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Reclaiming the Blessings of Religious Liberty: Religion and the American Constitutional Experiment

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INTRODUCTION

Thomas Jefferson once described America's new religious freedom guarantees as a 'fair' and 'novel experiment'.[1] These guarantees, set out in the new American state and federal constitutions of 1776 to 1791, defied the millennium-old assumptions inherited from Western Europe: that one form of Christianity must be established in a community and that the state must protect and support it against all other forms of faith. America would no longer suffer such governmental prescriptions and proscriptions of religion, Jefferson declared. All forms of Christianity had to stand on their own feet and on an equal footing with all other religions. Their survival and growth had to turn on the cogency of their word, not the coercion of the sword, and on the faith of their members, not the force of the law.

This new American constitutional experiment in granting religious freedom to all and religious establishment to none was a product of both the theology and politics of the founding era from 1760 to 1800. The American founders – preachers, pamphleteers, philosophers and politicians alike – expounded six common principles: liberty of conscience; free exercise of religion; religious pluralism; religious equality; separation of church and state; and no establishment at least of a national religion. These six principles appeared

* This Article is distilled in part from J Witte, Jr, *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge, 2021), 138–170; J Witte, Jr, J A Nichols and R W Garnett, *Religion and the American Constitutional Experiment* (5th edn) (Oxford, 2022), 35–128.

1 S K Padover (ed), *The Complete Jefferson, Containing His Major Writings* (New York, 1943), 538, 673–676, 1147; P Leicester Ford (ed), *The Works of Thomas Jefferson* (1905), 11:7; Julian Boyd (ed), *The Papers of Thomas Jefferson* (Princeton, 1950), 1:537–39. See analysis in S E Mead, *The Lively Experiment: The Shaping of Christianity in America* (New York, 1963), 55–71. The concept of an 'experiment' in religious liberty goes back at least to John Locke. See 'A Second Letter Concerning Toleration (c. 1690)', in *The Works of John Locke* (12th edn) (London, 1824), 5:59–138, at 63 ff.

regularly in the debates over religious freedom and church–state relations in the eighteenth century, although with varying definitions and priorities. They were also incorporated into the original state constitutions as well as the First Amendment of the Constitution of the United States which provided that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. These principles remain at the heart of the American experiment today – as central commandments of the American constitutional order and as cardinal axioms of a distinct American logic of religious freedom.

This American experiment initially inspired exuberant rhetoric throughout the young America republic and well beyond. 'Our act for freedom of religion is extremely applauded', Jefferson wrote enthusiastically in 1786 from Paris, noting how widely it was circulating among European politicians and jurists.[2] Preacher Elhanan Winchester declared proudly to a London audience in 1788 that, in America, 'religious liberty is in the highest perfection. All stand there on equal ground. There are no religious establishments, no preference of one denomination of Christians above another. The constitution knows no difference between one good man, and another. A man may be chosen there to the highest civil offices, without being obliged to give any account of his faith, subscribe [to] any religious test, or go to the communion-table of any church.'[3] Yale President Ezra Stiles predicted confidently in 1783 that: 'The United States will embosom all the religious sects or denominations in Christendom. Here they may all enjoy their whole respective systems of worship and church government, complete . . . All religious denominations will be independent of one another [and] will cohabit together in harmony.'[4]

Today, however, the American experiment in religious freedom inspires far more criticism than praise. The United States does 'embosom' all manner of religious sects and denominations, not only from Christendom but from around the world – more than 1,000 religious traditions, in which more than two-thirds of the American population claims membership. American citizens and groups do enjoy remarkable freedom of religion. But the laboratory of the United States Supreme Court, which has directed the American experiment since 1940, no longer inspires confidence. The Court's record on religious freedom is vilified for its lack of consistent and coherent principles, its uncritical use of mechanical tests and misleading metaphors, and its massive pile of divided and discordant opinions; and the new trend of protecting

2 Letter to George Wythe (13 August 1786), in *The Works of Thomas Jefferson*, vol 5, available at <http:/oll.libertyfund.org/title/802/86631/1991245>, accessed 10 February 2023.

3 E Winchester, 'A Century Sermon on the Glorious Revolution (London, 1788)', in *Political Sermons of the American Founding Era, 1730–1805*, ed Ellis Sandoz (Indianapolis, 1991), 969, 988–989.

4 E Stiles, *The United States Elevated to Glory and Honor* (New Haven, CT, 1783), 54–55 (spelling modernised and original italics removed).

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religious freedom by statutes has raised even greater controversy, as legislatures are pressed to explain why they are privileging religious freedom over sexual liberty, reproductive freedom, and many other fundamental rights of citizens. Leading scholars now write openly that America's experiment in religious freedom was, from the start, a 'foreordained failure' and an 'impossibility' to achieve, and is now predictably sliding into its 'twilight'.[5] Other scholars are trying to accelerate this decline by strongly attacking the idea that religion deserves any special constitutional consideration at all, and warning the populace against 'the perils of extreme religious liberty'.[6] 'Why tolerate religion?' reads an influential recent text, given that it is so irrational, unscientific, nonsensical, categorical, abstract, and impervious to empirical evidence or common sense.[7]

When an experiment becomes a 'kind of wandering inquiry, without any regular system of operations', we must 'return to first principles and axioms', 'reassess them in light of our experience' and, if necessary 'refine them'.[8] So wrote Francis Bacon, the great seventeenth century 'father' of the experimental method. Although Bacon offered these prudential instructions principally to correct scientific experiments that had gone awry, his instructions commend themselves to legal experiments as well – as he himself, as Chancellor, sought to demonstrate in seventeenth century England.[9]

This article applies Bacon's prudential instructions to the American experiment in religious freedom. It returns to the first principles of religious freedom in the American founding era and documents their incorporation into state and federal constitutional law from 1776 to 1791. It highlights several key insights about religion and religious freedom that the founders used to create and ratify these early constitutional texts; and it shows how these insights informed several key Supreme Court cases and can still inform our debates about religious freedom today.

FOUNDING PRINCIPLES OF RELIGIOUS FREEDOM

The eighteenth century American founders, writing from 1760 to 1800, adopted and advocated six major principles of religious freedom: (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality;

5 S D Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford, 1995); S D Smith, 'Discourse in the Dark: The Twilight of Religious Freedom' (2009) 122 *Harvard Law Review* 1869; W Sullivan, *The Impossibility of Religious Freedom* (rev edn) (Princeton, NJ, 2018).

6 M A Hamilton, *God v. the Gavel: The Perils of Extreme Religious Liberty* (rev edn) (Cambridge, 2014).

7 B Leiter, *Why Tolerate Religion?* (Princeton, NJ, 2013).

8 F Bacon, 'The Great Instauration (1620)', preface, reprinted in ibid, *The New Organon and Related Writings,* (ed F H Anderson) (Indianapolis, 1960), 3, 11.

9 B Shapiro, 'Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform' (1980) 24 *American Journal of Legal History* 331.

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(5) separation of church and state; and (6) no establishment of a national religion. These six principles – some ancient, some new – appeared regularly in the debates over religious freedom and church–state relations in the eighteenth century, although with varying definitions and priorities. They were also commonly incorporated into the original state constitutions, and they helped to shape the First Amendment to the United States Constitution. They remain at the heart of the American experiment today and elaborated in both state and federal constitutional cases and statutes.[10]

First, the founders embraced the ancient Western principle of liberty of conscience. For them, this principle protected religious voluntarism – 'the unalienable right of private judgment in matters of religion', the freedom to choose, change, or discard one's religious beliefs, practices, or associations.[11] Faith was not something inherited, predestined, or predetermined by birth, baptism, status or caste, the founders insisted. It was something to be chosen and fashioned by each person using their reason, will, and experience. 'The Religion … of every man must be left to the conviction and conscience of every man', James Madison wrote, 'and it is the right of every man to exercise it as these may dictate'.[12]

For the founders the constitutional guarantee of freedom of conscience protected believers not only from traditional forms of torture, inquisitions, pogroms, imprisonment, heresy trials, and other such forms of 'soule rape', in Rhode Island founder Roger Williams' pungent phrase.[13] It also protected them from official or popular coercion, pressure, or inducements to accept certain religious beliefs or practices or face penalties and deprivations for choosing another. In addition, this guarantee permitted persons to claim exemptions and accommodations from military conscription orders, oath-swearing requirements, state-collected church taxes, or comparable general laws that conflicted with their core claims of conscience.[14] As President George Washington put it: '[T]he conscientious scruples of all men should be treated with great delicacy and tenderness' and 'as extensively accommodated' as 'the protection and essential interests of the nation may justify and permit'.[15]

10 See Witte, Nichols and Garnett, *Religion and the American Constitutional Experiment*, chapters 2–4, which have detailed sources.

11 E Williams, *The Essential Rights and Liberties of Protestants* (Boston, 1744), 42; H Fisher, *The Divine Right of Private Judgment, Set in a True Light* (repr. edn) (Boston 1790 [1731]).

12 J Madison, 'Memorial and Remonstrance Against Religious Assessments', in *The Papers of James Madison* (ed W T Hutchinson et al) (Chicago, 1962), 8: 298.

13 *Complete Writings of Roger Williams*, 7 vols (New York, 1963), 3: 220.

14 I Backus, *Appeal to the Public for Religious Liberty Against the Oppressions of the Present Day* (Boston, 1773); J Parsons, *Freedom from Civil and Ecclesiastical Slavery* (Newburyport, MA, 1774); T Jefferson, 'Draft of Bill Exempting Dissenters from Contributing to the Support of the Church, 30 Nov. 1776', in P B Kurland and R Lerner (eds), *The Founders' Constitution*, 5 vols (Indianapolis, 2000), 5: 74.

15 G Washington, 'Letter to the Religious Society Called Quakers, October, 1789', in *The Writings of George Washington* (ed J C Fitzpatrick) (Washington, DC, 1931), 30: 416. See also E F Humphrey

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Second, the principle of free exercise of religion was the right to act publicly and peaceably on one's conscientious beliefs. Quaker founder William Penn had already linked these two guarantees, arguing that religious liberty requires 'not only a mere Liberty of the Mind, in believing or disbelieving' but equally 'the free and uninterrupted exercise of our consciences, in that way of worship, we are most clearly persuaded, God requires us to serve Him'.[16] Most founders included alongside freedom of worship and religious assembly protections for the freedoms of religious speech, publication, education, charity, mission work, pilgrimage, and more. They also called for religious groups 'to have the full enjoyment and free exercise of those purely spiritual powers ... as may be consistent with the civil rights of society', and to enjoy rights to religious property, polity, incorporation, ecclesiastical discipline, and property tax exemption (and for a short time in some states, government-collected tithes, too).[17]

Third, the founders regarded religious pluralism as an important and independent principle of religious freedom, and not just a sociological reality. Rather than having one established faith per territory with separate classes of establishment conformists and dissenting non-conformists – some tolerated, some not – the founders called for a plurality of forms of religious belief and worship, each equal before the law. They also called for a plurality of religious forums that deserved free exercise protection – sanctuaries, schools, charities, publishing houses, Bible societies, missionary groups, and other such 'little platoons' of religion.[18] Part of their argument for religious pluralism was theological. As Baptist preacher Isaac Backus argued, it was God's 'sole prerogative' to decide which forms and forums of religion should flourish and which should fade, without influence or interference by state, church, or anyone else. 'God's truth is great, and in the end He will allow it to prevail.'[19] Part of their argument was political. Madison put it crisply in Federalist Paper No. 51: 'In a free government, the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects'.[20] 'Checks and balances'

(ed) *George Washington on Religious Liberty and Mutual Understanding: Selections from Washington's Letters* (New York, 1932).

16 *The Political Writings of William Penn* (ed A R Murphy) (Indianapolis, 2002), 79, 81–82.

17 L Hart, *Liberty Described and Recommended* (Hartford, CT, 1775), 14; W G McLoughlin (ed), *Backus on Church, State, and Calvinism, Pamphlets, 1754–1789* (Cambridge, MA, 1968), 348–349; 'A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church in Maryland', quoted by A P Stokes, *Church and State in the United States* (New York, 1950), 1: 741.

18 B Rush, 'Letter to John Armstrong (March 19, 1793)', in Kurland and Lerner (eds), *The Founders' Constitution*, 5: 781. The phrase 'little platoon' was made popular by E Burke, *Reflections on the Revolution in France* (London, 1790), 68.

19 McLoughlin (note 17), 317; Humphrey (note 15), 12; *The Freeman's Remonstrance Against an Ecclesiastical Establishment* (Williamsburg, VA, 1777), 13.

20 *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (ed C Rossiter) (New York, 1961), 324.

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are as important in religion as in politics, John Adams concurred. They 'are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of these Christians would persecute Deists, as [much] as either Sect would persecute another, if it had unchecked and unbalanced Power . . . Know thyself, Human Nature!'.[21]

Fourth, these principles of liberty of conscience, free exercise of religion, and religious pluralism depended on a guarantee of equality of all peaceable religions before the law. For the state to single out specific persons, groups, or religious practices for preferential benefits or discriminatory burdens would skew the choices of conscience, encumber the free exercise of religion, and upset the natural plurality of forms and forums of faith. Many of the founders therefore called for equality of all peaceable religions before the law. Madison captured the prevailing sentiment: 'A just Government . . . will be best supported by protecting every Citizen in the enjoyment of his religion, with the same equal hand which protects his person and property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another'.[22] The founders invoked this principle especially to fight against religious test oaths and loyalty oaths that were traditionally imposed as a condition for political office or benefits and contributed to the religious divisions of society and politics. They also pressed this principle of equality to challenge traditional state practices of discriminating in decisions about tax exemption, religious incorporation, licenses for teachers, schools, charities and missionary societies, and similar state-based benefits.

Most founders called for religious equality of all peaceable theistic religions, usually mentioning Christians, Jews, Muslims and Hindus, although they paid little heed to the many Native American and African American religions of the day. A few founders pressed for the legal equality of the religious and non-religious, too. Jefferson put it memorably: 'The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg'.[23] Such passages were unusual. Most of the founders were concerned about the equality of peaceable theistic religions before the law, not equality between religion and non-religion, which has become the norm in our day.

Fifth, the founders invoked the ancient Western principle of separation of church and state, or what Saint Paul had already called 'a wall of separation' (*paries maceriae*).[24] This institutional separation served to keep church and

21 J Adams, 'Letter to Thomas Jefferson, June 25, 1813', in L J Cappon (ed), *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and John and Abigail Adams* (Chapel Hill, NC, 1988), 333, 334.
22 Madison (note 12), paras 4 and 8.
23 T Jefferson, 'Notes on the State of Virginia, Query 17', in Padover (note 1), 673–676.
24 Ephesians 2:14. On the history of this concept, see J Witte, Jr, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI, 2007), 207–242.

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state officials and their operations free and focused on their core missions of soulcraft and statecraft, undistracted and well protected from the encroachments or privations of the other. 'Religion and government are equally necessary, but their interests should be kept separate and distinct', wrote Jeffersonian pamphleteer Tunis Wortman. 'Upon no plan, no system can they become united, without endangering the purity and usefulness of both – the church will corrupt the state, and the state pollute the church.'[25] John Dickinson of Pennsylvania argued similarly that when church and state 'are kept distinct and apart, the peace and welfare of society is [sic] preserved, and the ends of both answered. But mixing them together fuels animosities, and persecutions have been raised, which have deluged the world in blood and disgraced human nature'.[26] This understanding of separation of church and state helped to inform the movement in some states to exclude clergy and other religious officials from holding political office or exercising political power.

Some founders also called for separation of church and state in order to protect the individual's liberty of conscience. Madison warned that church and state officials must 'not be suffered to overleap the great barrier [between them] which defends the rights of the people' to hold the religious beliefs and practices they choose.[27] Jefferson tied the 'wall of separation' metaphor directly to protection of liberty of conscience:

> Believing with you that *religion is a matter which lies solely between a man and his God*, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof', *thus building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to *restore to man all his natural rights*, convinced he has no natural right in opposition to his social duties.[28]

25 T Wortman, *A Solemn Address to Christians and Patriots* (1800), in E Sandoz (ed), *Political Sermons of the American Founding Era, 1730–1805* (Indianapolis, 2000), 1477, 1482, 1487–1488.

26 J Dickinson, 'Centinel Number VIII', in E I Nybakken (ed), *The Centinel: Warnings of a Revolution* (Newark, 1980), 128.

27 Madison (note 12), para 2.

28 *The Writings of Thomas Jefferson* (ed H Washington), 9 vols (Washington, DC, 1853–1854), 8: 113 (emphasis added). This Washington edition of the letter inaccurately transcribes 'legitimate' as 'legislative'. See a more accurate transcription in D L Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York, 2003), 148.

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In Jefferson's formulation, which was often quoted by courts and commentators, separation of church and state assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking their social duties. Jefferson was not speaking here of separating politics and religion altogether. Indeed, in the next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: 'I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man'.[29]

Sixth, some founders also called for the disestablishment of religion. This was the most novel and controversial principle in the day. Seven of the original 13 states insisted on retaining their own state religious establishment even while calling for no national establishment of religion by the emerging federal government. Although local establishment practices varied, these states still exercised some control over religious doctrine, governance, clergy, and other personnel. They still required church attendance of all citizens, albeit at a church of their choice. They still collected tithes for support of the church that the tithe-payer attended, and often gave state money, tax exemptions, and other privileges preferentially to one favoured religion. They still imposed burdensome restrictions on education, voting, and political involvement of religious dissenters. They still obstructed the organisation, education and worship activities of dissenting churches, particularly Catholics and Quakers. They still conscripted established church institutions and their clergy for weddings, education, poor relief, political rallies, and distribution of state literature. They still often administered religious test oaths for political officials, and sometimes for lower state bureaucrats and employees, too.[30]

But disestablishment movements were gaining rapid support throughout the young American republic, with Massachusetts the final holdout until 1833. Disestablishment of religion, the founders argued, was the best way to integrate and protect all the other principles of religious liberty. Disestablishment protected the principles of liberty of conscience and free exercise by foreclosing government from coercively mandating or symbolically favouring certain forms of religious belief, doctrine and practice, and skewing each person's choices and changes of faith and religious affiliation. As the Delaware constitution stated: '[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious

29 Ibid.
30 M W McConnell, 'Establishment at the Founding', in T J Gunn and J Witte, Jr (eds), *No Establishment of Religion: America's Original Contribution to Religious Liberty* (Oxford, 2014), 45–69.

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worship'.[31] Disestablishment further protected the principles of religious equality and pluralism by preventing government from singling out certain religious beliefs and bodies for preferential treatment, or favouring or privileging certain clerics, sanctuaries or forms of worship to the inevitable deprecation of all others. Virginia's conventioneers called for government to 'prevent the establishment of any one sect in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty'.[32] Several early state constitutions provided 'there shall be no establishment of any one religious sect . . . in preference to another'.[33]

Finally, disestablishment of religion served to protect the principle of separation of church and state. As Jefferson wrote, it prohibited government 'from intermeddling with religious institutions, their doctrines, discipline, or exercises' and from 'the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them is an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own peculiar tenets'.[34] To allow government to establish or even meddle in the internal affairs of religious bodies would inflate the competence of government, Madison added. It 'implies either that the Civil Magistrate is a competent judge of religious truth; or that he may employ religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages, and throughout the world, the second an unhallowed perversion of the means of salvation'.[35]

The question that remained controversial in the eighteenth century founding era as much as in our own was whether more gentle and generic forms of governmental support for religion could be countenanced. Did disestablishment of religion prohibit all such support–mandating 'a high and impregnable wall of separation between church and state', as the Supreme Court would later put it, quoting Jefferson[36]–or did it simply require that such governmental support be distributed non-preferentially among all religions? Some founders viewed the principle of no establishment of religion as a firm ban on all state financial and other support for religious beliefs,

31 Delaware Declaration of Rights (1776), section 3; see also Pennsylvania Declaration of Rights (1776), II. See <https://avalon.law.yale.edu/subject_menus/18th.asp> for the original state constitutions quoted here and below. See also the collection in F Thorpe (ed), *The Federal and State Constitutions*, 7 vols (Washington, DC, 1909).

32 For E Randolph, see J Elliot (ed), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, DC, 1836), 3: 208; see also ibid, 3: 431. See also ibid, 3: 330; 3: 645–646.

33 See, e.g., New Jersey Constitution (1776), Art XIX.

34 T Jefferson, 'Letter to Rev. Samuel Miller (1808)', in Kurland and Lerner (eds), *The Founders' Constitution*, 5: 98–99.

35 Madison (note 12), para 5.

36 *Everson v Board of Education*, 330 U.S. 1, 17 (1947).

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believers and bodies, including traditional indirect forms of support like religious tax exemptions and religious corporations. Others viewed this principle more narrowly as a prohibition against direct financial support of one preferred religion but regarded non-preferential forms of state funding and land grants for all religious schools, charities, publishers, missionaries, military chaplains, and the like as not only permissible under a no-establishment policy, but necessary for good governance.[37]

THE FIRST STATE CONSTITUTIONS

Liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of religion: these six religious freedom principles circulated in the young early American republic, and they helped to shape the first state constitutions as well as the First Amendment to the United States Constitution.

Original state constitutions

Eleven of the 13 original states issued new constitutions between 1776 and 1784; Connecticut and Rhode Island retained their truncated colonial charters until 1819 and 1843, respectively.[38] These original state constitutions incorporated these founding principles of religious freedom in various forms.

Virginia's influential Bill of Rights of 1776, for example, set its religious freedom provisions in a basic natural rights and social contract framework, but also grounded its guarantees of religious rights and liberties on correlative moral duties and social virtues of 'Christian forbearance, love, and charity':

> I. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety... XV. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles. XVI. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of

37 See the collection of quotations from the founders in J H Hutson, *Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic* (Lexington, MD, 2003), 1–44.

38 See <https://avalon.law.yale.edu/subject_menus/18th.asp> with excerpts and analyis in C J Antieau et al, *Religion under the State Constitutions* (Brooklyn, NY, 1965); V P Muñoz, 'Church and State in the Founding-Era Constitutions' (2015) 4 *American Political Thought* 1–38.

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> religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[39]

Pennsylvania opened its 1776 Constitution with the same social contract and natural rights language, but focused more singly on freedom of conscience and free exercise of all theistic religions:

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.[40]

The 1776 Constitution of New Jersey provided comparable protections for freedom of conscience and free exercise of religion and against religious coercion and discrimination, and then spoke against traditional Protestant religious establishments:

> XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[41]

The New York State Constitution of 1777 set out its religious freedom provisions in loftier language that was deeply critical of traditional religious persecution

39 <https://avalon.law.yale.edu/subject_menus/18th.asp>, accessed 10 February 2023.
40 Ibid.
41 Ibid.

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brought on by the conflation of religious and political authorities, and accordingly called for the separation of church and state officials:

> XXXVIII. And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth … declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.
> XXXIX. And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall, at any time hereafter, under any presence or description whatever, be eligible to, or capable of holding, any civil or military office or place within this State.
> XL. And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it… [But] all such of the inhabitants of this State being of the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature; and do pay to the State such sums of money, in lieu of their personal service, as the same; may, in the judgment of the legislature, be worth.[42]

These and other early constitutions forged by the original 13 states formed the backbone of religious freedom in the United States for the first 150 years of the republic. State constitution-making and enforcement remained a complex and shifting legal business throughout this period. Only Massachusetts and New Hampshire retained their original constitutions of 1780 and 1784, respectively, albeit with many amendments. Each of the other original states created at least one new constitution after 1787. Thirty-seven new states joined the United States, each adding its own new constitution, half of them adopting at least one replacement constitution.[43] Religious freedom figured prominently in almost all these state constitutions, with all six founding

42 Ibid.
43 See C E Browne, *State Constitutional Conventions* (Westport, CT, 1973), xxviii–xxix, for convenient tables and Thorpe (note 31) for the multiple versions of each state constitution.

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principles of religious freedom coming to varying forms of expression. The state constitutions empowered state courts to hear constitutional cases from its own citizens or subjects, notably including religious freedom claims. These state cases, together with state legislative acts, helped translate the founding principles of religious freedom into a rich latticework of specific precepts, practices and policies concerning religion.

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Constitution of the United States, drafted in the summer of 1787 and ratified by the original states in 1789, is largely silent on questions of religion and religious freedom. The preamble to the Constitution speaks generically of the 'Blessings of Liberty'. Article I recognises the Christian Sabbath: 'If any Bill should not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law'. Article VI provides 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States'. A reference to 'the Year of our Lord' sneaks into the dating of the instrument. But nothing more. The 'Godless Constitution' has been both celebrated and lamented ever since.[44]

The federal constitutional drafters commonly assumed that questions of religious freedom and other rights and liberties were for the states and their people to resolve in accordance with their own state constitutions – and not for the budding federal government. As Madison put it: 'There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation'.[45] James Wilson thought the idea of a national bill of rights was 'impracticable – for who will be bold enough to undertake to enumerate all the rights of the people? – and when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted'.[46] Alexander Hamilton thought any such attempt would also be 'dangerous'. For this national bill of rights 'would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?'.[47]

44 See I Kramnick and R L Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York, 1996). See rejoinder in Hutson (note 37), 111–132; M E Marty, 'Getting Beyond the Myth of Christian America', in Gunn and Witte (eds) (note 30), 364–378.

45 Elliot (note 32), 3: 313.

46 M Farrand (ed), *Records of the Federal Convention* (New Haven, CT, 1911), 3: 143–44.

47 C Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September, 1787* (Boston, 1966), 243–253.

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The states, however, demanded explicit federal protections for religious freedom and other basic rights and liberties of the people, and they conditioned their ratification of the constitution on the creation and ratification of a separate bill of rights. The First Congress created the Bill of Rights in the summer of 1789, and the states ratified it in 1791. The Bill of Rights opened with the four freedoms guaranteed in the First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'. The next eight amendments guaranteed the right to bear arms, freedom from forced quartering of soldiers, freedom from property takings without just compensation, sundry important criminal and civil procedural protections, and a general guarantee in the Fifth Amendment that no person shall be 'deprived of life, liberty, or property without due process of law'. Heeding Wilson's warning about the dangers of trying to list all fundamental rights, the Ninth Amendment provided: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. Yielding to the strong political pressure to guarantee a federalist system of government, the Tenth Amendment guaranteed that all the powers not explicitly enumerated for the federal government were 'reserved' for the individual states.

The First Amendment uniquely targeted 'Congress'. This differed from all the other provisions in the Bill of Rights that were generically phrased or in the passive voice: 'the right of the people to bear and keep arms shall not be infringed'; 'excessive bail shall not be required' and the like. This specific choice of language – '*Congress* shall make no law…' – meant that the First Amendment guarantees of no establishment of religion and no prohibition on its free exercise were binding only on the federal government, and not on state or local governments. It further meant that the federal courts could not hear cases where citizens sought religious freedom protection against state or local encroachments on them. 'The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties', the Supreme Court declared early on; 'this is left to the state constitutions and laws'.[48] In the nineteenth century, Congress tried repeatedly but failed to pass constitutional amendments and national laws on religious liberty that would apply to the states and would be enforceable in the federal courts. The most notable attempt was the Blaine Amendment to the United States Constitution

48 *Permoli v Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845). See also *Barron v Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights in general, and the Fifth Amendment in particular, applied only to the national government).

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that was only narrowly defeated in 1876.[49] But until 1940, the First Amendment applied only to Congress, and it was a weak restriction at that. Not a single United States Supreme Court case before 1940 found a violation of the First Amendment religious freedom guarantees.

Not only was the First Amendment narrowly focused on Congress, but, unlike many of the earlier state constitutions on religious freedom, this federal constitutional text was rather cryptic. Of the six principles of religious freedom incorporated into the new state constitutions of 1776 to 1784, the First Amendment explicitly embraced only two: the free exercise of religion and no establishment of religion. The First Congress that crafted the First Amendment did have much more expansive religious freedom language available in the 25 drafts of the First Amendment proposed and debated in 1788 and 1789.[50] Ten of these drafts were proposed by the ratifying states in 1788 and 1789. North Carolina, for example, packed a whole series of principles in its proposed amendment:

> That any person *religiously scrupulous* of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. That *religion*, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only *by reason and conviction, not by force or violence*; and therefore all men have an *equal, natural, and unalienable right to the free exercise of religion according to the dictates of conscience*, and that no particular religious sect or society ought to be favored or *established by law in preference* to others.[51]

Ten more draft provisions on religious freedom came in for discussion during the First House debates in the summer of 1789. The House finally distilled these wide-ranging proposals into a proposed draft of August 25, 1789, embracing three principles:

> Congress shall make no law *establishing* religion, or prohibiting the *free exercise* thereof, nor shall the *rights of conscience* be infringed.[52]

Five more drafts circulated in the First Senate thereafter; the final proposed draft sent back to the House on 9 September 1789, now had only two principles:

49 See A W Meyer, 'The Blaine Amendment and the Bill of Rights' (1951) 64 *Harvard Law Review* 939; F W O'Brien, 'The States and "No Establishment": Proposed Amendments to the Constitution Since 1789' (1965) 4 *Washburn Law Journal* 183–210 (listing 21 failed attempts to introduce such amendments to the United States Constitution).

50 Witte, Nichols and Garnett, *Religion and the American Constitutonal Experiment*, Appendix I, 361–363.

51 North Carolina Proposal, 1 August 1788; repeated by Rhode Island, 16 June, 1790 in ibid.

52 Final Draft proposed by the Style Committee, passed by the House, and sent to the Senate, 25 August 1789, in ibid.

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> Congress shall make no law *establishing* articles of faith or a mode of worship or prohibiting the *free exercise* of religion … [53]

A joint House and Senate style committee stuck with these two principles, but it made the no-establishment guarantee more generic and ambiguous in the final formulation of the First Amendment: 'Congress shall make no law *respecting an establishment of religion*, or prohibiting the free exercise thereof'. The states ratified the Bill of Rights on 15 December 1791, and the 16 final words of the First Amendment have been the law of the land to this day.

The First Amendment on its face sets clear outer limits to Congress's actions towards religion. Congress may not establish or prescribe religion; and Congress may not prohibit or proscribe religion. While that sounds minimalist to modern ears, this was already a marked departure from the common practice of most European national governments in 1789. England, for example, still made communicant status in the Anglican Church a condition for national citizenship and for many positions and privileges in state and society. Protestants were only tolerated by the state, and with ample limits on their freedom. Catholics and Jews remained formally banned from the land until the Emancipation Acts of 1829 and 1833/58. Similarly, just as the First Amendment was being crafted and ratified, French authorities were ransacking the Catholic Church and its vast properties, literature and artwork, and murdering hundreds of its clergy, monks and congregants with reckless abandon, having done the same to French Calvinists a century earlier. The First Amendment clearly commanded the new American Congress to do nothing of the sort.

Less clear was whether the First Amendment prohibited federal laws and governmental actions short of outright prescribing or proscribing religion. Earlier drafts of the First Amendment no-establishment guarantee had included much more sweeping and exact language: Congress was not to 'touch' or 'favor' religion; not to give 'preference' to any religion or any religious 'sect', 'society' or 'denomination'; not to 'establish articles of faith or mode of worship'.[54] Such provisions were left aside for the more ambiguous provision that Congress could not make laws 'respecting an establishment of religion'. Adding the word 'respecting' to this guarantee could mean that Congress could make no laws 'concerning' or 'regarding' the various state establishments of religion that still prevailed. Or it could mean that Congress could make no laws that 'reflected' or showed 'respect for' old establishments of religion like the established Anglican Church in England, or various Lutheran, Reformed, Orthodox and Catholic establishments on the European

53 Draft proposed and passed by the Senate, and sent to the House, 9 September 1789, in ibid.
54 Draft Nos. 6, 8–10, 16, 21–23, 25, in ibid.

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Continent. Or it could mean that Congress could make no law that 'pointed to' or 'moved toward' a new establishment of religion even in piecemeal fashion, lest they become the 'nose of the camel under the tent'.[55] All these understandings fit within eighteenth century dictionary definitions of 'respecting'.[56]

What also remained an open question was whether the no-establishment provision allowed Congress to favour or support religion 'generally' or 'non-preferentially' as several earlier drafts had put it. No founder publicly supported the idea of Congress 'establishing' a single national religion that 'fixed', 'defined' and 'settled' by law the doctrine, liturgy, worship, religious canon, and other traditional features of established Christianity. For them, the most notorious example to be avoided at all costs was the established Church of England. The new American nation wanted no royal or presidential Supreme Head of a national Church; no bench of bishops sitting in Congress; no prescribed *Book of Common Prayer* that set the nation's liturgy, lectionary and religious calendars; no mandated King James Version of the Bible; no church courts with jurisdiction over family, charity, education, inheritance, defamation, and the like. Those prevailing English establishment patterns were all well beyond the pale for the young American republic.

The issue was whether the new First Amendment outlawed or permitted more 'mild and equitable'[57] forms of support for religion. It is instructive that the same First Congress that drafted the First Amendment did pass laws that funded and supported various forms and forums of religious education, missionaries on the frontier, legislative and military chaplains, presidential Thanksgiving Day proclamations and other government-led religious ceremonies, and comparable measures – all of which later Congresses continued to support and fund.[58] And the First Congress also included overt religious language and strong religious freedom guarantees in its first treaties, land grants, and territorial ordinances, like the Northwest Ordinance, which read: 'No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments'; and 'Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be

55 *Walz v Tax Comm'n*, 397 U.S. 664, 678 (1970).

56 See S Johnson, *A Dictionary of the English Language* (4th edn) (1773); W Perry, *The Royal Standard English Dictionary* (1st Am edn) (1788) and early modern sources quoted in *Oxford English Dictionary* (1971), s.v. 'respect'.

57 The phrase is from John Adams, recounted in J Witte, Jr, *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge, 2021), 105–37.

58 See, e.g., N S Chapman, 'Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause' (2020) 96 *Notre Dame Law Review* 677; M Storslee, 'Church Taxes and the Original Understanding of the Establishment Clause' (2020) 169 *University of Pennsylvania Law Review* 111.

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encouraged'.[59] The lesson taken by some later courts and commentators was that non-preferential support for religion was not necessarily an establishment of religion contrary to the First Amendment.

Likewise, the various drafts of the free exercise of religion guarantee had included much more sweeping language: Congress was not to 'infringe', 'abridge', 'violate', 'compel' or 'prevent' the exercise of religion or the rights and freedom of conscience, or indeed even 'touch' religion in a way that might obstruct, impede, or hinder its free exercise.[60] Again, such provisions were left aside for the blunter provision: Congress could simply not 'prohibit' the free exercise of religion. This left little textual guidance on what short of outright prohibition on the freedom to exercise religion was allowed or outlawed. Importantly, too, the First Amendment dropped the guarantee of freedom of conscience in general as well as in the specific protections of conscientious objection to military service which earlier drafts of the First Amendment and every state constitutions protected. (Article V of the Constitution did ban federal religious test oaths, in part because they violated freedom of conscience.) It was left an open question what government laws and actions that fell short of outright prohibition of religious exercise are outlawed by the First Amendment, and whether the guarantee of the free exercise of religion allows or requires accommodations and exemptions from general laws that offend conscience. All these remained contested issues in the eighteenth century, and remain so still today.

The historical sources do allow for a more nuanced reading of the final 16 words of the First Amendment religious freedom guarantee; elsewhere I have done a molecule-by-molecule parsing of these words to extract richer lessons of the original understanding of this text.[61] But even without such linguistic hairsplitting, it is worth remembering that the founders saw the principle of no establishment of religion as integral to the protection of the principles of religious equality, liberty of conscience, and separation of church and state. And they saw the protection of free exercise of religion – or the 'freedom to exercise religion'[62] – as essentially tied to the principles of liberty of conscience, religious equality, religious pluralism, and separation of church

59 *Journals of the Continental Congress* (Washington, DC, 1904–1937), 32: 340. See further M J Hegreness, 'An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities' (2011) 120 *Yale Law Journal* 1820–1884.

60 Draft Nos. 2, 6, 11–13, 15–18, 20–23 in Witte, Nichols and Garnett, *Religion and the American Constitutional Experiment*, 361–363.

61 Ibid, 109–124 and more fully J Witte, Jr, 'Back to the Sources: What's Clear and not so Clear About the Original Intent of the First Amendment' (2022) 47 *BYU Law Review* 1303–1383.

62 This was the language of the proposal from New York, tendered on 26 July 1788: 'That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience'. Draft No. 9, in Witte, Nichols and Garnett, *Religion and the American Constitutional Experiment*, 361–363.

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and state. But rather than spelling this out in detail as some state constitutions had done, the First Amendment, like other provisions in the Bill of Rights, simply set out the most basic limits of no prescription or proscription of religion, leaving it to Congress and the federal courts to develop a fuller religious freedom jurisprudence, drawing as apt on the founders' fuller views of religious freedom and on the expanding state experiments with religious freedom.

ENDURING INSIGHTS FROM THE CONSTITUTION-MAKING PROCESS

One key to the enduring success of this American experiment in religious freedom lies in the eighteenth century founders' most elementary insight – that religion is special and needs special constitutional protection. '[W]e cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor', writes leading religious liberty advocate Douglas Laycock.[63] Although America's religious landscape has changed, religion remains today a unique source of individual and personal identity for many, involving 'the duty which we owe to our Creator, and the manner of discharging it', in Madison's words.[64] The founders' vision was that religion is more than simply another form of speech and assembly, privacy and autonomy; it deserves separate constitutional treatment. The founders thus placed freedom of religion *alongside* freedoms of speech, press and assembly, giving religious claimants special protection and restricting government in its interaction with religion. Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith. All peaceable exercises of religion, whether individual or corporate, private or public, properly deserve the protection of the First Amendment. And such protection sometimes requires special exemptions and accommodations that cannot be afforded by general statutes. 'The tyranny of the legislative majority', Madison reminds us, is particularly dangerous to religious minorities.[65]

A second key to the success of this experiment lies in the eighteenth century founders' insight that, in order to be enduring and effective, the constitutional process must seek to involve all voices and values in the community – religious, non-religious, and anti-religious alike. Healthy constitutionalism

63 D Laycock, 'Religious Liberty as Liberty' (1996) 7 *Journal of Contemporary Legal Issues* 313, 314

64 J Madison, 'Article on Religion Adopted by Convention (June 12, 1776)', in *The Papers of James Madison*, 1: 175.

65 J Madison, 'Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)', in *The Writings of James Madison*, 5: 272.

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ultimately demands 'confident pluralism', in John Inazu's apt phrase.[66] Thus in creating the new American constitutions, the founders drew upon all manner of representatives and voters to create and ratify these new organic laws. Believers and sceptics, churchmen and statesmen, Protestants and Catholics, Quakers and Jews, Civic Republicans and Enlightenment Liberals – many of whom had slandered, if not slaughtered each other with a vengeance in years past – now came together in a rare moment of constitutional solidarity. The founders understood that a proper law of religious liberty required that all peaceable religions and believers participate in both its creation and its unfolding. To be sure, both in the founders' day and in subsequent generations, some Americans showed little concern in action for the religious or civil rights of Jews, Catholics, Mormons, Native Americans, Asian Americans, or African Americans, and too often inflicted horrible abuses upon them. And today, some of these old prejudices are returning anew in bitter clashes over race, immigration and refugees, and in fresh outbreaks of nativism, anti-Semitism, Islamophobia and anti-clericalism. But a generous willingness to embrace all peaceable religions in the great project of religious freedom is one of the most original and compelling insights of the American experiment. John Adams put it generously: religious freedom 'resides in Hindoos and Mahometans, as well as in Christians; in Cappadocian monarchists, as well as in Athenian democrats; in Shaking Quakers, as well as in . . . Presbyterian clergy; in Tartars and Arabs, Negroes and Indians' – indeed in all 'the people of the United States'.[67]

A third key to enduring success lies in balancing the multiple principles of religious liberty that the founders set forth in the frugal, 16-word phrase of the First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. While limited in their initial reach, these twin guarantees helped to chart the pathway of a robust American religious freedom jurisprudence that is still being developed today. On one side, the no-establishment guarantee outlaws government *prescriptions* of religion – actions that unduly coerce the conscience, mandate forms of religious expression and activity, discriminate in favour of one religion, or improperly ally the state with churches or other religious bodies. On the other side, the free exercise guarantee outlaws government *proscriptions* of religion – actions that unduly burden the conscience, restrict religious expression and activity, discriminate against religion, or invade the autonomy of churches and other religious bodies. These twin First Amendment guarantees of no

66 J D Inazu, *Confident Pluralism: Surviving and Thriving Through Deep Difference* (Chicago, IL, 2016).
67 J Adams, 'Letter from John Adams to John Taylor (Apr. 15, 1814)', in J Adams, *The Works of John Adams*, ed C F Adams, 10 vols (Boston, 1856), 6: 474; see also J Adams, 'Letter from John Adams to Thomas Jefferson (June 28, 1813)', in *Adams-Jefferson Letters*, 2: 339–40.

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establishment of any religion and free exercise of all religions thereby provided complementary protections to the other constitutive principles of the American experiment – liberty of conscience, religious equality, religious pluralism, and separation of church and state.[68]

These three founding insights were not only part of the original vision of the eighteenth century founders; they were also part of the original vision of the Supreme Court as it created the modern constitutional law of religious freedom in the 1940s and thereafter. All three insights recur in *Cantwell v Connecticut* (1940)[69] and in *Everson v Board of Education* (1947),[70] the two landmark United States Supreme Court cases that first applied the First Amendment religion clauses to state and local governments and inaugurated the modern era of universal religious liberty in America.

Cantwell and *Everson* declared anew that religion had a special place in the Constitution and deserved special protection in the nation. In a remarkable counter-textual reading, the Supreme Court took it upon itself and the lower federal courts to enforce the First Amendment religion clauses against all levels and branches of government in the nation – federal, state and local alike. The Court did so by 'incorporating' the First Amendment religion clauses into the Fourteenth Amendment Due Process Clause that provided that: 'No State shall … deprive any person of life, liberty, or property, without due process of law'. Part of the 'body' or 'corpus' of liberties in this Fourteenth Amendment guarantee, the Court argued, were the religious liberties set out in the First Amendment. Thus, while the First Amendment was still binding only on Congress and the federal government, its religious liberty guarantees of no-establishment and free exercise of religion were binding on state and local governments as well, but now through the Fourteenth Amendment. Through this act of 'incorporation' (as this method of constitutional interpretation is called) '*Congress* shall make no law' now became, in effect, '*Government* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

More than 170 religious freedom cases have reached the Supreme Court since 1940 (compared with only 48 cases in the prior 150 years). Fully 80% of these post-1940 cases dealt with state and local government issues, and roughly half of the cases have found religious freedom violations (no case before 1940 had found constitutional violations).[71] And for each of these Supreme Court cases, there have been hundreds of cases in the lower federal courts. While this universalisation of First Amendment religious liberty after 1940 did – and still

68 Witte, Nichols and Garnett, *Religion and the American Constitutional Experiment*, 92–94.
69 310 U.S. 296, 303–04, 310 (1940).
70 330 U.S. 1, 16 (1947).
71 A table of all Supreme Court cases on religious freedom from 1815 to 2021 is in Witte, Nichols and Garnett, *Religion and the American Constitutional Experiment*, 364–418.

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sometimes does – anger federalist states' rights activists, it was the growing local bigotry at home and abroad that compelled the Court to act decisively. Local bigotry was also the reason that America and the world embraced religious freedom in the 1940s as a universal and non-derogable human right of all persons – one of the famous 'four freedoms' that Roosevelt championed to rebuke the horrific abuses inflicted on Jews and other religious and cultural minorities during World War II and the Holocaust. Religious freedom for all was considered too important and universal a right to be left to the political calculus of state governments or to local religious and cultural prejudices and preferences.

Cantwell and *Everson* also declared anew that all religious voices were welcome in the modern constitutional process of protecting religious liberty. These two cases welcomed hitherto marginal voices: *Cantwell* welcomed a devout Jehovah's Witness who sought protections for his very unpopular missionary work. *Everson* welcomed a sceptical citizen who sought protection from paying taxes in support of religious education. Subsequent cases have drawn into the American constitutional dialogue a host of other religious and anti-religious groups – Catholics, Protestants and Orthodox Christians; Jews, Muslims and Hindus; Mormons, Quakers and Hare Krishnas; Wiccans, Santerians and Summumites; Sceptics, Atheists and Secularists; Religionists, A-Religionists and Anti-Religionists alike. While critics have charged the Court with favouring Christian theologies and practices, and with clumsily applying Christian religious terms and categories to measure the faith claims of others, the Court has been quite solicitous of a number of new and minority religions, including Atheists early on and Muslims since 9/11.[72] Glaring blind spots remain, notably in its churlish dealing with Native American Indian claims, but the Court has sought to heed the command to protect the religious freedom of all.

Cantwell and *Everson* declared anew the efficacy of the founding principles of the American experiment in religious freedom. The Free Exercise Clause, the *Cantwell* Court proclaimed, protects '[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose'. It 'safeguards the free exercise of the chosen form of religion', the 'freedom to act' on one's beliefs. It protects a plurality of forms and expressions of faith, each of which deserves equal protection under the law. 'The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.'[73] The Establishment Clause, the *Everson* Court echoed, means

72 See, e.g., *Torcaso v Watkins*, 367 U.S. 488 (1961) (upholding an atheist's claim that a mandatory oath proclaiming a belief in God is unconstitutional); *Holt v Hobbs*, 135 S. Ct. 2218 (2015) (upholding a Muslim prisoner's statutory right to maintain a longer beard contrary to state prison regulations).

73 *Cantwell*, 310 U.S. at 303, 310.

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that no government 'can set up a church'; 'can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion'; can 'punish [a person] for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance'; 'can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*'. Government may not 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation' or participating in the American public arena or political process.[74] 'The Constitution has erected a wall of separation between church and state', the Court said in summary.[75]

RESPONDING TO MODERN ATTACKS ON RELIGIOUS FREEDOM

In recent years, these religious freedom clauses and cases have come under increasing attack in America. Some of these attacks the United States Supreme Court has brought on itself. From 1980 to 2010, the Court's opinions both weakened the First Amendment religion clauses and introduced all manner of conflicting logics and contradictory tests to deal with religious freedom claims. That left lower courts and legislatures without clear enough direction, and produced sometimes widely variant approaches to such basic religious freedom questions – how courts should resolve intrachurch disputes over property, or government disputes over religious school support, or local contests over religious symbols and ceremonies in public life, and other issues.

Religions also brought some of these attacks on themselves. The horrors of 9/11 and scores of later attacks as well as the bloody and costly wars against Islamist terrorism worldwide have renewed traditional warnings that religion is a danger to modern liberty. *The New York Times* ran a sensational six-part exposé describing the 'hundreds' of special statutory protections, entitlements, and exemptions that religious individuals and groups quietly enjoy, prizes extracted by a whole phalanx of religious lobbyists in federal and state legislatures.[76] The Catholic Church was rocked by an avalanche of news reports and lawsuits about the paedophilia of delinquent priests and cover-ups by complicit bishops – all committed under the thick veil of religious autonomy and corporate religious freedom. Evangelical megachurches faced

74 *Everson*, 330 U.S. at 15–16.
75 Ibid, 17.
76 D B Henriques, 'In God's Name', *New York Times* (8–11, 20 October, 23 November and 19 December 2006). See further D B Henriques and A W Lehren, 'Religious Groups Reap Federal Aid for Pet Projects', *New York Times* (13 May 2007); and 'Federal Grant for a Medical Mission Goes Awry', *New York Times* (13 June 2007).

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withering attacks in Congress and the media for their massive embezzlement of funds, and the lush and luxurious lifestyles of their pastors – all the while enjoying tax exemptions for their incomes, properties and parsonages. Various Protestant denominations faced their own new public reports of massive sex abuses by their clergy and other church leaders against wives, children, parishioners, clients and students. Most recently, some Christian churches and other religious groups have drawn public scorn and political rebuke for holding large worship services, weddings, baptisms, funerals, and the like, becoming COVID super-spreaders in so doing, blatantly ignoring not only the biblical commands to love their neighbours but state laws to limit public gatherings to protect public health reasons. All these developments have fuelled a two-decade-long media and academic narrative about the underside and dangers of religion, and eroded popular and political support for religion and religious freedom.

Even bigger challenges of late have come with the culture wars between religious freedom and sexual freedom, which dominated the public airwaves until the COVID crisis began, and will likely resume after that crisis is over. The legal questions for religious freedom keep mounting. Must a religious official with conscientious scruples marry a same-sex or interreligious couple? How about a justice of the peace or a military chaplain asked to solemnise their wedding? Or a county clerk asked to give them a marriage licence? Must a devout medical doctor or a religiously chartered hospital perform an elective abortion or assisted-reproduction procedure to a single mother directly contrary to their religious beliefs about marriage and family life? How about if they are receiving government funding? Or if they are the only medical service available to the patient for miles around? Must a conscientiously opposed pharmacist fill a prescription for a contraceptive, abortifacient, or morning-after pill? Or a private employer carry medical insurance for the same prescriptions? What if these are franchises of bigger pharmacies or employers that insist on these services? May a religious organisation dismiss or discipline its officials or members because of their sexual orientation or sexual practices, or because they had a divorce, abortion, or IVF treatment? May private religious citizens refuse to photograph or cater a wedding, to rent an apartment, or offer a general service to a same-sex couple whose lifestyle they find religiously or morally wanting – especially when the state's new laws of civil rights and non-discrimination command otherwise?[77]

These are only a few of the headline issues today, which officials and citizens are now struggling to address under heavy pressure from litigation, lobbying and social media campaigns on all sides. Recent sharply divided Supreme Court

77 See analysis in J Witte, Jr, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge, 2019), 315–335.

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cases on point have only exacerbated these tensions. In *Christian Legal Society v Martinez* (2010) and *Obergefell v Hodges* (2015), same-sex rights trumped religious freedom concerns.[78] In *Burwell v Hobby Lobby* (2014) and *Masterpiece Cakeshop v Colorado Civil Rights Commission* (2018), religious freedom concerns trumped reproductive and sexual freedom claims. The culture wars have only escalated as a consequence.[79] 'Each side is intolerant of the other; each side wants a total win', Douglas Laycock wrote after a thorough study of these new culture wars. 'This mutual insistence on total wins is very bad for religious liberty.'[80] For the first time in American history, the nation's commitment to religious liberty has moved from the status of 'being taken for granted' to 'being up for grabs'.[81]

That's exactly how it should be, say a number of legal scholars who have challenged the idea that religion is special or deserving of special constitutional or legislative protection.[82] Even if this idea existed in the eighteenth century founding era–and that is now sharply contested by revisionist historians, too–it has become obsolete in our post-establishment, post-modern and post-religious age, these critics argue. Religion, these critics say, is too dangerous, divisive and diverse in its demands to be accorded special constitutional protection. Freedom of conscience claimants unfairly demand the right to be a law unto themselves, to the detriment of general laws and to the endangerment of other people's fundamental rights and legitimate interests. Church or religious autonomy norms are too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organisation–religious or not. Religious liberty claims are too often proxies for political or social agendas that deserve no more protection than any other agenda. Religion, these critics thus conclude, should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of expression, subject to the same rules of rational democratic deliberation that govern other ideas and values. To accord religion any special protection or exemption discriminates against the non-religious. To afford religion a special seat at the table of public deliberation or a special role in the implementation of government programs invites religious

78 561 U.S. 661 (2010) and 135 S.Ct. 2584 (2015).
79 134 S.Ct. 2751 (2014) and 138 S.Ct. 1719 (2018).
80 D Laycock, 'Religious Liberty and the Culture Wars' (2014) *University of Illinois Law Review* 839, 879.
81 P Horwitz, 'The *Hobby Lobby* Moment' (2014) 128 *Harvard Law Review* 154, 156.
82 For a good, recent sample of arguments pro and con, see A Sarat (ed), *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* (Cambridge, 2014); D Laycock, *Religious Liberty: Religious Freedom Restoration Acts, Same-Sex Marriage Legislation, and the Culture Wars* (Grand Rapids, MI, 2018); D Little, *Essays on Religion and Human Rights: Ground to Stand On* (Cambridge, 2015), 57–82, 170–176.

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self-dealing contrary to the First Amendment Establishment Clause. We cannot afford these traditional constitutional luxuries.[83]

Too many of these critical arguments, however, trade in revisionist history that pretends that the American founders cared rather little about religious freedom, that the First Amendment was only an 'afterthought' and 'foreordained' to fail,[84] or that principles like separation of church and state were really designed to protect Protestant hegemonies against surging Catholicism.[85] The historical reality is that the founding generation spent a great deal of time debating and defending religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791. Yes, tragically, some later Protestant majorities did abuse Catholics, Jews, Mormons, Native Americans, Asian Americans, and many others. But these were violations of constitutional freedom norms, not manifestations of their prejudicial designs – as some nineteenth century cases and many more twentieth century constitutional cases made abundantly clear.

Too many of these critical arguments trade in outmoded philosophical assumptions that serious public and political arguments about the fundamentals of life and the law can take place under the 'factitious or fictitious scrim of value neutrality'.[86] The reality, the last generation of political philosophy has taught us, is that every serious position on the fundamental values governing public and private life – on warfare, marriage reform, bioethics, environmental protection, and much more – rests on a set of founding metaphors and starting beliefs that have comparable faith-like qualities.[87] Liberalism and secularism are just two belief systems among many, and their public policies and prescriptions are enlightened, improved and strengthened by full public engagement with other serious forms of faith, belief and values. Today, easy claims of rational neutrality and objectivity in public and political arguments face very strong epistemological headwinds. Even the leading architects of religion-free public reason a generation or two ago have abandoned these views. John Rawls and Jürgen Habermas, for example, have affirmed in their later writings that religion can play valuable and legitimate roles in the lawmaking processes of liberal democracies.[88]

83 See detailed sources in J Witte, Jr and J A Nichols, '"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad' (2016) 92 *Notre Dame Law Review* 427–450.
84 See sources above, notes 5–7.
85 See, e.g., P Hamburger, *Separation of Church and State* (Cambridge, MA, 2004), 191–284. See J Witte, Jr, 'That Serpentine Wall of Separation' (2003) 101 *Michigan Law Review* 1869–1905.
86 L E Goodman, *Religious Pluralism and Values in the Public Sphere* (Oxford, 2014), 101.
87 J Perry, *The Pretenses of Loyalty: Locke, Liberal Theory, and American Political Theology* (Oxford, 2011); S L Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago, 2001).
88 See, e.g., J Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Ciaran Cronin trans) (Cambridge, 2010), 15; J Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review* 765.

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A growing number of serious political thinkers now acknowledge that deeply held beliefs and values, whether they issue from secular or religious sources, are not easily bracketed in public discourse; that efforts to exclude an entire class of moral and metaphysical knowledge are more likely to yield mutual distrust and hostility than social accord; that free speech norms do not allow the prohibition of religion from the public square; and that avowedly secular values are not inherently more objective than their religious counterparts. Secular norms and idioms can serve as useful discursive resources in religiously pluralistic societies. But purging religion altogether from public life and political deliberation, as some critics demand, is impractical, shortsighted and unjust.

Too many of these critical arguments trade in one-sided sociologies that dwell on the negatives rather than the positives of religion. It is undeniable that religion has been, and still is, a formidable force for both political good and political evil, that it has fostered both benevolence and belligerence, and both peace and pathos of untold dimensions. But when religious officials or religious group members do commit crimes – embezzling funds, perpetrating fraud, evading regulations, withholding medical care, betraying trust, raping children, abusing spouses, fomenting violence, harming the life and limb of anyone, including their own members – they are and should be prosecuted just like everyone else. Religious freedom does not and should not provide protections or pretexts for crime. But the grim reality is that these crimes occur in every organisation, and are perpetrated by all manner of people, religious and non-religious alike. That these abuses must be rooted out, however, does not mean that the perpetrator's individual or corporate rights must end as a consequence. Governments do not close down schools, libraries, clubs, charities or corporations when a few of their members commit these crimes. They prosecute the criminals, following the norms of due process. The same should take place in our churches, synagogues, temples and mosques that harbour criminal suspects.

Moreover, we would do well to remember the immensely valuable goods that religion offers to a community. America's leading religious historian, Martin E Marty, has documented the private and public goods of religion over a 60-year career. Religions, he shows, deal uniquely with the deepest elements of individual and social life. Religions catalyse social, intellectual and material exchanges among citizens. Religions trigger economic, charitable and educational impulses in citizens. Religions provide valuable checks and counterpoints to social and individual excess. Religions help diffuse social and political crises and absolutisms by relativising everyday life and its institutions. Religions provide prophecy, criticism and exemplars for society. Religions force others to examine their presuppositions. Religions are distinct repositories of tradition, wisdom and perspective. Religions counsel against

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apathy. Religions often represent practised and durable sources and forms of community. Religions provide leadership and hope, especially in times of individual and social crisis. Religions contribute to the theory and practice of the common good. Religions represent the unrepresented, teach stewardship and preservation, provide fresh starts for the desperate, and exalt the dignity and freedom of the individual.[89] No religion lives up to all these claims all the time; some religions never do. But these common qualities and contributions have long been among the reasons to support the special place of religion in the American constitutional and cultural order.[90]

Finally, too many of these critical arguments fail to appreciate how dearly fought religious freedom has been in the history of humankind, how imperiled religious freedom has become in many parts of the world today, and how indispensable religious freedom has proved to be for the protection of other fundamental human rights in modern democracies.[91] Even in post-modern liberal societies, religions help to define the meanings and measures of shame and regret, restraint and respect, and responsibility and restitution that a human rights regime presupposes. Religions help to lay out the fundamentals of human dignity and human community, and the essentials of human nature and human needs upon which human rights norms and instruments are built. Moreover, religions stand alongside the state and other institutions in helping to implement and protect the rights of a person and community – especially at times when the state becomes weak, distracted, divided, cash-strapped, corrupt, or is in transition. Religious communities can create the conditions (sometimes the prototypes) for the realisation of civil and political rights of speech, press, assembly, and more. They can provide a critical (sometimes the principal) means of education, healthcare, childcare, labour organisations, employment, and artistic opportunities, among other things. And they can offer some of the deepest insights into the duties of stewardship and service that lie at the heart of environmental rights and protection.[92]

Because of the vital role of religion in the cultivation and implementation of other human rights, many social scientists and human rights scholars have come to see that providing strong protections for religious beliefs, practices

89 See, e.g., M E Marty and J Moore, *Politics, Religion, and the Common Good: Advancing a Distinctly American Conversation About Religion's Role in Our Shared Life* (San Francisco, CA, 2000).

90 T C Berg, 'Secular Purpose, Accommodations, and Why Religion is Special (Enough)' (2013) 80 *University of Chicago Law Review Dialogue* 24–42; C Lund, 'Religion is Special Enough' (2017) 103 *Virginia Law Review* 481–526.

91 See B J Grim and R Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge, 2011); D Philpott and T S Shah, 'In Defense of Religious Freedom: New Critics of a Beleagured Human Right' (2016) 31 *Journal of Law and Religion* 380; D Philpott and T S Shah, *Under Caesar's Sword: How Christians Respond to Persecution* (Cambridge, 2018).

92 See J Witte, Jr and M C Green (eds), *Religion and Human Rights: An Introduction* (Oxford, 2012).

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and institutions enhances, rather than diminishes, human rights for all. Many scholars now repeat the American founders' insight that religious freedom is 'the first freedom' from which other rights and freedoms evolve. For the religious individual, the right to believe often correlates with freedoms to assemble, speak, worship, evangelise, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to practise religion collectively implicates rights to corporate property, collective worship, organised charity, religious education, freedom of press, and autonomy of governance.[93]

Several detailed studies have shown that the protection of 'religious freedom in a country is strongly associated with other freedoms, including civil and political liberty, press freedom, and economic freedom, as well as with multiple measures of well-being' – less warfare and violence, better healthcare, higher levels of income, and better educational and social opportunities, especially for women, children, the disabled, and the poor.[94] By contrast, where religious freedom is low, communities tend to suffer and struggle, with arrests and detentions; desecration of holy sites, books and objects; denial of visas, corporate charters, and entity status; discrimination in employment, education and housing; closures of worship centres, schools, charities, cemeteries, and religious services; and worse: rape, torture, kidnappings, beheadings, and the genocidal slaughter of religious believers in alarming numbers in war-torn areas of the Middle East and Africa.[95] In light of these grim global realities, it is important to affirm that religious freedom is an essential cornerstone of ordered liberty and constitutional law, not an academic plaything or dispensable cultural luxury.

Constitutions work like 'clock[s]', American founder John Adams reminds us. Certain parts of them are 'essentials and fundamentals', and, to operate properly, 'their pendulums must swing back and forth' and their operators must get 'wound up' from time to time.[96] We have certainly seen plenty of constitutional operators get wound up of late about religious freedom, and seen wide pendular swings in First Amendment jurisprudence over the past century. But despite the loud criticisms from the academy and media, and the anguished lamentations about the sorry state of religious liberty in America, we may well have come to the end of a long constitutional swing of cases away from religious freedom protection from 1980 to 2010, and are now witnessing

93 Ibid; M W McConnell, 'Why is Religious Liberty the "First Freedom"?' (2000) 21 *Cardozo Law Review* 1243.

94 B J Grim, 'Restrictions on Religion in the World: Measures and Implications', in A Hertzke (ed), *The Future of Religious Freedom: Global Challenges* (Oxford, 2013) 86, 101.

95 Ibid.

96 J Adams, 'Letter from the Earl of Clarendon to William Pym (Jan. 27, 1766)', in G W Carey (ed), *The Political Writings of John Adams* (Washington, DC, 2000), 644, 647 (originally printed in the *Boston Gazette*, with John Adams using the pseudonym of the Earl of Clarendon).

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the start of a pendular swing back in favour of stronger religious freedom protection by the federal courts.

In a series of strong cases beginning in 2012, the Court has strengthened and systematised the religious freedom protections of the First Amendment religion clauses and of various religious freedom statutes. In these new cases, the Court has rejected establishment clause challenges to local legislative prayers and to a large memorial cross standing prominently on state land. It has strengthened the autonomy of religious organisations in making labour and employment decisions. It has insisted that religious and non-religious schools and students receive state aid equally as a matter of free exercise rights. It has enjoined several public regulations, including certain COVID-related restrictions, that discriminated against religion. It has strengthened the constitutional and statutory claims of religious individuals and groups to exemptions from general laws that burdened conscience. It has insisted that death row inmates have access to their chaplains to the very end. And the Court has even allowed the collection of money damages from government officials who violated individuals' religious freedom. Together, these cases point to the dawning of a new fourth era in the unfolding of the American constitutional experiment of religious liberty.

It is essential, in my view, that these core principles of religious freedom remain vital parts of our American constitutional life and are not diluted into neutrality or equality norms alone, and not weakened by too low a standard of review or too high a law of standing. It is essential that we address the glaring blind spots in our religious freedom jurisprudence – particularly the long and shameful treatment of Native American Indian claims[97] and the growing repression of Muslims and other minorities at the local level, which are not being addressed very well.[98] It is essential that we show our traditional hospitality and charity to the 'sojourners within our gates'[99] – migrants, refugees, asylum seekers, and others – and desist from some of the outrageous nativism and xenophobia that have marked too much of our popular and political speech of late.[100] It is essential that we balance religious freedom with other fundamental freedoms, including sexual and same-sex freedoms, and find responsible ways of living together with all our neighbours, and desisting from mutually destructive strategies of defaming, demonising, and destroying

97 See case summary in K Sands, 'Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases' (2012) 36 *American Indian Law Review* 253.

98 But see the recent case of *Herrara v Wyoming* (slip op. May 20, 2019) (upholding Crow Indian treaty claims to hunting rights). On the harsh treatment of Muslims in lower federal courts, see, e.g., G C Sisk and M Heise, 'Muslims and Religious Liberty in the Era of Post 9/11: Empirical Evidence from the Federal Courts' (2012) 98 *Iowa Law Review* 291.

99 Exodus 20:10.

100 See, e.g., R Heimburger, *God and the Illegal Alien: Federal United States Immigration Law and a Theology of Politics* (Cambridge, 2018).

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those who hold other viewpoints.[101] And it is essential that we make our landmark International Religious Freedom Act[102] a strong focus of our international diplomacy and policy again, not something to be ignored when economic, military or geo-political interests get in the way, or deprecated and underfunded when other special administration interests gain political favour. Now is the time for American governments, academics, NGOs, religious and political groups, and citizens alike to stand for strong religious freedom at home and abroad, for all peaceable people of faith.

Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiselled away or pulled down. In centuries past–and in many regions of the world still today–disputes over religion and religious freedom have often led to violence, sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights and liberties with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process, and help others to achieve the same. As John Adams reminds us: '[T]he eyes of the world are upon [us]'.[103]

101 See overview in J Witte, Jr, *Church, State and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge, 2019).
102 22 U.S.C. § 6401 (2012).
103 Adams, *The Works of John Adams* (note 67), 8: 487.

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