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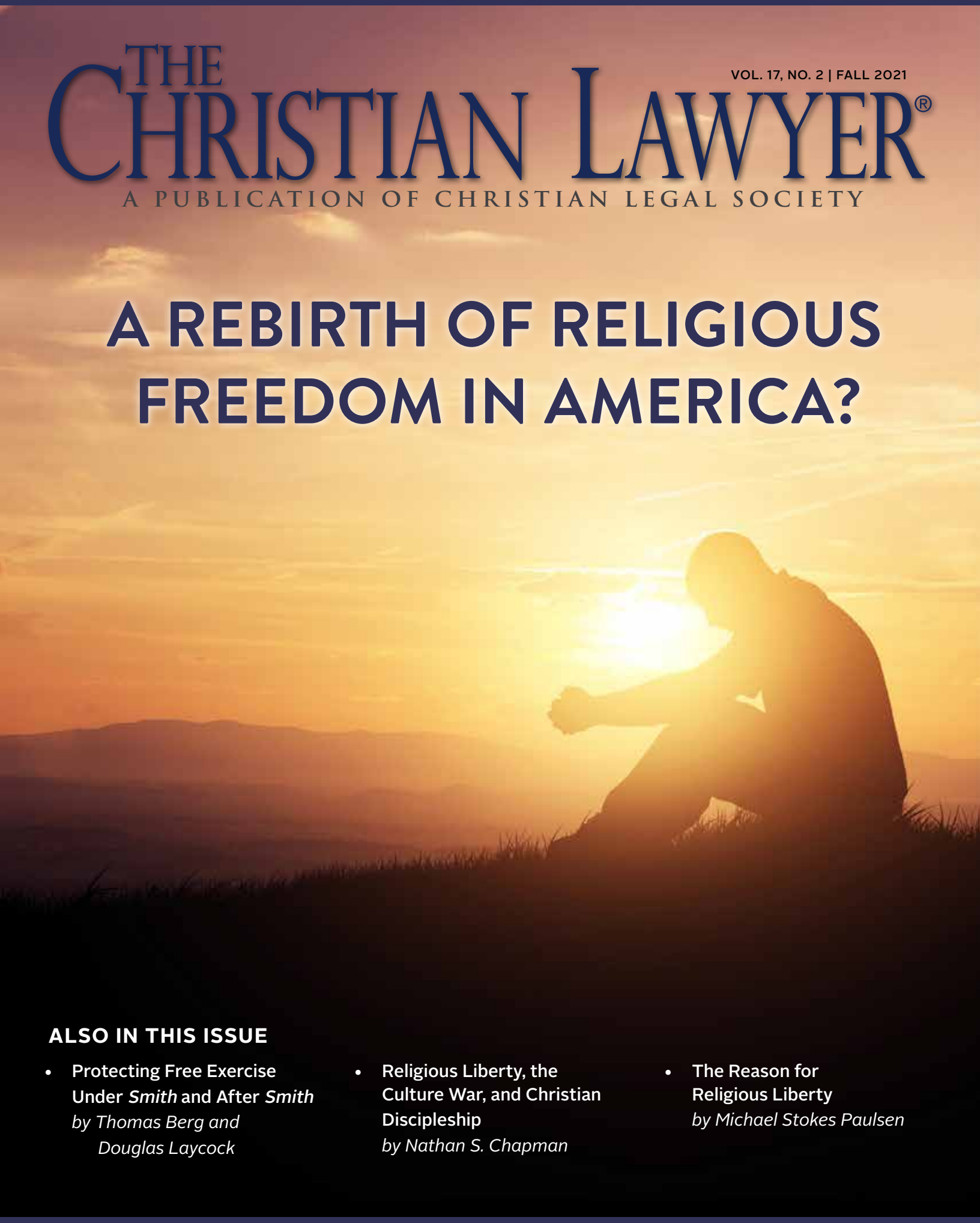
A REBIRTH OF RELIGIOUS FREEDOM IN AMERICA?



ALSO IN THIS ISSUE

David Nammo, Executive Director and CEO

I struggle with the theme of this magazine issue. Is there a rebirth of religious freedom in America, or are we on the verge of losing it altogether?

If you read or listen to many of the commentators out there, the country is on the verge of a total loss of religious freedom and an impending persecution of all Christ-followers. On the other hand, we have never seen so many strong and consistent decisions by the U.S. Supreme Court in upholding our first freedom than in the past decade or so.

So, pulling back from the rhetoric, where are we?

My view is that the precipice is not in the courts, but rather, is in the churches.

As attorneys, we can fight tooth and nail to uphold and defend religious freedom, but if the church does not exercise its calling—in the face of a culture that rejects transcendent truths—then we are wasting our time. If the freedoms are there, but the church capitulates or abandons biblical teaching, the message of salvation through Jesus Christ, and His Kingdom, and instead has traded the incorruptible for the corruptible, then we have squandered the time.

Religious freedom often feels local, but has a national impact. For example, Christian Legal Society's representation of the Fellowship of Christian Athletes (FCA) is primarily about their ministry in two California school district high schools. The FCA groups are just trying to reach and encourage students in the name of Jesus in those specific high schools. But if the courts rule against FCA, it could cripple not only the work in that school district, but also their entire nationwide ministry. It is why the fight to defend religious freedom is a daunting and important fight, and one that CLS will continue to wage in the courts, in the legislatures, and in the executive branch.

Attorneys across many groups and across this land have continued to deliver and fight for this right, including, since 1975, CLS' Center for Law & Religious Freedom. But would the church act different if we knew that tomorrow the right would be gone? I do not think we are in danger of losing our freedom, but the church seems to act with no sense of urgency.

Thankfully, America continues to carry the torch of religious freedom for the world. If America chooses to abandon this right, who will carry it for the world? I say "abandon" because I am not sure the next generation appreciates or understands our first freedoms (speech or religious freedom, actually). The next generation is being told that religious freedom is merely an excuse to discriminate against the LGBT community and that it should be abandoned, and their opinion (Christians and non-Christians alike), uneducated as it may be, is to scuttle it.

My prayer is that the Lord continues to grant grace to America on this issue, but more importantly, that the church take advantage of the freedoms it has in this country. May the churches and thousands of ministries that rely on this freedom see every day as a unique opportunity, as the wise bridesmaids from Matthew 25, and not slumber when they should be preparing.

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Editor-in-Chief, Design & Production
Courtney Herron

Copy Editor
Laura Nammo

Editorial Email
clshq@clsnet.org

For advertising inquiries, email clshq@clsnet.org.

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IN THIS ISSUE

A Rebirth of Religious Freedom in America

Protecting Free Exercise Under *Smith* and After *Smith*

BY THOMAS BERG AND DOUGLAS LAYCOCK

This article[1] is part of a symposium on the Court's decision in Fulton v. City of Philadelphia.[2] *It was originally featured in the* SCOTUSblog *on June 19, 2021.*

Fulton v. Philadelphia is an important win for religious liberty. Philadelphia may not terminate its foster-care services contract with Catholic Social Services (CSS) on the ground that CSS declines, because of its religious beliefs, to certify same-sex couples as foster parents. Teachings about sex and marriage are central to many religions; so are works of service. If religions lose the ability to serve because they act on their central teachings, the harm to free exercise is severe. The Court prevented that here, and the result was unanimous.

Fulton applied the rule of *Employment Division v. Smith*:[3] a law may burden religion if it is neutral and generally applicable, but if not, then the burden on religion must be justified by a compelling government interest. *Fulton* clarifies *Smith* in ways that strengthen protection.

The Court made clear that general applicability is a separate requirement from neutrality; both must be satisfied. It held that a rule flunks general applicability when it gives officials discretion to grant exceptions, even if the officials never grant any: the discretion enables discrimination against religion. Nor can government discriminate just because it's setting rules for its contractors rather than regulating the general public.

Fulton also makes clear that civil rights laws do not automatically, and in every context, serve a compelling government interest. Importantly, the liberals joined this holding.

Those points are significant. But the holding on general applicability turns on specific features of Philadelphia's rules. Cities can rewrite their rules, eliminating discretionary exceptions, and perhaps satisfy general applicability.

The holding's limits drew attack from Justice Samuel Alito, who (joined by Justices Clarence Thomas and Neil Gorsuch) argued that the Court should overrule *Smith* and strictly scrutinize generally applicable laws. Justice Amy Coney Barrett, joined by Justice Brett Kavanaugh, wrote separately that "it is difficult to see why the Free Exercise Clause … offers nothing more than protection from discrimination." So five justices said that *Smith* was mistaken, and there may be more.

Barrett and Kavanaugh followed *Smith* here because, they said, they're uncertain what would replace it. They did not need to overrule it; the general-applicability ground was available. But some cases will rest primarily on challenging *Smith*, including a pending cert petition[4] by a construction contractor who was denied a state license because he had religious objections to a requirement that he provide his Social Security number.

The Court can overrule *Smith* before it resolves every follow-on issue. But we want to begin to address Barrett's questions. We think the compelling-interest test should usually govern when a generally applicable law substantially burdens religion. That test, which applies to substantial burdens on several other fundamental rights, properly holds that only the prevention of significant harm can justify prohibiting religiously motivated conduct.

The compelling-interest test need not govern every situation. Laws that substantially interfere with religious organizations' internal governance decisions, like their selection of leaders, are absolutely barred under the *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*[5] decision, which Barrett mentions. But we don't think the test should be substantially weaker than "compelling interest."

Barrett notes that the Court has used a "more nuanced" approach than strict scrutiny when generally applicable laws affect speech or assembly. She may be referring to *United States v. O'Brien*,[6] which applied intermediate scrutiny so weak that the Court accepted a barely rational basis for punishing a protester who burned a draft card. But another expressive-conduct decision, *Boy Scouts of America v. Dale*,[7] used strict scrutiny to hold that the Boy Scouts could not be forced to accept an openly gay scoutmaster. The Court said that the nondiscrimination law in *Dale* "directly and immediately affects associational rights," while the draft-card law "only incidentally affects the free

speech rights of those who happen to use a violation of that law as a symbol of protest."

The difference the Court pointed to appears to be that a prohibition on symbolic conduct leaves open many other ways to express the same views. The Court also allows content-neutral restrictions on speech if—but only if—they leave adequate alternative channels of communication. Prohibitions on religious practice are usually more like the law in *Dale*: they leave open no other way to follow the practice in question. If you face a substantial penalty for acting consistently with your religious tenet, it's no answer to say you can still follow other tenets. If you are blocked from pursuing a form of religiously motivated service—like CSS placing foster children, or religious progressives giving food and water to undocumented migrants[8]—it's no answer to say you could do a different form of service. Religious practices are not fungible, and assessing whether they are close enough would involve courts in difficult religious judgments based on a mistaken premise.

Barrett cited a pre-*Smith* decision, *Gillette v. United States*,[9] that spoke of "substantial" rather than "compelling" government interests. And serious intermediate scrutiny would be far better than *Smith's* total abdication of review. The danger is that intermediate scrutiny often declines into excessive deference, as in *O'Brien*.

The key point, as *Fulton* again emphasized, is that "[r]ather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" Exemptions are as-applied holdings; they allow the law to go forward in most cases while preserving religious freedom in particular applications. The interest underlying drug laws may be generally compelling, but not, the Court found, as applied to limited use of a drug in worship services.[10] The interest underlying nondiscrimination laws may be generally compelling, but less likely so when there are multiple alternatives to the objecting religious provider or when the alleged discrimination is inside the church itself.

This analytical structure led Congress to find, when it enacted the Religious Freedom Restoration Act (RFRA), that the compelling-interest test "strikes sensible balances" between religious liberty and government interests. Multiple studies confirm[11] that RFRA has produced far from absolute protection for religion. Religious exercise includes conduct, and government more often has compelling reasons to regulate conduct than to regulate speech. If applied in light of these considerations, compelling interest is a workable standard.

Thomas C. Berg is the James L. Oberstar Professor of Law and public policy at the University of St. Thomas (Minnesota).

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia.

END NOTES

1 This is a reprint of an article that first appeared on *SCOTUSblog* on June 19, 2021 (https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith/). Minor stylistic edits were made, and links have been changed to endnotes. It is reprinted with the permission of *SCOTUSblog* and the authors, who wrote Christian Legal Society's amicus brief in the *Fulton* case. The brief can be found at https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/20200603161528534_19-123%20Christian%20Legal%20Socy%20Brief%20Fulton.pdf.

2 593 U.S. ___, 141 S. Ct. 1868 (June 17, 2021).

3 494 U.S. 872 (1990).

4 *Ricks v. Idaho Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2018), cert. denied, ___ U.S. ___ (June 28, 2021) (No. 19-66).

5 565 U.S. 171 (2012).

6 391 U.S. 367 (1968).

7 530 U.S. 640 (2000).

8 *United States v. Hoffman*, 436 F. Supp. 3d 1272 (D. Ariz. 2020).

9 401 U.S. 437 (1971).

10 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

11 Luke Goodrich and Rachel Busick, "Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases," 48 *Seton Hall L. Rev.* 353 (2018); Stephany Barclay and Mark Rienzi, "Constitutional Anomalies or As-Applied Challenges: A Defense of Religious Exemptions," 59 *Boston College L. Rev.* 1595 (2018); and Thomas Berg, "The New Attacks on Religious Freedom Legislation, and Why They Are Wrong," 21 *Cardozo L. Rev.* 415 (1999-2000).

Religious Liberty, the Culture War, and Christian Discipleship

BY NATHAN S. CHAPMAN

Religious accommodations used to be something almost every American could support. While Americans have long debated whether the government should promote religion, by the late twentieth century a broad coalition of conservative evangelicals, Catholics, Jews, and secular progressives had agreed to accommodate minority religious exercise whenever possible. Most notably, *Employment Division v. Smith*, which denied the First Amendment right of members of the Native American Church to use peyote as a sacrament, inspired a swift and ideologically broad-based demand for legislative reform.[1] As President Clinton signed the Religious Freedom Restoration Act (RFRA), he noted that only three members of Congress had voted against it, quipping that "the power of God is such that, even in the legislative process, miracles can happen."

This mid-1990s moment of kumbaya is long gone. Religious accommodation claims have become a front in the decades-long culture war between religious conservatives and social progressives. In the past ten years, the Supreme Court has recognized religious accommodations from three laws designed to promote sex and gender equality:

- *Fulton v. City of Philadelphia*, holding that Philadelphia may not end its contractual relationship with a Catholic adoption services provider for discriminating against same-sex couples when the city had a mechanism for discretionary exemptions from its non-discrimination rules.[2]
- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, holding that Colorado may not punish a baker for refusing to make a wedding cake for a same-sex couple when the punishment was motivated by religious animus.[3]
- *Burwell v. Hobby Lobby Stores, Inc.*, holding that the federal government may not require a closely-held for-profit corporation to purchase employee contraceptive insurance when a less religiously restrictive means existed to achieve the government's end.[4]

Each decision was subtle and limited in scope, but each has been met with stiff resistance from the cultural left. Two leading scholars, for instance, have argued that Justices Breyer and Kagan concur in many religious liberty cases simply to "appease" the conservative majority in exchange for liberal concessions elsewhere.[5] This argument assumes that no liberal judge could possibly agree with the majority on the merits. As of 2016, the American public favored requiring employers to provide birth control and was evenly split on whether to require wedding vendors to serve same-sex couples.[6] What has led to this radical shift in sentiment toward religious liberty, and what should Christian lawyers do about it?

On the surface, the reason for the shift is relatively straightforward: progressives oppose accommodations from laws embodying their sense of justice. From the perspective of social progressives, religious traditionalists have for too long denied the equal rights of women and sexual minorities. Accommodation claims interfere with those rights, disparage equal dignity, and represent a revanchist, rear-guard threat to progressive policy goals. While many progressives still support the religious accommodations they consider to be harmless, they adamantly oppose any that come at the cost of another's civil rights.[7]

None of this is much of a surprise to anyone following the American political scene, but zeroing in on religious accommodations without considering the broader context risks missing the forest for the trees. The culture war over sexual mores in America is nearly at an end. The rise of accommodations is evidence of the war's demise, not its vitality. Progressives won, conservatives lost. Yes, there are times and places where conservatives still have the political upper hand, but those times and places are dwindling. The truth is that accommodations are for political losers. The accommodation cases of the last ten years are not about who will win the culture war, but whether the victor gets to bayonet the loser on the field of defeat.

Christians who might sympathize with the conservative side of the culture war should embrace their new status as political

minorities. They should promote what John Inazu has called a "confident pluralism."[8] To my mind, this has two main components. The first is to continue to promote religious liberty, but with a wider ambit. Christians should focus not only on religious accommodations, but also on the rights of equal education. As a political minority, Christians will increasingly need to rely on private institutions to maintain their distinctive religious beliefs through education. The Supreme Court has already announced that states may no longer provide resources for non-religious activities to secular private schools without making the same resources available to religious schools.[9] The bigger concern, though, is that states will use funds to control the religious teaching and activity of private schools. The governing principle, as Michael McConnell and I argue in a forthcoming book, should be that the Establishment Clause forbids the government from interfering with the private market for religious beliefs and activity, whether with carrots or sticks. This means the government may not use the denial *or* the expenditure of funds to manipulate the beliefs and conduct of religious schools.

The Christian view of religious liberty should expand in another way too. The awkward transition from political majority to minority has understandably led many Christians to focus on what religious liberty can do for them. This has led to an unfortunate amount of navel-gazing that plays into the identity politics fracturing our country and, more importantly, that isn't Christ-like. Christians should be championing the religious liberty of their neighbors, too, leading the charge for groups that are far more politically vulnerable, like Muslims, Hindus, and indigenous peoples—especially where Christians are still in the political majority.

This leads to the second, more important change of mind that many American Christians ought to embrace. Being a minority is the Christian's natural political habitat. Christianity was born in a briar patch. Christians serve a Lord who refused the kingdoms of this world to announce one that is higher and fairer, who told his followers to abandon their swords for the cross. For far too long, many American Christians have taken as their model of political engagement the Israelite conquest of Canaan. That was always a theological mistake, and it has left nothing but a trail of carnage. The better model is the remnant of Jews exiled in a pagan empire. As Jeremiah declares: "seek the welfare of the city into which I have sent you into exile, and pray to the LORD on its behalf, for in its welfare you will find your welfare."[10] Augustine, writing as Christianity spread across the Roman Empire, argued that the church should use its influence to promote the peace of the earthly city—not to convert it into a heavenly one.[11]

What would it look like for conservative Christians to stop trying to use political power to make outsiders comply with Christian sexual norms and to start seeking their welfare? Many—including many who have written in these pages—have shown the way. Christian lawyers use their time, talents, and treasure to serve those ravaged by abuse, exploitation, infidelity, and consumerism. Some have helped take the initial steps toward reforming a dehumanizing carceral system. Others have fought for the rights of the immigrant, the single mother, and the LGBT runaway. As the experience of the

Apostle Paul illustrates, Christians have always been obliged to demand the right to follow Christ, and there will always be a need for lawyers to defend religious liberty. Yet the ordinary calling of the Christian lawyer is to join Christ in tending to the needy of all races and creeds. To elaborate on one of Pope Francis' metaphors for the church, Christian lawyers in America need to conceive of themselves not as culture warriors on the front lines, but as medics in a field hospital, impartially using their gifts to distribute the kindness they have so undeservingly received.

Nathan S. Chapman is the Pope F. Brock Associate Professor in Professional Responsibility at the University of Georgia School of Law where he focuses on religious freedom and Christianity and the law.

END NOTES

1 *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'").

2 *Fulton v. City of Philadelphia*, 2021 U.S. LEXIS 3121.

3 *Masterpiece Cakeshop Ltd. v. Colo.* C.R. Comm'n, 138 S. Ct. 1719 (2018).

4 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

5 See Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2019); see also Micah Schwartzman & Nelson Tebbe, *Re-upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term*, 2019-2020 AM. CONST. SOC'Y SUP. CT. REV. 115, https://ssrn.com/abstract=3694589.

6 *Where the Public Stands on Religious Liberty vs. Nondiscrimination* 19 (PewResearchCenter 2016), https://www.pewforum.org/wp-content/uploads/sites/7/2016/09/Religious-Liberty-full-for-web.pdf.

7 For a diagnosis of the ideological and political dynamics of this shift, see ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT (2020).

8 JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

9 See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020).

10 Jeremiah 29:7 (ESV).

11 AUGUSTINE, THE CITY OF GOD (Marcus Dods trans., Modern Library, 1994) (425).

Disestablishment and Religious Dissent, 1776-1833

BY CARL H. ESBECK

On May 10, 1776, the Second Continental Congress, sitting in Philadelphia, agreed to a resolution urging each of the British colonies in North America "to adopt such government as shall … best conduce" to the impending crisis with Great Britain. A preamble was added on May 15 that was further suggestive of a break with the mother country, and then Congress directed that the document be released to the public. The May 15 Resolution set in motion a round of constitution making along the Atlantic seaboard colonies, several of which proceeded to declare themselves sovereign states and sever ties with the British Crown. In the remaining months of 1776, Virginia, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina adopted constitutions. Georgia, New York, and Vermont followed in 1777.[1] South Carolina adopted its second constitution in 1778, Massachusetts followed with its first in 1780, and New Hampshire ratified a second constitution in 1784. Only Connecticut and Rhode Island failed to take this early republican step.

These American colonies, soon-to-be republics, meeting in representative conventions to debate and adopt constitutions to govern themselves, were a novelty in governmental practice rooted in the consent of the governed. In laboring to agree on the terms of a written constitution, the delegates to the state conventions were forced to address collectively the issue of church-state relations.[2] Each colony had unique and differing traditions of religious freedom rooted in the colony's peoples, their countries of origin, church affiliations, and theological principles. The state constitutional framers had to confront the issue of religion that some would have preferred to put off, at least until the end of military hostilities. Out of this unprecedented course of events, the emerging republics took up the complaints of those nonconformists who sought to disestablish religion where there was a state-established church or to lock in the current stage of what, over time, had evolved in the direction of no preferred church. These dissenter voices were being heard, often for the first time, because the patriots wanted their support for the revolution.

Neither the federal government, instituted in 1789 in New York City, nor the predecessor Articles of Confederation, approved in 1781 near the end of the revolutionary fighting, ever had anything resembling an established church. So there never was a national establishment to dismantle. Rather, disestablishment was entirely a state-by-state affair. The monograph, *Disestablishment and Religious Dissent, 1776 – 1833*,[3] devotes a chapter to each of these discrete state-level stories. Thus, there is in this volume a church-state account for each of the thirteen colonies, along with similar events in the soon-to-be-admitted states of Vermont, Kentucky, and Tennessee. Contributors to the chapters also discuss: Ohio, the first state admitted from the Northwest Territory; the Catholic disestablishments in Louisiana and Missouri, the first states admitted from the Louisiana Purchase; the unusual case of Maine, a state carved out of existing Massachusetts with its Congregational establishment; and Florida, which was wrestled from Catholic Spain under U.S. pressure. Each chapter begins with a colony's juridical ties to religion in its original charter and then walks forward through the events and people bearing on law, religion, and church relations, dwelling especially on the years of revolution, and then proceeding into the early republic with the restructured church-state relations in each state.

What follows is a fascinating story in political and jurisprudential innovation that has no European parallel. Disestablishment in the several states is America's preeminent contribution to governmental theory. Yet this early state history has been far less explored in favor of a focus on the newly instituted federal government. The received myth is that disestablishment was a

Cover of *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833*, edited by Carl H. Esbeck. *Printed with consent.*


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bold national experiment in religious freedom, one embodied in the First Amendment. While it is generally understood that the First Amendment (indeed, the entire Bill of Rights) bound only the new federal government, the popular belief is that the two religion clauses soon became the model that swept all of the states. The conventional telling, as well, is that Americans wanted religious freedom for their own sect but selfishly not for others. Yet pragmatism won out, the story goes, because all sects were a minority and, therefore, people came to understand that religious freedom had to be conceded to others if they wanted it for themselves. In this narrative, religious freedom is achieved not out of principle but out of practicality. These two claims are repeated as axioms in grade school social studies classrooms right on up to textbooks for college undergraduates. Our chapters show that both these conventional axioms are false.

A primary finding of the monograph is that neither the U.S. Constitution of 1787–88 nor the First Amendment of 1789–90 figured in the disestablishment process in the original thirteen states. No state modeled its declaration of rights after the First Amendment or even considered the amendment's text when making state religion law. Nor was any state's disestablishment influenced by the state-level debate over ratification of the 1787 Constitution or, two years later, the state-level debate over the Bill of Rights.

What the chapters do show is that protecting what they called the "right of private judgment" in individual religious practice came easily to Americans; however, a second finding is that voluntarism in the funding of churches—leading to the repeal of religious taxes and glebes—was slow and arduous work, spanning fifty years. When it came to finances for the state church, disestablishment forces struggled against the axiom of the Old World—that a state secures civic unity by devotion to just one religion that the state in turn supports.

While some states had a great deal of religious homogeneity, it began to break down into Protestant denominationalism through the eighteenth and into the early nineteenth centuries. Some colonies—especially New Jersey, Delaware, and Rhode Island—were pluralist from their founding, whether by choice or accident. The Great Awakening of the 1740s was the first harbinger of emerging pluralism, as it increased the ranks of independent congregations in New England and introduced Baptists into the mid-Atlantic and South. Migration from the British Isles and from colony to colony in the mid-eighteenth century further increased the growth and splintering of religious denominations. This reality would receive a new jolt in the early nineteenth century, with another round of revivals known as the Second Great Awakening, a movement that energized Methodists and Baptists, and somewhat so with Presbyterians. The Second Awakening increased the ranks of

fervent Christians that had no links to the older state-endorsed denominations. Many of these "enthusiastic" Christians explicitly preached individual liberty, political and otherwise; the institutional separation of church and state; voluntary associations as a primary means of social organization; and republicanism and local governance as the best forms of government.

A majority of the colonists who agitated for disestablishment were religious dissenters who, although in agreement concerning the general tenets of Protestant Christianity, still materially differed from the established Protestant church in their state. Their beliefs motivated them to seek freedom for reasons that were rooted in Christianity, as they understood the teachings of that faith. Christ's Kingdom is not of this world and rendering unto Caesar the things that are Caesar's were biblical passages strongly suggestive that state and church properly occupied different centers of authority under God. These dissenters believed that religious freedom was a right of private judgment and that the church, for reasons having to do with her role as understood biblically, was a body to be kept institutionally distinct from civil government and financially supported entirely by members' tithes and offerings (termed "voluntarism"). That churches remain voluntaristic is essential to their health, it was believed, for too close an embrace by the state would only detract from and even corrupt the church.

Not only did each of the original and early admitted states have its own unique disestablishment, but we found that the disestablishment story in any one state was no more important than that of others. This means we could find no warrant for the U.S. Supreme Court's step in *Everson v. Board of Education of Ewing Township*[4] and subsequent cases that elevated the disestablishment in Virginia as the more impactful in determining America's church-state principles for the entire nation.

These origins refute modern-day assertions that disestablishment was forged out of government indifference to religion, or even hostility to it. They also work to suppress the claim that disestablishment meant that religion was to have no role in shaping public affairs. Church and state could be separated, but religion and politics could not. Indeed, a majority believed religion (as they experienced it) was instrumental to the formation of virtue, and virtue was instrumental to the self-discipline of citizens necessary to sustain a republic. In the jurisprudential search for the origins of religious freedom, it is time judges and lawyers ended the neglect of the stories from the states and their disestablishments.

Carl H. Esbeck is the R. B. Price Distinguished Professor Emeritus at the University of Missouri School of Law. He formerly worked as the director of Christian Legal Society's Center for Law & Religious Freedom and as special counsel to the Deputy Attorney General, U.S. Department of Justice. He publishes widely on church-state relations in journals and law reviews and consults on First Amendment matters in litigation.

END NOTES

1 Vermont was not one of the original thirteen states, nor was it represented at the Continental Congress; however, in other respects Vermont was acting in parallel with the thirteen colonies.

2 The process of constitution making was not always in lockstep with the process of disestablishment. For example, Vermont's first constitution was in 1777, but its disestablishment was in 1807. Similarly, New Hampshire's first constitution was in 1776, but its disestablishment was in 1819.

3 *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776 – 1833* (University of Missouri Press 2019) (Carl H. Esbeck and Jonathan J. Den Hartog, eds.).

4 330 U.S. 1 (1947).

The State of Free Exercise

BY CHRISTOPHER C. LUND

Twenty years ago, the law-and-religion field did not attract much attention. Academic specialists cared about it, and affected groups did so too. But, for the most part, religion cases garnered little popular attention. That, of course, has changed. In recent years, we've seen a flood of high-profile cases about the free exercise of religion—whether religious wedding vendors have to serve gay couples getting married, whether religiously-run businesses and religious institutions have to provide coverage for forbidden forms of contraception in their insurance plans, and all kinds of other cases involving disputed issues of sexual morality. In June 2021, the Supreme Court decided one such case—*Fulton v. City of Philadelphia*,[1] a case about whether Catholic Social Services has to take gay couples seeking to adopt through them. Perhaps you live alone in a cave. If not, this is probably not news to you.

Obviously, these cases—you might call them "culture wars" cases, although that can be at least a little misleading—are important. But this kind of case has now come to dominate the landscape so completely that people on both sides now equate the free exercise of religion with conservative claims challenging liberal norms about sexual morality. For liberals, this is the reason to oppose the free exercise of religion. For conservatives, it is the reason to support the free exercise of religion. Both sides think of free exercise in these one-dimensional terms, and this isn't quite right.

As an example, consider another case the Supreme Court decided this term—a case that got virtually no public attention. This was *Tanzin v. Tanvir*.[2] The case was about three Muslims who claimed the FBI put them on the No Fly list because they refused to act as informants against their religious communities. When they filed their suit, the FBI backed down and removed them from the No Fly list, but the damage had apparently been done. Unable to fly, they couldn't visit their families or travel for work, and they had also lost the money they had already spent on plane tickets.

Tanzin v. Tanvir involved a suit brought under the Religious Freedom Restoration Act (RFRA), a federal statute protecting the free exercise of religion. You may remember RFRA. Before *Tanzin*, the most recent Supreme Court case about RFRA was the *Hobby Lobby*[3] case, about whether Christian-run businesses had to include religiously forbidden forms of contraceptive coverage in their insurance plans. The legal issue in *Tanzin* was a different and fairly technical one. Everyone agrees RFRA allows plaintiffs to get injunctive or declaratory relief. Everyone agrees that if the government is infringing your religious rights under RFRA, you can get a court order compelling the government to stop. But does RFRA entitle people to money damages for past violations? *Tanzin* illustrates why the issue matters—because the harm there couldn't be undone. The choice was damages or nothing, and the Court chose damages.

Tanzin was bipartisan in several ways. The Court is unanimous; everyone from Justice Sotomayor to Justice Thomas agrees that RFRA allows damages as a remedy. And it was bipartisan in another way. Almost all of the groups that weighed in as amicus, including many prominent liberal civil-rights groups, supported the religious claimants. But *Tanzin* is not an outlier case in these respects. *Holt v. Hobbs*,[4] a Supreme Court case from 2015, held that Muslim prisoners were entitled to wear half-inch beards as their religion required. *Holt* was unanimous too. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[5] a Supreme Court case from 2006, held that a Brazilian group could use hoasca (which contains dimethyltryptamine, a hallucinogen) in their religious rituals. *Gonzales* too was unanimous.

This is not to diminish the importance of the disputes—like *Fulton* or like *Masterpiece Cakeshop*,[6] the Court's 2018 case about whether a Christian baker has to make a wedding cake for a gay couple—that are happening right now. It is simply to say that there's a lot more happening than just those high-profile disputes. Flying underneath the public radar, all kinds of important free exercise disputes that do not fit peoples' conceptions about what free exercise cases look like are happening. This is probably a shame because there's potential in these cases to unite both the political left and the political right and because there are very sympathetic claims of religious liberty—ones that we all could get behind, ones that could help to bind a fractured polity together.

Take one case from Kansas. Mary Stinemetz was a Medicaid patient who needed a liver transplant. A Jehovah's Witness, she had religious objections to the blood transfusion that an

ordinary liver transplant required. In Nebraska, there was a hospital that had begun doing new bloodless liver transplants, which did not involve any transfusion and which were actually cheaper than ordinary liver transplants.

But Kansas' Medicaid had a policy against reimbursing out-of-state procedures beyond a 50-mile limit without a waiver. For unknown reasons, Kansas refused to give Stinemetz a waiver. This was hard to understand—again the bloodless liver transplant Stinemetz wanted would actually have been cheaper for the state. (The Kansas Court of Appeals later remarked that Kansas had "failed to suggest any state interest, much less a compelling interest, for denying Stinemetz's request.")

Stinemetz ultimately won her legal case. The Kansas Court of Appeals went out of its way for her, interpreting the Kansas Constitution to require a religious exemption. Sadly, by the time litigation ended, Stinemetz's problems had progressed to the point that she was no longer eligible for a transplant. She died of liver failure the year after her legal victory.

Stinemetz's story does not end happily, but many other free exercise cases do. Christian churches have won cases to continue programs feeding the homeless; Jewish and Muslim prisoners have won the right to have kosher or halal meals; Sikhs have won the right to carry sheathed swords. Amish pretrial detainees have won the right not to be photographed, and Native American schoolchildren have won the right to keep their hair long in religious observance. And almost no one notices all the cases where religious institutions (of all faiths) win zoning cases against hostile local governments.

People nowadays think of the free exercise of religion in partisan terms. These cases, however, illustrate an important truth—that religious liberty isn't just the right of a narrow few, but rather it is important for everyone. And though it is a partisan thing these days, it really shouldn't be. In a society as pluralistic as ours, everyone knows they are a minority in some places and in some respects. Perhaps those in power should try a little harder to remember how hard it is not to have it. That goes for the President in the Oval Office, the majority on the Supreme Court, and all of us ordinary people too.

Christopher C. Lund is a professor of law at Wayne State University Law School, where he has been voted Professor of the Year seven times. While his scholarly interests vary, his principal focus is in the field of religious freedom.

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2 592 U.S. __, 141 S. Ct. 486 (December 10, 2020).

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4 574 US 352 (2015).

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The Reason for Religious Liberty

BY MICHAEL STOKES PAULSEN

Why protect religious liberty? What is the reason, or set of reasons, for our constitutional protections for religious freedom? Do the reasons for our constitutional protection of religious liberty affect how we should understand and apply the First Amendment's language?

Rights have reasons. And those reasons matter. To be sure, constitutional legal language—like that of the First Amendment—sometimes overshoots, or undershoots, the purposes for which a specific provision was designed. As a rule, however, identifying the reason behind the right aids in the proper interpretation and application of the words actually adopted. The purposes and worldview underlying a specific freedom supply valuable context for—and thus inform the proper understanding of—the Constitution's language.

This seems especially true for religious liberty. The reasons underlying religious liberty in the American constitutional scheme powerfully inform the correct understanding of the Constitution's language. They clarify textual meanings of terms. They resolve linguistic ambiguity. They help in understanding religious freedoms's believed intrinsic scope—the "sphere" of liberty or autonomy contemplated by the Constitution's language. They help set boundaries or limits, or at least make sense of them. In short, the meaning and proper application of the First Amendment's terms only makes full sense when read in light of their animating purposes.

What, then, *explains* religious liberty? And how can that explanation inform the proper understanding of the First Amendment?

The Priority of God's Commands

Religious liberty, as a freedom specifically for *religious* belief and exercise, only makes entire sense on a series of *essentially religious premises*: that God exists (or may well exist); that God's nature and character are such (or may well be) as to give rise to obligations of loyalty and fidelity and, therefore, to certain obligations with respect to human conduct, worship, and identity; that the true commands of God, whenever knowable, are in principle prior to and superior in obligation to the commands of men; and that human civil society, acknowledging the priority of God's true commands (yet conceding the inability of human governmental institutions to know them perfectly), therefore, recognizes religious liberty as an inalienable right—not a right granted by government but instead *acknowledged* by government as an intrinsic limitation on all human authority. Consequently, the law must accord the broadest possible sphere of religious liberty to plausible claims of religious obligation and must do so even when such a sphere of liberty involves conduct in conflict with society's usual rules.

Without such foundationally religious premises, genuine religious liberty, I submit, does not make a great deal of sense as a social and constitutional arrangement. There is no fully convincing secular argument for religious liberty. At least, there is none that justifies religious liberty in the strong sense of *unique constitutional protection* of *religious* beliefs and practices *specifically because they are religious*—the only sense that does full justice to the Constitution's language and, even more fundamentally, to the fact that the document *has* a "free exercise" of religion provision specifically for the protection of religious belief and religious conduct.

Think about it. If society thought religious belief to be crazy—considered persons of faith to be lunatics believing in unreal, ridiculous things not corresponding to anything true, and then basing their idiosyncratic, society-challenging conduct on such crazed beliefs—why on earth would it adopt a constitutional provision specifically for the protection of such belief and conduct?

One can make a barely passable secular-libertarian argument for some degree of mild *tolerance* of at least some religious conduct based on the premise that people generally should be permitted, wherever possible, to do as they please (including those cranky, benighted religious folk). But it becomes hard to justify exempting religious conduct from the usual secular rules if you don't believe that religious belief corresponds to anything that is or could be actually *real*. If you think that "religion" is just the projection of an individual's subjective preferences—not a real thing, but an idiosyncratic personal choice not based in a right understanding of reality—you certainly will be reluctant to accord strong constitutional protection to conduct based on religious belief whenever such conduct conflicts with secular norms, whenever you care the least little bit about the secular norm in question. Whatever the Constitution's language says —including such embarrassing

things as according special constitutional status to the "*free exercise*" of principles of an individual's or religious community's faith—you will strain to read that language narrowly, as according religious choices no greater constitutional immunity from government than any other personal choice.

If one reads the First Amendment's religion clauses as a committed agnostic—that is, through the lens of modern skepticism of the validity or rationality of religious belief—one will tend to see religious liberty not as an inalienable affirmative liberty but as a narrow rule of nondiscrimination requiring that religious conduct not be treated *worse* than the same or similar actions of others engaged in for any other personal reason. On such a view, "religious liberty" consists merely of not singling out religious belief or exercise for special discrimination. Unfortunately, that has been the Supreme Court's approach to the Free Exercise Clause for the past three decades, since *Employment Division v. Smith*,[1] a case I have severely criticized for three decades.

Recent decisions suggest that the Court may be poised to reconsider the *Smith* approach. It should. And the key to restoring the proper understanding and status of the Free Exercise Clause is to read the First Amendment, as it were, through the eyes of religious faith—the way it would have been understood and read at the time it was adopted by the framing generation, reflecting the religious premises and purposes that formed its backdrop. The First Amendment should be viewed from the perspective of the religious believer, not the perspective of the indifferent agnostic or skeptical atheist.

There is abundant reason to believe that, as a matter of history and social context, the Free Exercise and Establishment Clauses of the First Amendment were not written out of a stance of agnosticism or skepticism about the possibility of true religious belief. Rather, they were adopted to protect something that the political and social culture regarded as supremely important—paramount, fundamental, beyond government's and society's power to regulate. They reflect the conviction that there is, or may be, such a thing as ultimate religious truth; that such truth, where it can be discovered or revealed, is in principle the most important thing there is; and that, consequently, it should prevail over any mere human law or custom in conflict with it. Given that religious truth might exist, the freedom to pursue that truth is worth protecting to the highest degree possible. And the freedom to act in accordance with one's sincere religious convictions similarly merits the greatest possible societal indulgence and legal protection. These were the premises that animated the First Amendment's protections of religious liberty. They should be read in such light.

The Reason for Religious Liberty Changes Law "On the Ground"

This has important practical legal implications. It means that the Free Exercise Clause is most sensibly read as an affirmative substantive freedom, *not* as a mere nondiscrimination rule. Read from a perspective that regards religion as a natural, God-given, inalienable right that precedes and has priority over the usual rules of society, this is the only reading of the Free Exercise Clause that squares with its purposes. It means

that the contrary premises of *Employment Division v. Smith*—that exempting religious conduct from the usual rules would be an unwelcome, disfavored "constitutional anomaly," would render every religious believer a "law unto himself," and would be "courting anarchy"—are simply unfaithful to the premises underlying the Free Exercise Clause.

It means that the Free Exercise Clause is about protecting *religious* exercise specifically, not personal "autonomy" in general. (That really would be "courting anarchy.") Religion really is uniquely favored by the First Amendment. However odd—or even unfair—that might sound to modern, secular ears, that is the original meaning of the Constitution's words, in their social and linguistic context.

It favors broad deference to a *religious adherent's sincere understanding* of what does or does not burden his religious free exercise, whether society agrees or not (as long as that understanding really does flow from religious conviction). Courts and legislatures do not determine what a religious person believes and whether it is adversely affected by society's rules. The believer determines these things.

Pointing in a somewhat more restrictive direction, the original understanding of religious freedom counsels a more traditional, theistic understanding of "religion"—one where an individual's sense of obligation flows from *God* (or gods) outside of himself and is not just a projection of one's one views, desires, or preferences (which would drain the word "religion" of all meaning and really would make every individual "a law unto himself"). This too might sound illiberal to modern ears: shouldn't "religion" be whatever an individual believes? But it is truer to the original constitutional meaning of the words of the text. Religion, in the eighteenth century, meant, well, *religion*: faith in God and duties of worship, morality, and conduct believed to flow from that faith. It is also truer to the text's operative logic: we protect religious conscience on the premise that God is real and that God's true commands rightly have a claim of priority over man's actions. We do not protect secular conscience in the same way for the simple reason that the nature of the conflict between an individual's personal ethical views and the requirements of the state is not the same.

It also means that the nature and scope of "compelling interests" thought to prevail over claims of religious autonomy must be extremely limited. The religious justification for religious liberty both informs and limits the types of asserted interests that defeat claims of religious liberty. Not everything the state thinks is important should defeat religious liberty. (If it did, "religious freedom" would be a charade, a pretense, a sham.) Rather, the state should win only where the would-be religious claimants' assertion can be fairly said to have no basis in a plausibly true command of God. In concrete terms, "religious freedom" cannot form the basis for a claimed privilege to impose intolerable harms (or risks of harm) to the natural, God-given rights of others. For example, the "free exercise" of religion simply does not protect murder, robbery, rape, abortion, violence, perjury, fraud, or flying hijacked planes into buildings. This is not just because these are activities the *state* judges to be wrong but at bottom because we believe these are things that God judges to be wrong and that, consequently, cannot plausibly be excused on the claim of fidelity to God's true commands. (Other situations can present difficult line-drawing questions. And taken too far, this can be a dangerous line of reasoning. But I think it at least poses the right set of questions.)

Finally, this means that the Establishment Clause of the Constitution is never properly misconstrued to be a "freedom *from* religion" provision—a principle of strict separation of religion from civil life that excludes or discriminates against religious persons, groups, and ideas. Rather, in harmony with the founders' reasons for recognizing religious liberty, the Establishment Clause is a corollary, cognate "freedom *for* religion" principle: government may not dictate religious exercise or belief; the state may no more coerce religious exercise than it can prohibit it.

Rights have reasons and those reasons support right readings of the rights in question. Religious liberty is about freedom *for* religion. Right religious beliefs rightly have a claim to priority over anything that government commands to the contrary. And the freedom to seek religious truth, and to live in accordance with such beliefs, is rightly regarded as a value of the highest importance.

Michael Stokes Paulsen is Distinguished University Chair and a professor of law at the University of St. Thomas, in Minneapolis. He was senior staff counsel for the Center for Law & Religious Freedom from 1986-1989. This essay is distilled from ideas first presented in *The Priority of God: A Theory of Religious Liberty*, 39 Pepperdine L. Rev. 1159 (2013) and *Is Religious Freedom Irrational?*, 112 Michigan L. Rev. 1043 (2014).

END NOTES

1 1 494 U.S. 872 (1990).

After *Fulton*, the Continuing Need to Overrule *Employment Division v. Smith*

BY KIM COLBY

The marquee religious freedom case before the U.S. Supreme Court in its 2020 Term was F*ulton v. City of Philadelphia*.[1] Released on June 17, the Court produced a unanimous decision that simultaneously exceeded expectations and dashed hopes.

***Fulton's* Facts:** Sharonelle Fulton is a foster care parent who partners with Catholic Social Services (CSS) to care for Philadelphia children needing a temporary home. She sued when Philadelphia terminated its contract with CSS because it would not certify same-sex couples as foster families. CSS believes marriage exists only between a man and a woman. CSS serves all children regardless of sexual orientation. No same-sex couple ever sought CSS' certification; if a couple had, CSS would have referred it to one of 26 other foster care agencies.

Private agencies may not provide foster care services without a city contract, which essentially serves as a license. CSS supplements government funding it receives with private funds. After a newspaper reported that CSS would not certify same-sex couples, Philadelphia put CSS to a choice: agree to abide by its nondiscrimination policy prohibiting sexual orientation discrimination or cease providing foster care services. When CSS refused to abandon its religious convictions, Philadelphia refused to renew its contract despite a shortage of foster families.

1990—*Employment Division v. Smith*: CSS asked a federal court to order Philadelphia to restore its contract. Both the trial and appellate courts, however, ruled that Philadelphia had not violated the Free Exercise Clause by denying CSS an exemption because the nondiscrimination policy was neutral and generally applicable. Both courts relied on the decision in *Smith*,[2] in which the Supreme Court held that religious individuals and institutions usually must comply with neutral and generally applicable laws even if the laws restrict their religious exercise. *Smith* radically departed from 30 years of precedents in which the Court applied the "compelling interest/least restrictive means" test to government actions that burdened a religious claimant's religious exercise. After *Smith*, a citizen must obey a neutral and generally applicable law even if compliance would violate core religious convictions and even if the government could easily accommodate the religious practice if it chose to do so.[3]

The *Smith* decision stunned religious freedom advocates but barely registered with the general public. The facts in *Smith* were unlikely to arouse most Americans' sympathy. Two drug counselors employed by a drug rehabilitation company engaged in their Native American religious ritual of ingesting peyote. Unsurprisingly, they were fired and subsequently denied unemployment benefits by the state.

Most observers expected the counselors to lose because the war on drugs was generally assumed to be a compelling government interest. But, in an opinion by Justice Scalia, the Court discarded the compelling interest test and substituted rational basis review—or possibly, no review at all—for strict scrutiny review whenever a burden on the free exercise of religion is imposed by a neutral and generally applicable law.

***Smith's* Aftermath:** Oddly, *Smith* left in place previous decisions requiring unemployment benefits for persons who lost

jobs for religious reasons. Instead, the Court said if the government operated a system of individualized exemptions, like the unemployment benefits system in which government officials determine whether individuals were fired for cause, then the government might still have to demonstrate a compelling justification for denying benefits to an individual fired for religious reasons. *Smith* also left the compelling interest test in place if laws discriminate *on their face* against religious exercise. The compelling interest test seemingly remained the standard if a law was not neutral or generally applicable.

1993—The Religious Freedom Restoration Act: CLS helped lead a coalition of 68 organizations from across the religious and political spectrum to undo *Smith's* damage by enacting the Religious Freedom Restoration Act (RFRA).[4] The coalition had one overriding principle: RFRA would protect *all* Americans' religious freedom. With overwhelmingly bipartisan support, RFRA passed the Senate 97-3 and the House by unanimous voice vote. President Clinton enthusiastically signed it into law in November 1993. Under RFRA, if a religious individual or institution shows its sincerely held religious belief is substantially burdened by a neutral and generally applicable law, then the government must demonstrate it is using the least restrictive means of furthering a compelling interest. The Court has characterized RFRA as a "sensible balancing test."[5]

Church of the Lukumi Babalu Aye v. City of Hialeah: Also in 1993, the Court explored when a law is "neutral" and "generally applicable" in *Lukumi.*[6] Adherents to Santeria practiced animal sacrifice as part of their worship. The city passed ordinances prohibiting religious sacrifices while allowing hunting and other animal killings to continue. A unanimous Court held that Hialeah violated the Free Exercise Clause because its ordinances targeted religious practices, rendering them not neutral. Nor were the ordinances generally applicable because they permitted conduct performed for secular reasons but prohibited analogous conduct performed for religious reasons. The Court would not address the meaning of "neutral" and "general applicability" again for 24 years until *Masterpiece Cakeshop*. While lower courts sometimes applied *Lukumi* to require religious exemptions, the Court remained silent.

1997—The Court again Removed Free Exercise Protection at the State Level: Pre-*Smith,* federal and state governments were required to show a compelling interest before burdening religious exercise. RFRA originally restored the compelling interest requirement to federal and state laws. But in *City of Boerne v. Flores,*[7] the Court ruled Congress exceeded its authority under the Fourteenth Amendment by imposing the compelling interest standard on the states. After *Boerne,* Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA)[8] to restore the compelling interest test to state prisons and zoning laws. Other state laws are not subject to the compelling interest test unless the state adopts a state RFRA, as 24 states have done, or its state supreme court determines the compelling interest test applies when the state burdens religious exercise.

For nearly three decades, at the federal level, RFRA rather than the First Amendment has provided the primary protection for Americans' religious freedom. *Smith* demolished the *constitutional* safety net the Free Exercise Clause previously provided against state actions, and *Boerne* removed the *statutory* safety net that Congress tried to restore through RFRA for religious exercise burdened by state laws.

2012-2021—Free Exercise Reawakens: The Court broke its silence regarding constitutional free exercise in 2004 in *Locke v. Davey*[9] when it condoned explicit discrimination against religious exercise. Washington State prohibited college students from using state scholarships to study "devotional theology." Despite *Smith's* ban on facial discrimination, the Court upheld, 7-2, this religious targeting. Similarly, in 2010, in *Christian Legal Society v. Martinez,*[10] a 5-4 Court relied on *Smith* to rule that, if a public law school's (purported) "all-comers" policy was neutral and generally applicable, it could deny a religious group's right to require its leaders agree with its religious beliefs. In a cursory footnote, five justices dismissed this basic religious freedom, which was the nadir of the modern Free Exercise Clause.

In 2012, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*[11] a unanimous Court ruled that the Free Exercise and Establishment Clauses combined to protect the "ministerial exception": religious congregations' right to choose who serves as their ministers. The Court held that the ministerial exception included a teacher at a church's school, reaffirming this right in *Our Lady of Guadalupe* v. *Morrissey-Berru* (2020).[12]

The Court set *Smith* aside to rule for the ministerial exception.[13] The Court ruled that federal courts could not decide a teacher's lawsuit alleging discrimination against her religious employer, despite *Smith* characterizing nondiscrimination laws as neutral and generally applicable. Relying on *Smith*, the federal government had claimed the Religion Clauses offered

no protection for a congregation's decisions regarding its ministers. At argument, Justice Scalia belittled the government's argument.

After *Hosanna-Tabor*, the Court issued several more victories, but most involved federal statutes rather than the Free Exercise Clause. In *Hobby Lobby v. Burwell* (2014),[14] *Zubik v. Burwell* (2016),[15] *Little Sisters of the Poor v. Pennsylvania* (2020),[16] and *Tanzin v. Tanvir* (2021),[17] the Court applied RFRA, building on its 2006 *O Centro* decision. RLUIPA protected a Muslim prisoner in *Holt v. Hobbs* (2015).[18] Title VII vindicated a Muslim teenager not hired because her hijab failed a company's "look" policy in *EEOC v. Abercrombie & Fitch Stores* (2015).[19]

A resurgent Free Exercise Clause secured two victories, *Trinity Lutheran Church v. Comer* (2017)[20] and *Espinoza v. Montana Dept. of Revenue* (2020).[21] But in both, the Court ruled that state laws discriminated based on religious status, which *Smith* itself prohibited.

State and Local Restrictions on Religious Exercise: RFRA and Title VII do not protect free exercise against state and local laws. RLUIPA does, but only in the limited contexts of prisons and zoning. If free exercise is to be protected at the state and local levels, the federal Free Exercise Clause must once again be the constitutional safety net for religious exercise against state and local restrictions. Three cases demonstrate that need.

2017—Masterpiece Cakeshop: The Court scrambled to rescue Jack Phillips from the Colorado Civil Rights Commission's crusade to compel him to create a wedding cake for a same-sex marriage ceremony contrary to his traditional Christian beliefs. A 7-2 Court found Colorado violated both *Lukumi* requirements.[22] Some commissioners had shown impermissible hostility toward Phillips' religious beliefs, violating *Lukumi's* neutrality requirement. The Commission had violated *Lukumi's* general applicability requirement when it failed to punish three bakers for refusing to make cakes to which they objected. But *Masterpiece Cakeshop* was a narrow win.

2020-2021—COVID Closures: The Court analyzed challenges to state and local executive orders through the *Lukumi* lens. But what was the appropriate comparator under the "generally applicable" analysis: Was a religious worship service more like Walmart (allowed) or a rock concert (not allowed)? Initially, a 5-4 Court reasoned that worship services were more like rock concerts than Walmart. Yet when Nevada restricted worship services to 50 parishioners, while allowing casinos with thousands of patrons, the Court's choice of comparators seemed faulty. With Justice Barrett's confirmation, a 5-4 Court required state officials to justify less favorable treatment of religious congregations by using a "compelling interest/less restrictive means" test if any other assembly was exempted.[23]

2021—*Fulton Exceeds Expectations*: The Court agreed to review whether *Smith* should be overruled. No one predicted all nine justices would agree that Philadelphia's application of its nondiscrimination provision to exclude CSS violated the Free Exercise Clause. Again, the Court narrowly applied the *Lukumi* analysis. Philadelphia failed to meet the generally applicable requirement because its nondiscrimination policy allowed the Commissioner to grant exemptions at his "sole discretion." Even though no exemption had been granted, the potential exemption triggered CSS' right to a religious exemption. Under *Smith* and *Lukumi*, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[24]

Five *Fulton* takeaways are:

First, Philadelphia claimed that CSS' certification would not endorse same-sex marriage, but the Court said that CSS' own understanding of its religious beliefs controlled.[25]

Second, Philadelphia argued for deference to government decisions in the government contracts context. The Court declared that principles of neutrality and general applicability constrain the government even in its capacity as manager.[26]

Third, the Court found that foster care agencies do not become public accommodations by certifying foster parents. A selective assessment, certification is not generally available to the public.[27]

Fourth, Philadelphia's interest in preventing discrimination was not sufficiently compelling in this case to override free exercise.[28]

Fifth, as Professors Lupu and Tuttle remarked, no justice and only four amicus briefs argued for Smith's retention.[29]

Fulton Dashes Hopes: Yet *Smith* survives. In two concurrences, Justices Alito, Thomas, and Gorsuch excoriated the Court for not overruling *Smith*. Justice Barrett's concurrence, joined fully by Justice Kavanaugh and partially by Justice Breyer, expressed an inclination to overrule *Smith*, tempered by uncertainty regarding the standard that should replace it. Justice Barrett identified four concerns:[30]

1) Should religious institutions be treated differently than individuals?

2) Should a distinction be made between indirect and direct burdens?

3) What level of scrutiny should apply?

4) How would pre-*Smith* cases have been decided under a new test?

Professors Tom Berg and Douglas Laycock, who co-authored CLS' amicus brief in *Fulton*,[31] responded quickly to Justice Barrett's questions.[32]

Justice Alito's concurrence brilliantly enumerates the reasons for restoring a "compelling interest/least restrictive means" test as the constitutional standard for federal and state actions. [33] Justice Gorsuch's concurrence details that *Lukumi* inadequately protects religious freedom from state and local officials' apathy—and too often their antipathy. As Justice Gorsuch urged, incremental decisions using *Lukumi's* analysis—no matter how welcome—mean "[i]ndividuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties."[34] Because the window to overrule *Smith* may close unexpectedly, the time has come to restore a federal constitutional safety net that protects all Americans' religious exercise.

Kim Colby is Director of CLS' Center for Law & Religious Freedom. She is a graduate of Harvard Law School. Kim has represented religious groups in numerous appellate cases, including two cases heard by the U.S. Supreme Court. She has also filed dozens of amicus briefs in federal and state courts. In 1984, Kim was heavily involved in congressional passage of the Equal Access Act.

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22 *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

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27 *Id.* at 1880-81.

28 *Id.* at 1881-82.

29 Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles; A Comment on Fulton v. City of Philadelphia*, American Constitution Society, Supreme Court Review (5th Ed., 2020-21) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3888375; *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring in judgment, with two justices).

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32 Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 21 Cato Sup. Ct. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3893231.

33 *Fulton*, 141 S. Ct. at 1883-1926 (Alito, J., concurring in judgment, with two justices).

34 *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring in judgment, with two justices).

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Light in the Midst of Darkness

BY LAKUITA BITTLE

We are the LIGHT of the world.[1] God says so in His Word. Sometimes to gain the full understanding of a word, we must look closer at its definition. Merriam-Webster gives one definition of "light" as "something that makes vision possible."[2] As Christians, we know that Jesus is the light of the world.[3] He is the one that makes our vision possible. He lives inside of each of us. Ephesians 5:8 further explains, "For at one time you were darkness, but now you are light in the Lord. Walk as children of light." Once we accept Jesus as our personal Savior, we become children of Light. We no longer walk in darkness because His Word gives us the clarity we need. It is He who helps to illuminate and eliminate the dark areas in our lives.[4] Yet that does not mean darkness is not still all around.

Attorneys are often faced with dark situations, from clients' circumstances to stressful litigation such as defending the rights and liberties of others. Need I mention the gross darkness that we face in our culture and society? But how bright is our light shining, as Christian attorneys? How clear is our vision? The darker it is around us, the brighter the light must shine to make things visible. Think about your office space or your home during the daytime. You can sometimes fully function without your overhead lighting. You may or may not have it turned on. Even then, it is still possible to do things such as read this magazine article or locate a particular item in the room. But at night, when the darkness comes, you need a greater light to make vision possible. You need a stronger wattage to see things clearly; you may even need multiple lights.

Let's turn to the word "darkness," which is the opposite of light. The word "light" has a stronger definition or perception when you fully understand the definition of "darkness." "Darkness"is defined as the "total or near total absence of light."[5] The world is filled with so much darkness. At times, it feels as though the body of Christ is being confronted with darkness—or the absence of light—in many areas, including in our schools, against our churches, and even in our families.

Since March 2020, when the pandemic took most of us by surprise, there has been a complete shift in our lives. Some days seemed very dark in the past year and a half. I know I personally found my light growing dim at times and being overtaken by the cares of this world. I've seen many relatives transition to their eternal homes, including my grandmother and my uncle. I had to overcome some health challenges that may have seemed minor to some, but for a perfectly healthy person, that

was not something I had even fathomed. There were plenty of times where I felt overwhelmed by my workload. There were even months where I was isolated from seeing my family and friends. Many of you had to overcome the same hurdles. I find that it is during the darkest times of my life is when I have to dig deeper and connect with the true Light, Jesus. I had to really seek the Lord and ask for His vision. One way I did that was by starting a daily scripture writing plan and purposing in my heart to start off my days with prayer. I also joined a spiritual and fitness accountability group. It was during these personal devotion times that I felt my spiritual wattage increase. When we were able to reassemble at my local church, I certainly felt a greater level of surge. It is not that I strayed away from the faith, but rather that I needed to continue to deepen my relationship with God. I needed a greater illumination as the darkness around me grew. The same light will not always work for us as we progress in life.

We have all been affected in some way or another by the darkness around us, even before 2020, but it should not snuff out our light. This is why fellowship is so important. As Christian attorneys, we need one another. As we connect our light with other Christian attorneys in our community or nationwide, we gain a stronger ability to see, and our vision gets clearer in what God is calling us to do. I am so grateful for my Christian friends, mentors, and wise counsel that I have been blessed to have in my life. It is an even greater blessing to be part of the staff here at Christian Legal Society.

The practice of law is very stressful at times. We are constantly surrounded by darkness and are called to make life-changing decisions in an instant on behalf of victims, clients, and the community. Perhaps we are so acclimated to the pressure that there are times when we are unaware of the amount of darkness surrounding us daily. But we have been called and chosen by God[6] to be right where we are today. Despite the difficulties, there are many great rewards, both earthly and eternal. Are we hiding our light? Has the darkness of this world dimmed it a little? Or, are we shining bright in our work places, homes, families, and beyond?

I just want to encourage you wherever you are to let your light shine bright as a Christian attorney![7] Don't hide it or place it under a bushel.[8] It is one of the most important things about Christian fellowship in this profession. It is worth taking the "time" because we are always watching our hours. Christian Legal Society is founded on the importance of growing the light of Jesus in this profession.

Our God is greater than any darkness. The darkness does not comprehend the light,[9] which must continue to shine. Think about the power of one light bulb. A room can be completely dark, but when the light turns on, darkness ceases. Imagine the power that we have as believers when we truly let our lights shine. The darkness around us will begin to dissipate. People will be drawn to the light inside of us, and God will get the glory. And even when the darkness does not comprehend the light, we continue to shine and SHINE BRIGHT! Will there

be challenging time, fears, uncertainty? Absolutely! But we have the hope of Glory—Jesus Christ! We are children of the true light bearer. Remember, "the light shines in the darkness, and the darkness has not overcome it."[10] It will not overtake you.

I urge you to fellowship with others in your community and CLS chapters. The months of social distancing and lack of fellowship have affected the church and the world. It makes a difference to have the body come together! I promise, the light of Jesus shines brighter when we are together; our profession, our partners, our associates, and our law schools need it more now than ever!

Lakuita Bittle, director of CLS' Attorney Ministries, oversees our membership and provides support to our attorney chapters nationwide. Prior to joining CLS in March 2021, Lakuita worked in the Prince George's County State's Attorney's Office for over five years, most recently as a prosecutor in the Major Crimes Unit. She is actively involved in her church and serves on a local nonprofit board, Kadesh CDC. Lakuita is passionate about serving her community and enjoys spending time with her family and friends.

END NOTES

1. "You are the light of the world. A town built on a hill cannot be hidden" (Matthew 5:14 (NIV)).
2. https://www.merriam-webster.com/dictionary/light.
3. John 8:12.
4. Psalm 119:105.
5. https://www.merriam-webster.com/dictionary/darkness.
6. "For many are invited, but few are chosen" (Matthew 22:14).
7. "In the same way, let your light shine before others, that they may see your good deeds and glorify your Father in heaven" (Matthew 5:16 (NIV)).
8. "Neither do men light a candle and put it under a bushel, but on a candlestick, and it giveth light unto all that are in the house" (Matthew 5:15 (KJV)).
9. John 1:1-5.
10. John 1:5

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Seedtime & Harvest

BY ANTON SORKIN

Sowing Season

It has become perhaps a cliché to invoke the expert in the law of Luke 10, who sought to justify himself by asking Christ to define his terms: "who is my neighbor?" But you would be wrong! For there is perhaps nothing more novel than to reconsider the applicational prowess that Christ demonstrates in developing the theology of grace with the use of social history. Offering the three bystanders and the broken man, scripture taps into the hearts and minds of "experts" to ask a basic question regarding the witness of their faith.

> "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?"

Was it the priest, who knew the law and followed its imperatives to the letter; considering, no less, his performance of faith to be the apotheosis of religious piety? Or, was it the Levite? Less gripped by the codes of tradition, he too nevertheless took the path of least resistance when he passed the half-dead man without the offer of help. Or, was it the Samaritan, a despised schismatic, who garnered little respect among the elite as he walked among the "clean" with only the offer of pollution in his attendance? The lawyer replied: "the one who showed mercy"—refusing to even acknowledge the social caste of the one who proved to be the neighbor by possessing the requisite sensitivity to see a need and act to meet it.

> "My thoughts, the intimate life of my soul, are torn this way and that in the havoc of change."
>
> Augustine of Hippo, *Confessions*

And, if acknowledgment wasn't enough, the lawyer, who sought to circumvent the duty to act with limiting principles, received a further directive from Christ. To bind his neighbor's wounds and pay for his convalescence until the man could walk again. A moment of reparative justice. In the words of Darrell Bock: the "obligation [was] not to see what can be avoided, but to render aid when it can be readily supplied."[1] Christ was emphatic to "go and do likewise"—teaching that

awareness begets action and, through our salt and light measures (Matthew 5:16), we display the author of our convictions (Hebrews 12:2).

It is perhaps another cliché to quote the infamous passage of Micah 6:8 without first considering the social history that envelops the call for Christians to *act* justly, *love* mercy, and *walk* humbly with our God. But you would be wrong! For in missing the context, we miss the surrounding pitfalls of sanctimonious expressions of a faith lodged deep in the conscience of public leaders who "lean on the Lord" (Micah 3:11) for their protection while living lies devoid of saving faith. It is perhaps no wonder that, in trying to justify themselves, the people—entering another period of religious dereliction—would scale the quantitative measure of devotion through offerings of rams, rivers of oil, and their first born (Micah 6:7) while neglecting the "weightier matters of the law: justice and mercy and faithfulness" (Matthew 23:23). Instead of the regenerating community made whole through the pursuit of these virtues, the people turn to ceremonies, writes Leslie C. Allen, "discharged with emotional feeling and material extravagance," which "became the sum total of [their] spiritual commitment."[2] Remain vigilant, lest, like Simon the Magician (Acts 8), you begin "to live in the substitutes for life with God."[3]

Alas, it is perhaps a final cliché to say that the law school experience is akin to the rich man asking to send Lazarus to bring him a drop of water to cool his tongue—for he was in agony in the fire. But, again, you would be wrong! For it is from fire that we have been plucked (Zechariah 3:2) and into the fire thrown again to test the mettle of our confession (1 Peter 1:7) and to learn with renewed zeal the "famed sweet-mystery-of-life" inspired by ethanol and caffeination.

Harvest Season

Taken together, we see a developing picture of the new chapter in the life of law student ministry. A commitment to study the patterns of social existence and seek out the broken and ill-timed vessels alongside the roads paved by situational hazards. An opportunity to study the grassroots patterns of Holy Spirit manifestations to discern what God may call us to perform in this short season of our educational captivity. It will certainly feel that way and the friends that you make will be the lifeline that carries you over the finishing line. But, together, we can build a community that preaches the permanent things. A community set against the free-choice society and the anxieties it produces. Participating in a new project in holistic ministry that seeks to stitch the fabric of our former skins together with a new instinct toward the "habits of the soul."[4] We must set aside our childish ways and discern the spirit of the age.

But, most importantly, we must embrace the call to love. "Love," writes Timothy P. Jackson, "is the foundational norm that ought to structure political principles and policies." Its mechanisms serve through the extension of unearned care and the breaking of barriers that seek to annul the outside world through false dichotomies that keep the church inside its theologically patted walls.[5] This mindset not only separates us from the outside world and leaves the work of God to those less delicate to the optics of "sinners" at our tables, but also it marks us as the unfaithful servant who engages in patterns of willful disobedience in hopes that his master will not soon return (Matthew 24:45-51, 25:14-26).

The operational theater of the Christian resolve is based on the treatment of strangers within the social system we inhabit. Our very proximity to the broken vessels of our institutional designs signifies the gravity of our convictions, which will inevitably attract others inside. As Willie Jennings explains, "[s]torytellers make our bodies for us, forming narrative fabric so tightly aligned with our skin that it becomes our skin." It is in this moment that we must recommit to a new social imaginary that will yield a "boldness born of intimacy." A new commitment to go outside the camp and bear the optics of sitting beside the wells of Samaria. Fashioning a new body that bends toward the needs of others, in the sacrificial display of the Savior who paid it all.

Anton Sorkin is the director of CLS' Law Student Ministries, where he helps Christian law students across the nation better integrate their work and worship. He has a passion for helping students study the interaction between law and religion, engage with the complexity of the modern forms of public witness, and better love God and serve their neighbors. Anton is also a visiting scholar at the University of Texas School of Law.

END NOTES

1 Darrell Bock, *Luke (9:51-24:53)* 1034 (Baker Academic 1996).

2 Leslie C. Allen, *The Books of Joel, Obadiah, Jonah, And Micah* 375 (Nicot 1976).

3 Willie James Jennings, *Acts 79* (Pauw Ed., 2017).

4 C.S. Lewis, *Mere Christianity 101* (1952).

5 Timothy P. Jackson, *Political Agape: Christian Love and Liberal Democracy* 2-3, 11-19 (2015).

6 Willie James Jennings, *Acts* 49, 69 (Pauw Ed., 2017).

Shutting the Door on Faith-Based Legal Services

BY KEN LIU

Open Door Legal Services[1] is a Christian Legal Aid clinic that helps homeless men and women resolve legal problems. The clinic is hosted by Seattle's Union Gospel Mission (SUGM), which has served the city's homeless with food, resources, and friendship since 1932. In line with SUGM's mission of bringing "the love of Jesus and hope for a new life to our homeless neighbors," all of SUGM's services, including legal aid, are provided with the goal of ministering to the whole person. But if the Washington Supreme Court has its way, the door could potentially close on the ability of SUGM's attorneys to minister to legal aid clients.

Matthew Woods is an attorney who volunteered with Open Door Legal Services. When Open Door had a staff attorney position open in 2016, he expressed interest in the position. Knowing that SUGM is a Christian organization, he disclosed that he was bisexual and was in a same-sex relationship. After being told that SUGM's Employee Code of Conduct contained a prohibition on same-sex romantic relationships, he applied for the position anyway, and SUGM turned him down.

Woods sued SUGM for discrimination on the basis of sexual orientation under the Washington Law Against Discrimination (WLAD), which prohibits employer discrimination on the grounds of age, sex, sexual orientation, and disability. WLAD also specifically exempts religious nonprofits from the statute, as well as all employers with fewer than eight employees. At trial, SUGM successfully got the case dismissed on summary judgment based on the religious exemption.

Woods appealed the case to the Washington Supreme Court, challenging the constitutionality of WLAD. On March 4, 2021, the Court upheld the constitutionality of the statute, but narrowed its scope, and remanded the case to determine whether SUGM's decision not to hire Woods was protected under the "ministerial exception" as defined by the U.S. Supreme Court.

This case, *Woods v. Seattle's Union Gospel Mission*,[2] is the first religious freedom case against a Christian Legal Aid (CLA) clinic in the country. Although its outcome will govern only Washington State, its reasoning could influence other states. We hope the courts there and elsewhere will understand and appreciate the importance of religious values as an essential aspect of faith-based legal services and permit CLA clinics to choose their attorneys accordingly.

Legal background. The ministerial exception was first elucidated by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*,[3] although it had been applied in the lower courts for over 40 years. Rooted in the U.S. Constitution's Free Exercise and Establishment Clauses, the doctrine exempts religious institutions' employment relationships with its ministers from anti-discrimination laws. The exception seeks to protect religious organizations' freedom to select their own ministers and to prevent government intrusion into ecclesiastical decisions.

In a more recent case, *Our Lady of Guadalupe School v. Morrissey-Berru*,[4] the Supreme Court again applied the ministerial exception to a religious school's employment of teachers. The Court held that the First Amendment precludes the government from interfering with religious organizations' right to decide matters of "faith and doctrine."

In an earlier case, *Corporation of Presiding Bishop v. Amos*,[5] the Supreme Court unanimously held that a statutory exemption for religious nonprofits' employment decisions even regarding "secular" jobs does not violate the Establishment Clause. Even liberal icons William Brennan and Thurgood Marshall recognized that "[a] case-by-case analysis for all activities [of a religious nonprofit employer] would both produce excessive government entanglement with religion and create the danger of chilling religious activity."[6]

Legal aid ministry. In light of such established precedents, it is unfortunate the Washington Supreme Court felt the need to remand the case for more litigation. The court could have, and should have, applied its state statutory exemption as the Washington Legislature intended: a complete exemption for religious nonprofits from the reach of the state nondiscrimination law. The statutory exemption avoids a court parsing the attorney's duties into "secular" versus "religious." Such government action is an unwarranted intrusion into the right of religious entities to hire employees whose beliefs and values align with the organization's, a right that should be protected by the federal Constitution's protection of religious organizations' free exercise of religion.

"Legal issues are infused with judgments of fair versus unfair, good versus harmful, just and unjust.... For faith-based legal clinics, this means the delivery of their legal services has a ministry purpose and function. "

The Washington Supreme Court apparently does not understand the nature of religious activities in general and Christian legal aid in particular. Of course, there is a great degree of difference in the extent to which faith-based charities integrate their faith with the services they provide. For many faith-based organizations, however, everything they do is infused with a ministry purpose. As a result, it is often impossible to separate their functions between "secular" versus "religious" ones.

This is no less true with Christian Legal Aid clinics.[7] Although there are differences in the degree to which CLA clinics integrate their faith into their legal services, most CLA attorneys are guided by their faith in how they serve clients. Legal issues are infused with judgments of fair versus unfair, good versus harmful, just and unjust. These determinations are by nature laden with values and cannot help but be informed by one's faith and worldview. For faith-based legal clinics, this means the delivery of their legal services has a ministry purpose and function. This is especially true for CLA attorneys when they serve in a *counselor* or *advising* role (as opposed to those in litigation or other type of advocacy). Their advice is guided by religious values.

Procedurally, this may mean seeking non-adversarial options for resolving disputes rather than litigation, whether it be formal mediation or asking a trusted third party (e.g., a pastor) to help resolve a personal dispute pursuant to the process outlined in Matthew 18.[8] Substantively, this may mean voluntarily conceding on certain issues they would otherwise desire to fight about. For instance, for clients who are in bitter child custody disputes with an ex-spouse, a CLA attorney might advise them on the importance of loving their enemies, forgiveness, and the value of allowing their children to have a fruitful

relationship with their other parent. This might result in the client deciding to voluntarily share in physical custody rather than fight for sole custody.

Others may argue that non-religious attorneys also try to resolve disputes amicably and advise their clients to compromise on issues, but the big difference in CLA clinics is in how we do so. CLA attorneys can appeal to clients using specifically Christian values and sharing Christ's words, such as "Love your enemies and pray for those who persecute you" (Matthew 5:44), and "forgive one another, as God in Christ forgave you" (Ephesians 4:32).

Many CLA attorneys go further and also share the gospel with clients and pray with them. Many legal aid clients come to a clinic full of anger, bitterness, or despondency, and their legal problems are often intertwined with a whole web of other problems that are relational, emotional, or spiritual in nature. Often what they need even more than legal help is a compassionate listening ear and the love of Christ. Although attorneys are not professional counselors, often the best help they can provide to a hurting client is words of comfort and a shoulder to cry on. What they need is not just help, but hope.

All of these forms of service are, in a true sense of the word, "ministerial." In CLA clinics, such ministry is common and goes to the heart of what distinguishes Christian Legal Aid from secular. This is why CLA clinics need the freedom to choose whom to hire and fire. Faith qualifications are often integral to the position of a CLA attorney.

Ministerial services and legal ethics. For CLA attorneys, and indeed for all attorneys of faith, what may be most troubling about the *Woods* case is the concurring opinion of Justice Mary Yu, whose views likely reflect what many non-Christian judges believe. She first acknowledges that, "Without question, the [Rules of Professional Conduct] (RPCs) do not prohibit religious considerations from being a factor in legal practice because '[i]n rendering advice, **a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors**, that may be relevant to the client's situation.' RPC 2.1."[9] Nevertheless, she dismisses the significance of this rule and goes on to make the flat-footed statement, "I believe it is simply not possible to simultaneously act as both an attorney and a minister while complying with the RPCs."[10]

Justice Yu seems to believe there is an inherent conflict between providing spiritual advice and legal advice. She states, "In the particular context of a legal aid organization serving the needs of vulnerable populations, the likelihood of concurrent conflicts of interest would be enormous if an attorney attempted to act as a minister and a lawyer at the same time. This

conflict is likely if the necessary legal advice conflicts with the religious message of the lawyer."[11]

But Justice Yu misses several important points in making such a sweeping pronouncement. First, she neglects the acceptance today of lawyers' ability to provide limited representation (or "unbundled legal services"). Lawyers need not provide full representation for an entire litigation matter, but may limit the scope of representation to discrete tasks.[12] A lawyer can, therefore, engage in ministerial functions (e.g., providing spiritual advice) as part of the representation and engage in strictly legal functions (e.g., arguing motions) at other times. Saying that lawyers may only provide technical legal advice is like telling doctors they can only dispense medication but they cannot tell patients about the importance of eating nutritious food, getting good exercise, and maintaining a healthy lifestyle.

Justice Yu also confuses attorneys' role as *advocates* with their role as *counselors*. Once an attorney takes on the role of advocate, legal ethics rules do require the attorney to set aside his own preferences and views (to some extent) in helping to achieve the client's goals.[13] Before an attorney accepts the role of an advocate, however, the attorney's role can and should first be as counselor to the client. An attorney who blindly fights for his client's stated goals without first advising the client on the pros and cons of the goals and considering all options and implications does a significant disservice to the client and may, in fact, violate the RPCs.[14] Further, legal ethics rules permit lawyers to decline engaging in actions they believe are "repugnant or imprudent."[15] A lawyer, therefore, may initially counsel a client based on the lawyer's religious values and then represent the client only after determining that such representation can be done without violating such values. Or, as is done in many CLA clinics, the lawyer may at the outset limit her services solely to providing advice and counsel and not represent the client in advocacy work at all.

Justice Yu goes on to argue that "[The SUGM staff attorneys] are first and foremost charged with providing objective legal advice that may, in fact, conflict with the employing entity's religious doctrine. A religious organization that chooses to employ an attorney in order to provide civil legal aid cannot control the legal advice by requiring the attorney to serve as minister and attorney at the same time."[16] This is even more reason why a faith-based legal clinic must be permitted to hire based on its own faith criteria. Assuming the premise of Justice Yu's argument is correct, then the hiring organization must at least know that its staff attorneys share the same core beliefs as the organization, otherwise the attorney may decide to take on cases and positions that are antithetical to its values. This would clearly implicate the religious organization's First Amendment rights.

"It is in its personnel—the people who are doing the serving—that faith-based legal clinics must have discretion to choose based on religious values because the work they do is ministry."

To be clear, no CLA clinic I know would discriminate against clients in providing legal services. CLA clinics are generally glad to serve LGBT clients in addressing legal issues on which they would serve any other clients. It is in its personnel—the people who are doing the serving—that faith-based legal clinics must have discretion to choose based on religious values because the work they do is ministry.

Conclusion. All who follow Christ are called to be "ministers" in everything we do, including in our professions. Government officials often may not understand the all-encompassing nature of the Christian call. They will, of course, argue that employment roles can be divided into "religious" versus "secular" ones. Certainly there might be some roles for some religious employers that may be more or less impacted by one's faith and values than others. It should not be the purview of the government to make such judgments on behalf of religious organizations.

In a seminal article on Christian Legal Aid, "Client Choices, Community Values: Why Faith-based Legal Services Providers are Good for Poverty Law," Melanie Acevedo states: "Faith-based lawyering for the poor is subversive to the vision of the lawyer as an impersonal, amoral keeper of a role, capable of checking his or her personal values at the door of every professional interaction. Faith-based lawyering sees the religious lawyer as a person who, like everyone else, can't help but be guided by his or her deepest beliefs."[17]

Many today seem to assume that Christian values are in opposition to what they consider to be a good and fair society, but for Christian Legal Aid attorneys, it is our faith that compels us to speak out for the poor, the oppressed, and the downtrodden. We are specifically called to "[d]efend the weak and the

fatherless; uphold the cause of the poor and the oppressed. Rescue the weak and the needy; deliver them from the hand of the wicked" (Psalms 82:3-4).

I pray we may all continue doing so according to the dictates of our deepest beliefs.

Ken Liu is Director of Christian Legal Society's Christian Legal Aid (CLA) program, in which he helps to start new CLA clinics and provides support for a network of 65 CLA clinics around the country. Ken has volunteered with Good Samaritan Advocates, a CLA program in suburban Washington, D.C., since 2015. Ken also works part-time at Gammon & Grange, P.C, a law firm serving churches, ministries, and other nonprofit organizations.

END NOTES

1 See www.ugm.org/what-we-do/stabilization/legal-services (not to be confused with Open Door Legal in San Francisco, CA).

2 Slip opinion is available at https://www.courts.wa.gov/opinions/pdf/961328.pdf.

3 565 U.S. 171 (2012).

4 591 U.S. ___, 140 S. Ct. 2049 (2020).

5 483 U.S. 327 (1987).

6 *Id.* at 344 (Brennan, J., concurring).

7 *See* Melanie D. Acevedo, "Client Choices, Community Values: Why Faith-Based Legal Services Providers are Good for Poverty Law," 70 *Fordham L. Rev.* 1491 (2002) for a detailed discussion of how Christian legal clinics integrate faith into their legal service.

8 "If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church" (Matthew 18:15-17).

9 ABA Model Rules of Professional Conduct, Rule 2.1, Comment 2, provides further: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. **It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.** Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." (Emphasis added.)

10 *Woods*, p.7.

11 *Id.*, pp.7-8.

12 See Sunil Mootien-Pillay, Dan Ford, Carla Reyes, "Unbundling Of Legal Services In Washington State," Revised August 25, 2016, Washington State Bar Association Pro Bono and Public Service Committee. See also Lyle Moran, "Unbundled Law Firms Find Success Offering Virtual Legal Services," April 27, 2021.

13 [A] lawyer shall abide by a client's decisions concerning the objectives of representation." Washington RPCs, Rule 1.2(a).

14 Rule 2.1 specifically requires an attorney to "exercise independent professional judgment." See also, Larry O. Natt Gantt, "More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations," 18 *Geo. J. Legal Ethics* 365, 368, 371-84 (2005) ("despite the innocuous, permissive language in Rule 2.1, attorneys may be required to discuss nonlegal considerations with their clients in certain instances." Emphasis added.)

15 Washington RPCs, Rule 1.2, Comment 6. See also American Bar Association Model Rules of Professional Conduct, Rule 1.16(b)(4) (a lawyer may withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

16 *Woods*, pp.8-9.

17 Acevedo, 70 *Fordham L. Rev.* 1491, 153.

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Christian Legal Aid of Arizona

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Pepperdine University Legal Aid Clinic

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Christian Legal Aid of Los Angeles

Oakland
Pope Francis Legal Clinic

Sacramento
Love & Wisdom Legal Aid Clinic

San Diego Metro Area
San Diego Christian Legal Aid

San Jose
Silicon Valley Christian Legal Aid

Santa Ana
Christian Legal Aid of Orange County
Trinity Law Clinic at the Orange County Rescue Mission
Trinity Law Clinic Mobile Legal Clinic

COLORADO

Denver
Justice and Mercy Legal Aid Center

Denver Metro
Christian Legal Clinic of Metro Denver
Triage Legal Clinics
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Christian Legal Aid of the District of Columbia
- Central Union Mission
- DC Dream Center

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Jacksonville
CLS Pro Bono Project

Jacksonville Metro Area
Jericho Road Legal Service Ministry

ILLINOIS

Chicago
Cabrini Green Legal Aid

Chicago Metro Area
Administer Justice

INDIANA

Indianapolis Metro Area
Neighborhood Christian Legal Clinic

KANSAS

Wichita
Wichita Christian Legal Aid

KENTUCKY

Lexington
Merciful Justice Legal Clinic

Louisville
Access Justice

MARYLAND

Gaithersburg
Good Samaritan Advocates
- Covenant Life Church
- Montgomery County Correctional Facility

MICHIGAN

Detroit Metro Area
Christian Legal Aid of Southeast Michigan

Detroit
Joseph Project

Grand Rapids
West Michigan Christian Legal Aid

Kalamazoo
Christian Legal Aid of Southwest Michigan

Lansing
Christian Legal Aid of Lansing

MINNESOTA

Minneapolis
Park Avenue Walk-in Legal Clinic

Twin Cities
Twin Cities Christian Legal Aid

MISSISSIPPI

Jackson
Mission First Legal Aid Office

MISSOURI

St. Louis Metro Area
New Covenant Legal Services

NEW JERSEY

Newark Metro
Immigrant Hope

NEW MEXICO

Albuquerque
New Mexico Christian Legal Aid

Las Cruces
Catholic Charities of Southern New Mexico

NEW YORK

New York City
Open Hands Legal Services, Inc.

NORTH CAROLINA

Durham
Justice Matters

Greensboro
William Wilberforce Center

Raleigh
Campbell Community Law Clinic

OHIO

Cleveland
Scranton Road Legal Clinic

Columbus Metro (Westerville)
Vineyard Immigration Counseling Service

Toledo
Christian Legal Collaborative

OKLAHOMA

Oklahoma City Metro
Trinity Legal Clinic
- Crossings Community Center
- Cross and Crown Mission
- City Rescue Mission
- Living Faith Ministry
- OKC First Church of the Nazarene
- Salvation Army – Norman

Tulsa
Tulsa University College of Law CLS Christian Legal Aid Clinic

OREGON

Portland
Union Gospel Mission of Portland Christian Legal Aid Clinic

PENNSYLVANIA

Philadelphia
Christian Legal Clinics of Philadelphia
- West Philadelphia Legal Clinic
- Hunting Park Legal Clinic
- South Philadelphia Legal Clinic
- Chester Legal Clinic
- Germantown Legal Clinic
- Kensington Legal Clinic
- Chosen 300 Legal Clinic
- North Philadelphia Legal Clinic

Pittsburgh
Christian Legal Aid of Pittsburgh

TENNESSEE

Nashville Metro
Compassionate Counsel

TEXAS

Houston Metro (Cypress)
Houston Legal Aid Center

Houston Metro (The Woodlands)
Community Christian Legal Aid

Houston
Restoring Justice

VIRGINIA

Arlington
Restoration Immigration Legal Aid

Northern Virginia
Good Samaritan Advocates
- Columbia Baptist Church
- Cornerstone Chapel
- Reston Bible Church
- The Lamb Center

Roanoke
Roanoke Rescue Mission

WASHINGTON

Seattle
Open Door Legal Services

Spokane
Union Gospel Mission of Spokane Christian Legal Aid Clinic

WISCONSIN

Milwaukee
JC Legal Resources Center Inc.

For contact information and other details for the Christian Legal Aid clinics, view the full clinic directory at ChristianLegalAid.org/clinics.

Connect with other CLS members in your area

ALABAMA

Birmingham
CLS Birmingham
Mark Hogewood
mhogewood@wallacejordan.com

*Mobile**
CLS Mobile

ARIZONA

Phoenix
CLS Phoenix
David Williams
dwilliams@davismiles.com

Tucson
CLS Tucson
Jim Richardson
richardsonjim@icloud.com

CALIFORNIA

Inland Empire
CLS Inland Empire
Maureen Muratore
mmlawyer@peoplepc.com

*Los Angeles**
CLS Los Angeles

Orange County
CLS Orange County
Kelli Marsh
clsorangecountychapter@gmail.com

Sacramento
CLS Sacramento
Steve Burlingham
steveb@gtblaw.com

San Diego
CLS San Diego
Miles Lawrence
Miles@LTSLaw.net

San Fernando Valley
CLS San Fernando Valley
Ben Jesudasson
ben@bjlawgroup.com

San Francisco
CLS San Francisco
Kirstin L. Wallace
kwallace@archernorris.com

*West Los Angeles**
CLS West L.A.

COLORADO

Colorado Springs
CLS Colorado Springs
Joe Brown
jbb@telioslaw.com

Denver
CLS Metro Denver
Katelyn Ridenour
katelyn@oneaccord.legal

DISTRICT OF COLUMBIA

CLS DC Metro
Paul Daebeler
pfdaebeler@verizon.net

FLORIDA

Jacksonville
CLS Jacksonville
Joseph Scone
joe@sconelaw.com

Central Florida
CLS Orlando
A. Jay Fowinkle
AF@markslawfla.com

West Palm Beach
CLS West Palm Beach
Betty Dunkum
bld@victorytrial.com

GEORGIA

Atlanta
CLS Atlanta
Clare Draper
Clare.draper@alston.com

HAWAII

Honolulu
CLS Hawaii
William Harrison
wharrison@hamlaw.net

ILLINOIS

Chicago
CLS Chicago
Brent Amato
amatos1@comcast.net

KANSAS

Topeka
CLS Topeka
Matthew Shoger
matthew.shoger@outlook.com

Wichita
CLS Wichita
Douglas Coe
doug@legacylegalllc.com

LOUISIANA

New Orleans
CLS New Orleans
Frank Bruno
frank@fabruno.com

MARYLAND

Greater Baltimore
CLS Maryland
Matt Paavola
matt@myworkerscomplawfirm.com

MASSACHUSETTS

*Boston**
CLS Boston

MINNESOTA

Minneapolis
CLS of Minnesota
Ted Landwehr
tland@landwehrlaw.com

MISSISSIPPI

Jackson
CLS of Central Mississippi
Bob Anderson
bob.anderson@mdhs.ms.gov

MISSOURI

Kansas City
CLS Kansas City
Mike Whitehead
mikewhitehead1@gmail.com

St. Louis
CLS St. Louis
Gary Drag
gddrag@lawofficeofgarydrag.com

Springfield
CLS of Springfield
Lydia Seifner
lydia@spfdfamilylaw.com

NEBRASKA

Lincoln
CLS Lincoln
Jefferson Downing
jd@keatinglaw.com

NEVADA

*Las Vegas**
CLS Las Vegas

NEW JERSEY

Cape May
CLS Cape May
Anthony P. Monzo
amonzo@mchlegal.com

NEW YORK

New York City
CLS NYC
Jonathan Nelson
jnelson@nelsonmaddenblack.com

NORTH CAROLINA

Wake County
Wake County CLS
Max Rodden
mrodden@smithdebnamlaw.com

OHIO

Columbus
CLS of Central Ohio
Todd A. Fichtenberg
toddafichtenberg@gmail.com

Willoughby Hills
CLS of Ohio Northeast
Robert L. Moore
rob@robmoorelaw.com

OKLAHOMA

Oklahoma City
CLS Oklahoma City
David Van Meter
david@vanmeterlawfirm.com

OREGON

Salem
CLS of Oregon
Herbert Grey
herb@greylaw.org

PENNSYLVANIA

*Greater Philadelphia**
CLS Philadelphia/Delaware Valley

Pittsburgh
CLS Western Pennsylvania
Lauren Rushak
lrushak@clarkhill.com

TENNESSEE

Chattanooga
CLS Chattanooga
J. Christopher Clem
cclem@sampleslaw.com

Memphis
CLS Memphis
Jay Lifschultz
Jay.lifschultz@usa.net

Nashville
CLS Greater Nashville
Nick Barry
nicholasrbarry@gmail.com

TEXAS

Austin
CLS Austin
Steve Campos
stevecampos@atxlawgroup.com

Dallas
CLS Dallas
Roshan Mansinghani
president@clsdallas.org

Houston
CLS Houston
Jordan La Raia
jordan.laraia@franksintl.com

San Antonio
CLS San Antonio

Chad Olsen
chad@braychappell.com

Williamson County
CLS Williamson County
Terence Davis
terence@cedarparkattorney.com

VIRGINIA

Leesburg
CLS Northern Virginia
Mark Crowley
markvincentcrowley@earthlink.net

*Richmond**
CLS Richmond

WASHINGTON

Seattle
CLS Seattle
Peter Dolan
Pdolan@elmlaw.com

WISCONSIN

Madison
CLS Madison
Ryan Seib
ryan@assuritylegal.com

** These existing chapters are seeking new leadership. Are you interested in helping revive these chapters? Email us at clshq@clsnet.org.*

We are so excited to see our attorney chapters gathering again in person. With everyday life slowly getting back into gear, it is good to see you coming together in your communities to enjoy good, wholesome fellowship.

New York City

New York City CLS Chapter attorneys and CLS Executive Director David Nammo enjoyed good food, sunshine, and poolside chats at their annual barbecue in August.

Central Florida

Fifth District Court of Appeal Judge Meredith Sasso provided an engaging lunch time talk for attorneys in the **Central Florida CLS Chapter** who gathered in person in July.

Wake County

Wake County CLS Chapter attorneys enjoy some good soul food at their monthly meeting in August, featuring Administrative Law Judge Karlene S. Turrentine.

Houston

CLS attorneys hosted a coffee event for summer associates interning at local law firms in **Houston, Texas.**

Orange County (CA)

The **Orange County CLS Chapter** gathered together in July for a little backyard food and fellowship. It was a beautiful evening, and the group was joined by CLS Executive Director David Nammo.

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Charlie Oellermann, President and Chairman of the Board

I follow in the footsteps of a remarkable succession of godly men and women who have had the privilege of serving as the president of Christian Legal Society. Under our bylaws, the CLS president serves a two-year term, during which he or she chairs the board of directors. When this issue of *The Christian Lawyer* goes to press, I will have served about half of my term, and I take this opportunity to update you briefly on the board's activities.

First, some basic information regarding the current board of directors: the board includes 19 members of CLS plus David Nammo, CLS' executive director and CEO. Board members hail from more than 10 states, spanning the entire country from California to Virginia and from Florida to Oregon—and many states in between. All current board members are attorneys (although our bylaws provide for non-attorneys to join our board), and they represent almost all categories of legal practice, including large- and small-firm practitioners, in-house counsel, and legal educators. We are always looking for those who are interested in serving on the board.

The board exercises its fiduciary responsibility to ensure that CLS is well-managed through two primary mechanisms. First, the board advises, supports, and evaluates our executive director and CEO with respect to CLS' ministry work. Second, the board also works through committees that meet monthly, including typical governance committees, as well as committees that oversee each of CLS' four national ministries: Attorney Ministries, Law Student Ministries, Christian Legal Aid, and the Center for Law & Religious Freedom.

To help David and the CLS staff focus its efforts in a manner that will best serve God's Kingdom, the board plans, in coordination with the four CLS ministry directors, to develop a Strategic Growth Plan in 2022. The Strategic Growth Plan will help us envision what the organization can grow into over the next several years and allow us to then take the necessary steps to get there.

CLS' Center for Law & Religious Freedom (the Center), which is featured in this issue, provides a good example of the utility of such a plan. As most would acknowledge, the challenges to religious freedom have grown in manifold ways since the Center was formed as the first religious freedom advocacy organization back in 1975.

The Center has responded effectively to many of those challenges in the courts, the halls of Congress and state legislatures, and many other venues. In the same timeframe, other organizations thankfully have also taken up the mantle of religious freedom. Given this evolving landscape and the work that still needs to be done, several questions are posed: Where can the Center be most effective in deploying its resources to advance religious freedom? Should the Center prioritize amicus brief writing in the federal appellate courts, advocacy in the federal executive branch, and/or direct representation of parties in the trial courts?

The Strategic Growth Plan is intended to answer those types of questions not only for the Center, but also for CLS' three other ministries. How might we best expand our network of Christian Legal Aid clinics, both in the U.S. and beyond? How can we meet our longstanding goal of having a CLS attorney chapter in all major U.S. cities and all 50 states? How do we best minister to Christian law students and share the gospel on the approximately 200 law school campuses across the country? In the coming year, I am looking forward to working through these important issues prayerfully with my fellow board members, under the guidance of the Holy Spirit.

It is a privilege to represent the membership of CLS through its board of directors. I welcome your input regarding CLS and the board's efforts at any time.

Get Away with Us

CLS' 2022 REGIONAL RETREATS

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SOUTHERN CALIFORNIA

MIDWEST RETREAT
LAKE GENEVA (WI)

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