2020 presidential election. In October 2019, troll farms, many of which were based in Eastern Europe, operated the top 19 American Christian Facebook pages.

Thacker is uniquely placed to guide the reader through the disturbing world of "digital discipleship." He's a widely published author on topics related to faith and media and is chair of Research in Technology Ethics at the Washington, DC–based Ethics and Religious Liberty Commission. He also delivers regular high-quality content on these topics through his *WeeklyTech* blog and his *Digital Public Square* podcast.

Thacker's message in this book is clear: technology is useful, entertaining, and an unavoidable part of our everyday life. Yet we ignore at our peril its frightening power to distort reality and manipulate our emotions in ways that help polarize America's political and social landscape.



4 History Reconsidered

Andrew R. Polk, *Faith in Freedom: Propaganda, Presidential Politics, and the Making of an American Religion* (Cornell University Press, 2021).

Well-written history tends to draw in the reader as effectively as a good novel, and Andrew Polk's book amply meets this mark. Polk takes us back to the 1940s and 1950s and shows us the building blocks of many of today's most troubling narratives about the role of Christianity within America's body politic.

Polk isn't just an academic; he's a superb communicator. He has produced a fascinating account of a little-known aspect of American history—when businessmen, ad makers, and politicians collaborated to deliberately reshape the nation's understanding of religion and religious freedom. This book represents a major contribution to our understanding of America's civic history and is highly recommended.

5 Enduring the Unthinkable

Nury Turkel, *No Escape: The True Story of China's Genocide of the Uyghurs* (Hanover Square Press, 2022).

Shahbaz Taseer, *Lost to the World: A Memoir of Faith, Family, and Five Years in Terrorist Captivity* (MCD, 2022).

The number five slot on the *Liberty* List is shared by two books, each providing a harrowing reminder of why religious freedom is a foundational human right.

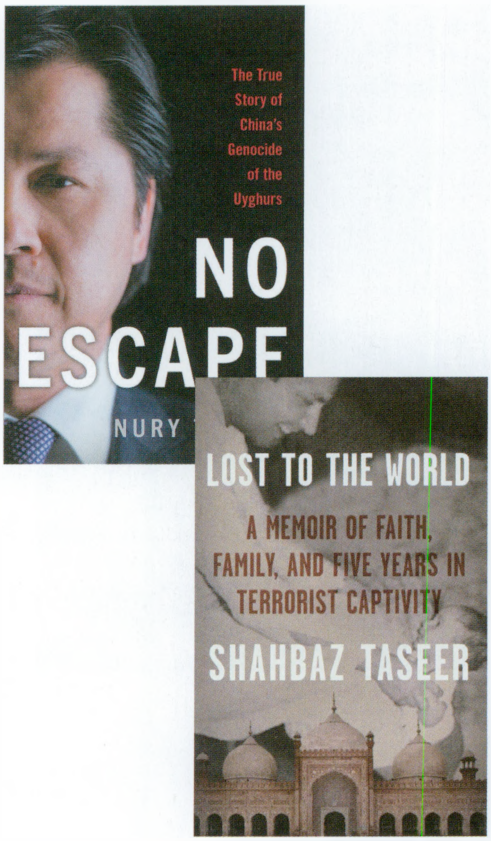
Nury Turkel shares his experience in China as a Uyghur Muslim. The Uyghurs are a religious and ethnic minority brutally targeted by an increasingly authoritarian state. Although Turkel was born in a Chinese "re-education camp," today he is an American citizen. He currently serves as chair of the United States Commission on International Religious Freedom.

Turkel's well-documented story is an indictment of China's continuing treatment of hundreds of thousands of Uyghur Muslims, who are seen by the Chinese Communist Party as a threat to cultural and political uniformity. Uyghur men, women, and children are corralled into camps, forced to labor in factories, and subjected to abuses such as organ harvesting and forced sterilization.

This book also raises an issue of growing concern for religious freedom advocates—that China is not only exploiting surveillance technology to pursue its barbaric objectives but is also exporting this technology to other authoritarian states around the world.

In ***Lost to the World***, Shahbaz Taseer, a businessman and son of a provincial governor in Pakistan, describes his five years of captivity and abuse at the hands of Islamic militants. The reason for his abduction and torture? In 2011 Taseer publicly supported a Christian woman sentenced to death by a Pakistani court for the "crime" of blasphemy against Islam. That same year, Taseer's father—Salman Taseer—was also brutally assassinated for his remarks against Pakistan's blasphemy laws.

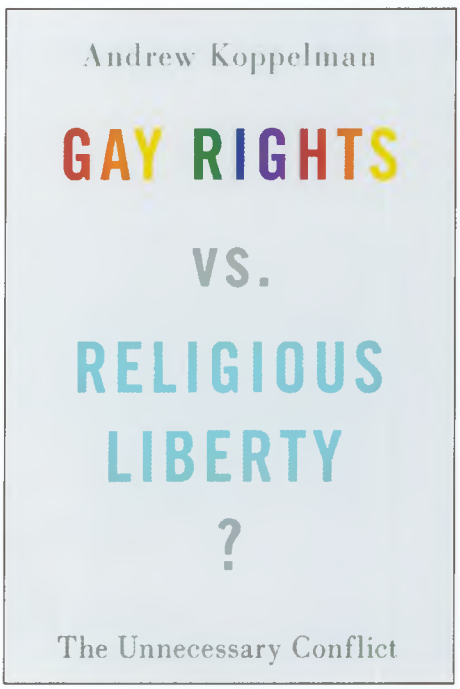
Both Taseer's and Turkel's stories are raw and personal. For those of us who may sometimes get lost in abstract arguments about principles of religious liberty, these accounts of the essential evil of religious discrimination and intolerance are a much-needed corrective.

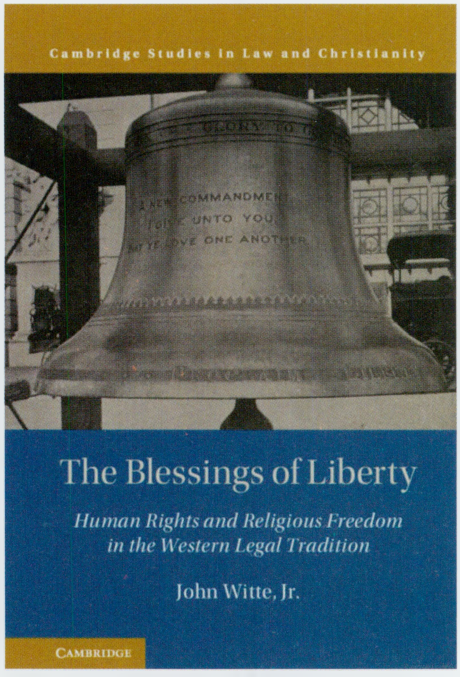


6 A Clash of Titans

Andrew Koppelman, *Gay Rights vs. Religious Liberty? The Unnecessary Conflict* (Oxford University Press, 2020).

In the title of his book, law professor Andrew Koppelman captures what, for many, is *the* defining issue today in the field of religious liberty. Are calls for stronger religious freedom protections simply the pleas of bigoted religious fundamentalists, eager for the legal right to discriminate? Or are they a last-ditch attempt by people of faith to keep themselves





from being driven to the margins of society by an aggressive secularism that's pushing a new moral orthodoxy?

For those who want to gain a broad understanding of today's debates about religious liberty and LGBTQ+ rights, this is an excellent place to start. Koppelman's writing is clear and engaging. He portrays himself as an honest broker—he claims sympathy for both stronger anti-discrimination protections and for robust protection of religious freedom.

One of Koppelman's most interesting chapters explores the oft-used "racism analogy," which is relied on by LGBTQ+ advocates who are hostile toward any religious accommodation in anti-discrimination law. Koppleman presents a persuasive case for why religiously driven sentiment against same-sex relationships shouldn't be seen as simply analogous with racism.

The head-spinning speed at which Supreme Court decisions and social change have driven public discussion around LGBTQ+ rights in recent times means that some of Koppleman's commentary seems slightly dated. Yet regardless of this, *Gay Rights vs. Religious Liberty* provides a solid analysis of issues that will continue to dog discussions of religious freedom in America for the foreseeable future.

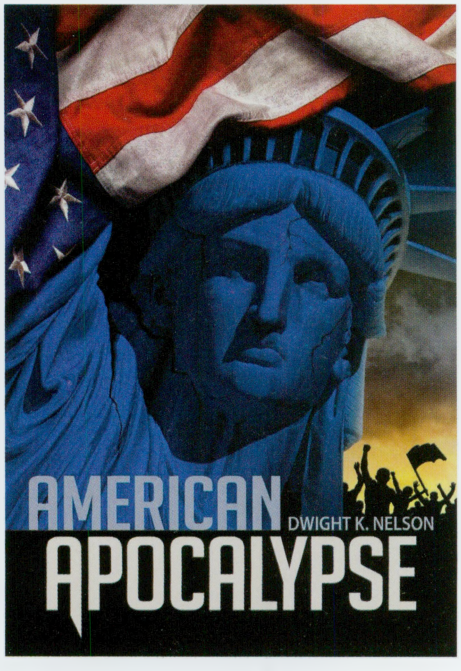
7 An Essential Legal Primer

John Witte Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge University Press, 2022).

In the world of religious freedom legal scholarship, professor John Witte Jr. is legendary. During the past 30 years he has published more than 300 articles and 40 books on topics related to law and religion.

His latest book is an epic account of how modern legal concepts of religious freedom came to be. However, Witte also addresses current areas of debate, exploring topics such as tax exemptions for religious institutions, the slighting of religious freedom in the European Court of Human Rights, and the balance between "free exercise" and "no establishment" within America's public schools.

Witte's book is densely argued and clearly aimed at fellow scholars and legal professionals. However, his elegant writing makes this book generally accessible also for those who would like to dig deeper into the conceptual side of religion within the Western legal tradition.



8 The Bible and Politics 101

Dwight K. Nelson, *American Apocalypse* (Pacific Press, 2022).

As pastor of a large church on a university campus, Dwight Nelson has honed his communication skills over many years. This strength

shows through in Nelson's book exploring the often fraught relationship between Christian believers and American politics.

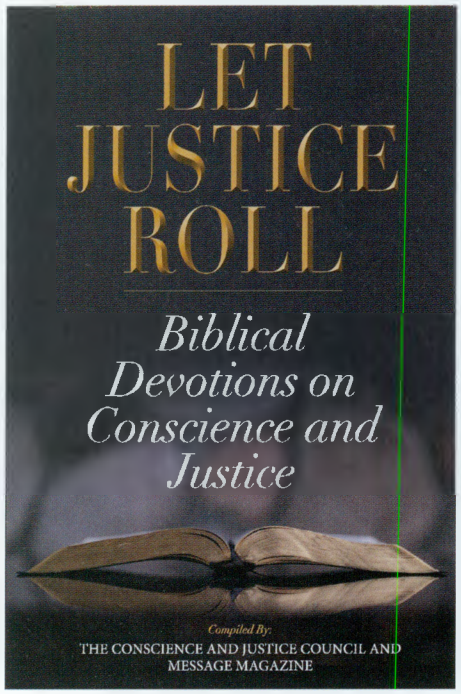
American Apocalypse has clearly been written with a lay audience in mind—its style is casual and personal. It draws on anecdotes, current events, and biblical principles to highlight the corrosive dangers of mixing faith with legislative ambition. This book provides a solid entry point for those interested in a biblical perspective on the myth of American exceptionalism and the desire for a wholly "Christianized" America.

9 Faith in Action

Carmela Monk Crawford and Edward Woods III, eds., *Let Justice Roll: Biblical Devotions on Conscience and Justice* (Message Imprint, 2021).

The genius of *Let Justice Roll* lies partly in its format. It's a mosaic of thought-provoking and pithy essays, unified by a single assumption: that inner faith must inevitably find outward expression.

This daily devotional book has been jointly produced by *Message* magazine and the Conscience & Justice Council, a national network of leaders engaged in public affairs and religious liberty advocacy. Each one-page contribution is from a different author and draws on personal stories and insights to amplify a biblical message about conscience, faith, or discipleship. This book provides an inspiring take on what it means to live the values of God's kingdom, even against the messy backdrop of today's political and social realities.



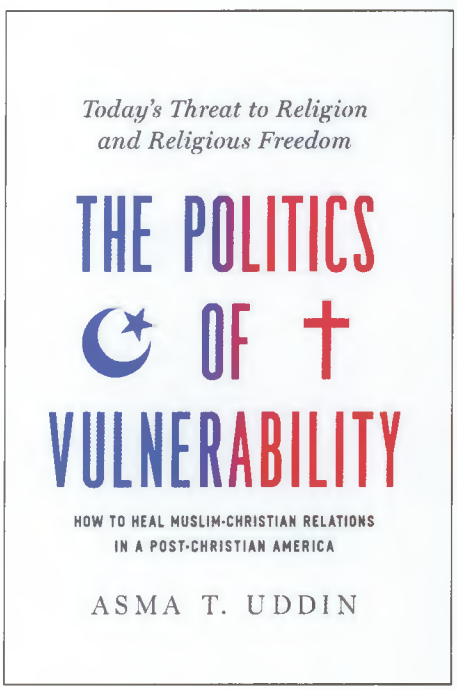
10 A Troubled Relationship

Asma Uddin, *The Politics of Vulnerability: How to Heal Muslim-Christian Relations in a Post-Christian America* (Pegasus Books, 2021).

It seems that Christian issues and voices suck most of the air out of the room in discussions about religious liberty in America today. In her latest book, renowned constitutional lawyer Asma Uddin highlights an oft-neglected but critical perspective—that of America's Muslims.

Uddin goes deep into the research of what drives Islamophobia and explores why a significant number of American Christians hold the attitude of "religious freedom for me, but not for thee" when it comes to their Muslim neighbors.

Uddin has a formidable approach to building her argument. As with her earlier book, *When Islam Is Not a Religion*, she writes clearly and persuasively, leading readers to search their own attitudes and biases. This book is an eloquent affirmation that religious freedom belongs to every human being equally, regardless of religious tradition.



Assault on India's Secular Foundations

The world's largest democracy struggles under a toxic load of religious nationalism.

By Saba Sattar

The world has witnessed a turbulent wave of violent religious riots in India over recent months. In late May, a spokesperson for the ruling Hindu nationalist party made derogatory remarks about the Muslim prophet Muhammad during a televised debate. Her comments triggered fervent, nationwide protests and plunged India into serious diplomatic rows with many Muslim-majority nations. The ensuing domestic riots also prompted some Indian state-level governments to implement internet curbs and declare curfews.

The rioting has occurred across what South Asian scholars refer to as "communal lines." These communal lines define various tight-knit social, ethnic, or political groups in India that find their identity in shared caste, tribe, or religion. In many instances these groups also define themselves in terms of hostility toward other social groups.

Toward the end of June the unrest took a decidedly gruesome turn when two Muslim men beheaded a Hindu tailor in the Udaipur district of Rajasthan state following his social media posts about the conflict.

On the international stage, what happens in India matters. Not only is India the world's largest democracy, but it will soon overtake China as the world's most populous nation. Its rich history and civilization span more than five thousand years.

But for a country that has painstakingly built an international reputation based on its political stability and burgeoning economic power, these recent events are unnerving. How could mere religious rhetoric provoke such civil upheaval? And, more important, is there a path toward a shared understanding across communal lines?

Understanding *Hindutva*

In India, as in other countries, many see religion as a matter of *who one is* rather than *what one believes*. This distinction is vital for understanding the global rise of religiously driven populism that has spread to many of the world's powerful nations, including the United States.

For a majority of India's Hindus, national identity and religious identity are one and the same. In New Delhi, the 2014 election of Prime Minister Narendra Modi of the Bharatiya Janata Party (BJP) and his subsequent reelection in 2019 is reflective of this social and political reality. The BJP has, in essence, mainstreamed Hindu nationalism.

Since the mid-twentieth century, India has maintained two dominant traditions within mainstream politics. The first is aligned with Modi's nationalist agenda. Known as *Hindutva*, this trendy brand of Hindu nationalism has been transformed from a theological concept into an identity. It was invented in 1923 by writer and political activist Vinayak Savarkar. His treatise, *Hindutva: Who Is a Hindu?* called for a united Hindu nation without interference from minority religions—specifically from the "foreign religions" of Islam and Christianity. At the time, Savarkar's work received a muted response, in large part because an individual's identity remained dependent on his or her village or caste. But as the national sentiment matured, *Hindutva* has morphed into a leading civic ideology in India.

The second dominant political tradition is associated with Mahatma Gandhi, who is revered as the "Father of the Nation." Gandhi conceived a diverse India, one in which national identity was

political rather than cultural. The founding fathers consecrated secularism as a defining principle of the 1950 constitution, which recognized every religion as equal under the law.

Both political streams have ebbed and flowed ever since. For Mahatma Gandhi's party, political elitism and white-collar corruption have tarnished the plausibility of its claims to inclusivity.

For its part, the BJP has historically advocated both for free market reforms and an assertive foreign policy rhetoric to counter terrorism and Chinese encroachment in the Indo-Pacific—issues that align closely with Washington. However, it has also worked to mobilize mainstream Hindus around the ideology of *Hindutva*.

A string of surveys between 2016 and 2018 by two universities in India revealed that most Hindus now resonate with the basic tenets of the BJP's political platform. The most recent poll, with a sample size of more than 24,000 Hindus from various caste and villages, revealed that a majority favored disciplining Muslims who consume beef (a practice deemed irreverent by Hindus, who regard cows as sacred). Similarly, another study suggested Hindus from various castes believe that those who do not utter the words *Bharat mata ki jai* ("Victory for Mother India") at public events should be punished.

As India continues to position itself as a rising regional power, many Indians yearn for cultural legitimacy. They seek to enhance India's image on the world stage as a rising power on par with the great power competitors of Washington and Beijing, and Modi's rhetoric plays into these desires. Yet, ironically, Modi's populist language and agenda ultimately undercut this goal. His institutionalization of *Hindutva* through the appointment of radical ministers, the rewriting of Indian history under previous Mughal Muslim rulers, and inflammatory speech have contributed to a climate of social unrest across the nation.

The ongoing national quarrel has thus intensified between whether the Indian nation should take up diversity, as Mahatma Gandhi once envisioned, or mold the country as a Hindu-first community. To a large degree, this new *Hindutva* trend has already attained the long-established objectives of Hindu nationalist revivalists. It has leveraged an extraordinary level of popular Hindu support and further entrenched divisive communal lines in India.

A Delicate Balance

Hindus and Muslims have coexisted peacefully in India for more than a millennium. Through the centuries Indian natives largely perceived external Muslim rulers as part of a subcaste that assimilated new merchants and settlers.

While some communal tensions did exist, these were considerably increased from the mid-nineteenth century on by the "divide-and-rule" strategy of the colonial British. This divide-and-rule policy included the deliberate division of different caste and religious groups. For the British, lacking widespread grassroots support, this socially destructive strategy proved successful in consolidating their power over Indian natives.

Today, 200 million Muslims reside in a nation of 1.4 billion people, making India home to the third-largest Muslim group in the *umma*, or global Muslim community. The third-largest religious group in India—Christians of various denominations—number just 28 million, or less than 2.5 percent of the population.

Can the historic balance between the different religious communities in India be reinvigorated? Or will the recent tide of religious riots—fueled by passions from all sides—become the norm?

Two Paths Ahead

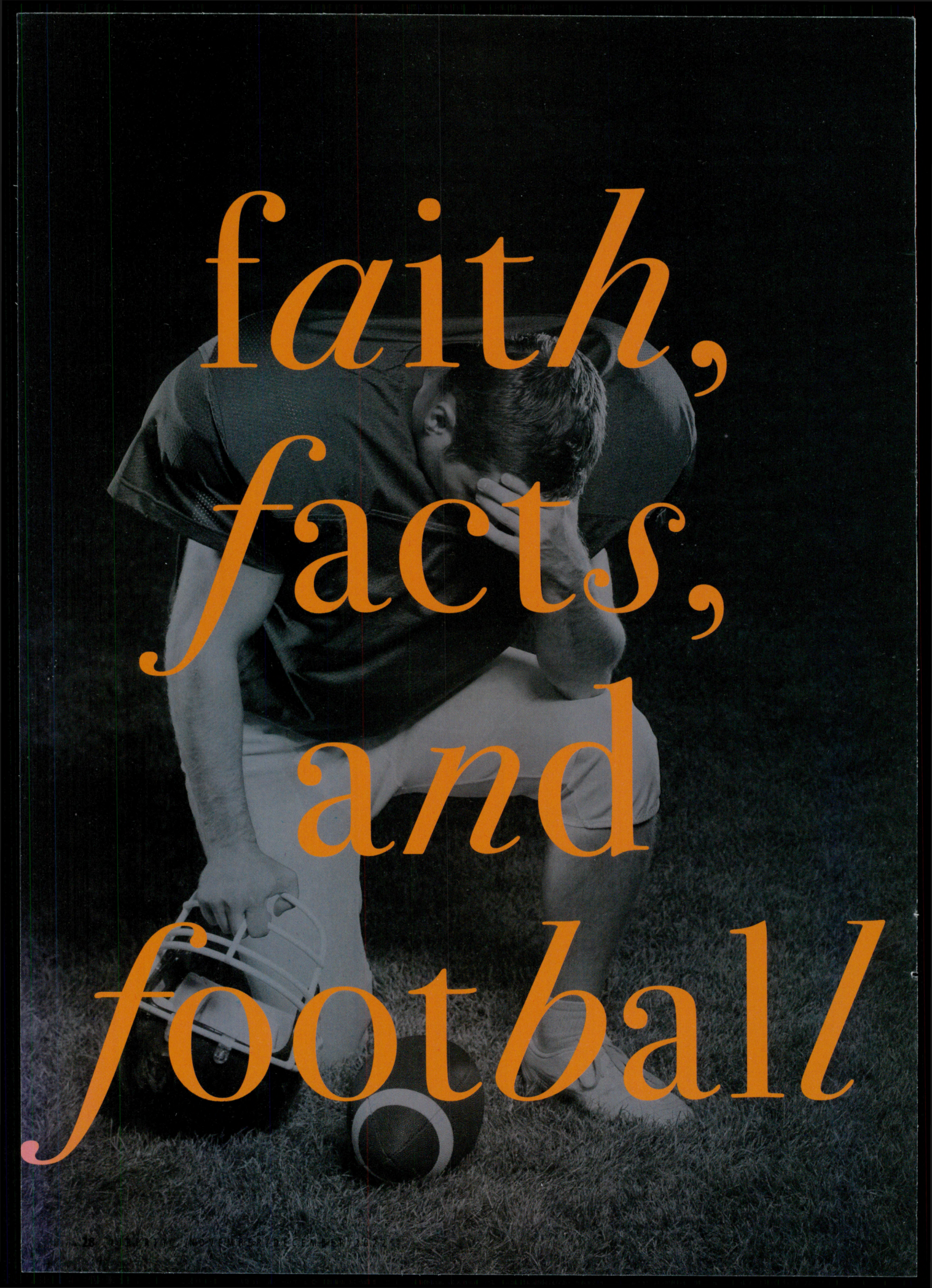
The choice ahead for India is between building on secular political values or pursuing a narrative of identity driven by Hindu nationalism. This means also engaging with the lingering debate between freedom of expression and respect for religious beliefs. Although freedom of expression, including religious speech, is protected constitutionally and in other legislative forms, the grassroots reality often tells a different story. The power of religious rhetoric—especially perceived disrespect for religion—is illustrated, like the Charlie Hebdo killings in France, by the recent beheading of the Hindu tailor in Rajasthan state.

The leaders of the BJP must work to shape the national discourse in ways that promote a sustainable future where pluralistic democracy can thrive. They can do more to ensure that civil liberties are guaranteed and enforced under due process of law. If they choose, they can help check the current trend, driven by Hindu nationalism, toward persecution of Muslims and other religious minorities.

India's secular foundation may be under temporary assault, but there is hope. Through its five-thousand-year-old existence, India has demonstrated time and again its resilience in enduring hyper-political drifts.

Saba Sattar is an Asia-Pacific analyst for an integrated risk management wing of the world's largest private security company. She holds a doctorate in statecraft and national security from the Institute of World Politics in Washington, DC She previously provided extensive research support as a postgraduate intern for the US Department of Defense's Near East South Asia Center for Strategic Studies.

For a majority of India's Hindus, national identity and religious identity are one and the same.



faith, facts, and football

A win for religious freedom? Or a dangerous attack on church-state separation? Detangling a web of law and fact in a contentious Supreme Court decision

By Todd R. McFarland

If you should ever find yourself sitting in a law school classroom, especially during your first year, there's a key distinction you're sure to encounter: issues of fact versus issues of law. These concepts are reasonably straightforward and intuitive. Issues of fact deal with what happened. Issues of law concern the law that applies to those facts.

Appellate courts, and especially the US Supreme Court, are supposed to deal only with issues of law. Factual disputes are to be worked out at trial. The surest way for the Supreme Court to decline a case is for it to be a "fact bound" dispute, hinging on who did what and when. The high court concerns itself with the law and lets other courts apply it.

This is what made the case of Coach Joseph Kennedy and the Bremerton School District unique. In a 6-to-3 decision this summer, the Supreme Court ruled that a school district should not have fired a high school football coach for praying publicly after games. But the outcome depended not so much on legal issues but on which facts were emphasized. Reading the Court's decision and dissent, one could be forgiven for thinking that each were dealing with two different cases entirely.

Facts Versus Facts

It all started innocently enough. In the fall of 2015 an employee of another school district was talking to the principal of Bremerton High School. This individual commented favorably on the practice of one of the school's football coaches, Joseph Kennedy, and some of the players who engaged in prayer at the 50-yard line after each game.

This was apparently news to the Bremerton principal, who, prior to this, was unaware of the tradition. An investigation ensued, which turned up additional information about prayers and religious activities taking place within the school's football program. The school, concerned that allowing the coach to continue would violate the First Amendment's establishment clause, told him to stop. Coach Kennedy made a Facebook post about the school's edict, speculating that he could lose his job for praying, and the post generated widespread attention. Coach Kennedy's concerns were proved valid: he was eventually fired.

In one set of facts, Coach Kennedy agreed to stop leading locker-room prayers with the student athletes and to cease giving religiously themed pep talks to the students after games on the field. Kennedy sought only to engage in silent, brief prayer on the field after the game, giving thanks for the Lord's protection. He was instead told to go to the press box and pray out of sight.

According to the *other* set of facts, Coach Kennedy's actions encouraged students to join him for prayer at midfield, alongside various state politicians. The media and public also began storming the field, and the entire affair shot to national attention. As a result, the head coach, along with three of five assistant coaches, quit. Given Kennedy's leadership role as a coach, his inherent power over students, and the risk that some might feel that prayer after the game was school-endorsed, the school had no choice but to fire him.

Competing Values?

The case pitted two American ideals against each other: the freedom to practice one's

Does this mean teachers and coaches are free to begin subtly pressuring students to convert to their own preferred religion?

religion, and the right to be free from government-imposed religion. These two principles fall under what lawyers like to call the "free exercise clause" and the "establishment clause" of the First Amendment to the US Constitution. But what these clauses actually mean is the subject of ongoing debate. There are those who would say that only a federal law declaring an official state religion would violate the establishment clause. Others, however, see an establishment clause violation whenever religion is mentioned by any public official.

Challenges to these twin values, which are both equally important for true religious liberty, predate the United States and its Constitution by a few millennia. In the Bible the Old Testament book of Daniel tells two stories. Both are Sunday or Sabbath School favorites, and both neatly and dramatically illustrate both compelled and prohibited religious practice. These are the stories known as "Daniel in the Lions' Den" and "The Fiery Furnace."

Christian children are introduced early to the story in Daniel 6, when the book's namesake—an official in the court of King Darius—is condemned to be thrown into a lions' den for publicly praying. The catalyst for this is the jealousy of other royal courtiers following Daniel's promotion by the king. These spurned officials convince the king to issue an edict stating that no one should pray to any god for 30 days except to the king, upon pain of death. The target of this new law, of course, is Daniel, who is known for his habit of praying to his God.

One does not need a Harvard law degree to see how this would be a rather classic "free exercise" violation, had the First Amendment existed during the time of the Medes and Persians.

Three chapters earlier in the book of Daniel, we learn that King Nebuchadnezzar took a different approach. He built a golden image of himself, set it up in the plain of Dura, gathered all his government officials, and declared they had to bow down and worship the image when the music played—on pain of death. It's hard to imagine a clearer violation of the establishment clause. The king is saying, "Here is a state-sponsored image: please bow down to it in worship or die." Daniel's three friends refuse and are punished by being thrown into a fiery furnace.

Put in biblical extremes, then, was the Bremerton School District acting like King Darius, threatening Coach Kennedy with the lions' den—termination from a part-time job—if he dared pray like Daniel?

Or was the school district instead protecting high school students from a fiery furnace—less playing time—if they didn't succumb to religious coercion and pray with their coach?

Thankfully, neither Coach Kennedy nor his students were threatened with an actual lions' den or a fiery furnace—a fact that speaks to the effectiveness of both religion clauses of the First Amendment working together to nurture and protect the high level of religious tolerance we enjoy today.

The Balancing Act

But how to keep this peace? How should the lines be drawn between protecting free exercise and preventing state-sanctioned religious coercion? And did the Supreme Court get it right this time?

The answer to this question depends on which set of facts you want to emphasize. Coach Kennedy never claimed a desire or right to coerce or compel the students to pray with him. He claimed only a right for him, personally, to engage in a brief prayer at school in a manner in which he felt called by God.

Bremerton School District, for its part, never said Kennedy couldn't pray—just that he couldn't pray publicly. But is this a reasonable request? Would a teacher making the sign of the cross while praying before a meal be committing a fireable offense? If Coach Kennedy can be prohibited from making a demonstrative prayer, what about a teacher wearing a Muslim hijab or Jewish yarmulke?

Even for those who might take a less strict approach to the demands of the establishment clause, Coach Kennedy's actions may give reason for pause. Students should feel free from religious coercion, either direct or indirect. Teenagers are acutely aware of the power of authorities around them and often change their behavior accordingly—even if it is simply to rebel. It seems reasonable to assume that teen athletes who are not getting as much playing time as they want or believe they deserve may feel pressure to religiously align with the coach. The choice may not, as it was for Daniel, be between abstaining from prayer and facing the death penalty, but for a high school football player the perceived threat of sitting on the bench might be just as effective.

For this reason, Kennedy's earlier conduct—praying in the locker room and giving religious speeches on the field, for example—was problematic. If the school district had allowed him to continue, this would indeed have constituted

a violation of the establishment clause. Had Kennedy refused to change what he was doing, the dispute about his termination would never have made it to the Supreme Court.

Just the Facts, Please

But Kennedy was not fired for leading locker-room prayer activities. Instead, he was fired because he prayed silently while kneeling on the 50-yard line. The Supreme Court said that doing so did not violate the establishment clause any more than would a teacher reading a Bible during lunch in view of students.

But for the dissenting justices, this wasn't about a coach praying silently. It was about the prior locker-room prayers, the media coverage, the politicians coming onto the field after games, and the publicity Kennedy had attracted. In other words, a different set of facts than that relied on by the majority.

The dissent blamed Kennedy for the media attention since it was generated after a Facebook post that gained wide attention and was further fueled by his continued cooperation with the media. But would the dissenting justices—Sotomayor, Breyer, and Kagan—be as critical of a woman who generated nationwide publicity by posting on Facebook that she was about to lose her job for refusing to sleep with her boss?

Coach Kennedy's Facebook post was protected both by the First Amendment and federal employment laws. It is hypocritical for the dissenting justices to blame the employee for publicizing what he reasonably and in good faith believed was discrimination. And threatening someone's job for praying will inevitably upset certain sections of society.

Ultimately, this confusion of facts is the key weakness of not only the dissenting opinion but also of those who supported the school district in the dispute. To justify Coach Kennedy's termination, it was necessary to point to facts beyond those the school district originally used to justify their decision—their fear of being sued for allowing Kennedy to pray silently after games on the field.

That the head coach and three of five assistant coaches quit because of the media firestorm around Coach Kennedy is not a relevant fact in the case. Consider a different scenario: What would happen if a coach in Alabama complained he was about to be fired for his sexual orientation, and the resulting media attention and public outcry caused the rest of the coaching staff to quit? Would the school district then be able to justify the termination of the coach because he "contributed to negative relations between parents, students, community members, coaches, and the school district"?

There's little question that the attention around Coach Kennedy caused a lot of disruption. However, standing up for one's rights is not a fireable offense. In fact, our laws say quite the opposite. Asserting our legal rights is specifically protected by both the First Amendment and federal civil rights laws.

Does this mean teachers and coaches are free to begin subtly pressuring students to convert to their own preferred religion or that school districts have no control over what its staff says? One needs only to look to the *Kennedy* case itself for that answer. There is no legal ambiguity around Kennedy's locker-room prayers or religiously themed pep talks—prohibitions against these activities are so ingrained in the law that they were never challenged.

Bremerton School District failed across the board here. Its ignorance of what was going on in the locker room and on the field was nothing short of administrative malpractice. The school district then overreacted. Suddenly Bremerton schools were to become a religion-free zone where prayer could happen only in secret, similar to the time of King Darius.

The United States has, through the years, been remarkably successful in striking a balance between keeping people out of both the lions' den *and* the fiery furnace. Many repressed minorities around the world would give anything to exchange their religious freedom challenges for those we engage with here.

We can keep our public institutions free from religious coercion without banishing all evidence of religion. The *Kennedy* decision has not heralded a new era of religious indoctrination in public schools, but rather drawn the line in a sensible way that allows employees to keep their faith and students to keep theirs.

Todd R. McFarland is deputy general counsel for the General Conference of Seventh-day Adventists and oversees litigation related to church-state issues and religious liberty.

LIBERTY®

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

www.libertymagazine.org

Printed by Pacific Press Publishing Association, PO Box 5353, Nampa, ID 83653-5353.
Subscription price: U.S. $7.95 per year ($15.95 for non-U.S. addresses). Single copy: U.S. $1.50. Price may vary where national currencies differ. For subscription information or changes, please call (800) 545-2449.

Vol. 117, No. 6, November/December 2022

"The fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did. Persecution, like a lion, tears the saints to death, but leaves Christianity pure: state establishment of religion, like a bear, hugs the saints, but corrupts Christianity, and reduces it to a level with state policy."

Baptist preacher John Leland in his 1804 book, *The Government of Christ a Christocracy*. A nationally renowned preacher who championed strict separation between church and state, Leland's influence on leaders such as Thomas Jefferson and James Madison helped shape the religion clauses of the First Amendment to the US Constitution.