Religious Law and Religious Courts as a Challenge to the State: Legal Pluralism in Comparative Perspective

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Religiöses Recht und religiöse Gerichte als Herausforderung des Staates: Rechtspluralismus in vergleichender Perspektive

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National Report United States of America: Religious Law and Religious Courts as a Challenge to the State

*Joel A. Nichols and John Witte, Jr.**

A. Introduction

The United States Supreme Court famously said in *Zorach v. Clauson* in 1952, "We are a religious people, whose institutions presuppose a Supreme Being."[1] It seems inconceivable that today's Supreme Court would make such a statement in 2016, even though it would adhere to some of the principles of that case, including that there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[2] The Court has continued to show strong deference to legislative actions that provide free exercise and liberty of conscience protection to individuals, and has carved out strong constitutional and statutory interpretation protections for religious groups, particularly in the past five years. The Court has insisted that all layers of government entities refrain from "establishing" a single religion by coercing nonbelievers, directly spending government funds on religion (unless done equally with non-religious groups), or favoring one religion over another. It has, however, permitted, and sometimes even required that religious parties have equal access to forums, facilities, and funds made available to non-religious parties.

At the same time, while few would contend in the extreme that the government should be "hostile" to religion (in the language of *Zorach*), political support for religious freedom has come under severely increasing pressure re-

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[1] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[2] Ibid. 314.

cently. While there was overwhelming political support for religious rights 25 years ago, in recent years several state legislatures have succumbed to lobbying and media pressure and scrapped their new legislative religious freedom acts or have limited their existing religious liberty acts.[3] There are many causes for this change of legislative heart. The horrors of 9/11, Fort Hood, and the bloody and costly wars against Islamist terrorism have renewed traditional warnings about the dangers of religious extremism that can come from too much religious freedom. In 2006, *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.[4] The Catholic Church was rocked by an avalanche of news reports and lawsuits about the pedophilia of delinquent priests and cover-ups by complicit bishops – all committed under the thick veil of religious autonomy that these religious freedom statutes protected.[5] Evangelical megachurches faced 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.[6]

Even bigger challenges of late have come with the culture wars between religious freedom and sexual freedom.[7] 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 solemnize their wedding? Or a county clerk asked to give them a marriage license? 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? May a religious organization 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

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[3] See, for example, *Laycock*, *Douglas*, Religious Liberty and the Culture Wars, University of Illinois Law Review (2014), 839 (839 et seqq.).

[4] *Henriques*, *Diana B.*, In God's Name, New York Times, October 8–11, 20, December 10, 2006. See further *Henriques*, *Diana B./Lehren*, *Andrew W.*, Religious Groups Reap Federal Aid for Pet Projects, New York Times, May 13, 2007; *Henriques*, *Diana B./Lehren*, *Andrew W.*, Federal Grant for a Medical Mission Goes Awry, New York Times, June 13, 2007.

[5] See, for example, *Hamilton*, *Marci A.*, Justice Denied: What America Must do to Protect its Children, 2008.

[6] See, for example, Press Release, Senator *Grassley*, *Chuck*, Grassley Seeks Information From Six Media-based Ministries, November 6, 2011, http://www.grassley.senate.gov/news/news-releases/grassley-seeks-information-six-media-based-ministries; *Montague*, *John*, The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption, Cardozo Law Review 35 (2013), 203 (203 et seqq.).

[7] See overviews in *Laycock* (n. 3), 839 et seqq.; *Berg*, *Thomas C.*, What Same-Sex Marriage and Religious-Liberty Claims Have in Common, Northwestern Journal of Law and Social Policy 5 (2010), 206 (206 et seqq.); *Anderson*, *Ryan*, Truth Overruled: The Future of Marriage and Religious Freedom, 2015.

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?[8]

In addition to a waning political consensus in favor of religious liberty, a number of legal scholars have challenged the idea that religion is special or deserving of special constitutional or legislative protection.[9] Even if this idea existed in the eighteenth-century founding era, they claim, it has become obsolete in our post-establishment, post-modern, and post-religious age. Religion is just too dangerous, divisive, and diverse in its demands to be accorded special protection. Instead, they contend, religion should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. It should be treated as just another form of expression that must play by the rules of rational democratic deliberation just like everyone else.

There is some tension between the U.S. Supreme Court's case law on religious liberty and these growing criticisms in the political and academic realms. Overall, most courts today would not verbalize (and perhaps not even recognize) statements like that in *Zorach*. And the facts confirm that a shared notion of America as a "religious people" may be waning, certainly to the extent that means that there is a shared Christian (let alone Protestant) basis for American

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[8] For a few examples, see Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015), cert. denied, 136 S. Ct. 23 (2015) (ruling against county clerk who refused to issue same-sex marriage licenses); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (finding that a for profit company could assert religious liberty rights in conscientious opposition to providing certain kinds of contraceptive care to employees); Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014) (ruling against photographer who claimed religious exemption from state public accommodation statute with respect to same-sex weddings).

[9] See, especially, *Leiter*, *Brian*, Why Tolerate Religion?, 2013, with critique in *McConnell*, *Michael W.*, Why Protect Religious Freedom?, Yale Law Journal 123 (2013), 770 (770 et seqq.), and *Rienzi*, *Mark L.*, The Case for Religious Exemptions – Whether Religion is Special or Not, Harvard Law Review 127 (2014), 1395 (1395 et seqq.). See also *Schwartzman*, *Micah*, Religion as a Legal Proxy, University of San Diego Law Review 51 (2014), 1085 (1085 et seqq.); *Schwartzman*, *Micah*, What if Religion is not Special?, University of Chicago Law Review 79 (2012), 1351 (1351 et seqq.); *Schragger*, *Richard/Schwartzman*, *Micah*, Against Religious Institutionalism, Virginia Law Review 99 (2013), 917 (917 et seqq.); *Schragger*, *Richard/Schwartzman*, *Micah*, Lost in Translation: A Dilemma for Freedom of the Church, Journal of Contemporary Legal Issues 21 (2013), 15 (15 et seqq.), with rejoinders by *Berg*, *Thomas C.*, Secular Purpose, Accommodations, and Why Religion is Special (Enough), University of Chicago Law Review Dialogue 80 (2013), 24 (24 et seqq.), and *Koppelman*, *Andrew*, Religion's Specialized Specialness, University of Chicago Law Review Dialogue 80 (2013), 71 (71 et seqq.). For an overview of the recent academic literature, see *Brady*, *Kathleen* A., The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence, 2015, and *Koppelman*, *Andrew*, Defending American Religious Neutrality, 2013. For a good recent sampling, see Symposium, Is Religion Outdated (as a Constitutional Category), San Diego Law Review 51 (2014), 971 (971 et seqq.).

legal culture. There has been movement away from American institutions operating on the presumption of a "Supreme Being" as well, since that seems unnecessary and, to some, impermissible as a constitutional presumption. But this does *not* mean that courts fail to protect religious liberty; in fact they are doing so in stronger ways than ever, especially for religious organizations, but for religious individuals as well.[10]

These twin movements away from recognizing religion as a basis for public life and decision-making but strongly enforcing religious rights for organizations and individuals has also led to an increased discussion about the place of alternative dispute resolution by religious groups and individuals. Academics and politicians in the United States and the American public generally would all be loathe to call these "religious courts," since that conjures images of differing laws for different citizens and undermines the strong U.S. notion of "equal justice for all" under law. But some religious citizens are beginning to press for the acceptance of such faith-based arbitration, and courts are beginning to have to decide whether to enforce their decisions on an equal basis with "secular" arbitrations or if there is something different about them that merits disfavor.

In this chapter, we outline this changing landscape of religion and religious liberty protections within U.S. law. *Part B.* briefly describes the sociological status of religious identity in the United States, both historically and at present. *Part C.* discusses the underpinnings of religious liberty in the United States, focusing upon the current legal structures under which religious liberty claims are addressed. *Part D.* examines more carefully the role of religious groups and their rights, and then turns to a specific application of marriage and divorce law and "anti-Shari'a statutes." Finally, *Part E.* concludes by looking broadly at some areas of jurisdictional overlap between religious groups and individuals, on the one hand, and those of the state and civil law, on the other. We conclude optimistically, believing that America's history and commitment to religious liberty ultimately provide guidance and reason for hope even as religious liberty is under increasing pressure in the 21st century.[11]

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[10] For organizations and Supreme Court cases, see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012), and Burwell, 134 S. Ct. 2751. For individuals, see, especially, Religious Freedom Restoration Act of 1993; Pub. L. No. 103–141, 107 Stat. 1488 (1993); Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 (2000); state level variations of the same; and court cases like Holt v. Hobbs, 135 S. Ct. 853 (2015) (ruling that prison grooming policy that prevented inmate from growing half-inch beard violated RLUIPA), and EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (upholding a Civil Rights Act Title VII claim by a Muslim woman who wore a head scarf and was denied accommodation by a private retail employer).

[11] Compare *Horwitz*, *Paul*, The Hobby Lobby Moment, Harvard Law Review 128 (2014), 154 (154 et seqq.).

B. America's current religious landscape

The United States has long been a predominantly Christian nation, from the time of the settling of the first colonies in the 1500s until today. This has not meant uniformity in views, of course, as religious pluralism was a sociological fact even in the earliest days. Initially, pluralism and religious freedom were often limited to a variety of different Protestant Christian denominations. Increasingly, by the later 19th and 20th centuries, religious pluralism was becoming more robust – encompassing Catholics, Orthodox Christians, Jehovah's Witnesses, Jews, Muslims, and a host of others as well. These minority groups have often claimed religious rights in federal court cases, and by the beginning of the 20th century federal courts became receptive to their claims. In the 21st century, America's religious landscape continues to pluralize to include more non-Christian religions even while remaining predominantly Christian – although a fast-growing portion of Americans self-identify as "unaffiliated" with respect to religion.[12] Nonetheless, Americans continue to claim religious affiliation at a higher rate than most Western industrialized countries and attend religious services more frequently than in other countries.[13]

I. Historical landscape

When the European settlers were arriving in the New World, religious upheaval was still rattling the Old World. Spanish Catholic explorers were in Florida during the 1500s (before venturing into New Mexico, California, and Mexico not many years later). Anglican settlers came to Virginia in the very early 1600s and Puritan dissenters from the Church of England arrived in Massachusetts in 1620, with Calvinist refugees from throughout Europe following close behind.[14] Meanwhile, much of northern Europe remained locked in bitter warfare between and among Catholic and Protestant forces that finally ended in Europe only in 1648 with the Peace of Westphalia.

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[12] See, for example, Pew Research Center, America's Changing Religious Landscape (2015); http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf.

[13] *Berger*, *Peter L./Davie*, *Grace/Fokas*, *Effie*, Religious America, Secular Europe?: A Theme and Variation, 2008, 12: "The American picture differs sharply from the European one. Both behavioral and opinion indicators are much more robustly religious."; *Caplow*, *Theodore*, Contrasting Trends in European and American Religion, Social Analysis 46 (1985), 102 (102 et seq.) (offering data which reveal a greater "religious vitality" in the United States than in Europe).

[14] See *Holifield*, *E. Brooks*, Era of Persuasion, American Thought and Culture, 1521–1680, 1989, and *Gaustad*, *Edwin Scott*, Historical Atlas of Religion in America, rev. ed. 1976, chap. 1.

The European checkerboard of competing religious and political groups was projected, in part, onto the New World.[15] Over time, the British eventually assumed formal control over the Atlantic seaboard, eventually stretching south to the Carolinas and Georgia and continuing through the Middle and New England colonies as well. The royal charters of all these colonies confirmed the rule of English laws and liberties, including its ecclesiastical laws. By the time of the American Revolution of 1776, there were Anglican churches in every American colony, and every American colony was under the formal jurisdiction of the Bishop of London and the Archbishop of Canterbury.

Colonial America was not only a frontier for European establishments, but also a haven for dissenters. Providence Plantation, established in 1636, was famously "a lively experiment [for] full liberty in religious concernments."[16] Maryland and Pennsylvania similarly undertook to permit religious liberty and pluralism in ways outside what was permitted elsewhere in the 1700s. Together, the Anglican establishment combined with the influx of dissenters led to a high level of religiosity among the colonists and by the mid-1700s non-Anglican churches substantially outnumbered Anglicans in spite of continued establishment.

Despite experimentation with religious liberty and the permissibility of dissent in matters of conscience, early America was overwhelmingly Christian – and nearly all Protestant.[17] While certainly a simplification, it is fair to generalize that the United States in the late 1700s "emerged from the generally Christian actions of generally Christian people [who] bequeathed Christian values, and a Christian heritage, to later American history."[18] This generic Protestant Christian heritage continued in America, as illustrated by the famous sur-

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[15] See *Gaustad*, *Edwin Scott*, Faith of the Founders: Religion and the New Nation 1776–1826, 2004, 12 et seqq.

[16] "Plantation Agreement of Providence – 1640" and "Charter of Rhode Island and Providence Plantations- 1663", in: Thorpe, Francis Newton (ed.), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, 1909, 6:3205–3206, 3211–3213.

[17] For example, in 1750 there were only 30 Catholic churches compared to more than 1400 other Christian churches. *Gaustad* (n. 14), App B. No non-Christian groups are even listed. See also *Hutson*, *James H.*, Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic, 2003, 111: "The white population of the United States in 1790 has been estimated at 3,173,000. Of this number, a thousand or so were Jews who lived in cities along the Atlantic seaboard. Muslims, Hindus, and Buddhists, could be counted on the fingers of one hand." (citing *Gemery*, *Henry*, The White Population of the Colonial United States, in: Haines, Michael R./Steckel, Richard H. (eds.), A Population History of North America, 2000, 143 (150)).

[18] *Noll*, *Mark A./Hatch*, *Nathan O./Marsden*, *George M.*, The Search for Christian America, 1983. See also *Bonomi*, *Patricia U.*, Under the Cope of Heaven: Religion, Society, and Politics in Colonial America, 2003.

prise of Alexis de Tocqueville concerning the prominence of religion in American life during his visit in the 1830s.[19]

II. Current sociological trends

While the level of religious affiliation and activism in the United States has remained high compared to other Western industrialized countries,[20] the most recent research reveals "a remarkable degree of churn" in the religious landscape.[21] The populace still overwhelmingly self-identifies as Christian, but Christians have lost a significant percentage of members: In 2007, 78 % of U.S. adults identified as Christian, but in 2014 the number decreased to approximately 71 %.[22] The decline extends across both Protestants and Catholics. Catholics decreased from 23.9 % in 2007 to 20.8 % in 2014. Protestants decreased from 51.3 % in 2007 to 46.5 % in 2014, with a more pronounced decrease among mainline Protestants. As a result, Evangelical Protestants are now the clear majority among Protestants: "The evangelical protestant tradition is the only major Christian group in the survey that has gained more members than it lost through religious switching."[23] The major change in the U.S. religious landscape is the growth in adults who identify as "unaffiliated" – with an increase from 16.1 % in 2007 to 22.8 % in 2014.[24] There has also been modest growth among non-Christian faiths as nearly 6 % of U.S. adults self-identify as affiliated with non-Christian faiths, up from 4.7 % in 2007. The most pronounced gains in non-Christian faiths are among Muslims (0.4 % up to 0.9 %) and Hindus (0.4 % to 0.7 %), but the largest non-Christian faith remains Jewish (1.9 % in 2014). Much of the growth in non-Christian faiths comes from immigration. Religious "switching"

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[19] *Tocqueville*, *Alexis de*, Democracy in America, trans. and ed. Harvey C. Mansfield and Delba Winthrop, 2000.

[20] *Berger/Davie/Fokas* (n. 13), 12; Pew Research Center, The American-Western European Values Gap (2011), http://www.pewglobal.org/files/2011/11/Pew-Global-Attitudes-Values-Report-FINAL-November-17-2011-10AM-EST.pdf.

[21] Pew Research Center (n. 12). See also Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey (2008), http://www.pewforum.org/files/2013/05/report-religious-landscape-study-full.pdf.

[22] Pew Research Center (n. 12). The remaining statistics are from the same study. They are mirrored, in large part, by other research. See, for example, *Newport*, *Frank*, Three-Quarters of Americans Identify as Christian, Gallup Poll, December 24, 2014, http://www.gallup.com/poll/180347/three-quarters-americans-identify-christian.aspx.

[23] Pew Research Center (n. 12), p. 13.

[24] "Unaffiliated" does not necessarily mean irreligious, since this category includes those who describe their religious affiliation as "nothing in particular" (15.8 % in 2014) as well as agnostic (4.0 % in 2014) and atheist (3.1 % in 2014). Of those responding "nothing in particular," 8.8 % said that religion was not important to them but 6.9 % said that religion was important to them but they were just unaffiliated. Pew Research Center (n. 12), p. 10, p. 14.

has led to gains only for Evangelical Protestants, as other Christian groups lost adherents from individuals who were raised in a religious faith but now identify with no religion.[25]

Alongside their claimed religious affiliation, a high percentage of Americans claim to attend religious services frequently. More than half say they attend monthly, and 41 % say they attend weekly or every other week.[26] Mormons report the highest weekly attendance (75 %), with Protestants, Muslims, and Catholics all reporting strong weekly attendance also (53 %, 50 %, and 45 % respectively).[27]

While the numbers regarding religious affiliation and religious service attendance remain quite high relative to other countries (even if there is a decline from historical numbers), social scientists caution that self-reported attendance in particular may be inflated.[28] Memory lapses and, more importantly, social desirability pressures to answer in a particular way are likely to influence the results.[29]

III. Religious courts, religious decision-making, and religious norms in the civil law

The high levels of religious affiliation and activism in the United States, however, did not lead to the development of a series of church or religious courts. The early modern English church courts were subjects of bitter complaint among many Protestant dissenters in England who emigrated to America, and from the colonial times onward, there were no formally recognized church courts in the United States, even in the Anglican south.[30] In the 18th century, there was some talk of bringing an Anglican bishop to the colonies, but it never materialized due to the same kind of opposition against an established church

[25] Thus 85.6 % of U.S. adults say they were raised Christian but more than 1/5 of them (19.2 % of all adults) no longer identify with Christianity. Pew Research Center (n. 12), p. 36.

[26] *Newport* (n. 22).

[27] Ibid.

[28] *Wuthnow*, *Robert*, Inventing American Religion: Polls, Surveys, and the Tenuous Quest for a Nation's Faith, 2015. See also *Wuthnow*, *Robert*, In Polls We Trust, First Things, no. 255, August/September 2015, 39 (39–44).

[29] See *Presser*, *Stanley/Stinson*, *Linda*, Data Collection Mode and Social Desirability Bias in Self-Reported Religious Attendance, American Sociological Review 63 (1998), 137 (137 et seqq.); *Hadaway*, *C. Kirk/Long Marler*, *Penny/Chaves*, *Mark*, What the Polls Don't Show: A Closer Look at U.S. Church Attendance, American Sociological Review 58 (1993), 741 (741 et seqq.).

[30] *Nichols*, *Joel A.* (ed.), Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion, 2012; *Nichols*, *Joel A.*, Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community, Vanderbilt Journal of Transnational Law 40 (2007), 135 (135 et seqq.).

in America.[31] After the Revolution, there was no serious discussion given to establishing religious courts for decision-making. Instead, it was simply assumed that that civil courts would have jurisdiction and decide disputes in all spiritual and temporal matters.

One of the main reasons for the absence of church courts has been the significant and persistent Protestant Christian dominance of the population, both in numbers and in mindset and theology. Until the mid-20th century, even Catholics were often discriminated against in American law, as they were outnumbered by Protestants and also viewed skeptically for their allegiance to a foreign authority in Rome.[32] Moreover, the sheer number of non-Christians in the U.S. was low enough throughout most of the 20th century that too little thought was given to accommodating minorities. While legislatures occasionally aided non-majoritarian groups such as conscientious objectors to military service, too often they passed acts that reflected the majoritarian religious beliefs and sometimes disadvantaged religious minorities. When that happened, civil courts increasingly had to step in – striking down religious oaths offensive to Quakers and others, mandatory educational requirements for high school offensive to the Amish, or prayer and Bible reading in public schools offensive to non-Christians and non-believers generally.[33]

Throughout the 19th and deep into the 20th centuries, laws were assumed to reflect the underlying Protestant notion that the civil government had been instituted by God, and government should thus be imbued with Christian notions of morality and good governance. This meant that citizens could and should expect civil laws to align with their Christian morals. When they did not, the civil laws could be changed. A notable example is the institution of federal Prohibition in 1920, whereby the sale and consumption of alcohol were banned. This was the direct result of a long theological and political push that culminated in the passage of the 18th Amendment to the U.S. Constitution.[34] (Notably, Catholics were specifically exempted because of their need to use wine as a sacrament in their worship.) America's experiment with Prohibition was quite short-lived, as the 21st Amendment (1933) repealed the 18th Amendment after only thirteen years. Another example of strong overlap between Protestant norms and civil law is the historical family law permission of divorce on strict "hard fault"

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[31] *Meyerson*, *Michael I.*, Endowed by Our Creator: The Birth of Religious Freedom in America, 2012, 38–40.

[32] *Gaustad* (n. 14), 108–110.

[33] See Torcaso v. Watkins, 367 U.S. 488 (1961); Wisconsin v. Yoder, 406 U.S. 205 (1972); Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[34] See, generally, *Hamm*, *Richard F.*, Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920, 1995; *Okrent*, *Daniel*, Last Call: The Rise and Fall of Prohibition, 2010, 35–53; *Merrill*, *John L.*, The Bible and the American temperance movement: text, context and pretext, Harvard Theological Review 81 (1988), 145 (145 et seqq.).

grounds and the right of remarriage at least for the innocent party.[35] Family law norms, including the introduction of unilateral no-fault divorce, have shifted dramatically since the 1970s and there is no longer alignment between civil law and Protestant norms.

During this time of widespread consonance between Protestant norms and the civil law, some religious courts had nonetheless begun operating quietly and without much interaction with civil courts. The most prominent were the Jewish beth din[36] and Catholic canon law courts, which were deciding matters of divorce, wills, and internal church governance for their voluntary members. Further, a number of Protestant denominations had religious decision-making regimes that would pass judgment on religious matters – typically questions of membership, appropriate books of faith and ways of worship, and the like. Occasionally these decisional regimes would affect secular matters, such as who was the proper holder of a church's property once the local congregation or parish had divided. In those situations appeals (framed as new lawsuits) were often taken to civil courts, and gave rise to a series of U.S. Supreme Court decisions as well as state level decisions on church property.[37] As we discuss below, those church property cases form the basis for current constitutional religious liberty case law regarding group rights.

C. Current legal framework of religious liberty in the United States

I. Essential rights and liberties of religion

Religious liberty in the United States draws upon the insights and experiences of the American colonial and early national founders from the 1600s and 1700s, especially. By the mid to late 1700s, America's founders had ideologically coalesced around what they called the "essential rights and liberties" of religion:[38] (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) disestablishment,

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[35] *Witte, John, Jr.*, From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition, 2nd ed. 2012.

[36] *Broyde, Michael J.*, New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute?, in: Nichols, Joel A. (ed.), Marriage and Divorce in a Multicultural Context, 2012, 138 (138 et seqq.).

[37] See, for example, Watson v. Jones, 80 U.S. 679 (1871); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Jones v. Wolf, 443 U.S. 595 (1979).

[38] The phrase is used in several historical documents, but see especially *Williams, Elisha*, The Essential Rights and Liberties of Protestants, 1744.

at least of a national religion. These six principles formed the baseline understanding for the seminal discussions of religious liberty, which culminated in the First Amendment to the U.S. Constitution and various state religious liberty provisions, and they continue to have relevance for modern conceptions of religious liberty as well.

Liberty of conscience, for the founders, protected a person's deepest beliefs. It encompassed the right to private judgment in matters of religion and the right to change one's beliefs. It prohibited discrimination against people because of their religious or conscientious beliefs. And, for some founders, it gave a right of exemption from otherwise applicable laws. *Free exercise of religion* was closely connected to liberty of conscience. Whereas liberty of conscience entitled one to hold and change beliefs, free exercise gave a person the right to act publicly upon one's conscientiously-held beliefs (so long as the action did not unduly encroach upon others).

Religious pluralism was an independent constitutional value from the beginning. The polity and religions alike benefited from a variety of confessional forms of worship, for it both prevented one majoritarian group from oppressing minority groups and also allowed primacy for the power of religious persuasion rather than the power of the sword. Further, religious pluralism meant, for many founders, that a variety of religious structures should flourish. Schools, charities, families, and other civic societies were vital bastions of religion and crucially important to the health of liberty within the nation at the same time. All three of these principles depended upon *religious equality* before the law. For the state to single out any religion for special benefits or burdens would upset the natural plurality of forms of worship and structures of the faithful, and would also impinge upon the conscience and exercise rights of believers.

The founders relied upon the concept of *separation of church and state* both to protect the church from the state as well as the state from the church. Neither could thrive when the two were unduly intermixed. Separation also protected the individual's liberty of conscience from the intrusions of both church and state, since "religion is a matter which lies solely between a man and his God."[39] Finally, for many founders, *disestablishment of religion* was an essential ingredient of religious liberty by foreclosing government from coercively prescribing mandatory forms of religious belief, doctrine, and practice. Disestablishment thus protected liberty of conscience and free exercise of religion, and it further bolstered other key principles by ensuring equality of all religious groups and individuals before the law. To be sure, a number of states maintained religious establishments for some years after a national establishment was formally out-

[39] *Jefferson*, *Thomas*, Letter to the Danbury Baptist Association (1802), in: Washington, H. A. (ed.), The Writings of Thomas Jefferson: Being his Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private 1854, 8:113.

lawed, but the trend was clear by the late 1700s: Disestablishment of religion was the final link in the interlocking chain of the essential rights and liberties of religion.

These six principles remain central to religious liberty today, as they form the intellectual underpinnings for America's modern legal framework for religious liberty. Two dualities form the backbone of that framework – (1) the distinction between constitutional religious liberty protections and statutory religious liberty protections, and (2) the differences between federal (national) protections and state protections. We address these in turn below, with federal constitutional protections at the center since they provide the basis for most U.S. Supreme Court cases, followed by federal statutory protections, and then state constitutional and statutory regimes.

II. Federal legal framework for religious liberty

1. Federal Constitutional protections

The touchstone of the United States religious liberty framework is the First Amendment to the U.S. Constitution. Drafted in 1789 and ratified in 1791, the First Amendment's mere sixteen words provide directly that government shall neither prescribe nor proscribe religion: "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof."[40] This Amendment has given rise to some 225 cases just in the U.S. Supreme Court, to say nothing of the thousands of cases in lower federal and state courts. Since the 1940s, the First Amendment has been the legal norm for actions of state and local governments as well as those of the federal government ("Congress"),[41] and 80 percent of the cases reaching the U.S. Supreme Court since then have addressed state and local issues, with roughly half finding constitutional violations.

Historically, the First Amendment has commonly been broken into two clauses: the Establishment Clause and the Free Exercise Clause. Cases that turn upon the First Amendment invoke one clause or the other, and sometimes both. The Establishment Clause outlaws government prescriptions of religion – actions that unduly coerce the conscience, mandate forms of religious expression, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. The Free Exercise Clause outlaws government proscrip-

[40] U.S. Const. amend. I.

[41] See Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating, via the 14th Amendment, the First Amendment Free Exercise Clause against the states), and Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating, via the 14th Amendment, the First Amendment Establishment Clause against the states).

tions of religion – actions that unduly burden the conscience, restrict religious expression and action, discriminate against religion, or invade the autonomy of churches and other religious bodies. Together, the Establishment Clause and Free Exercise Clause thus provide complementary protections to the first principles of the American experiment – liberty of conscience, freedom of religious expression, equality of plural faiths before the law, and separation of church and state. Further, as discussed below, the First Amendment protects religious groups as well as individual claimants and their consciences.

No establishment of religion. One of the most distinct principles of the American constitutional experiment in religious liberty is the prohibition on governmental establishments of religion. The 1791 First Amendment rejected centuries of tradition of religious establishments at the national level, and by 1833 every state had rejected formal state religious establishments as well. Disestablishment of religion, many American founders argued, was ultimately the best way to ensure that all of the essential rights and liberties of religion were protected. Disestablishment kept government from coercively prescribing forms of religious belief, doctrine, and practice at the cost of the principles of liberty of conscience and freedom of exercise. It kept government from singling out certain religious beliefs and bodies for preferential treatment at the cost of the principle of equality for a plurality of faiths. And it kept government from influencing religious bodies, or from coming under their influence, at the cost of the principle of separation of church and state. In 1947, the Supreme Court repeated these basic principles in holding that the First Amendment Establishment Clause also applied to state and local governments.[42] In more than 50 cases thereafter, the Supreme Court has worked to give concrete meaning and discrete application to this multi-principled guarantee of no establishment of religion.

While it is hard to find a coherent logic and consistency across all the cases, most of the Supreme Court Establishment Clause cases concern three broad issues: religion in public schools; government in religious schools; and the place of religion in public life and policy. *First*, the Court has held that religion has no place in a public school when class is in session but voluntary religious expression by students is permissible before, between, and after classes. To the dismay of some observers, mandatory group prayer and Bible-reading have no foreseeable chance of being reinstated in United States public schools. And to the dismay of others, various religious exercises and practices by the students themselves are not only permissible in public schools, but must often be accommodated. *Second*, the Court has held that the government's role in religious schools must be restricted, but that the government may not absent itself from religious schools entirely. Government may not directly fund religious aspects of religious schools, nor may it become excessively entangled in their establishment

[42] Everson, 330 U.S. 1.

and administration. But students and their parents are firmly protected in their choices to attend religious schools and the students are entitled to a quality education and, usually, to the provision of remedial, disability, and other social welfare services while attending religious schools even if this results in the indirect government funding of the religious education they choose. It is not a violation of the Establishment Clause for a statute to give equal treatment to religious and non-religious schools, parents, students, and teachers in the distribution of general educational benefits and services, nor for the government to facilitate the choice to attend religious schools through tax deducations, scholarships, and even vouchers in some cases.[43] *Third*, the Court has been inconsistent on what role is permitted for religion in public and political life. For example, may government fund, maintain, or display religious texts, ceremonies, and symbols; and may government use religious officials, institutions, or personnel in discharging its political tasks? Overall, while the Court has not been shy about striking down improper public displays or endorsements of religion,[44] it has also shown some deference for the role of the political process and majoritarian beliefs. It has tended to uphold religious displays and practices that have long historical pedigree and that serve historical or civic purposes more than religious ones.[45] It has also permitted religious displays and practices on private property or in non-prominent places on government property and religious displays that are balanced or offset by secular symbols and practices.[46]

Free exercise. While the Establishment Clause prevents the government from dictating particular religious practices and precepts, the Free Exercise Clause protects the individual's "freedom to act" upon conscientiously-held beliefs. In 1940, the Supreme Court made explicit that the Free Exercise Clause embodies several essential rights of religion: It protects "[f]reedom of conscience," the "free exercise of the chosen form of religion," and a "plurality of forms and expressions of faith." States and localities were therefore no more able to restrict religious exercise than was the national government.[47] Upon this

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[43] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Mitchell v. Helms, 530 U.S. 793 (2000); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).

[44] See, for example, McCreary Cty. v. ACLU, 545 U.S. 844 (2005) (striking down Ten Commandments display as unconstitutional when circumstances indicated reasons for the display were religious); Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

[45] Marsh v. Chambers, 463 U.S. 783 (1983) (permitting appointment of legislative chaplains to offer prayers); Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (permitting prayers at opening of town meetings, even if the prayers are sectarian in nature).

[46] See, for example, Van Orden v. Perry, 545 U.S. 677 (2005) (upholding Ten Commandments monument in the context of other memorials); Salazar v. Buono, 559 U.S. 700 (2010) (refusing to force removal of Latin cross that stood alone, on private land, erected to honor fallen American soldiers).

[47] Cantwell, 310 U.S. at 303-4, 310.

basis, federal and state courts assessed government actions that burdened an individual's (or group's) free exercise rights in an exponentially increasing number of cases thereafter.

Many free exercise cases can be explained by placing them into clusters. For example, a large cluster of cases from 1940 to 2015 upheld free exercise (and sometimes free speech) rights to engage in religious worship, proselytism, publication, solicitation, advertising, and other forms of religious expression. Another small cluster of cases from 1963 to 1989 upheld free exercise rights to receive unemployment compensation for employees who were discharged for religious reasons. Yet another series of cases from 1981 to 2002 used the Free Speech Clause of the First Amendment to grant religious claimants equal access to public forums open to other non-religious parties. By contrast, a thin cluster of cases from 1879 to 1990 rejected claims for a free exercise exemption from general criminal laws. A thicker cluster of cases from 1918 to 1971 denied that free exercise rights included conscientious objector status in military matters, leaving such issues to legislation and military regulation. And yet another cluster of free exercise cases from 1982 to 1990 rejected claims to exemptions from taxation, social security, military dress, and prison regulations.

A second, more common way to view the Court's free exercise cases is to focus on the level of judicial scrutiny, or the standard of review that the Court uses to determine the constitutionality of the challenged law. Under rational basis review, a court will uphold a challenged law if: (1) it is in pursuit of a legitimate governmental interest, and (2) it is reasonably related to that interest. This test features high judicial deference to the legislature and other branches of government. On the other end of the spectrum is strict scrutiny review, whereby a court will uphold a challenged law only if: (1) it is in pursuit of a compelling or overriding governmental interest, and (2) it is narrowly tailored to achieve that interest, without intruding on the claimant's rights any more than is absolutely necessary. This test involves close judicial inquiry into the purposes and provisions of the law. Since the 1940s, the Supreme Court has applied the rational basis review test several times, and it has also used an intermediate test occasionally. Beginning with *Sherbert v. Verner* (1963),[48] however, the Court applied strict scrutiny review in a line of free exercise cases. The Supreme Court used this strict scrutiny test in ten cases after 1963, finding for the religious claimant six times and for the government four times.

In *Employment Division v. Smith* (1990), however, the Court formally rejected the strict scrutiny free exercise test and adopted a lower-level scrutiny test instead. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability

[48] Sherbert v. Verner, 374 U.S. 398 (1963).

on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[49] Any law that is neutral and generally applicable is constitutional, said the Court, even if the law substantially burdens a central aspect of the claimant's religion.[50] If a law is not neutral or not generally applicable, however, then government must justify that law by demonstrating that it serves a compelling governmental interest and is narrowly tailored to achieve that interest. Moreover, if the law burdens not only free exercise rights but other fundamental rights, too, the Court will treat it as a "hybrid rights" claim that is sometimes deserving of higher scrutiny.

2. Federal statutory protections

In reaction to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. RFRA's stated purpose was to "restore the compelling state interest test" of *Sherbert* and its progeny.[51] It provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it, "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[52] In *City of Boerne v. Flores* (1997), however, the Supreme Court declared RFRA unconstitutional as applied to the states, subjecting Free Exercise claims against state and local laws to the low-level scrutiny test of *Smith* when reviewed by a federal court. The *Boerne* Court left RFRA intact when used to review federal laws.[53] Federal courts have continued to apply RFRA's strict scrutiny regime to federal laws, and the Supreme Court applied the statute firmly as recently as 2014.[54]

There were two important responses to the *City of Boerne* decision: Congress's passage of another religious liberty act, using a different enumerated Constitutional power, and state level responses. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA protects the rights of religious property owners burdened by zoning and landmark laws, and also protects institutionalized persons in both federal and state-run prisons, hospitals, and similar institutions. It mandates strict scrutiny of both federal and state laws that burden these rights and allows courts to grant

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[49] Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

[50] Ibid. 886 et seq. See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[51] 42 U.S.C. § 2000bb(b)(1) (2012).

[52] 42 U.S.C. § 2000bb-1 (2012).

[53] City of Boerne v. Flores, 521 U.S. 507 (1997).

[54] Burwell, 134 S. Ct. 2751. See also Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006).

exemptions from full compliance with such laws.[55] The Supreme Court has upheld RLUIPA against constitutional challenge,[56] and applied it as recently as 2015 in *Holt v. Hobbs* in favor of a Muslim prisoner.[57] Further, Congress has enacted several other special protections and strict scrutiny regimes for religious claimants, which the pre-*Smith* Court would have made available under the Free Exercise clause. Some of these new statutes echo earlier statutes, like the Civil Rights Act (1964) and its regulations that prohibit religious discrimination by private parties.[58]

III. State constitutional and statutory protections for religious liberty

Because the Supreme Court applied the First Amendment to the states in the 1940s, its provisions operate as a floor for religious liberty. That is, states and localities may not provide *less* protection for free exercise rights nor may they contravene the Establishment Clause.[59] But because of the perceived weakness of *Smith* in the free exercise realm, many states have chosen to provide more protection than that required by the U.S. Constitution. Nineteen states eventually passed their own state RFRAs, modeled on the federal RFRA. Sometimes these are embedded in the state constitution, while other times they are legislative acts. Fourteen more states have judge-made standards akin to RFRAs, under which state courts review state and local government actions that burden religious freedom.

Such state RFRAs, however, have recently been strongly challenged by advocates for sexual liberty and same-sex marriage, who see them as grounds for religious parties to discriminate.[60] This is particularly true if the state RFRA provides more protection than the federal RFRA, and especially if it encroaches on sexual orientation and gender identity rights.[61] In Indiana, for example, a

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[55] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. §§ 2000cc-2000cc-5 (2012).

[56] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[57] Holt, 135 S. Ct. 853.

[58] See, for example, Abercrombie, 135 S. Ct. 2028.

[59] States are permitted to enforce their own stricter versions of no establishment or no funding of religion. See Locke v. Davey, 540 U.S. 712 (2004), and Utah Const. art. 1, § 4 ("No public money or property shall be appropriated for or applied to [religion]").

[60] See *Lund*, *Christopher C.*, Religious Liberty After Gonzales: A Look at State RFRAs, South Dakota Law Review 55 (2010), 466 (466 et seqq.); *Luchenister*, *Alex J.*, A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws, Harvard Law and Policy Review 9 (2015), 63 (63 et seqq.). See generally *Laycock* (n. 3), 839 et seqq.

[61] See, for example, *Nejaime*, *Douglas/Siegel*, *Reva B.*, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, Yale Law Journal 124 (2015), 2516 (2516 et seqq.).

proposed state RFRA caused a national uproar in 2015. On the heels of the legalization of same-sex marriage, the Indiana bill "appeared to be shielding businesses that didn't want to serve gay couples."[62] Businesses threatened to boycott Indiana and the NCAA fretted over how to handle the men's basketball "Final Four" event; a trending Twitter hashtag was #boycottIndiana.[63] Supporters of the law lined up in support of businesses that advocated their stand against same-sex marriage, both through patronage of such business and through crowd-funding efforts. Responding to the political and business pressures and the escalation in the culture war, the Indiana legislature amended the proposed RFRA to explicitly protect sexual orientation and gender identity in the law and alleviate some of the concerns of opponents. That same week, Arkansas's legislature similarly backed down from a more protective state RFRA and amended it to provide that it should be interpreted consistent with the federal RFRA, thereby also defusing political pressures.[64]

In addition to shifting political pressure against stronger statutory religious liberty protections, minority religious groups face increasing pressures. Ironically, a wave of "anti-Shari'a" or "anti-foreign law" statutes has been growing even as these broader religious liberty statutes face pressure. We discuss such laws more in the following section.

IV. Group religious liberty rights

A few additional comments are in order about the place of religious groups in America's religious liberty framework. The best historical understanding affirms that religious entities have the right to be free from undue government in-

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[62] See *Bazelon*, *Emily*, What Are the Limits of "Religious Liberty"?, New York Times Magazine, July 7, 2015, http://www.nytimes.com/2015/07/12/magazine/what-are-the-limits-of-religious-liberty.html.

[63] *Galloway*, *Jim*, Gearing Up for Next "Religious Liberty" Fight, Georgia Business Leaders Look to Indiana, Atlanta Journal-Constitution, October 17, 2015, http://politics.blog.ajc.com/2015/10/17/gearing-up-for-next-religious-liberty-fight-georgia-business-leaders-look-to-indiana/.

[64] *Davey*, *Monica/Robertson*, *Campbell/Pérez-Peña*, *Richard*,, Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts, New York Times, April 2, 2015, http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html?_r=0; *Bazelon* (n. 62); *Cook*, *Tony/LoBianco*, *Tom/Stanglin*, *Doug*, Indiana Governor Signs Amended "Religious Freedom" Law, USA Today, April 2, 2015, http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/; *Trager*, *Kevin/Eady*, *Alyse*, Arkansas Governor Signs New "Religious Freedom" Bill, USA Today, April 3, 2015, http://www.usatoday.com/story/news/politics/2015/04/02/arkansas-religious-freedom-bill/70831330/; *Holpuch*, *Amanda*, Indiana amends religious freedom bill to put an end to discrimination, The Guardian, April 2, 2015, http://www.theguardian.com/us-news/2015/apr/02/indiana-republicans-religious-freedom.

fluence, control, and interference in their internal activities. When religious organizations choose to participate in governmental programs and benefits, they should be allowed to do so equally without the Establishment Clause acting as an obstacle. When they choose to assist in providing social services, and even using government funds, they should be allowed to do so fairly but on their own terms so long as they do not violate the free exercise rights of the users of their services. When they resort to civil courts for resolution of internal disputes, their internal decisions about internal matters should be respected, although general neutral principles of law may be applied provided they do not unduly touch upon religious matters.

Two groups of Supreme Court case law provide context for these principles. The first is a deep well of cases pertaining to church property disputes. Most of the early Supreme Court cases touching religion involved church property disputes, and a series of important decisions through the 20th century built upon those precedents. Two clear yet discordant themes emerge in the church property cases. In one line of cases, the Court has held that religious groups must be treated the same as other legal associations; they are subject to standard legal principles ("neutral principles of law")[65] when resolving disputes. In a second line of cases, the Court has held that religious groups must be treated differently from other organizations, and the courts must diligently avoid deciding matters of disputed doctrine. Courts thus frequently give substantial deference to decisions by internal religious bodies.[66] Most lower courts have converged on neutral principles approaches to decide property disputes within and among religious groups. But the strong norm of judicial aversion to deciding internal religious disputes persists as well and has strongly influenced other areas of religious group rights, especially concerning "internal governance of the church."[67]

The second group of cases is of more recent vintage and flows from that last principle. This line also strongly affirms that the rights of religious groups are grounded in the First Amendment. In 2012, the Court unanimously held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission."[68] The Court also said that the rights of religious organizations were grounded in the Establishment Clause. "Both Religion Clauses bar the government from interfering" with an internal decision of a religious group. The *Hosanna Tabor* case involved a religious school's termination of a former teacher, ostensibly in violation of certain provisions of the Americans with Disabilities Act (a federal nondiscrimination statute). With a nod to the principle of separation of church and state, the Court held that applying antidiscrimination laws

[65] Jones, 443 U.S. 595.
[66] See, for example, Serbian E. Orthodox Diocese v. Miliojevich, 426 U.S. 696 (1976).
[67] Hosanna Tabor, 132 S. Ct. at 702 et seq., 702–703, 707–709 (2012).
[68] Ibid. 706.

to religious organizations would improperly accord "the state the power to determine which individuals will minister to the faithful."[69]

This strong statement of constitutional rights for religious organizations was followed two years later by an even stronger reading of a federal religious liberty statute in favor of a religious group. In *Burwell v. Hobby Lobby* (2014), the Court held that for-profit, closely-held corporations could "exercise" religion for purposes of the federal RFRA. The corporations sought protection from a mandate under the Affordable Care Act (ACA) requiring them to provide certain kinds of contraceptive health coverage to female employees. A divided Court interpreted the intent and text of RFRA to extend religious liberty protection to such corporations, and proceeded to rule in favor of the corporations since the regulation "impose[d] a substantial burden on the [corporations'] ability to conduct business in accordance with their religious beliefs."[70] This strong reading of RFRA, in favor of religious group rights even to the point of covering for-profit corporations, has generated criticism that the Court has gone too far protecting religion at the expense of the "full and equal citizenship" of affected parties.[71]

Overall, the line of cases grounding religious group rights in the Constitution – whether in church property cases or in employment cases like *Hosanna Tabor* – is firmly in accord with America's founding principles of religious liberty. Whether for-profit corporations may exercise religious rights is a more contentious and debatable matter, but overall the notion aligns with the founding principles and also aligns with the strong protections afforded to corporations, partnerships, and many other associations by American statutes and case law today.[72] Indeed, it would be anomalous for the government to give religious groups less protection just because they exercise religious functions. Whether such religious rights should extend further, as adverse third party effects increase or as the "beliefs" of the corporation become more attenuated and harder to ascertain, will present challenging questions going forward.

These two lines of cases make clear that religious liberty claims do not always involve claims by an individual against a government imposition – of swearing an oath, of joining the military, of having to send a child to a public school that has scripture readings or prayers that do not align with one's beliefs. They also

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[69] Ibid.

[70] Burwell, 134 S. Ct. 2751.

[71] *Sepper, Elizabeth*, Reports of Accommodation's Death Have Been Greatly Exaggerated, Harvard Law Review Forum 128 (2014), 24 (30). For criticism in the same vein of Hosanna Tabor, see *Griffin, Leslie C.*, The Sins of Hosanna Tabor, Indiana Law Review 88 (2013), 981 (981 et seqq.).

[72] See *McDonnell, Brett*, The Liberal Case for Hobby Lobby, Arizona Law Review 57 (2015), 777 (777 et seqq.) (discussing how the Hobby Lobby opinion squares well with corporate social responsibility and the notion that corporations can and sometimes do pursue goals other than maximizing shareholder profits).

involve churches and other religious groups who seek to keep their property from a dissident faction, religious schools who want to engage only like-minded believers, voluntary religious student groups who wish to share facilities and funds on an equal basis with non-religious groups, nonprofit social service organizations who seek to serve vulnerable members of society while holding true to their core beliefs, and even for-profit organizations and entities who want to participate in the economic marketplace without sacrificing their convictions. Recognizing that religious liberty extends collectively, to groups and "institutions," is an important part of America's heritage.[73]

D. Anti-Shari'a statutes, faith-based family law, and religious tribunals

Despite the Supreme Court's protection of the rights of religious groups, United States courts do not offer formal legal recognition to religious tribunals or their decisions. A number of religious systems have methods for decision-making and dispute resolution; these vary substantially in their level of sophistication and procedural detail as well as in the size and scope of their decision-making.[74] The most extensive literature covers Jewish courts and their decision-making model. Even though a small percentage of the U.S. population employs these courts, the *beth din* have been held up by some as a model for other religious systems because of their formalized structure and procedures.[75] Christian communities in the United States lack a robust history of enforceable separate decision-making, but there has been some movement in this direction recently, especially regarding arbitration.[76] As Christian communities' political influence

[73] *Horwitz*, *Paul*, Defending (Religious) Institutionalism, Virginia Law Review 99 (2013), 1049 (1052). See his fuller treatment in *Horwitz*, *Paul*, First Amendment Institutions, 2013. See also the nuanced discussion about corporate organizational rights and religion in *Colombo*, *Ronald J.*, The First Amendment and the Business Corporation, 2015, esp. 139 et seqq.

[74] The best overview of existing religious dispute resolution models is *Masci*, *David*/*Lawton*, *Elizabeth*, Applying God's Law: Religious Courts and Mediation in the U.S., Pew Forum on Religion & Public Life, April 8, 2013, http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/.

[75] *Broyde*, *Michael J.*/*Bedzow*, *Ira*/*Pill*, *Shlomo C.*, The Pillars of Successful Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience, Harvard Journal of Racial and Ethnic Justice 30 (2014), 33 (33 et seqq.); *Broyde*, *Michael J.*, Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent, New York Law School Law Review 57 (2012–2013), 287 (287 et seqq.).

[76] *Helfand*, *Michael A.*, Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders, New York University Law Review 86 (2011), 1231 (1231 et seqq.); *Helfand*, *Michael A. (ed.)*, Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism, 2015.

fades and as conservative religious positions are increasingly under pressure,[77] their appetite may grow for establishing more formal adjudication procedures outside the civil system. At present, political debates about faith-based decision-making has centered upon Muslims, but some of the same questions that affect Muslims and their dispute-resolution tribunals may merely be a microcosm of coming challenges.

The best illustration of these cultural tensions can be seen in matters of marriage and divorce and family law. While Protestant Christian norms used to form the foundation for the civil law regarding marriage and divorce, civil law has increasingly diverged from Protestant Christian norms in recent decades. The headline battles so far have been about what *forms* of marriage should be recognized by the state – sometimes over the objection of religious groups, and sometimes at their insistence: traditional versus same-sex marriage, contract versus covenant marriage, monogamous versus polygamous marriage. Emerging battles, however, do not concern merely the *forms* of marriage, but rather the *forums* in which marriage and family cases are adjudicated. What will be the role of faith-based family laws and religious tribunals in our democratic system of government? The question of the legitimacy and authority of such faith-based family law systems is lurking just over the horizon, and Islamic law, in particular, has already become a controversial issue within state constitutional law. Two points merit further attention here. The first concerns the particular challenges faced by Muslims in America, and the second concerns these alternate forums – with family law as the prime laboratory for these issues.

Muslims now "represent the second largest religion in Europe and the third in North America."[78] In the past 15 years, antipathy has grown toward American Muslims and their sophisticated legal system called Shari'a.[79] The tragic events of 9/11, followed by London's 7/7, Fort Hood, the bloody and unpopular wars in Afghanistan and Iraq, and the inhuman and ruthless acts of the so-called Islamic State, all too often shape public perceptions of Muslims.[80] Sometimes this antipathy arises in more generalized ways, such as in the enormous

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[77] *Nichols*, *Joel A.*, Religion, Marriage, and Pluralism, Emory International Law Review 25 (2011), 967 (967 et seqq.).

[78] *Esposito*, *John L.*, Foreword, in: Bukhardi, Zahid H. (ed.), Muslims' Place in the American Public Square, 2004, xi. See also Pew Research Center (n. 12).

[79] See *An-Na'im*, *Abdullahi Ahmed*, Islam and the Secular State: Negotiating the Future of Shari'a, 2008, 267 et seqq. See also *Abou El Fadl*, *Khaled*, Reasoning With God: Reclaiming Shari'ah in the Modern Age, 2014.

[80] See *Peek*, *Lori*, Behind the Backlash: Muslim Americans after 9/11 (2011), 16: "In the aftermath of the terrorist attacks, Muslims experienced a dramatic increase in the frequency and intensity of these hostile encounters." See also *Uddin*, *Asma T.*, American Muslims, American Islam, and the American Constitutional Heritage, in: Hertzke, Allen D. (ed.), Religious Freedom in America: Constitutional Roots and Contemporary Challenges, 2015, 224 (224 et seqq.).

public outcry in 2010 about the possible construction of a mosque near the site of the World Trade Center attacks.[81] And sometimes it plays out in the law – including disproportionately adverse rulings against Muslims in free exercise cases[82] and, more pointedly, through the recent swath of "anti-Shari'a" laws at the state level.

In November 2010, Oklahoma became the first state to pass an anti-Shari'a law, with its popularly-ratified "Save Our State" Amendment to the Oklahoma Constitution. Its text specifically disallowed courts from using "international law or Sharia law." The amendment never went into effect, because it was promptly enjoined by a federal court and eventually struck down for violating the Establishment Clause, since it overtly discriminated against a particular religious law.[83] Several other states have stepped into the fray with proposed laws, although the text of these laws now omits specific mention of Shari'a law in favor of banning "foreign law" in general. Many proponents still openly reference these as "anti-Shari'a" laws. Ten states have passed variants of anti-Shari'a statutes, and proponents continue to push them in a few more (although bills have been introduced and defeated in many U.S. states).[84] Some of these anti-Shari'a statutes apply only to individuals, not businesses; some specifically limit their application to family law matters; and some insist that no "provisions of any religious code" may be enforced.[85] Most state laws have been passed as legislative enactments, but others, like Alabama (and Oklahoma, to start the trend), have been added by statewide referendum as state constitutional amendments.

These blatantly discriminatory anti-Shari'a laws are largely "a solution in search of a problem."[86] Even the strongest advocates of these laws cannot cite American cases where references to Shari'a "conflict with the Constitution and state public policy."[87] The anti-Shari'a campaign in the American states is trans-

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[81] See, for example, *Goodstein*, *Laurie*, Across Nation, Mosque Projects Meet Opposition, New York Times, August 8, 2010.

[82] *Sisk*, *Gregory C./Heise*, *Michael*, Muslims and Religious Liberty in the Era of Post 9/11: Empirical Evidence from the Federal Courts, Iowa Law Review 98 (2012), 231 (231 et seqq.).

[83] See Awad v. Ziriax, 670 F.3d 1111, 1119 (10th Cir. 2012), aff'g 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

[84] Alabama, Arizona, Florida, Kansas, Louisiana, North Carolina, Oklahoma, South Dakota, Tennessee, and Washington. See Alabama Const. art. I, § 13.50; Ariz. Rev. Stat. Ann. §§ 12-3102 to 3103; 2014 Fla. Laws ch. 2014-10; Kan. Stat. Ann. §§ 60-5101 to 5108; La. Rev. Stat. Ann. § 9:6001; N.C. Gen Stat. Ann. §§ 1-87.12 to 87.20; Okla. Stat. Ann. tit. 12, § 20; S.D. Codified Laws § 19-8-7; Tenn. Code Ann. §§ 20-15-101 to 106; Wash. Rev. Code. Ann. § 2.28.165.

[85] See, respectively, Arizona, Kansas, Oklahoma, Tennessee; Florida and North Carolina; and South Dakota.

[86] *Franck*, *Matthew J.*, Bench Memos: A Solution in Search of a Problem, National Review Online, June 15, 2012, http://www.nationalreview.com/benchmemos/303028/solution-search-problem-matthew-j-franck.

[87] Center for Security Policy, Sharia Law and American State Courts: An Assessment of State Appellate Cases (2014), p. 8. For more detailed criticism of this document and the speci-

parently discriminatory in its effort to single out Muslims and their laws for special restrictions. American courts have long maintained that, if a contract or arbitral decision with Shari'a or other foreign law provisions violates public policy, an American court will not enforce it. Many of the examples cited by supporters of anti-Shari'a laws are cases that maintain this boundary or that simply mention "Shari'a" somewhere in the opinion. In addition, the Supremacy Clause of the United States Constitution, which renders the Constitution as the supreme law of the land and supersedes any other law in conflict, operates as a clear backstop for the wrongful imposition of foreign or religious law. The anti-Shari'a legislation in place in the states today is unnecessary, harmful, and often unconstitutional.

One of the drivers behind the anti-Shari'a laws is a concern about family law issues.[88] Minority religious groups struggle with the intersection of civil and religious law regarding marriage and divorce when their faith norms are not aligned with the civil law, and they may gravitate toward dispute resolution within their own religious communities. This has been true for many years with the Jewish court (*beth din*) regarding marriage and divorce, especially within New York. It has also been true in less visible ways for the Catholic Church and its canon law of marriage and annulment (and lack of availability of divorce).[89] Conservative Protestant Christians, too, face increasing tensions, especially with the strong cultural movement on same-sex marriage norms.[90] But the political lens is trained squarely on Muslims and their "Shari'a arbitration tribunals" right now.[91] Even though arbitration is widely available as an alternative to civil court dispute resolution generally, and even though it is broadly lauded in many circles (especially for business disputes), it quickly becomes controversial when it involves religion. This is doubly true when the religious arbitration involves family law issues and Islam.

Currently, marital parties in America may agree in advance to arbitrate any marital dissolution disputes rather than litigate them. That choice of forum provision in a prenuptial agreement is typically enforceable. But this turns quite

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fic cases it mentions, see *Witte, John, Jr./Nichols, Joel A.*, Who Governs the Family? Marriage and Divorce as a New Test Case of Overlapping Jurisdictions, Faulkner Law Review 4 (2013), 321 (321 et seqq.).

[88] See, for example, *Halloran McLaughlin, Julia*, Taking Religion Out of Civil Divorce, Rutgers Law Review 65 (2013), 395 (395 et seqq.).

[89] *Broyde/Bedzow/Pill* (n. 75), 33 et seqq.; *Broyde, Michael J.*, Faith-Based Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society, Chicago-Kent Law Review 90 (2015), 111 (111 et seqq.). See generally *Nichols*, Marriage and Divorce in a Multicultural Context, (n. 30).

[90] *Nichols, Joel A.*, Religion, Family Law, and Competing Norms, in: Michael A. Helfand (ed.), Negotiating State and Non-State Law, 2015, 197 (197 et seqq.).

[91] See *Quraishi-Landes, Asifa*, Rumors of the Sharia Threat are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms, New York Law School Law Review 57 (2012–2013), 245 (245 et seqq.).

controversial if and when private parties choose to apply Islamic or other religious law – or even if they choose to have civil law applied by a religious arbitrator. Islamic law grants a husband more rights to initiate divorce than a wife, has particular rules that favor the father in child custody, has its own distinct methods of property division through use of the *mahr* (a bridal gift or dower), and may even permit polygamy, depending on the school of interpretation and the context.[92] These themes run counter to many civil state priorities.

This tension between religious arbitration councils and civil courts has not yet come to a head in the United States, but both Canada and Great Britain have been steeped in this controversy in recent years.[93] In Ontario, for example, Christians, Jews, and Muslims have submitted their personal disputes to religious arbitration for years, but the government commissioned the former Attorney General to study the issue when an outspoken imam began publicly advocating in 2003 for a more formal procedure to promote the application of Shari'a to Canadian Muslims in family law matters. The Attorney General's report recommended that Ontario should continue to *allow* religious arbitrations – conditioned upon the implementation of certain safeguards to ensure proper consent and fairness. Nonetheless, in 2005 political leaders removed the legal option of applying any religious principles and insisted that there would be "one law for all Ontarians."[94]

In the United Kingdom, Archbishop Rowan Williams gave a seminal speech on the intersection of civil and religious law in February 2008. He suggested that some sort of "accommodation" of Shari'a by British common law was "unavoidable." For both pragmatic and substantive reasons, he advocated for some sort of "plural jurisdiction," according to which Muslims could choose to resolve family law disputes and some other civil matters either in British courts or in religious arbitration tribunals. His remarks gave rise to a flurry of articles, the vast majority of which were starkly opposed to the idea – including accusations that he was introducing "licensed polygamy,"[95] even though he clearly was not advocating for a wholesale abdication of the state's role in marriage and divorce jurisdiction.

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[92] See *Bhala*, *Raj*, Understanding Islamic Law (Shari'a), 2011, 859 et seqq., 991 et seqq.

[93] See *Macfarlane*, *Julie*, Islamic Divorce in North America: A Sharia Path in a Secular Society, 2012; *Bano*, *Samia*, Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law, 2012.

[94] See *Boyd*, *Marion*, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, 2004; *Yelaga*, *Prithi/Benzie*, *Robert*, McGuinty: No Sharia Law, The Toronto Star, September 12, 2005.

[95] *Williams*, *Rowan*, Archbishop's Lecture, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), in: Ahdar, Rex/Aroney, Nicholas (eds.), Shari'a in the West, 2011, 293 (293 et seqq.). See also *Bennett*, *Catherine*, It's One Sharia Law for Men and Quite Another for Women, The Observer (The Guardian (U.K.)), February 10, 2008: "licensed polygamy".

The situations in Canada and the United Kingdom illustrate the hard but "unavoidable" questions the Archbishop sought to raise. In Canada, while Ontarian civil law is uniform and courts will not enforce family arbitrations that purport to apply religious law, this does not mean that religious arbitrations have ceased. Rather, as Attorney General Boyd later reported, Muslim arbitrations have "merely becom[e] invisible to official law without ceasing operations."[96] And in the United Kingdom, a very high percentage of Muslims already lack alignment between their civil and religious marriages; one study indicated that 27 % of all Islamic marriages in the United Kingdom are not official under English law.[97]

There is no question that arbitration by religious authorities, especially regarding family law matters, would be as controversial in America as it has been in Canada and the United Kingdom. Even more controversial would be for the parties' arbitration agreement to choose the law that governs within that chosen arbitral forum. Having such a choice of law within the arbitration tribunal would make it easier for parties to align their commitments as both religious and political citizens. But such religious arbitration, especially on choice of law matters, would likely be contested by the state, especially if the religious laws were used to displace the state's norms and aspirations for gender equality or the best interest of the child.[98] Whether American courts will treat religious arbitrations of family law matters the same as they treat arbitrations of other matters is still an open question,[99] although the new Uniform Premarital and Marital Agreement Act may signal one more step in this direction.[100]

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[96] *Shah*, *Prakash*, A Reflection on the Shari'a Debate in Britain, Studia z Prawa Wyznaniowego (Studies of Ecclesiastical Law) 13 (2010), 71 (71 et seqq.) (citing *Boyd*, *Marion*, The Past, Present and Future of Arbitration in Religious Contexts: Reflections on Ontario Law in a Comparative Context (lecture, Institute of Advanced Studies, London, U.K., July 10, 2009)).

[97] *Shah-Kazemi*, *Sonia Nûrîn*, Untying the Knot: Muslim Women, Divorce and the Shariah, 2001.

[98] See, for example, Aleem v. Aleem, 947 A.2d 489 (Md. 2008) (disapproving an Islamic religious marital dissolution on public policy grounds).

[99] See *Bambach*, *Lee Ann*, "That Ye Judge With Justice": Faith-Based Arbitration by Muslims in an American Context" (unpublished PhD diss., Emory University, 2014) (on file with author); *Baker*, *Amanda M.*, A Higher Authority: Judicial Review of Religious Arbitration, Vermont Law Review 37 (2012), 157 (157 et seqq.); *Walter*, *Nicholas*, Religious Arbitration in the United States and Canada, Santa Clara Law Review 52 (2012), 501 (501 et seqq.). See also *Ahmed*, *Farrah/Luk*, *Senwung*, How Religious Arbitration Could Enhance Personal Autonomy, Oxford Journal of Law and Religion 1 (2012), 424 (424 et seqq.); *Wolfe*, *Caryn Litt*, Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts, Fordham Law Review 75 (2006), 427 (427 et seqq.).

[100] Uniform Premarital and Marital Agreements Act § 2(5) and cmt. (2012) (providing a narrower definition of premarital agreement in order to avoid, among other considerations, undermining the enforceability of Islamic mahr contracts). See also *Oman*, *Nathan B.*, How

Some of the concerns about arbitration are magnified when applied to a family law context and suggest the need for caution: its general lack of a public process, its lack of a court record or precedent, and its nearly irreversible decisions on appeal. But other concerns with arbitration seem less pressing, especially the usual concern about the potential deference given to "repeat players" in arbitration. And once a First Amendment layer of free exercise and liberty of conscience protection gets added, provided such arbitrations do not violate the no establishment principle, the questions about faith-based family law arbitration become even harder.

Allowing a qualified priest or pastor, rabbi or imam to serve as an arbitrator for parties is an easy case. Allowing the parties to choose the applicable law, even if it is religious law, aligns with the general availability of choice-of-law granted to parties. And refusing to enforce arbitral decisions that venture too far beyond society's accepted norms, even if the decision stems from religious precepts, accords with shared principles and values. But deciding what is "too far" raises novel challenges for courts as they balance religious liberty with equality, uniformity with particularity, and freedom of contract with freedom of conscience.

E. Conclusions

One way to frame the tension between protecting religious liberty while also promoting liberal democratic norms is in terms of "overlapping jurisdictions."[101] This arises when more than one entity claims the authority to proclaim and/or enforce the law pertaining to certain individuals or subject matter. Quite literally, this is a claim of jurisdiction – the power "to declare the law" (*jus dicere*). Religious and political authorities have a long history of jurisdictional overlap in the Western legal tradition, which has carried forward to today.[102]

This notion of "overlapping jurisdictions" includes two broad clusters of issues. One cluster concerns claims of conscientious objection to general laws: May a private citizen refuse to photograph or cater a wedding for someone whose lifestyle or relationships they find religiously objectionable? May a religious organization dismiss or discipline its officials or members because of their

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to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts, Utah Law Review 2011 (2011), 287 (287 et seqq.).

[101] See *DeBoer, Michael J.*, Foreword: Overlapping Jurisdictions, Religion, Conscience, and Fundamental Questions, Faulkner Law Review 4 (2013), 299 (299 et seqq.).

[102] See generally *Berman, Harold J.*, Law and Revolution: The Formation of the Western Legal Tradition, 1983; *Berman, Harold J.*, Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition, 2003; *Witte, John, Jr.*, Law and Protestantism: The Legal Teachings of the Lutheran Reformation, 2002.

sexual orientation or sexual practices, or because they had a divorce or abortion? May a pharmacist refust to fill a prescription for a contraceptive or morning-after pill? May a religious group, in its worship services, use a hallucinogenic plant for sacramental purposes, even if that plant has been regulated generally as an illegal drug? Such newer contests join older cases of conscientious objection to participate in the military, to swear an oath, to work on one's Sabbath or other holy days, or to receive medical treatment.[103] At the heart of all these contests are competing claims between the laws of the individual conscience and the laws of the organized communities of which that individual is a part. Whose law governs in instances of irresolvable dispute: the law of the state, of the religious community, or of the individual's conscience?

A second cluster of issues touching the overlapping jurisdiction of religion and civil law concerns the governance of institutions and subject matter that, by their nature, have both spiritual and secular qualities. Three classic examples are education and schooling; charity and social welfare; and marriage and family life. These are what the Western legal tradition has long called *res publica mixta*, or "mixed public matters." These three examples involve hybrid subject matter and institutions that touch upon both the private and public spheres, and upon both spiritual and secular life. They are arenas where religious and political authorities have long shared (and often contested) jurisdiction, and they remain forums for sharp jurisdictional contests between religious and political officials in the United States.

The most prominent and perennial place of overlapping jurisdiction in the United States has been the realm of education and schooling. Dozens of Supreme Court cases and thousands of lower court cases over the past century have sought to sort out the place of religion in public schools, the place of government in private schools, and the wavering lines between private and public school faculties, facilities, students, programs, and services. A headline case appears every year or two, and the legal and cultural disputes show no signs of abating.[104]

Charity and social welfare are becoming hotter areas of conflict, too. Beginning in the mid-1990s, federal and state social welfare policies shifted from the state-centric programs inaugurated in the New Deal era half a century earlier to new programs that allow religious communities to play a more prominent role in providing charitable relief both at home and abroad. One of the

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[103] United States v. Seeger, 380 U.S. 163 (1965) (conscientious objection to military service); Torcaso v. Watkins, 367 U.S. 488 (1961) (oaths); Sherbert v. Verner, 374 U.S. 398 (1963) (refusal to work on Sabbath); Jehovah's Witnesses v. King Cty. Hosp., 390 U.S. 598 (1968) (per curiam), affirming 278 F. Supp. 488 (W.D. Wash. 1967) (medical treatment/blood transfusions).

[104] See, for example, Ariz. Christian Sch. Tuition Org., 563 U.S. 125; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

new programs called "faith-based initiatives" – government programs that fund religious and other private charities to deliver social welfare and emergency relief services on the government's behalf – is the subject of growing cultural and constitutional battles today.[105]

Finally, as we saw in the previous section, the "mixed" institution of marriage and the family is particularly contentious. For many people, marriage is "more than a mere contract."[106] It is not merely a private contract between two individuals but also an important familial, communal, and even spiritual event. It is not merely an avenue by which the state confers status benefits and burdens on a couple, but also a unique marker of fundamental change in a person's identity and responsibility within his or her community. For many people, the communal and ceremonial dimensions of marriage are more important as a religious matter than a civil matter. For such people, a statement by the state – of either marriage or divorce – is simply not morally weighty or conclusive enough to have binding effect unless it matches their individual conscience or religious community norms.

In all these areas of overlapping jurisdiction, whether concerning individual conscience or in the realm of "mixed institutions," the liberal state faces challenges about how to accommodate religious individuals and groups while remaining cohesive. Can the state have a new multiculturalism that works to decentralize authority and enforcement, as a way to respect individual consciences and minority views, while still having a cohesive social civic unity? Or must multiculturalism (and the state itself) depend upon finding ways to incorporate all those individual consciences and diverse groups *into* the larger society and its decision-making models – and perhaps insist on such incorporation? While not easy, we believe America's commitment to religious liberty and its historical resources provide a steady path that society and the courts can use to work out the answers to such questions.

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[105] See *Monsma*, *Stephen V.*, Pluralism and Freedom: Faith-Based Organizations in a Democratic Society, 2012; *Berg*, *Thomas C.*, Religious Organizational Freedom and Conditions on Government Benefits, Georgetown Journal of Law and Public Policy 7 (2009), 165 (165 et seqq.).

[106] See *Witte*, *John*, *Jr./Nichols*, *Joel A.*, More than a Mere Contract? Marriage as Contract and Covenant in Law and Theology, University of St. Thomas Law Journal 5 (2008), 595 (603–606).