RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2025

FROM *the* EDITOR

Welcome to the June 2025 issue of the *Religious Liberty Law Section Newsletter.*

In 1701, William Penn, the Governor of Pennsylvania, signed what is often referred to as the Pennsylvania *Charter of Liberties*, the first article of which guaranteed a form of religious liberty to all the inhabitants of Pennsylvania. Due in part to its – for that time and place – expansive provision for religious liberty, this *Charter* became one of the most famous of the pre-revolutionary colonial constitutions and remained the governing document of Pennsylvania until the Pennsylvania Constitution was adopted in 1776. The *Charter* remains a landmark in religious liberty history because it represents an early attempt to limit the ability of the government to infringe upon a citizen's right to believe and act in conformance with the citizen's personal religious faith. For this reason, I have chosen select portions of the *Charter of Privileges Granted by William Penn, Esquire, to the Inhabitants of Pennsylvania and Territories October 28, 1701* as this issue's Great Moments in Religious Liberty History.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"Civil liberty can be established on no foundation of human reason which will not at the same time demonstrate the right of religious freedom"

— John Quincy Adams

IN *this* ISSUE

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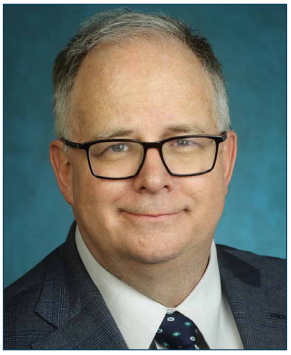
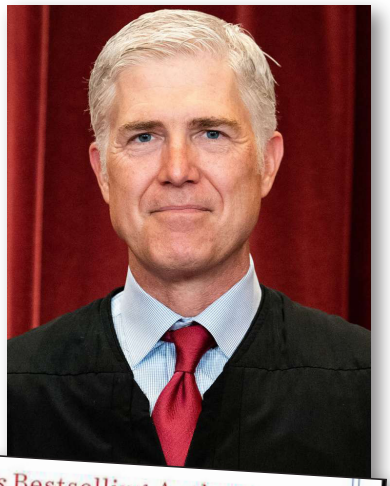
FROM *the* CHAIR



ANDREW PETERSEN is a founding partner in the Tucson law firm of Humphrey & Petersen, PC, where he practices civil defense litigation, primarily in the areas of insurance, municipal and civil rights, professional malpractice, contracts and indemnification, and appellate litigation. He earned his J.D. from the University of North Carolina School of Law at Chapel Hill.

The phrase "Rule of Law" encompasses many elements, and individuals on opposing sides use several of the same concepts, including liberty, equality, fairness, and justice. At a recent conference, I listened to an engaging yet simplistic history of the Rule of Law. What was missing, however, was a discussion of significant contributions over the last 50 years. A valuable starting point may have been Dr. King's distinction between just and unjust laws in his Letter from Birmingham Jail. Also absent were contributions to religious liberty and Madison's notion of the "sacred rights of conscience."

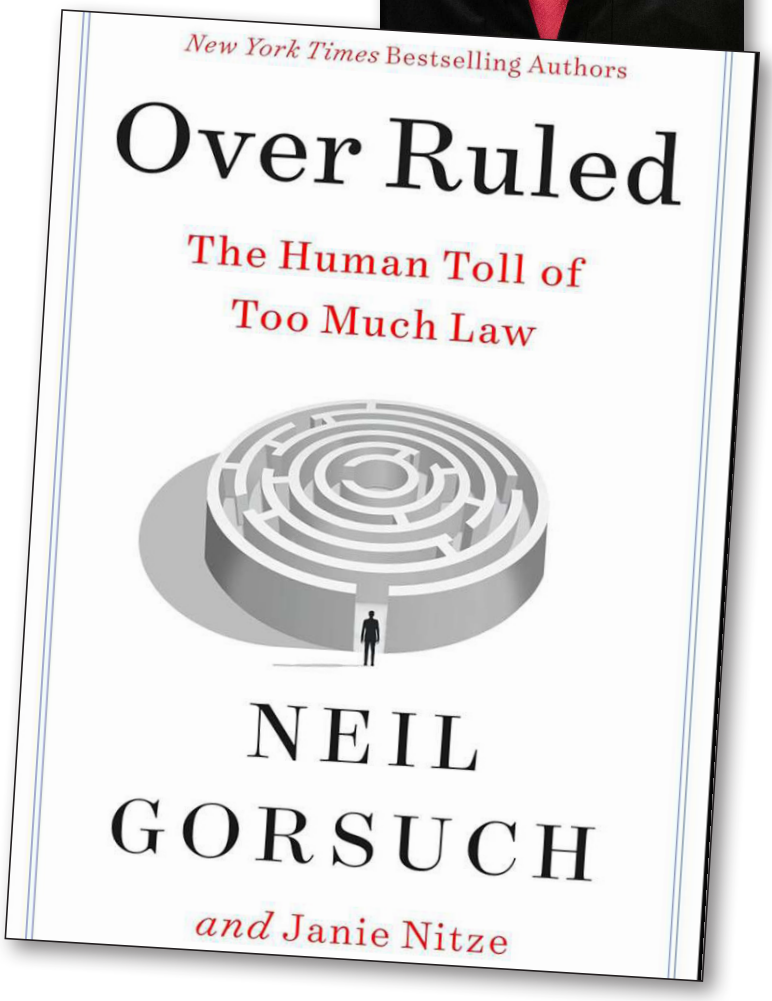


In Justice Gorsuch's book *Over Ruled* he writes about religious liberty: "…[T]he right to think and express religious beliefs is a kind of canary in the First Amendment coal mine. When the spirit of the times breeds censure, it is often the first to go." I would extend that idea and suggest that religious liberty is also a canary in the Rule of Law coal mine. There is a profound moral aspect to the Rule of Law as it strives to protect our sacred rights of conscience and human dignity. Freedom of thought, conscience, and religious liberty are foundational to the Rule of Law. Recognizing this is just the first step.

With gratitude,

Andrew J. Petersen

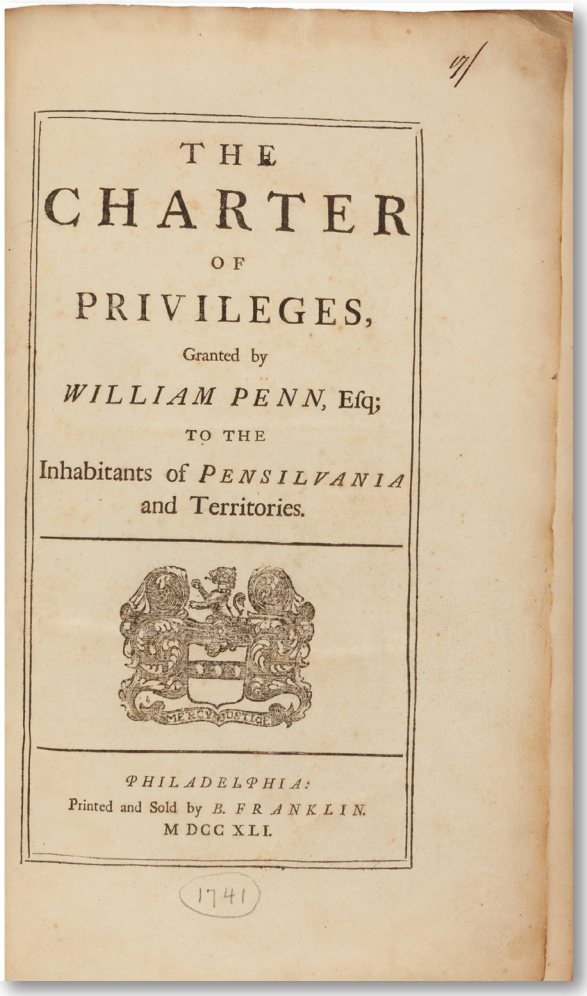
Andrew J. Petersen, Chair



GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Charter of Privileges Granted by William Penn, Esquire, to the Inhabitants of Pennsylvania and Territories, October 28, 1701

Know you, therefore, that for the further well-being and good government of the said province and territories, and in pursuance of the rights and powers before mentioned, I, the said William Penn, do declare, grant, and confirm unto all the freemen, planters, and adventurers, and other inhabitants of this province and territories, these following liberties, franchises, and privileges, so far as in me lies, to be held, enjoyed, and kept by the freemen, planters, and adventurers, and other inhabitants of and in the said province and territories thereunto annexed, forever.


THE
CHARTER
OF
PRIVILEGES,
Granted by
WILLIAM PENN, Esq;
TO THE
Inhabitants of *PENSILVANIA*
and Territories.

PHILADELPHIA:
Printed and Sold by *B. FRANKLIN.*
M DCC XLI.

1741

First

Because no people can be truly happy, though under the greatest enjoyment of civil liberties, if abridged of the freedom of their consciences as to their religious profession and worship.

And Almighty God being the only lord of conscience, father of light and spirits, and the author as well as object of all divine knowledge, faith, and worship, who only does enlighten the minds and persuade and convince the understandings of people, I do hereby grant and declare that no person or persons inhabiting in this province or territories, who shall confess and acknowledge one almighty God, the creator, upholder and ruler of the world; and profess him or themselves obliged to live quietly under the civil government, shall be in any case molested or prejudiced in his or their person or estate because of his or their conscientious persuasion or practice, nor be compelled to frequent or maintain any religious worship, place, or ministry contrary to his or their mind, or to do or suffer any other act or thing contrary to their religious persuasion.

And that all persons who also profess to believe in Jesus Christ, the saviour of the world, shall be capable, notwithstanding their other persuasions and practices in point of conscience and religion, to serve this government in any capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, allegiance to the King as sovereign and fidelity to the proprietary and Governor, and taking the attests as now established by the laws made at Newcastle, in the year one thousand and seven hundred, entitled *An Act Directing the Attests of Several Officers and Ministers*, as now amended and confirmed this present Assembly…

But because the happiness of mankind depends so much upon the enjoying of liberty of their consciences, as aforesaid, I do hereby solemnly declare, promise, and grant, for me, my heirs and assigns, that the first article of this charter relating to liberty of conscience, and every part and clause therein, according to the true intent and meaning thereof, shall be kept and remain without any alteration, inviolably forever.

And lastly, I, the said William Penn, Proprietary and Governor of the province of Pennsylvania and territories thereunto belonging, for myself, my heirs and assigns, have solemnly declared, granted, and confirmed, and do hereby solemnly declare, grant, and confirm, that neither I, my heirs or assigns, shall procure or do anything or things whereby the liberties in this charter contained and expressed, nor any part thereof, shall be infringed or broken. And if anything shall be procured or done by any person or persons contrary to these presents, it shall be held of no force or effect.

In witness whereof, I, the said William Penn, at Philadelphia in Pennsylvania, have unto this present charter of liberties, set my hand and broad seal, this twenty-eight day of October, in the year of our Lord, one thousand seven hundred and one, being the thirteenth year of the reign of King William the Third, over England, Scotland, France, and Ireland, etc., and the twenty-first year of my government.

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Hunter v. U.S. Department of Education***

115 F.4th 955 (9th Cir. 2024)

TITLE IX'S RELIGIOUS EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OR EQUAL PROTECTION.

In this case, 40 LGBTQ students who applied to or attended religious colleges and universities that receive federal funding sued the U.S. Department of Education alleging that the religious institutions discriminated against them on the basis of sex due to their sexual orientation and gender identities by subjecting them to discipline, rejecting their applications for admission, or rescinding their admissions. The plaintiffs claimed that Title IX's exception for religious institutions whose tenets mandate gender-based discrimination violated, among other things, the Equal Protection guarantee of the Fourteenth Amendment as well as the First Amendment's Establishment Clause.

In analyzing, first, the plaintiff's Establishment Clause claim, the court focused on the original meaning and history of the Establishment Clause, in accord with *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), noting that "'[a]ny practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change' does not violate the Establishment Clause."

The plaintiffs' Establishment Clause claim was that Title IX's religious exemption violates the Establishment Clause because the exemption acts as a subsidy to religious institutions.

Because no exemption identical to the Title IX exemption existed at the time of the Founding, the court resorted to historical analogues that might also be said to subsidize religious institutions. In particular, the court made reference to religious property tax exemptions, noting that "[b]oth the statutory exemption to Title IX and property tax exemptions operate as a financial benefit to non-secular entities that similarly situated secular entities do not receive" and that "the history of tax exemptions near the time of the Founding suggests that the statutory exemptions that operate as a subsidy to religious institutions do not violate the Establishment Clause according to its original meaning."

Further, looking next at the uninterrupted practice of religious exemption laws in our nation's traditions (including religious accommodations for prisoners, Title VII religious exemptions, religious property tax exemptions, religious exemptions to the draft, Social Security tax exemptions, and Title VII's religious accommodation provisions), the court found "a continuous, century-long practice of governmental accommodations for religion that the Supreme Court and our court have repeatedly accepted as consistent with the Establishment Clause, demonstrating that religious exemptions have withstood the critical scrutiny of time and political change."

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The court also noted that, practically speaking, if Title IX's religious exemption was unconstitutional, then no religious accommodation could stand, and noted that "[g]iven that the government 'sometimes must' accommodate religion, the [Title IX] exemption does not [as the plaintiffs argued] prefer religion to irreligion for simply carving religious behavior out of the statute."

In conclusion, the court held that "[w]e are not persuaded that this type of facially neutral religious accommodation violates the Establishment Clause."

The court then turned its attention to the plaintiffs' Equal Protection claim, which alleged that Title IX's religious exemption violates the Constitution's equal protection guarantee because it "targets Americans for disfavored treatment based on their sex, including targeting based on sexual orientation and gender identity."

In analyzing the plaintiffs' Equal Protection claim, the court first noted that, to pass constitutional muster under the Equal Protection Clause, the challenged law must serve an important governmental objective and be substantially related to achieving that objective. In that vein, the court noted that "[t]he exemption substantially relates to the achievement of limiting government interference with the free exercise of religion" and that it "does not give a free pass to discriminate on the basis of sex to every institution," but only to institutions which, if Title IX did not provide a religious exemption, "it would create a direct conflict with a religious institution's exercise of religion." Therefore, the court noted, "the exemption substantially relates to a 'fundamentally important' government interest."

Despite the fact that the court said that "the discrimination LGBTQ+ individuals face (both on religious campuses and outside of them) is invidious and harmful … 'the First Amendment's Free Exercise Clause guarantees protection of those religious viewpoints even if they may not be found by many to be 'acceptable, logical, consistent, or comprehensible.'"

Therefore, the court concluded, "Title IX's religious exemption does not violate the Fifth Amendment's Equal Protection guarantee."

CASE 2 *Satanic Temple, Inc. v. City of Boston*

111 F.4th 156 (1st Cir. 2024)

CITY COUNCIL'S PRACTICE OF OPENING ITS PUBLIC MEETINGS WITH INVOCATIONS FROM SPEAKERS CHOSEN BY CITY COUNCIL MEMBERS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION.

In this case, the Boston City Council had a practice of opening its meetings with an invocation. The invocations were performed by invocation speakers chosen by the City Council members. The Council did not take requests for invitations. Rather, each speaker had to be invited by a Council member under an unwritten policy that each Council member was assigned a particular Council meeting for which the Council member could invite an invocation speaker. Council members had discretion in selecting invocation speakers, although in practice they said they chose invocation speakers in recognition ofthe speakers having benefited the communities which the individual Councilors represented.

The Satanic Temple, an "IRS-recognized atheistic religious corporation … which venerates … Satan" sued the City of Boston after its demand that it be allowed to perform an invocation at Boston City Council meetings was denied. The Satanic Temple alleged that, by not granting it the opportunity to perform invocations, the City had violated the Temple's First Amendment Free Speech and Free Exercise rights, the Fourteenth Amendment's Equal Protection guarantee, and the free exercise provision of the Massachusetts Constitution. The Temple asked the court to find that Boston's prayer practice was unconstitutional, order Boston to afford the Temple an opportunity to bless the City Council's meetings, issue a permanent injunction that Boston not exclude the Temple from an equal opportunity to bless the Council's meetings in the future and create a mechanism to ensure the Temple an equal opportunity to bless the Council's meetings.

The court first addressed the Temple's claim that the City's prayer practice was a facially unconstitutional violation of the Establishment Clause of the U.S. Constitution. In doing so, the court first held that the basis of the Councilors' choices of invocation speakers – limiting such choices to speakers who have benefited the communities the Councilors represent – was "consistent with the Establishment Clause" because it fell squarely within the tradition of legislative prayer that acknowledges the important role religion plays in many communities. The court also rejected the Temple's contention that governments that begin their public meetings with prayer must make prayer opportunities available to all interested participants, stating that "[t]he Constitution does not require that legislative bodies accept all speakers who request to give invocations." And, finally, the court rejected the Temple's argument that the Council members' unregulated discretion in selecting invocation speakers rendered the City's prayer policy unconstitutional, stating "[t]hat the Councilors here exercised discretion is also facially permissible." Therefore, the court held that "Boston's [prayer] practice is constitutional on its face."

The court then addressed the Temple's claim that the City's prayer practices were unconstitutional as applied. In doing so, the court stated that the Temple's as-applied claims failed "for many of the same reasons" its facial claims failed. First, the court noted that the Temple had failed to show that any of the Council members chose or barred invocation speakers based on the Councilor's own religious preferences. Second, the court noted that, contrary to the Temple's allegations, the actual invo-

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cations presented did not "constitute proselytizing or coercion as those terms are used by the Supreme Court." The court noted that "[s]ectarian prayer violates the constitution only '[i]f the course and practice over time shows that the invocations denigrate non-believers or religious minorities, threaten damnation, or preach conversion,' because at that point, the invocation 'fall[s] short of the desire to elevate the purposes of the occasion and to unite lawmakers in their common effort." The court stated that "legislative invocations of sectarian religious prayers are generally constitutional" because "'[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases' … Indeed, '[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods, as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.'" The court also rejected the Temple's argument that the Council President's asking the audience to stand for the invocation constituted unconstitutional coercion or that the Council exercised unconstitutional control over the content of the speakers' invocations.

Finally, the court rejected the Temple's claim that the City's prayer practices violated the free exercise guarantees of the Massachusetts Constitution.

In conclusion, the court determined that the Boston City Council's prayer practices passed constitutional muster both facially and as applied.

CASE 3 *Markel v. Union of Orthodox Jewish Congregations of America*

124 F.4th 796 (9th Cir. 2024)

A KOSHER FOOD INSPECTOR APPOINTED BY A BOARD OF ORTHODOX RABBIS TO GUARD AGAINST VIOLATION OF JEWISH DIETARY LAWS IS A "MINISTER" FOR PURPOSES OF THE MINISTERIAL EXCEPTION AND IS THEREFORE BARRED FROM SUING EITHER HIS EMPLOYER OR HIS SUPERVISOR ON CLAIMS RELATED TO THE TERMINATION OF HIS EMPLOYMENT

In this case, the plaintiff – who was employed by the Union of Orthodox Jewish Congregations of America (UOJCA) as a *mashgiach* (a kosher food inspector) – sued the UOJCA and his UOJCA supervisor for wage and hour violations, fraud, and misrepresentation. The UOJCA and the supervisor raised Ministerial Exception defenses.

The court began its analysis with the First Amendment, from which the "ministerial exception" arises. According to the court, the ministerial exception "precludes the application of 'laws governing the employment relationship between a religious institution and certain key employees.'" The court stated further that "the Religion Clauses require deference to a 'religious institution's explanation of the role of [its] employee in the life of the religion in question'" and that the ministerial exception rule "permits no exceptions. It is categorical. The ministerial exception encompasses all adverse personnel or tangible employment actions between religious institutions and their employees and disallows lawsuits for damages based on lost or reduced pay."

In determining whether the ministerial exception applied in this case, the court first found that the UOCJA was a religious institution because it was organized to support the Orthodox Jewish community and its activities primarily served that purpose. In addition, the court noted that the UOCJA held itself out to the public as a religious institution. And the court rejected the employee's argument that the UOCJA was not a religious institution because it made a profit and competed with for-profit companies, stating that "[t]he act of profiting, or competing with for-profit companies, however, does not inherently make an organization non-religious for purposes of the ministerial exception."

The court then addressed the issue of whether the plaintiff was a "minister" for purposes of the ministerial exception and found that he was. The court first found that the "'ministerial exception encompasses more than a church's ordained ministers.'" "'What matters, at bottom, is what an employee does.'" "If individuals "perform[ ] vital religious duties,' they are 'ministers' of that faith for purposes of the ministerial exception."

Applying those principles, the court first recognized that Judaism has many "ministers." The court then concluded that the plaintiff's job as a *mashgiach* was "'essential to [UOJCA's][religious] mission'" and, therefore, it followed that the plaintiff was a "minister" for purposes of the ministerial exception. The court noted that the plaintiff "was responsible for the kosher integrity of [the UOJCA's] grape products" and that "keeping kosher was essential to observing Orthodox Judaism, and [UOJCA's] central mission is to support Orthodox Jews as they strive to fully live their faith." "Because only observant Orthodox Jews can serve as a *mashgiach* for the [UOJCA], and because they are necessary to carrying out [UOJCA's] religious mission of 'ensuring the wide availability of kosher food,' a *mashgiach* is a minister for purposes of the ministerial exception."

The court determined that the fact that the plaintiff was not a Rabbi, had no formal title, and did not receive religious training from the UOJCA, did not control the court's analysis. "All that matters is that Markel played a role in 'carrying out [UOJCA's religious] mission' … of providing kosher-certified foods so that Orthodox Jews could observe their faith."

The court also concluded that issues involving a religious institution can never be bifurcated into being either "religious" or "non-religious" because "[d]elineating a religious organization's decisions between religious and secular would create excessive entanglement between the church and state…" and would be contrary to the Establishment Clause's original public meaning.

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The court stated that the "fundamental purpose [of the Establishment Clause] was to disentangle government and religion, or to prevent excessive entanglement." Therefore, the court stated, "[t]he ministerial exception thus must be robust enough to disallow the government, including the judiciary, from ever parsing out or defining for any religion what its beliefs or practices are." For this reason, the court also stated that "the ministerial exception forbids courts from requiring religious institutions to proffer a religious justification before invoking the exception … religious organizations need not have a specific religious purpose to invoke the ministerial exception."

Finally, the court addressed the issue of whether the ministerial exception defeated not only the plaintiff's allegations against the religious institution itself (the UOJCA) but also the plaintiff's allegations against the plaintiff's UOJCA supervisor? The court concluded that the ministerial exception did extend to the plaintiff's supervisor as well as to the UOJCA, stating that the ministerial exception "protects a religious organization's supervisors and religious leaders from claims brought by ministerial employees" and that "[n]othing about the constitutional analysis changes if the defendant is another minister" because a claim against another minister "would still permit a court to 'prob[e] the ministerial work environment,' which would 'interfere[ ] with the Free Exercise Clause'" and that "'the very process of inquiry' in considering claims brought by one minister against another regarding tangible employment actions 'may impinge on rights guaranteed by the Religion Clauses.'" Therefore, "[s]ince the same constitutional harm looms regardless of whether an employee-plaintiff's employment-related claims are against the religious organization or its leaders, we hold that the ministerial exception protects both."

For these reasons, the court determined that all the plaintiff's claims – against both the UOJCA and the plaintiffs' UOJCA supervisor – were barred by the ministerial exception.

ABOUT THE AUTHOR

BRADLEY S. ABRAMSON is Senior Counsel at Alliance Defending Freedom where he serves on the Allied Legal Affairs Team supporting ADF's network of over 4,500 attorneys. Before joining ADF in 2010, he practiced law in Colorado, specializing in general civil litigation, employment law, and family law. He received his B.A. in Philosophy from the University of Minnesota College of Liberal Arts and his J.D., cum laude, from the University of Minnesota Law School.

FEATURE ARTICLE

Religious Faith: The Essential Ingredient In The American Experiment Of Limited Government

By Bradley S. Abramson

> "If I were asked today to formulate as concisely as possible the main cause of the ruinous Revolution that swallowed up some 60 million of our people, I could not put it more accurately than to repeat: ***'Men have forgotten God; that's why all this has happened.'"***
>
> – Aleksandr Solzhenitsyn

According to its Mission Statement, the Religious Liberty Law Section is formed to, among other things, "advance and to protect, the basic human and constitutional right of religious liberty through law." We might ask, then, why religious liberty needs protecting and why we need to expend effort to advance it.

The answer is that there seems to be arising in America an increasing disrespect for – and even hostility towards – religion and, as a consequence, religious liberty. Some have gone so far as to contend that religious liberty is simply a code for discrimination and that religious expression is akin to "hate speech."[1]

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How can this be in a nation founded on the very concept of religious liberty? Why has the culture turned against religious liberty? And why should we care? The answer is that America is in dire need of a refresher course in religious liberty. It is imperative we revisit – and ask and answer again – a very fundamental question: why is religious liberty important, not just to religious believers, but to everyone in America, and what have we forgotten about why religious liberty needs encouragement and protection?

Belief In God Is Necessary To Create A Limited Government

From its beginning, the United States has valued and protected religious freedom. It is embodied in the very first freedom in the very First Amendment to the Constitution of the United States.[2]

Indeed, before the adoption of the First Amendment in 1791, several states already had laws guaranteeing religious freedom, the most well-known of which was the Virginia Act for Establishing Religious Freedom of 1786. Thomas Jefferson counted the passage of that Act as one of the three accomplishments of his life worthy of being memorialized on his tombstone, along with authoring the Declaration of Independence and founding the University of Virginia.

Why did our founders believe that religious belief and exercise were so important as to enshrine their protection, first in state law and then in the First Amendment to the United States Constitution? Why was it the very first right the founders felt compelled to protect?

This is a particularly important question today because this knowledge, once widely known and understood, has been or is being lost at an alarming rate. Indeed, there are increasingly large segments of our citizenry who not only fail to appreciate the importance of religious faith to our political system but who believe we would be better off without it.

So, what are these fellow citizens missing? The answer is that they are missing the fact that freedom of religion and freedom of religious exercise are the most fundamental rights we have because:

(1) Religious faith constitutes the indispensable foundation for our constitutional system of limited government; and

(2) Once a limited government is established, it cannot be maintained, for long, without religious faith.

Indeed, there are increasingly large segments of our citizenry who not only fail to appreciate the importance of religious faith to our political system but who believe we would be better off without it.

So, let's first consider the proposition that limited government can only arise from the realization that God – not the State – is the source of our rights and liberties.

Religion V. State Power In The History Of Western Civilization

Whether moderns like to admit it or not, the fact is that Western civilization is founded on Judeo-Christian principles,[3] and the Judeo-Christian tradition has a long history of pitting religious authority against the authority of the State.

In the Biblical book of 1 Kings it is recorded that King Ahab said to the prophet Elijah "'Is that you, you troubler of Israel?'" To which, Elijah responded: "'I have not made trouble for Israel. But you and your father's family have. You have abandoned the Lord's commands.'"[4] In other words, Elijah announced the principle that even the King was morally responsible and answerable to God because the authority of God is higher than the authority of the King. Elijah bravely confronted the King with that truth.

The other ancient Jewish prophets – Isaiah[5], Jeremiah[6], Daniel[7], and others – all stood against the governmental rulers of their time; reminding them that their authority was limited and subject to a higher authority – and that higher authority was God.

The first Christians also stood firmly against illegitimate authority – recognizing and paying homage to a law higher than the law of man. When the Apostles were ordered to stop spreading the gospel, they refused, stating that they must obey God rather than men.[8]

St. Augustine (354-430) declared that a law that does not conform to divine law should not be obeyed because "an unjust law is no law at all."[9]

St. Thomas Aquinas (1225-1274) discussed in great detail the concept of the Natural Law, the divinely imparted law that is higher than any law created by a secular government and which even the State cannot legitimately offend; that a governmentally enacted law is no legitimate law at all if it is contrary to the law of God; and that if a positive law offends the moral law, not only is it no law at all, but the moral person has a moral obligation to disobey it.[10]

St. Thomas More (1478–1535) articulated the same idea in these words, uttered just before his execution: "I die the King's good servant, but God's first". He was imprisoned and then executed for opposing the King; an example of the extremes to which the State will go to rid itself of the threat that true reli-

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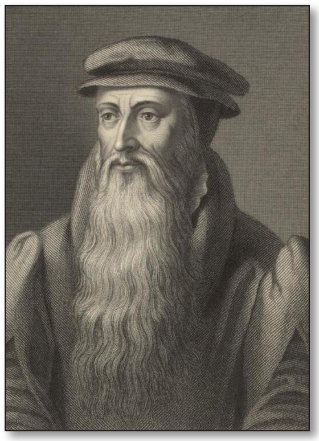
gious belief presents to it.[11]

John Knox (1514-1572), the Scottish reformer, did not shy away from confronting political authority when that authority transgressed the law of God. He said: "I will be the most loyal of subjects, provided the state do nothing repugnant to the Gospel." However, he said, "If the prince exceeds their bounds, no doubt they may be resisted, even by power. For there is neither greater honor, nor greater obedience, to be given to kings or princes, than God hath commanded." He also succinctly and famously declared that, "Resistance to tyranny is obedience to God."[12]


John Knox
1514-1572

The philosopher John Locke, who had a significant influence on the American founders, also stated, in his 1689 work, *A Letter Concerning Toleration:* "[O]bedience is due in the first place to God, and afterwards to the laws."[13]

Religion V. State Power In The American Experience

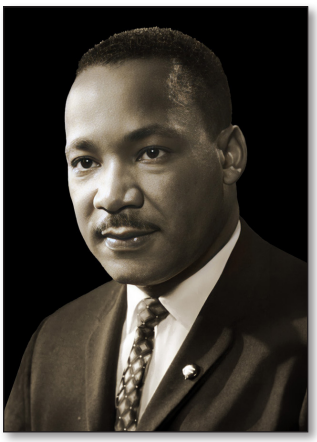
Our American founders carried this concept into the American experience, grounding our very liberties on the only sure foundation upon which they can be grounded – religious belief in a God whose authority over men is higher than any human government.

Thomas Jefferson based the American Declaration of Independence on what he called the self-evident truth that all men are "endowed by their Creator with certain unalienable Rights", including the rights of life, liberty, and the pursuit of happiness. In so doing, he recognized that our basic human rights come not from the State, but from God. He wrote: "God, who gave us life, gave us liberty" and asked, "Can the liberties of a nation be secure when we have removed a conviction that those liberties are the gift of God?" The rhetorical answer to his rhetorical question, of course, is "no".

James Madison, in his *Memorial and Remonstrance*, wrote: "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign."

But we needn't stop with those of the founding generation. The realization that religion is the necessary component for the creation of a limited government was clearly understood, at least up to relatively recent times.

As recently as the 1960's – already becoming dim in our collective consciousness – Martin Luther King, Jr., a Baptist minister, stood upon the same foundation when, in 1967, he stated in a sermon delivered at the Mt. Zion Baptist Church in Cincinnati, Ohio: "The church … is … the conscience of the state. It must be the guide and the critic of the state, …" This is true because the secular state has and can have no conscience because the secular state – without recourse to a transcendent morality – has no basis upon which to rest or declare any transcendent moral judgment. To a secular state, all non-transcendent "moral" judgments are not moral or ethical judgments at all but are nothing but mere opinions; and being mere opinions, which will be protected and which suppressed will only be determined by a simple decree of the State.


Dr. Martin Luther King Jr.

In short, religion is the foundation of our freedom and liberty because the belief in a Supreme Being forms the very basis for our political philosophy of a limited government. The power of government can only be limited if there is a power higher than the State to limit it – and that higher power – God – is the foundation of human rights that even the State cannot offend.

A secularist might say that the power of government is limited by "the people"; that "the people" are the source of our liberties." But "the people" – whatever that is – are not and cannot be a foundation for the protection of human rights or limited government.

How do we know that? We know that because, during the French Revolution – a "people's revolution" if ever there was one – the regime of secular "reason" (the first pre-Marxist attempt to create a secular state, changing Notre Dame Cathedral into a "Temple of Reason") resulted in 300,000 French citizens being arrested and at least 30,000 executed.[14] During the French Revolution, "the people" were the source of tyranny, terror, and murder on a grand scale.

We also know that from our founders. Our founders were as concerned about the tyranny of the people as about the tyranny of monarchy or oligarchy.

John Adams said "It is in vain to say that democracy is less vain, less proud, less selfish, less ambitious or less avaricious than aristocracy or monarchy. It is not true in fact and nowhere appears in history. Those passions are the same in all men under all forms of simple government, and when unchecked, produce the same effects of fraud, violence, and cruelty."

In the same vein, Alexander Hamilton said "The ancient democracies … never possessed one good feature of government. Their very character was tyranny …"

James Madison wrote in *The Federalist 47* that "The accumu-

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lation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Similarly, Benjamin Rush said that "A simple democracy is the devil's own government."

Fisher Ames stated that "liberty never lasted long in a democracy, nor has it ever ended in anything better than despotism."

That is why our founders created a constitutional republic, not a democracy.

A democracy, in and of itself, is not a limited government. A democracy, if not constrained by a limitation of its powers, can be as tyrannical as any dictatorship. After all, Socrates was famously executed by a democracy for allegedly corrupting the youth and not worshipping the State's gods. In a democracy, the people are the State. William Blackstone noted this, stating that "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, *or a popular assembly*, is a degree of tyranny" (my emphasis).[15] And that is why we find many of our founders making statements that were less than complimentary of democracy. They recognized that a democracy was not only no guarantee of liberty, but could be as tyrannical and despotic as any other form of authoritarian state.

Indeed, "the people" (whatever that is) cannot be the source of our liberties, even in a democracy. Because if "the people" gave us our liberties, then "the people" have the authority to deprive us of those liberties. Only if our liberties come from God – an authority apart from and higher than the state – are they safe from being violated or revoked by any governmental authority created by man, including a democracy.

Our founders' genius was not in creating a democracy. Democracies had existed before – and failed. Our founders' genius was in creating a limited government, the greatest and perhaps only bulwark against tyranny. And, in doing so, our founders correctly recognized that the only basis for limiting government was the idea that certain rights existed before and apart from the State – and that the only ground of such "unalienable rights" was God. God is the only basis of our liberties – the sole reason a man or woman can stand against the otherwise overwhelming power of the State when the State attempts to extend its power beyond its legitimate bounds.

Michael McConnell – for many years a judge on the United States Court of Appeals for the 10th Circuit and now a law professor at Stanford – recognized this truth when he wrote, "[The free exercise clause also makes an important statement about the limited nature of governmental authority … If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility."[16]

Our founders well knew – and we forget at our peril – that every government tends to take unto itself all power, and to demand that the individual bow to the State; to take, first, its citizens' property, then their liberty, and finally their lives.

That is precisely why governments attempt to suppress, marginalize, and, if possible, co-opt religion and religious belief and, particularly, religious expression and exercise – because the religious idea that there is an authority higher than the State threatens every State's desire to extend its power to the greatest extent possible and, in so doing, deprive the people of their liberty.

Benito Mussolini expressed this concept well when he described his totalitarian version of fascism as: "All within the State, nothing outside the State, nothing against the State."[17]

But Mussolini's view is not a peculiar one. It is, with very few exceptions, the story of human history, and our founders knew that. Whether under a monarchy, oligarchy, or even democracy before the American experiment, and under fascism, communism, and all other totalitarianisms since, the concept of limited government is unusual and fragile. It is by no means a historical necessity. In fact, not only is it not an historical necessity, it is an historical aberration. And it is based solely and securely on the idea that human rights come from God, not the State, so that even the State cannot infringe upon them, and that if the State does so it loses its legitimacy and may be legitimately opposed.

Both reason and history demonstrate, without exception, that in those societies where the government persecutes, suppresses, denies, or co-opts religion, the totalitarian State emerges and reigns supreme.

The horrible State-sponsored holocausts of the 20th century – whether in Nazi Germany, which attempted to co-opt and subordinate the church to the State and to use the church for the State's purposes, going so far as to change the church's liturgy and language to coincide with the tenets of National Socialism, as well as in the atheistic Marxist regimes of the Soviet Union, the Peoples Republic of China, and Cambodia, among others, all of which suppressed and attempted to entirely eradicate religion from their societies - stand as eternal testaments to the horrific results of religious persecution and suppression.

Although there is disagreement as to the exact number of people killed by various atheist communist regimes in the 20th century, one source estimates that 20 million people were murdered, worked, exposed, or starved to death under communism in the Soviet Union alone.[18]

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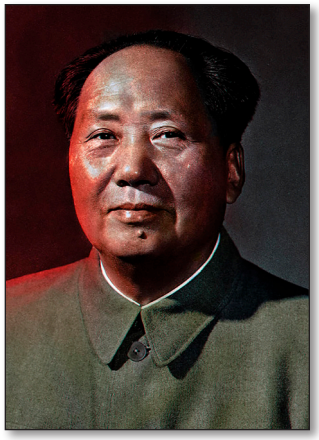
Or consider Mao's communist China. Between 1950 and 1976 – a period of only 26 years – up to 80 million Chinese may have been killed – for an average of over 3 million per year![19]


Mao Tse Tung (Mao Zedong)

Consider, further, Pol Pot's communist Cambodia. It is estimated that in the five years between 1975 and 1979, 1.5 to 2 million men, women, and children were systematically murdered during that nation's communist-inspired genocide – 25% of the entire Cambodian population.[20]

History – particularly the history of the 20th century with its plethora of fascist and Marxist States – demonstrates what happens when religion, serving as the conscience of and restraint upon governments, is absent. The undeniable lesson of the 20th Century is that when governments do not submit themselves to the higher authority of a Supreme Being, the result is horrific and unparalleled crimes against humanity; an unleashing of unrestrained murderous governmental power against its citizens.

Religiously Based Morality Is Necessary To Sustain A Limited Government

So, religious faith is necessary to even establish a limited government.

But once a limited government is established, it can only survive if the people are virtuous and self-restrained by religion and religiously based morality. Why is that? It is because limited government – both in theory and practice and by its very nature – loosens and lessens the power of the State. The resulting danger is that, as the power of the State is lessened, the people must control themselves. If they do not, the State must intervene just to keep the peace and impose order on society. Liberty, without personal virtue, descends into licentiousness, which then requires government intervention to maintain order, and government intervention turns into despotism. Indeed, the mass of the citizenry welcomes such despotism, to protect itself from the chaos and violence of its unrestrained fellow citizens.

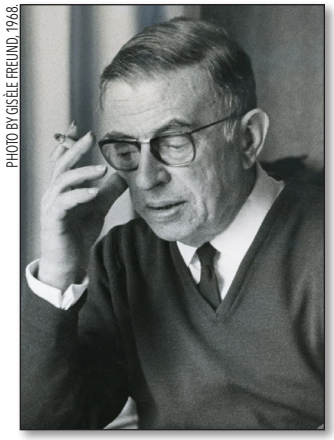


PHOTO BY GISÈLE FREUND, 1968
Jean-Paul Sartre

For this reason, too, our liberties are grounded upon religious faith, because without God there is no transcendent basis for morality. Atheists and other secularists admit this. David Silverman, past president of *American Atheists* stated that "There is no objective moral standard … [moral decision making] is a matter of opinion."[21] Atheist existentialist philosopher Jean-Paul Sartre wrote that "If there is no God, everything is permitted."[22] Michael Ruse, an atheist philosopher of science, wrote that "In an important sense, ethics as we understand it is an illusion fobbed off on us by our genes …"[23] Secular humanist philosopher Julian Baggini stated that "Moral claims are not true or false … moral claims are judgments [that] it is always possible for someone to disagree with."[24] John Steinrucken, an atheist, wrote in the *American Thinker* that "Those who doubt the effect of religion on morality should seriously ask the question: Just what are the immutable moral laws of secularism? Be prepared to answer, if you are honest, that such laws simply do not exist!"[25] Atheist Richard Dawkins stated that "there is, at bottom, no design, no purpose, no evil, no good, nothing but pitiless indifference."[26] Atheist professor William Provine stated "No inherent moral or ethical laws exist."[27] Humanist philosopher Richard Taylor wrote that "to say something is wrong because … it is forbidden by God, is … perfectly understandable to anyone who believes in a law-giving God. But to say that something is wrong … even though no God exists to forbid it, is not understandable … The concept of moral obligation [is] unintelligible apart from the idea of God."[28]

And as our founders noted, without the self-restraining power of religion-based morality, people are unfit to govern themselves. Indeed, what we constantly encounter in reading our founders is what to modern ears seems an obsessive concern with morals and virtue. But that is because the founders recognized that for a Republic – a limited government, a political system that limits the power of the State – to survive, its citizens must be personally virtuous. Liberty and an unrestrained citizenry are incompatible. For that reason, the founders were extremely fearful that a lack of personal virtue on the part of the citizenry would, sooner or later, doom the American experiment in liberty, proving that people are not, in fact, capable of governing themselves.

Benjamin Franklin, who was a signer of both the Declaration of Independence and the Constitution, stated: "Only a virtuous people are capable of freedom. As nations become more corrupt and vicious, they have more need of masters."

Richard Henry Lee, another signer of the Declaration of Independence, stated: "It is certainly true that a popular government cannot flourish without virtue in the people."

Benjamin Rush said that "without virtue, there can be no liberty."

And the founders recognized that only a religious citizenry could be a virtuous citizenry.

John Adams recognized the importance of religious faith and exercise to our American political philosophy. He said "We have no government armed with power capable of contending with human passions unbridled by morality and religion … Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." He added, "It is religion and morality alone which can establish the

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principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue."

Samuel Adams stated: "Religion and good morals are the only solid foundation of public liberty."

Fischer Ames, one of the framers of the First Amendment, stated: "Our liberty … is founded on morals and religion."

Charles Carroll of Carrollton, also a signer of the Declaration of Independence, stated that "Without morals a republic cannot subsist any length of time; they therefore who are decrying the Christian religion … are undermining the solid foundation of morals, the best security for the duration of free governments."

Benjamin Rush, another signer of the Declaration of Independence, said: "The only foundation for a useful education in a republic is to be laid in religion. Without this, there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments."

And, of course, George Washington, in his Farewell Address, famously stated that: "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports … And let us with caution indulge the supposition that morality can be maintained without religion … Reason and experience both forbid us to expect that national morality can prevail in the exclusion of religious principle."

John Quincy Adams made the same point, stating:

> ***"There are three points of doctrine the belief of which forms the foundation of all morality. The first is the existence of God; the second is the immortality of the human soul; and the third is a future state of rewards and punishments. Suppose it possible for a man to disbelieve either of these three articles of faith and that man will have no conscience, he will have no other law than that of the tiger or the shark. The laws of man may bind him in chains or may put him to death, but they never make him wise, virtuous, or happy."***

Alexis de Tocqueville (1805-1859), the great French observer of mid-19th Century America made the same observation. Based on his in-depth study of the American Republic, he concluded that "Liberty cannot be established without morality, nor morality without faith" and asked, "How could a society escape destruction if, when political ties are relaxed, moral ties are not tightened, and what can be done with a people master of itself if it [is] not subject to God?" Among his many observations of America, was this: "Religion in America … must be regarded as the foremost of the political institutions for that country; for if it does not impart a taste for freedom, it facilitates the use of it … I do not know whether all Americans have a sincere faith in their religion – for who can search the human heart? – But I am certain that they hold it to be indispensable to the maintenance of republican institutions."

Our founders went to great lengths to distinguish between liberty and license and lectured us *ad nauseam* that we will lose our liberties when we lose our virtue, because without virtue liberty descends into license, and license into despotism.

That is why John Adams said that our constitution is only fit for a moral and religious people – that it is wholly inadequate for any other. Because, without the self-restraint that flows only from belief in a transcendent God to whom we are morally responsible, liberty descends into license, and license can be controlled only by the naked power of the State.

It's interesting to note that, prior to the mid-19th Century, there were not any full-time publicly funded police forces in the U.S. Today, of course, nearly every town and city has its own police force. And although there are many proffered explanations for the rise in crime[29] and the militarization of police[30] in the U.S., one possible explanation may be that, as America becomes more secular[31] and, as a consequence, the restraints of religiously based morality are loosened, we are experiencing what our founders warned us about – citizens who are no longer self-controlled; who are no longer restrained by morality; and who, as a consequence, engage in widespread criminal behavior such as looting, theft, assault, murder, and riotous conduct.

Because citizens are no longer governed by their own moral self-restraint, they must now be governed by the naked power of the State. And the people welcome the State's growing assertion of power, to protect themselves from the increasing lawlessness of their fellow citizens.

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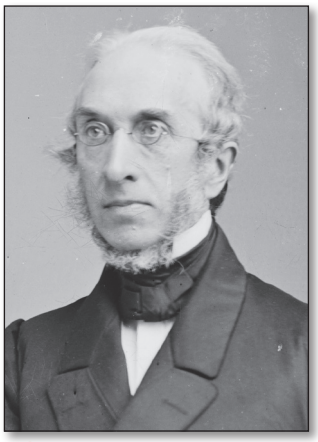
History teaches that the decline of religion leads to the erosion of morality, and the erosion of morality requires more and greater intervention by the State to simply maintain order and to force its citizens to act in ways that, under the influence of religion, its citizens would otherwise have acted on their own without state intervention. For that reason, the decline of religious belief inevitably results in an increased power of the State, for as the moral power of religious belief wanes, the State must intervene to compel by force what religion once achieved through the self-imposed restraints of morality.


Robert C. Winthrop

One of the best encapsulations of this truth comes from Robert Winthrop (1809-1894), prominent in his day but now nearly forgotten. Robert Winthrop, a descendant of John Winthrop, a founder and governor of the Massachusetts Bay Colony, studied law under Daniel Webster and later served as the 22nd Speaker of the House of Representatives in the 30th Congress. He also served as a U.S. Senator from the State of Massachusetts. Robert Winthrop enunciated this undeniable truth: "Men, in a word, must necessarily be controlled either by a power within them or by a power without them; either by the Word of God or by the strong arm of man; either by the Bible or by the bayonet."

Conclusion

So, what have we learned, or perhaps more accurately what have we rediscovered, that our founders knew so well 250 years ago?

First, we've learned that religious liberty is not a favor the government bestows upon the religious. It is not a concession. It is not an accommodation. It is not a mere toleration. Religious belief and exercise, and the religious liberty laws that protect them, are the very philosophical basis of our American concept of limited government – the idea that there is an authority higher than the State, by which the State itself is limited and to which the State itself is answerable. Without religious faith in a transcendent and good Supreme Being, there can be no transcendent or philosophical basis for limited government.

And second, we've learned that limited government, once established, cannot survive without the self-restraining influence that comes only from religious belief.

Americans used to know this. Indeed, Alexis de Tocqueville wrote: "The Americans combine the notions of religion and liberty so intimately in their minds, that it is impossible to make them conceive of one without the other."

This is what we must bring back to the memory and attention of our fellow citizens.

Religious liberty doesn't only protect those of religious faith. It protects all Americans – the religious and the irreligious, the theist, the agnostic, and the atheist.

At least one modern atheist – John Steinrucken – agrees, writing that:

> *"An orderly society is dependent on a generally accepted morality. There can be no such morality without religion … We secularists should recognize that we owe much to the religionists …* [Christianity has a] *benign but essential role as guarantor of our political and legal systems – that is, of a moral force independent of and transcendent to the political … The fact is, we secularists gain much from living in a world in which excesses are held in check by religion. Religion gives society a secure and orderly environment within which we secularists can safely play out our creativities. Free and creative secularism seems to me to function best when within the stable milieu provided by Christianity … If the elitists of our Western civilization want to survive … our elitists should see that their most valued vested interest is the preservation within our culture of Christianity and Judaism … they should publicly hold in high esteem the institutions of Christianity and Judaism, and to respect those who* [ ] *believe and to encourage and to give leeway to those who, in truth, will be foremost in the trenches defending us against those who would have us all bow down to a different and unaccommodating faith."*[32]

Those who encourage the free and public exercise of religion, support the limited State that is the essence of the American experiment in self-government. Conversely, those who attack or discourage religion and its free exercise, undermine the very concept of limited government – the ground upon which our freedoms and liberties rest – as well as the necessary moral conditions to sustain it.

The freedom we all enjoy under a limited government is a priceless gift to us from our religious fellow citizens. But for them, we would be living a very different life than we now enjoy.

What history has taught us – particularly after the horrendous experience of the 20th Century – is that religious believers stand between us and the gulag; between us and the concentration camp; between us and the firing squad.

We forget this at our peril. And this is why the Religious Liberty Law Section – and its mission of protecting and advancing religious liberty through law – is so important.

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ENDNOTES

1. See, for example, U.S. Civil Rights Commission Chairman Martin R. Castro's Statement on page 29 of the Commission's September 2016 briefing report titled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* that "The phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance."
2. U.S. Const. Am. Art. I
3. *The Book That Made Your World: How the Bible Created the Soul of Western Civilization*, Vishal Mangalwadi, Thomas Nelson Publishers, 2011.
4. 1 Kings 18:16-18
5. Isaiah 10: 1-5
6. Jeremiah 22
7. Daniel 6: 6-13
8. Acts 5:27-29
9. *On Free Choice of the Will, Book 1, §5*, St. Augustine
10. *Summa Theologica 1 – 11, q. 96, Art. 4*, St. Thomas Aquinas
11. *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, Vol. 8, #996
12. *https://en.wikiquite.org/wiki/John_Knox*
13. *A Letter Concerning Toleration*, John Locke (1689)
14. *https://en.wikipedia.org/wiki/Reign-of-Terror*
15. William Blackstone, *Commentaries* 1:120-41 1765)
16. Vol. 103 Harvard Law Review No. 7, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, May 1990.
17. *www.brainyquote.com/quotes/benito_mussolini_109829*
18. *The Black Book of Communism: Crimes, Terror, Repression*, by Stephane Courtois, Andrzej Paczkowski, Nicolas Werth, Jean-Louis Margolin, et al., 1999 [English translation] Harvard University Press.
19. Washington Post, *Repression's Higher Toll*, Daniel Southerland, July 16, 1994
20. Wikipedia, *Cambodian Genocide*.
21. Debate with Frank Turek: *Which offers a better explanation for reality – theism or atheism?*
22. *Being and Nothingness: An Essay on Phenomenological Ontology*, Jean-Paul Satre, 1943.
23. *Evolution and Ethics*, Michael Ruse and Edward Wilson, New Scientist, pp. 51-52 (1985).
24. *Atheism: A Very Short Introduction*, pp. 41-51, Baggini, J. (2003).
25. *Secularism's Ongoing Debt to Christianity*, John D. Steinrucken, American Thinker (March 25, 2010).
26. *River out of Eden: A Darwinian View of Life*, Dawkins. p. 133.
27. *Scientists Face It! Science and Religion are Incompatible* (1988), William Provine, p. 10.
28. *Ethics, Faith, and Reason*, pp. 83-84, Taylor, R. (1985).
29. *www.macrotrends.net/global-metrics/countries/USA/united-states/crime-rate-statistics*
30. *https://en.wikipedia.org/wiki/Militarization_of_police#United_States*
31. Pew Research Center Report, Dec. 14, 2021
32. *Secularism's Ongoing Debt to Christianity*, John D. Steinrucken, American Thinker, (March 25, 2010).

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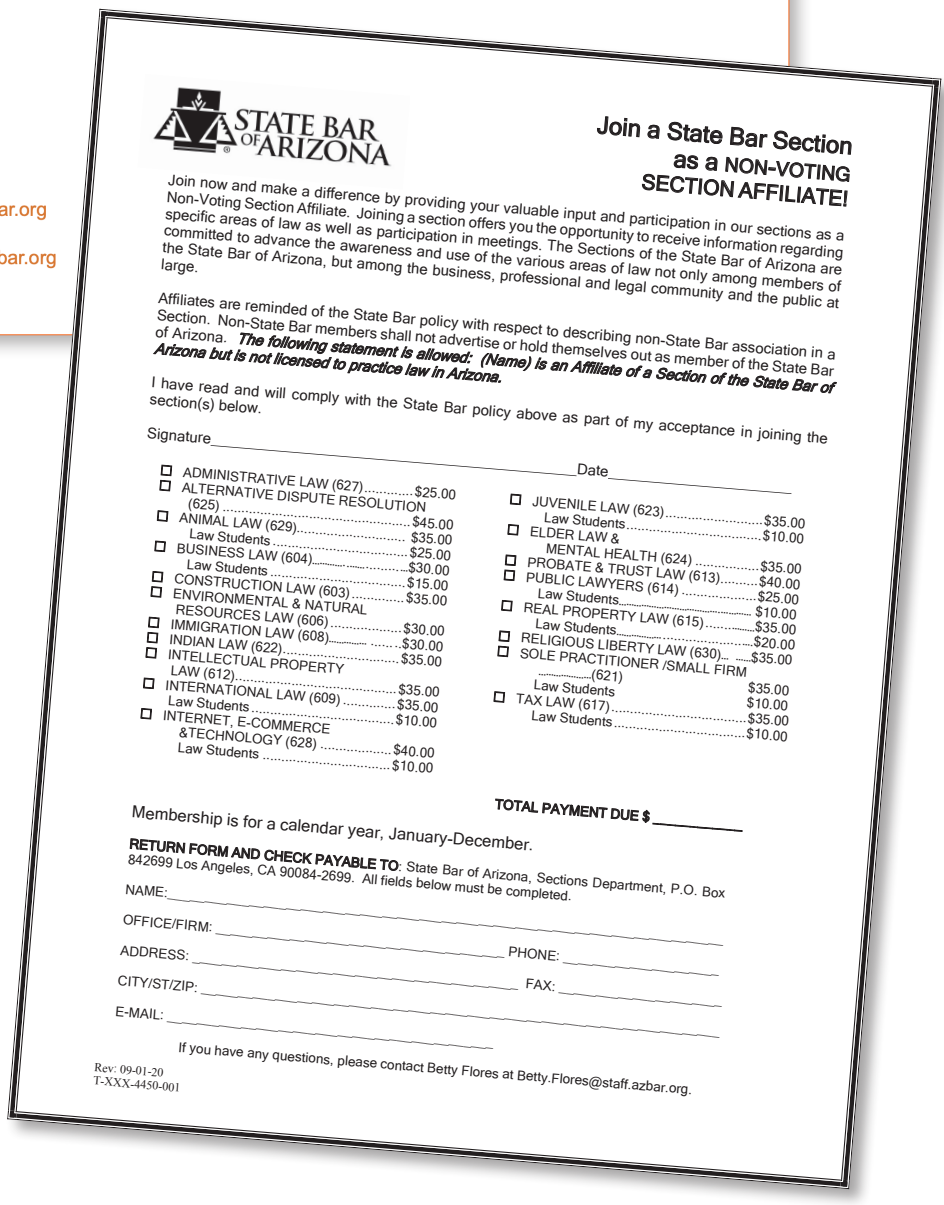

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RESOURCES

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Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Executive Orders

February 6, 2025, Executive Order: Eradicating Anti-Christian Bias.
www.whitehouse.gov/presidential-actions/2025/02/eradicating-anti-christian-bias

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance

2019 Annual Report of the U.S. Commission on International Religious Freedom.
www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://trumpwhitehouse.archives.gov/briefings-statements/remarks-vice-president-pence-2nd-annual-religious-freedom-ministerial

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act –
Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

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