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American Religious Liberty in International Perspective

John Witte, Jr.

Abstract

This Article compares First Amendment religious liberty with prevailing international human rights norms on religious freedom, particularly as set out in the 1966 International Covenant on Civil and Political Rights, the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the 1989 Vienna Concluding Documents. The United States Supreme Court's cases on freedom of conscience, free exercise of religion, and religious equality and non-discrimination compare favorably to international standards, although the Court's repeated failure to protect the distinct religious freedom claims of Native American groups falls short. The Supreme Court cases defending the principle of separation of church and state mesh well with international concerns for the rights and autonomy of religious groups, but go beyond international norms in largely removing religious freedom from public education.

Keywords: Religious Liberty; First Amendment; International Human Rights; United States Supreme Court; International Covenant on Civil and Political Rights; -UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; Freedom of Conscience

Introduction

Writing in 1787, American founder and future president John Adams offered a robust appraisal of the place of the new American constitution in the history of the world:

The United States have exhibited, perhaps, the first example of governments erected on the simple principles of nature; and if men are now sufficiently enlightened to disabuse themselves of artifice, imposture, hypocrisy, and superstition, they will consider this event as a [new] era in history. Although the detail of the formation of the American

governments is at present little known or regarded either in Europe or in America, it may hereafter become an object of curiosity [for it is] destined to spread over the northern part of . . . the globe. The institutions now made in America will not wholly die out for thousands of years. It is of the last importance, then, that they should begin right. If they set out wrong, they will never be able to return, unless it be by accident to the right path.¹

More than two centuries later, Adams's sentiments still prove remarkably prescient. Particularly on issues of religious liberty, Adams and other eighteenth-century American founders did, indeed, begin on the right constitutional path, and today most Americans enjoy ample freedom of religion as a consequence. American understandings of religious liberty have had a profound influence around the globe in the past century, and they now figure prominently in a number of national constitutions² and international human rights instruments.³

To be sure, as Adams predicated, there has always been "a glorious uncertainty in the law" of American religious liberty and a notable diversity of understandings of its details.⁴ This was as true in Adams's day as in our own. In Adams's day, there were competing models of religious liberty more overtly theological than his—whether Anglican, Reformed, or Evangelical in inspiration. There were also competing models more overtly philosophical than his—whether classical, republican, or libertarian in inclination. But despite their deep differences, most eighteenth-century American founders settled on six main principles of religious liberty: (1) liberty of conscience; (2) freedom of exercise; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) no federal establishment of religion. They designed the First Amendment religion clauses to balance these principles. The First Amendment free exercise clause outlaws government *proscriptions* of religion—actions that unduly burden the conscience, restrict forms of religious exercise and expression, discriminate against religion, or invade the autonomy of churches and other religious bodies. The First Amendment establishment clause, in turn, outlaws government

¹ *The Works of John Adams*, ed. J. F. Adams, 10 vols. (Boston, 1850–1856), 4:290, 292–293, 298.

² John T. Noonan, Jr., *The Lustre of our Country: The American Experience of Religious Freedom* (Berkeley/Los Angeles/London, 1998), 263–356. For a good example of its influence on selected common law countries, see Symposium, "The Foundations and Frontiers of Religious Liberty: A 25th Anniversary Celebration of the 1981 UN Declaration on Religious Tolerance," *Emory International Law Review* 21 (2007): 1–276.

³ See detailed analysis in John Witte, Jr. and Johan D. van der Vyver, eds., *Religious Human Rights in Global Perspective*, 2 vols. (1996); Tore Lindholm, W. Cole Durham, Jr., and Bahia G. Tahzib-Lie, eds. *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden/Boston, 2004); Natan Lerner, *Religion, Secular Beliefs, and Human Rights: 25 Years After the 1981 Declaration* (Leiden/Boston, 2006);

⁴ Adams, *Works*, 9:629–632, at 630.

prescriptions of religion—actions that unduly coerce the conscience, mandate forms of religious exercise and expression, discriminate in favor of religion, or improperly ally the government with churches or other religious bodies. Both the free exercise and establishment clauses thereby provide complementary protections to the first principles of religious liberty that the eighteenth-century American founders championed.

Today, these founding models and principles of religious liberty have born ample progeny, and the great rivalries among them are fought out in federal and state courts, legislatures, and agencies throughout the land. As several chapters in this volume have demonstrated, however, modern American constitutional laws on religious liberty are very much in transition today.⁵ Strong and settled free exercise and establishment laws of the 1960s to 1980s have now fractured into a series of shifting lines of federal cases on discrete topics, most with weaker standards of review and none providing an integrated framework for resolving religious liberty questions. This weakening and fracturing of the First Amendment has, in turn, triggered a small explosion of new federal and state legislation on religion, yielding an intricate mosaic of special religious preferences and exemptions. It has also triggered a brisk new industry of religious liberty litigation in state courts. A neo-federalist understanding of religious liberty, with separate state and federal tracks of religious liberty law, is becoming a growing reality in America today -- to the delight of some and to the dismay of others.

This chapter compares this modern American religious liberty law with prevailing international norms on point. Comparative legal analysis is always edifying—if for no other reason than to have confirmation, from a fresh perspective, of the validity and utility of one’s own legal norms and practices and to gain an idea or two about reforming them. But especially at this time of transition in First Amendment law, such comparative legal analysis is particularly salutary. Moreover, a good deal of what appears in modern international human rights instruments captures the best of American constitutional learning on religious liberty. The Universal Declaration of Human Rights of 1948 and the great 1966 Covenants encapsulate and elaborate American President Franklin Roosevelt’s famous “four freedoms”—including notably religious freedom.⁶ More recent international provisions on religious liberty were forged, in no small measure, by the efforts of American politicians, scholars, and activists. To compare First Amendment law with international norms is, in a real sense, to judge American law by a standard of religious liberty that it has helped to shape.⁷ It is also to judge America by the same international standard which the U.S. Department of State and the U.S. Office and Commission of International

⁵ See chapters __ above.

⁶ See “Roosevelt’s Eighth Annual Message to Congress (January 6, 1941),” in *State of the Union Messages of the Presidents, 1790–1966*, ed. F. Israel (New York, 1966), 3:1.

⁷ Louis Henkin, “Rights, American and Human,” *Columbia Law Review* 79 (1979): 405.

Religious Freedom now use each year to judge the laws and policies on religion of all other nations.⁸

Several common international legal principles help to confirm, refine, and integrate prevailing American First Amendment principles and cases. The prioritizing of the principles of liberty of conscience, free exercise, and religious equality in international human rights instruments suggests a prototype for the integration of American free exercise and establishment values. The insistence of international human rights instruments that state abridgments of religious rights and liberties be both “necessary” and “proportionate” confirms the strict scrutiny test of American free exercise jurisprudence and its statutory analogues. The heavy emphasis on the religious rights of groups in recent international instruments both confirms the American protection of corporate free exercise rights and one core understanding of the doctrine of separation of church and state. The international doctrine of granting “a margin of appreciation”⁹ for local religious and political practices could be put to particularly effective use in our federalist system of government.

What follows in this chapter is a brief review of the main teachings on religious liberty in the international human rights documents, and then a comparison of those teachings with prevailing First Amendment and related American laws on religious liberty.

The International Framework of Religious Liberty¹⁰

International religious rights and liberties have deep roots in classical Roman law, medieval canon law, and early modern Protestant and Catholic legal traditions.¹¹ Their definitive modern formulation, however, came only after World War II, with the promulgation of the Universal Declaration of Human Rights (1948). Four international instruments, elaborating the Declaration, contain the most critical protections of religious rights and liberties: (1) the International

⁸ International Religious Freedom Act of 1998, 112 Stat. 2787, 22 U.S.C.A. 6401. The act affirms the importance of religious freedom, as reflected in American history and law, and in various international human rights instruments. The act further decries the fresh rise of religious repression and persecution around the world and applies religious freedom standards in its assessment of diplomatic relations with foreign nations. An Office of International Religious Freedom, with an Ambassador-at-Large for International Religious Freedom publishes annual reports on the state of religious freedom on each of the 195 countries of the world, as well as in-depth studies of selected countries. The office also makes recommendations to Congress and the Executive branch on responses, including the imposition of economic sanctions, on countries that fall short of international standards.

⁹ Clovis C. Morrisson Jr., “Margin of Appreciation in European Human Rights Law,” *Revue des droits de l’homme* 6 (1973): 263.

¹⁰ This Section is adapted in part from John Witte, Jr., *Religion and the American Constitutional Experiment*, 2d ed. (Boulder/London, 2005), 223-249 and John Witte, Jr., *God’s Joust, God’s Justice: Law and Religion in the Western Tradition* (Grand Rapids, Mich., 2006), 63-142.

¹¹ John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge/New York, 2008).

Covenant on Civil and Political Rights (1966) (“the 1966 Covenant”);¹² (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (“the 1981 Declaration”);¹³ (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, which was promulgated in 1989 (“the 1989 Vienna Concluding Document”);¹⁴ and (4) the 1992 Declaration on the Rights of the Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (“the 1992 Minorities Declaration”).¹⁵

The 1966 International Covenant on Civil and Political Rights largely repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration of Human Rights. Article 18 reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁶

Article 18 distinguishes between the right to freedom of religion and the freedom to manifest one’s religion – the rough equivalent to what American law labels as liberty of conscience and free exercise of religion respectively. The right to freedom of religion—the freedom to have, to alter, or to adopt a religion of one’s choice—is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner. Freedom to manifest or exercise one’s religion—individually or collectively, publicly or privately—may be

¹² UN Doc. A/6316 (1968).

¹³ U.N. Doc. A/RES/36/55 (1982).

¹⁴ 28 I.L.M. 527.

¹⁵ Posted at <http://www.ohchr.org/english/law/minorities.htm>. (last visited December 20, 2007).

¹⁶ 1966 Covenant, art. 18.1-18.4.

subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The latter provision is an exhaustive list of the grounds allowed to limit the manifestation of religion. The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect any of the listed state interests. Such limitations must not be applied in a manner that would vitiate the rights guaranteed in Article 18 – an ideal that is often honored in the breach, even in many advanced Western countries.¹⁷

Article 20.2 of the 1966 Covenant calls for States Parties to prohibit “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.” Articles 2 and 26 require equal treatment of all persons before the law and prohibit discrimination based, among other grounds, on religion. Article 27 further guarantees to religious and cultural minorities “the right to enjoy their own culture” and “to profess and practise their own religion.”

The 1981 Declaration elaborates the religious liberty provisions that the 1966 Covenant adumbrated. Like the 1966 Covenant, the 1981 Declaration on its face applies to “everyone,” whether “individually or in community,” “in public or in private.”¹⁸ Articles 1 and 6 of the 1981 Declaration set forth a lengthy illustrative catalogue of rights to “freedom of thought, conscience, and religion” — repeating but also illustrating more concretely the 1966 Covenant’s guarantees of liberty of conscience and free exercise of religion. Article 6 enumerates these rights as follows:

- (a) To worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, to acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue, and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

¹⁷ Symposium, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief,” *Emory International Law Review* 19 (2005): 465-1320.

¹⁸ 1981 Declaration, *supra* note 2, art. 1.1.

(g) To train, to appoint, to elect, or to designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holy days and ceremonies in accordance with the precepts of one's religion or belief; and

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹⁹

The 1981 Declaration also dwells specifically and at some length on the religious rights of children and their parents. It guarantees the rights of parents (or guardians) to organize life within their household and to educate their children "in accordance with their religion or beliefs."²⁰ Such parental responsibility within and beyond the household, however, must be discharged in accordance with the "best interests of the child."²¹ At minimum, the parents' religious upbringing or education of their child "must not be injurious to his physical or mental health or to his full development."²² Moreover, the Declaration provides more generically, "the child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full conscience that his energy and talents should be devoted to the service of his fellow men."²³ The Declaration leaves juxtaposed the parents' right to rear and educate their children in accordance with their own religion and beliefs and the state's power to protect the best interests of the child, including the lofty aspirations for the child's upbringing. Despite ample debate on point, the Declaration drafters offered no specific principles to resolve the disputes that would inevitably arise between the rights of parents and the powers of the state operating *in loco parentis*. Some further guidance on this subject is provided by the 1989 UN Convention on the Rights of the Child -- though the issue of parental rights over their child's religious upbringing and welfare remains highly contested at international and domestic law.²⁴

As these children's rights provisions illustrate, the 1981 Declaration, like the 1966 Covenant, allows the "manifestation of religion" to be subjected to "appropriate" state regulation and adjudication. The 1981 Declaration permits states to enforce against religious individuals and institutions general regulations designed to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. It is assumed, however, that in all such instances,

¹⁹ Ibid., art. 6.

²⁰ Ibid., art. 5.1.

²¹ Ibid., art. 5.2, 5.4.

²² Ibid., art. 5.5.

²³ Ibid., art. 5.3.

²⁴ U.N. Doc. A/44/25; see further Symposium, "What's Wrong with Rights for Children?" *Emory International Law Review* (2006): 1-239.

the grounds for such regulations are enumerated and explicit and that such regulations abide by the international legal principles of necessity and proportionality.²⁵

The 1981 Declaration includes more elaborate prohibitions than the 1966 Covenant on religious discrimination and intolerance. It bars religious “discrimination by any State, institution, group of persons, or person.”²⁶ And it defines such discrimination as “any distinction, exclusion, restriction or preference based on religion or belief, and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal basis.”²⁷ All such discrimination based on religion or belief, the Declaration insists, is “an affront to human dignity” and a “disavowal” of the “fundamental freedoms” that form the cornerstone of national and international peace and cooperation.²⁸ Accordingly, the Declaration calls on all States Parties “to take effective measures to prevent and eliminate” such discrimination “in all fields of civil, economic, political, social, and cultural life,” including rescinding laws that foster discrimination and enacting laws that forbid it.²⁹

The 1989 Vienna Concluding Document extends the religious liberty norms of the 1981 Declaration, particularly for religious groups. Principle 16 rounds out the list of enumerated rights guarantees quoted above from the 1981 Declaration:

16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*,

A. take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and non-believers;

B. foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;

C. grant upon their request to communities of believers, practicing or prepared to practice their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

²⁵ 1981 Declaration, art. 1.3.

²⁶ *Ibid.*, art. 2.1

²⁷ *Ibid.*, art. 2.2.

²⁸ *Ibid.*, art. 3.

²⁹ *Ibid.*, art. 4.1-2.

- D. respect the right of religious communities to establish and maintain freely accessible places of worship or assembly; organize themselves according to their own hierarchical and institutional structure; select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State; solicit and receive voluntary financial and other contributions;
- E. engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;
- F. respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;
- G. in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;
- H. allow the training of religious personnel in appropriate institutions;
- I. respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;
- J. allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;
- K. favorably consider the interest of religious communities in participating in public dialogue, *inter alia*, through mass media.

A number of these religious group rights provisions in the Vienna Concluding Document reflect the international right to self-determination of peoples. This right has long been recognized as a basic norm of international law, and is included, among other places, in the 1966 Covenant.³⁰ The right to self-determination has its fullest expression in the 1992 Minorities Declaration. This right belongs to “peoples” within pluralistic societies. It guarantees a religious community the right to practice its religion, an ethnic community the right to promote its culture, and a linguistic community the right to speak its language without undue state interference or unnecessary legal restrictions. The 1992 Minorities Declaration recognizes that “the promotion and protection of the

³⁰ 1966 Covenant, art. 1.1.

rights” of religious, cultural, and linguistic minorities is “an integral part of the development of a society as a whole and within a democratic framework based on the rule of law.” Accordingly, it calls upon states to respect and to pass implementing legislation that protects and promotes the rights of cultural, religious, and linguistic minorities “to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”³¹ It further provides that “States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”³² So conceived, the right to religious self-determination provides religious groups some of the same strong protections that are afforded to religious individuals under the freedom of conscience guarantee.

These are the basic international provisions on religious rights on the books. Various regional instruments, notably the European Charter on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and People’s Rights (1981), elaborate some of these guarantees. Various religious declarations and treaties involving religious bodies, notably the recent concordats between the Vatican and Italy, Spain, and Israel as well as the Universal Islamic Declaration of Human Rights (1981) and the Cairo Declaration on Human Rights in Islam (1990), give particular accent to the religious concerns and constructions of their cosigners.³³ But the foregoing four instruments capture the common lore of current international human rights norms on religious rights and liberties.

These instruments highlight a number of the hottest legal issues that have confronted national and international tribunals over the past half century: How to protect religious minorities within a majoritarian religious culture -- particularly controversial groups like Muslims, Mormons, Bahias, Jehovah’s Witnesses, Scientologists, Unification Church members, and indigenous or first peoples who often bring charges of religious and cultural discrimination. How to place limits on religious and anti-religious exercises and expressions that cause offense or harm to others. How to adjudicate challenges that a state’s proscriptions or prescriptions run directly counter to a party’s core claims of conscience or cardinal commandments of the faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members or too little relief from secular courts in the event

³¹ 1992 Minorities Declaration, Preamble and arts. 1-2. See further Johan D. van der Vyver, *Leuven Lectures on Religious Institutions, Religious Communities, and Rights* (Leuven, 2004), 67-90.

³² 1992 Minorities Declaration, art. 4.2..

³³ See the collection of documents in Tad Stanke and J. Paul Martin, *Religion and Human Rights: Basic Documents* (New York, 1988).

of fundamental rights violations by religious tribunals. How to adjudicate intra- or interreligious disputes that come before secular courts for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of vital social services – child care, education, charity, medical services, disaster relief, among others.

International Norms and American Laws Compared

The United States has ratified the 1966 Covenant. None of the fourteen reservations, understandings, or declarations that the United States put to the instrument seeks to avoid or evade the religious liberty standards set out in the document. The 1966 Covenant, however, is not self-executing. It “does not, by itself, create private rights enforceable in U.S. courts.”³⁴ It requires implementing legislation to become effective, and no such law to date has been issued.³⁵ Yet, the 1966 Covenant holds out a high standard of religious liberty, which the United States has pledged to support.

The 1981 Declaration, 1989 Vienna Concluding Document, and 1992 Minorities Declaration are not binding legal instruments on the United States. Nonetheless, as collective expressions of common international opinion, if not common international law, on the meaning and measure of religious liberty, these instruments, too, carry ample moral, intellectual, and diplomatic suasion.

These international human rights instruments both confirm and prioritize several of the founding principles of religious liberty in America – liberty of conscience, freedom of exercise, religious equality, religious pluralism, separation of church and state, and disestablishment of religion. The principles of liberty of conscience, individual and corporate free exercise of religion, and equality of a plurality of religions before the law form the backbone of the international norms on religious liberty. Liberty of conscience rights, with their inherent protections of religious voluntarism and prohibitions against religious coercion, are absolute rights from which no derogation can be made. The exercise of religion may be regulated only to protect either the fundamental rights of others or public health, safety, welfare, and morals, and the burden caused by the regulation must be “proportionate” to achieving that stated interest. Equality of religions before the law must not only be protected but affirmatively fostered by the state, particularly to ensure the equal protection and treatment of religious and cultural minorities. A vast pluralism of forms and forums of religion and belief deserve protection—whether ancient or new, individual or communal, internal or external, private or public, permanent or transient.

³⁴ David P. Stewart, “United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations,” *DePaul Law Review* 42 (1993): 1183, 1202ff.

³⁵ Louis Henkin, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,” *American Journal of International Law* 89 (1995): 341; Gerald Neumann, “The Global Dimension of RFRA,” *Constitutional Commentary* 14 (1997): 33.

International human rights instruments further confirm the American principles of corporate free exercise rights and the basic separation of the state from churches and other religious groups. Religious groups organized for purposes of religious worship, education, charity, and other causes have the fundamental right to function in expression of their founding religious beliefs and values and must enjoy a level of autonomy of their own internal affairs. The state may regulate these religious groups only on stated grounds that are necessary and proportionate. Conspicuously absent from international human rights instruments, however, are the more radical demands for separationism, rooted in the popular American metaphor of a “wall of separation between church and state.” *Everson v. Board of Education* (1948),³⁶ *McCullum v. Board of Education* (1948),³⁷ and other early establishment clause cases maintained that religious liberty requires the absolute separation of church and state and the cessation of state support for religion, particularly religious schools. Only the secular state can guarantee religious liberty, it was argued, and only separation can guarantee the state’s neutrality on religious matters. Such views, which still pervade popular opinion in America, are not reflected in international human rights instruments nor, indeed, widely shared by other nation-states around the world.³⁸

If they were hypothetically applied in the United States, the international instruments would commend several lines of Supreme Court cases protecting liberty of conscience rights. These include a series of cases from *Arver v. United States* (1918)³⁹ to *United States v. Welsh* (1970),⁴⁰ where the Court upheld federal statutes that granted conscientious objection status to religious pacifists. These also include several early free exercise cases from *West Virginia Board of Education v. Barnette* (1943)⁴¹ to *Torcaso v. Watkins* (1961)⁴² that protected parties from coerced participation in swearing pledges and oaths as well as the later establishment cases of *Lee v. Weisman* (1992)⁴³ and *Santa Fe Independent School District v. Doe* (2000)⁴⁴ that protected parties from coerced participation in public prayers and ceremonies. And, these liberty of conscience cases include a series of sabbatarian cases, from *Sherbert v. Verner* (1963)⁴⁵ onward, that

³⁶ 330 U.S. 1 (1947).

³⁷ 333 U.S. 203 (1948).

³⁸ See John Witte, Jr., “Facts and Fictions About the History of Separation of Church and State,” *Journal of Church and State*, 48 (2006): 15-45.

³⁹ 245 U.S. 366 (1918).

⁴⁰ 398 U.S. 333 (1970).

⁴¹ 319 U.S. 624 (1943).

⁴² 367 U.S. 488 (1961).

⁴³ 505 U.S. 577 (1992).

⁴⁴ 530 U.S. 290 (2000).

⁴⁵ 374 U.S. 398 (1963), extended in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). The Court, however, has not always been consistent in its treatment of sabbatarian concerns. See, e.g., *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (struck down state law that allowed private sector employees to pick their Sabbath, which employers must accommodate); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (statute disallowing sales on Sunday does not violate free exercise rights of Jewish Saturday sabbatarian); and *Gallagher v. Crown Kosher Supermarket*, 366 U.S.

relieved parties from having to choose between adherence to a core commandment of conscience and a set of government benefits to which they were otherwise entitled. The international instruments norms make it unequivocally clear that private parties have the right to chose, change, or reject religion without compulsion, control, or conditions imposed by the state.

Particularly younger children, the 1981 Declaration and 1989 UN Convention on the Rights of the Child underscore, cannot be compelled to participate in religious or secular activities to which their parents object. Several American cases have confirmed this, based on the landmark case of *Wisconsin v. Yoder* (1972).⁴⁶ To be sure, parental rights to control their child's religious upbringing must be balanced against the state's duty to protect the best interest of that child. The international instruments would likely confirm the Supreme Court case of *Prince v. Massachusetts* (1944)⁴⁷ that insisted that a minor child could not proselytize on the street corner at night in violation of child labor laws, even if the child's guardian regarded that activity as essential to the child's religious upbringing. These instruments would also uphold *Jehovah's Witnesses v. King County Hospital* (1968)⁴⁸ that insisted that a minor child be given a necessary blood transfusion and other medical care, even though the parents wanted to treat the child by prayer alone as a test and testimony of faith. Endangering a child's life and limb is an automatic trigger for state intervention – notwithstanding parental religious interests to the contrary.

The international instruments would strongly commend the “strict scrutiny” test for free exercise claims. This was the test developed by the Supreme Court in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and recaptured by Congress in the Religious Freedom Restoration Act (RFRA) (1993)⁴⁹ and the Religious Land Use and Institutionalized Persons Act (RLUIPA)(2000).⁵⁰ The test provides that when the state imposes a substantial burden on the free exercise of a claimant's religion, the state must show that it is pursuing a compelling or overriding purpose, has used the least restrictive alternative for achieving that purpose, and has engaged in no religious discrimination in drafting or applying the law in question. Absent such showing, that state must either rescind the law or provide the burdened party with an exemption from full compliance. This American strict scrutiny test is the rough equivalent to the “necessity” and “proportionality” standard of the international human rights instruments, particularly as set forth in the 1966 Covenant.

617 (1961) (Sunday closing law does not violate free exercise rights of owner of kosher super market, Orthodox Jewish customers, or rabbis with a duty to inspect kosher markets per Jewish dietary laws).

⁴⁶ 406 U.S. 205 (1972) (exempted Amish from full compliance with compulsory school attendance law).

⁴⁷ 321 U.S. 158 (1944).

⁴⁸ 390 U.S. 598 (1968).

⁴⁹ 42 U.S.C. secs. 2000bb to 2000b-4

⁵⁰ 42 U.S.C.A. secs. 2000cc-2000cc5.

Just as in international law, so in First Amendment law, this strict scrutiny regime of free exercise is not “strict in theory, but fatal in fact.”⁵¹ Even in the *Sherbert* and *Yoder* heyday of 1963-1989, when the Supreme Court had strict scrutiny as its stated free exercise standard, government won nearly half the time, especially in cases where parties claimed free exercise exemption from taxation and social security laws. These holdings are consistent with prevailing international and comparative law standards that all parties, including religious parties, must comply with a fairly administered tax scheme.⁵²

While they would applaud a strict scrutiny regime, the international instruments would find little to commend in the much narrower reading of the free exercise clause introduced by the Supreme Court in *Bowen v. Roy* (1986),⁵³ *Lyng v. Northwestern Indian Cemetery Protective Association* (1988),⁵⁴ and *Employment Division v. Smith* (1990).⁵⁵ These latter cases, which now control application of the First Amendment free exercise clause by the federal courts, effectively reduce the free exercise guarantee to a type of heightened rational basis review.⁵⁶ In particular, the *Smith* Court has held that laws that are judged to be “neutral and generally applicable” will pass constitutional muster regardless of the burden cast on religion or the nature of the power exercised by government. Even a discretionary law or policy that crushes a central belief or practice of a free exercise claimant will survive constitutional challenge if it is neutrally drafted and generally applicable to all. Only if the law is not neutrally drafted or generally applicable will government be required to demonstrate a compelling government interest that overrides the burdened free exercise right. Such a harsh, religion-blind neutrality leaves religious minorities too vulnerable to the machinations of state legislators and state judges who tend to keep their eyes on majoritarian sentiment and the next election. This runs directly counter

⁵¹ See Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton, 2006), 215 (quoting Gerald Gunther).

⁵² See esp. *U.S. v. Lee*, 455 U.S. 252 (1982) (denied free exercise exemption from social security taxes for Amish employer); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (levy of state sales and use taxes on religious articles is not a violation of religious crusader’s free exercise rights).

⁵³ 476 U.S. 693 (1986) (agency’s use of social security number does not violate free exercise rights of native American, who believes such use would impair his child’s spirit).

⁵⁴ 485 U.S. 439 (1988) (construction of road through section of national forest regarded as sacred ground by three tribes does not violate free exercise clause; American Indian Religious Freedom Act provides no cause of action).

⁵⁵ 494 U.S. 872 (1990) (denial of unemployment compensation benefits to Native American who was discharged for sacramental use of peyote, a proscribed narcotic, does not violate free exercise clause).

⁵⁶ Save in cases involving blatant religious discrimination by the state. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (local ordinance transparently discriminating against Santerian ritual sacrifice of animals violates the free exercise clause). But cf. *Locke v. Davey*, 540 U.S. 712 (2004) (state scholarship program established to assist payment of academically-gifted students’ post-secondary education expenses for all students, except those pursuing a theology degree, does not violate the free exercise clause).

to the strong solicitude for religious minorities mandated especially by the 1966 Covenant and the 1992 Minorities Declaration.

It is especially troublesome that the *Bowen*, *Lyng*, and *Smith* cases involved claims by Native American Indians to special protection for their religious sites and rites. The right to self-determination of indigenous peoples, particularly their religious self-determination, is an important international human rights principle, and it requires unusual solicitude by nation-states. Congress, in fact, had recognized this responsibility in passing the American Indian Religious Freedom Act (1978), which called officials “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁵⁷ The Supreme Court’s cavalier treatment of the Native American’s religious liberty claims is a substantial blight on its First Amendment record. The Court’s special accommodations of Adventist sabbatarianism in *Sherbert* and Amish communitarianism in *Yoder* come much closer to the solicitude mandated by international human rights instruments.

The international norms on equality and non-discrimination would applaud the free speech “equal access” and “equal treatment” cases from *Widmar v. Vincent* (1981)⁵⁸ to *Good News Club v. Milford Central School* (2001)⁵⁹ that give religious parties equal access to forums, facilities, and even funds made available to like-positioned non-religious parties. They would likewise commend recent establishment clause cases like *Agostini v. Felton* (1997),⁶⁰ *Mitchell v. Helms* (2000),⁶¹ and *Zelman v. Simmons-Harris* (2002)⁶² that treated religious and non-religious schools alike in the distribution of general government-funded educational services and materials. Nothing in international law nor in First Amendment law requires the state to make public forums or state funds available to private parties. But when the state does offer these forums or funds, it may not discriminate against otherwise eligible religious claimants in granting access or distributing them.⁶³

The international instruments would also commend cases like *McDaniel v. Paty* (1978)⁶⁴ that removed special state prohibitions on religious ministers participating for political office. It would also uphold the recent case of

⁵⁷ 42 U.S.C. sec. 1996 (1978).

⁵⁸ 454 U.S. 263 (1981) (when a state university creates a limited public forum open to voluntary student groups, religious groups must be given “equal access” to that forum).

⁵⁹ 533 U.S. 98 (2001) (public middle school’s exclusion of Christian children’s club from meeting on school property after hours was unconstitutional viewpoint discrimination, and was not required to avoid establishment of religion).

⁶⁰ 521 U.S. 203 (1997).

⁶¹ 530 U.S. 793 (2000).

⁶² 536 U.S. 639 (2002).

⁶³ Nor may the state may not discriminate in favor of religion for a non-essential accommodation. See, e.g. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (state sales tax exemption exclusively for religious periodicals violates establishment clause).

⁶⁴ 435 U.S. 618 (1978)

Watchtower Bible and Tract and Tract Society v. Village of Stratton (2002)⁶⁵ and several earlier free exercise and free speech cases that prohibited discriminatory licensing requirements against religious solicitors in public places. Non-discriminatory and neutrally applied “time, place, and manner” regulations on all public speech, including religious and political speech and activities, is as permissible under the international instruments as it is under First Amendment law.⁶⁶ But again singling out religious solicitors for special restrictions or requirements violates the essential religious liberty principle of equality and non-discrimination.

The principles of structural pluralism (or group rights) set out in the international instruments would endorse the many lines of cases and statutes protecting the forms and functions of religious associations, whether worship centers, religious schools and charities, or other such groups.⁶⁷ Various Supreme Court cases upholding general regulation of these bodies in furtherance of health, safety, and welfare, and in exercise of regulatory, taxation and police power would likewise pass muster.⁶⁸ The principle of structural pluralism, especially as elaborated in the Vienna Concluding Document, would look askance, however, at a case like *Jones v. Wolf* (1979),⁶⁹ which permitted government resolution of intrachurch disputes involving “neutral principles” of law. The “deference test,” maintained by the Supreme Court from *Watson v. Jones* (1871)⁷⁰ to *Serbian Orthodox Diocese v. Milivojevich* (1976).⁷¹ would find greater favor under international human rights instruments as a proper form of intrareligious dispute resolution. Also favorably received at international law would be the cases of *NLRB v. Catholic Bishop of Chicago* (1979)⁷² and *Presiding Bishop v. Amos* (1987)⁷³ that protected the employment decisions of religious employers, including their right to engage in religious discrimination in their core employment decisions. Neither international law nor American law would require a Catholic Church to hire a rabbi to say a mass, or require a synagogue to employ a Methodist minister to read the Torah on the Sabbath.

The absence of a disestablishment of religion principle in international human rights instruments would not call into question the entire line of

⁶⁵ 536 U.S. 150 (2002).

⁶⁶ See the early summary free exercise case, *Poulos v. New Hampshire*, 345 U.S. 395 (1953) and the summary free speech case in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

⁶⁷ See especially the classic early case, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidated state law mandating attendance at public schools as violation of rights of private schools and of parents).

⁶⁸ See, e.g., a good summary case in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Application of Fair Labor Standards Act Does not obstruct core religious functions of a foundation). See generally William Bassett, *Religious Organizations and the Law*, 2 vols. (St. Paul, MN, 1997-2007).

⁶⁹ 443 U.S. 595 (1979).

⁷⁰ 80 U.S. (13 Wall.) 679 (1871).

⁷¹ 426 U.S. 696 (1976).

⁷² 440 U.S. 490 (1979).

⁷³ 483 U.S. 327 (1987).

disestablishment clause cases that have emerged since 1947, principally on issues of religion and education.⁷⁴ Many of these cases, serve to protect the principles of liberty of conscience, free exercise, religious equality, and religious pluralism in a manner consistent with prevailing international instruments. But when there is a clash between such principles and the principle of non religious establishment, international norms would give preference to the former—as do American cases upholding the principle of accommodation.

The international instruments do not have an equivalent to the *Lemon* test that the Court developed in 1971 to apply the First Amendment establishment clause. This test requires that a law or policy will pass constitutional muster under the establishment clause only if it (1) has a secular purpose; (2) has a primary effect that neither inhibits or prohibits religion; and (3) fosters no excessive entanglement between religious and political officials.⁷⁵ This test, while ignored or reformulated by several later Supreme Court cases, still finds favor among lower federal courts in the absence of a consistently applied alternative. This *Lemon* test is consistent with international instruments in so far as it protects non-religious or religious minorities from coerced support for or participation in majoritarian religions, and protects various religious communities from undue intrusion or regulation by the state. The *Lemon* test goes further than international instruments, however, in requiring a necessary “secular” purpose for a state law or policy. The key to international religious liberty is not the secular nature of the law but the freedom of each individual to accept or reject the religions that are available.

Moreover, the realm of education—where parental religious rights and preferences receive especially strong protection—is not the ideal place for undue zealotry in application of disestablishment values. To be sure, the international instruments would not countenance any more than the First Amendment coerced religious exercises in school classrooms—such as mandatory participation in prayers, pledges, confessions of faith, Bible reading, and the like—however strong the countervailing parental preferences. But the constitutional purging of tax-supported public schools of virtually all religious symbols, texts, and traditions, in favor of purportedly neutral and secular tropes, stands in considerable tension with international principles of religious equality and of parental religious rights. It also fails to recognize what the international instruments have long recognized—that peaceable religious, non-religious, and anti-religious “thought, conscience, and beliefs” are all “religious” and are all deserving of religious liberty protection.

⁷⁴ See a detailed summary of these cases in my *Religion and the American Constitutional Experiment*, ch. 8.

⁷⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test was used most recently by the plurality opinion of Justice Souter in *McCreary County v. ACLU*, ___ U.S. ___ (2005), striking down a courthouse display of a Decalogue and other texts with prominent religious language.

Conclusions

The ample vacillations in the Supreme Court's First Amendment cases can be explained, in part, on factual grounds. The application of a sixteen-word guarantee to dozens of diverse and complex issues over the course of a century and more has inevitably led to conflicting decisions. "The life of the law has not been logic: it has been experience," Oliver Wendell Holmes reminds us.⁷⁶ The American law of religious rights and liberties is no exception.

These vacillations, however, also betray the failure of the Court to develop a coherent framework for interpreting and applying the First Amendment. The Court has tended to rely too heavily on its mechanical tests of free exercise and establishment and to use these tests as substitutes, rather than as guides to legal analysis. The Court has tended to pit the First Amendment establishment and free exercise clauses against each other, rather than treating them as twin guarantees of religious rights and liberties. The Court has been too eager to reduce the religion clauses to one or two principles, thereby often ignoring the range of interlocking first principles of the American experiment in religious liberty. The accumulation of these interpretive shortcomings, particularly in the past two decades, has brought the American experiment to a state of acute crisis—both of law and of faith in the law.

The Court needs to develop a more integrated approach to First Amendment questions that incorporates the first principles of religious rights and liberties on which the American experiment was founded and integrates them into the resolution of specific cases. Such a framework is easy enough to draw up on the blackboard or in the pages of a treatise—and a number of important integrative methodologies and frameworks have been offered of late.

Resort to international legal and human rights norms of religious liberty might seem a rather unpromising path to developing a more integrated American constitutional law of religious liberty. Not only have Americans been better at exporting their constitutional ideas and institutions than importing those of other peoples. But the budding international norms on religious liberty seem, by conventional wisdom, to have rather little that is worth importing. The canon of applicable international human rights norms has developed only slowly and sporadically since World War II. Very few international cases are at hand, and those that have been reported do not follow the conventional form and format of American constitutional law. International human rights norms would thus seem to be better left outside the ambit of First Amendment inquiry.

To keep this parochial veil drawn shut, however, is to deprive the American experiment of religious liberty of a rich source of instruction and inspiration. There are more golden rules of religious liberty in the mountains of international human rights documents than was traditionally thought. A number

⁷⁶ Oliver Wendell Holmes Jr., *The Common Law* (Boston, 1881), 1.

of national and international tribunals, especially in Europe,⁷⁷ are now mining these documents with new alacrity in discerning the meanings and measures of religious liberty for the twenty-first century. Both United States Congress and the United States Supreme Court have begun to consider international and comparative legal sources in defining and adjudicating other fundamental rights claims.⁷⁸ It is time to cast American laws of religious liberty in international perspective as well.

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⁷⁷ See, e.g., Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (New York/Cambridge, 2005); Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (New York/Oxford, 2001); Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge/New York, 1997).

⁷⁸ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003) and analysis in Thomas Alexander Aleinikoff, "Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution," *Texas Law Review* 82 (2004): 1990.

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