



WHY RELIGIOUS FREEDOM?

**WHY THE RELIGIOUSLY COMMITTED, THE
RELIGIOUSLY INDIFFERENT AND THOSE
HOSTILE TO RELIGION SHOULD CARE**

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Executive Summary

This critical paper on religious freedom and its relationship to the State by Professor Brett Scharffs of the J. Reuben Clark Law School at Brigham Young University poses an important question: why should anyone care about religious freedom? The question here, though, is specifically directed towards those who are indifferent or hostile to, or uninformed about religious freedom. Prof. Scharffs proceeds to examine a number of the crucial debates around freedom of religion and conscience through both an historical prism and by reviewing recent American jurisprudence dealing with this foundational, or as he terms it a “root” freedom. The arguments made by Prof. Scharffs are particularly cogent. Firstly, he articulates why religious freedom is a distinct freedom with deep historical and philosophical roots, distinct from freedom of speech, association, and assembly yet inextricably bound to them and they to it. He cautions against direct or indirect attempts to sever fundamental freedoms from the root of religious freedom -an act which would result in the withering of these related freedoms. Secondly, in his examination of the role of the State vis-a-vis the guarantee of religious freedom he offers a valuable and timely distinction between what he terms monist and dualist views. Prof. Scharffs cautions against both secular and religious monism in which religious freedom and other freedoms are viewed as gifts of the State to citizens which can likewise be taken back by the State. He advocates for a dualism in which the State acknowledges the core principle that human rights are understood to be born by all human beings and derived from our inherent characteristics of reason and conscience and our ability to have empathy and compassion for our fellows. Prof. Scharffs raises grave concern about what he perceives to be “an erosion of the strong commitment to dualism that underlies not just the human rights worldview but most of Western history.”

— Dr. Andrew P.W. Bennett,
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Introduction

Religious freedom: Is it the grandparent of human rights, or the neglected stepchild? As with most false dichotomies, the answer is both. It is the grandparent of human rights as well as the neglected stepchild. But it is also the underappreciated core, or taproot, of human rights.

In this essay I will discuss a deceptively simple and surprisingly controversial (even “provocative”) question: Why should we care about religious freedom?¹

For the seeker of religious truth, the answer may be obvious: Religious freedom creates the conditions, the “constitutional space,”² for investigation and the pursuit of truth. But what about those who fall into other groups? What about the religiously committed—who are confident they are in possession of religious truth? Or the religiously indifferent—who are not much interested in religion or spirituality? Or those who are affirmatively hostile to religion—those who believe religion does more harm than good? Should they—should we—care about religious freedom?

I would like to provide three reasons for suggesting that they—and all of us—should care deeply about freedom of religion (and belief). As I begin, I’d like to make two preliminary notes. First, the human rights documents’ inclusion of “and belief”³ in the formulation of the protection of freedom of religion is important, since it carves out space to protect and respect religious as well as non-religious bases for belief. In the words of the UN Human Rights Committee, it protects “theistic, non-theistic, and atheistic belief, as well as the right not to profess any religion or belief.”⁴

1 “Freedom of Religion or Belief is a surprisingly provocative right. So let us be provoked” (Heiner Bielefeldt, “A Surprisingly Provocative Human Right: Freedom of Religion or Belief” [23rd International Law and Religion Symposium: Religious Rights in a Pluralistic World, October 2016]).

2 Thanks to University of Melbourne Law School dean Carolyn Evans for sensitizing me to the concept of “constitutional space.”

3 The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief reads:

1.1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

1.2 No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

1.3 Freedom to manifest one’s religion or beliefs may be subject only to such limitation as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. . . .

Article 3 Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations. “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief” (G. A. Res. A 36/55, 1981) (hereafter Elimination of All Forms of Intolerance).

4 “Human Rights Committee, General Comment 22, Article 18 (Forty-Eighth Session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” University of Minnesota Human Rights Library, <http://hrlibrary.umn.edu/gencomm/hrcom22.htm>.

The second preliminary note is to acknowledge that there are many important instrumental reasons why religion and religious freedom are important. For example, one recent study estimates that religion in America contributes \$1.2 trillion to the American economy—much in the form of education, health care, care of the homeless, drug and addiction counselling, marriage counselling, and so on.⁵ There is also evidence that religious freedom positively correlates with a number of other important social and political goods.⁶ My focus is a little different—not on the good that religion does, but on why we should care about religious freedom itself, or the freedom to choose religion.

The reasons I will focus on are these:

First is the role of religious freedom as a historical foundation for constitutional, political, civil, and human rights. I will suggest that without freedom of religion and belief (FORB), the entire human rights project may collapse from its own weight. Second, I will argue that FORB is necessary if we are to resist statism and other monistic views of state power. And third, I will suggest that we may not have the intellectual, political, or rhetorical resources to defend conscience if we do not respect and protect freedom of religion and belief.

⁵ Brian Grim and Melissa Grim, “The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,” *Interdisciplinary Journal of Research on Religion* 2, no. 24 (2016): 12.

⁶ Brian Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press, 2010), 2–3 (“The higher degree to which governments and societies ensure religious freedom for all, the less violent religious persecution and conflict along religious lines there will be.”)

I. Historical importance of FORB (Freedom of Religion and Belief)

As a matter of history, religious freedom is among the first and foundational human rights.⁷ The story of the emergence of FORB as a human right is complex.⁸ But think about the other important civil and political rights that we bundle together with religious freedom—freedom of speech, freedom of the press, freedom of assembly, and freedom of association, among others.⁹ As a matter of history, freedom of speech arose in large measure as an effort to protect religious dissenters and their right to express and advocate for their religious views.¹⁰ As a matter of history, freedom of the press was a battle fought in large measure over the printing of the Bible.¹¹ Freedom of assembly, likewise, was in large measure historically a struggle for the right of minority religious communities to gather and worship together.¹² Freedom of association, closely related, includes the right to associate with those who share our beliefs and commitments, including religious communities and religiously affiliated institutions such as schools and universities.¹³

7 Malcolm Evans, “Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict,” in *Facilitating Freedom of Religion or Belief: A Deskbook*, ed. Tore Lindholm, W. Cole Durham Jr., and Bahia G. Tahzib-Lie (Leiden: Brill, 2004), 11–14.

8 *Ibid.*, 1–18.

9 For example, these freedoms all appear in the First Amendment of the US Constitution, which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (U.S. Const. amend. I).

10 In the sixteenth century, the Reformation allowed a space for dissenters to voice concerns about the dominant Catholic Church. See Joris van Eijnatten, “In Praise of Moderate Enlightenment: A Taxonomy of Early Modern Arguments in Favor of Freedom of Expression,” in *Freedom of Speech: The History of an Idea*, ed. Elizabeth Powers (Lewisburg, PA: Bucknell University Press, 2011), 23; see also *ibid.*, 20: “During this phase [the sixteenth century], freedom of expression was treated primarily as an aspect of a wider issue, that of religious toleration.”

11 William Tyndale was convicted of heresy and executed for translating the Bible from Greek into English. See David Daniell, *William Tyndale: A Biography* (New Haven: Yale University Press, 1994), 83–134, 374–84. Similarly, with great persecution from the Catholic Church, Martin Luther broke with mainstream Catholicism and published the first Bible in German. See Scott H. Hendrix, *Martin Luther: Visionary Reformer* (New Haven, Yale University Press, 2015), xx, 13–14, 240. Furthermore, Hendrix chronicles how the printing press was used to perpetuate the ideals from the Reformation: “Beginning in 1518, an astounding number of people agreed with Luther, left behind the religion of their ancestors and rallied to his side. Rome, however, did not buckle, and what ensued from 1520 to 1525 was a war of words. . . . The war was made possible by a new, cheaper, and faster technology—printing with movable type” (*ibid.*, 13–14).

12 In the seventeenth century, the Church of England placed restrictions on the ability of minority religious groups to gather together and worship. See John D. Inazu, “The Forgotten Freedom of Assembly,” *Tulane Law Review* 84, no. 565 (2010): 575. During this time, religious nonconformists could not assemble themselves into groups larger than five persons (*ibid.*). In 1670, William Penn and other Quakers attempted to gather together and worship in violation of English law (*ibid.*, 575–76). They were arrested on the charge that their worship constituted an unlawful assembly, but were later acquitted by a jury (*ibid.*). The case, however, gained renown in the American colonies (*ibid.*, 576). One hundred years after the trial of William Penn, John Page, a representative from Virginia and a staunch advocate for the freedom of assembly alluded to Penn’s trial during House debates over the language in the Bill of Rights (*ibid.*, 575–76). Irving Brant notes that “the mere reference to [the Penn trial] was equivalent to a half hour of oratory” (Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs-Merrill, 1965), 55).

13 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554 (2000) (“The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (Private schools enjoy a right of free association so long as they do not discriminate based on race); The Editors, with Nazila Ghanea, introduction to *Facilitating Freedom of Religion*, xl; Karen Lim, “Freedom to Exclude After *Boy Scouts of America v. Dale*: Do Private Schools Have a Right to Discriminate Against Homosexual Teachers?,” *Fordham Law Review* 71, no. 6 (2003): 2599.

Even non-discrimination norms (which these days are often conceptualized as being in tension with FORB) arose in large measure as efforts to stamp out discrimination on the basis of religion—for example, discrimination against Catholics and Jews in the United States.¹⁴ The non-discrimination provisions of international human rights documents as well as the US Civil Rights Act all include prohibitions on the basis of religion as a key component of the concept of non-discrimination.¹⁵

My claim (directed to the committed, the indifferent, and the hostile) is simply this: Freedom of thought, conscience, and belief, including foundationally freedom of religion, is historically the taproot¹⁶ of the tree of human rights that was planted with the Magna Carta (drafted by a religious leader, the archbishop of Canterbury Stephen Langton),¹⁷ nourished by the Declaration of Independence (with its inalienable rights with which human beings are endowed “by their Creator”)¹⁸ and the French Declaration of the Rights of Man (which describes the foundational rights it identifies as “sacred”),¹⁹ given global recognition in the Universal Declaration of Human Rights (UDHR),²⁰ and turned into globally recognized and protected rights protected

14 The United States explicitly listed religion as a class that is protected from discrimination in Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §2000e-2 (1964) (prohibiting discrimination because of an “individual’s race, color, religion, sex, or national origin”). Similar language is used in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and Convention on the Elimination of All Forms of Discrimination Against Women. Universal Declaration of Human Rights, G.A. Res. 217 (III) U.N. Doc. A/810, art. 2 (1948) (hereafter UDHR) (“Everyone is entitled to all the rights and freedoms . . . , without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (hereafter ICCPR) (requiring all signatories to the covenant to provide “all individuals within [their] territory and subject to [their] jurisdiction the rights recognized [therein], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 (hereafter CEDAW) (prohibiting “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”).

15 See the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e-2 (1964).

16 The taproot is the main root of a tree from which other roots sprout. It is the root that goes deepest into the ground and provides nourishment and sustenance for the smaller roots.

17 William J. Murray and Robert Armstrong, “The Magna Carta: Celebrating Our Foundation of Freedom,” Religious Freedom Coalition, June 15, 2015, <http://www.religiousfreedomcoalition.org/2015/06/15/the-magna-carta-celebrating-our-foundation-of-freedom/> (declaring that the Magna Carta serves as the “backbone of our personal freedoms and liberties”). The Magna Carta was the document that established many rights, including “the protection of church rights” (ibid.). For a discussion on the rise of human rights as a normative ideal, see Thomas Buergethal, “The Human Rights Revolution,” *St. Mary’s Law Journal* 23 (1991): 3, 7 (describing the Universal Declaration of Human Rights as “the Magna Carta of the international human rights movement and the premier normative international instrument on the subject”).

18 The Declaration of Independence, §2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”).

19 Declaration des Droits de l’Homme et du Citoyen (Declaration of the rights of man and of the citizen) art. 17 (Fr. 1789), translated at “Declaration of the Rights of Man—1789,” Avalon Project, http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed Nov. 27, 2016) (hereafter Declaration of the Rights of Man). Included in these sacred rights are the right to practice one’s religious views as long as those views do not “disturb the public order established by law” (ibid., art. 10).

20 UDHR (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or

by international treaties such the International Covenant on Civil and Political Rights (ICCPR)²¹ and the European Convention on Human Rights (ECHR),²² among others,²³ and scores of post-World War II constitutions.²⁴

This is my question: can we expect the leaves and branches to thrive, or even survive, if the roots have been cut? Barrister Simon McCrosson from the United Kingdom has described what he called “cut-flower” culture—enjoying something beautiful, after cutting it from its roots, without recognizing that cut flowers are destined to fade, wither, and soon die. This can be the consequences of severing the taproots of freedom; or of disconnecting our freedoms from their moral foundations.

Consider the controversy over the presence of the crucifix in public schools in Italy. From an American perspective such a display would clearly violate the Establishment Clause. But consider the surprising strength of the Italian position. The argument, most clearly articulated in lower-court opinions in Italy, was that it was Catholic doctrine (concerning the dignity of humanity) and Catholic culture (with its commitment to equality) that created the conditions where human rights could be recognized, embraced, and given legal protection.²⁵ The crucifix is a symbol of that religious doctrine and culture that created the soil out of which human rights could grow, at least in Italy, and perhaps beyond. According to this argument, to prohibit the crucifix is not only to forget or reject that history, but it is a kind of arrogant patricide—the children, who enjoy the human rights bequeathed by the parent, banishing, exiling, or ejecting that parent in the very name of the rights they enjoy.

A popular argument these days is that FORB is an unnecessary, or redundant, human right, since much of what is protected by FORB would be protected by freedom of speech, freedom of the

belief in teaching, practice, worship and observance.”)

21 ICCPR, art. 18 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”).

22 European Convention on Human Rights, art. 9 (“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”).

23 Elimination of All Forms of Intolerance, see n4 (discussing how the document was drafted to further the goal of the United Nations to “promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion”); Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), at art. 2 (granting rights to “each child within [a signatory’s] jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”).

24 Roughly 160 constitutions since World War II have declared freedom of religion as a right. See the Constitute Project, <https://www.constituteproject.org/?lang=en>.

25 Indeed, the courts recognized that in his discussion of rendering to Caesar that which is Caesar’s, requirement of loving one’s neighbour, and prioritization of charity over even faith, Christ expounded those “ideas of tolerance, equality and liberty which form the basis of the modern secular State.” *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. (G.C.), at §15 (quoting TAR Veneto, 17 March 2005, Decision n. 1110, para. 11.1).

press, freedom of assembly, and freedom of association.²⁶ If we imagine rights as a kind of bundle, then perhaps removing one stick (FORB) will not materially weaken the strength of the bundle.

But I think we have to concede that religious claims are among the most heartfelt and most morally serious claims made by human beings, since they appeal not only to deeply held conscientious beliefs, but often also to what people believe God asks or demands of them. If we are unwilling to protect religious speech, should we expect other types of speech to be protected, types of speech that may be less central to human identity and meaning? If we are unwilling to protect the freedom of the press for religious speech, should we expect other types of publications to be given robust protection? If freedom of association is denied for the religious, can we expect other types of association to be given legal protection?

I believe these questions answer themselves—if we are unwilling to protect religious freedom, which lies at the core of human identity and meaning, then we should not expect our political, legal, and social institutions to protect other important civil and political rights.

²⁶ See, e.g., Daniel O. Conkle, “The Free Exercise Clause: How Redundant, and Why?,” *Loyola University Chicago Law Journal* 33 (2001): 95–96 (arguing that FORB can be “be subsumed within the free speech principle that disfavors content discrimination”); Donald L. Beschle, “Does the Establishment Clause Matter? Non-establishment Principles in the United States and Canada,” *University of Pennsylvania Journal of Constitutional Law* 4, no. 3 (2002): 452 (“Is the Establishment Clause, then, redundant? To a large extent, yes. But that does not mean that it has no significance”).



II. Resisting Statism

My second answer to the question, Why religions freedom? concerns marshalling intellectual and cultural resources to resist statism.

I've recently become concerned that in our lifetimes we are in the midst of a larger conflict than we often recognize. What I have in mind is a world-defining struggle between two dramatically different visions of the state and its relationship with its people.

The contest I have in mind is between what I will call monism (which is inclined toward various types of statism), and dualism, or the idea that the state's domain over our lives is in some important way subject to limits that lie outside and beyond the state itself.²⁷

Dualism is an old idea, found in Jesus Christ's answer to the lawyer, who asked whether it was lawful to pay taxes. Jesus's answer expresses a worldview that was already normatively powerful, yet also disruptive, two thousand years ago.

As recorded in the Gospel of Mark:

They brought [a coin]. And he saith unto them, Whose is this image and superscription? And they said unto him, Caesar's.

And Jesus answering said unto them, render to Caesar the things that are Caesar's, and to God the things that are God's. And they marvelled at him. (Mark 12:16–17 KJV)

This reflects what I am calling dualism—the idea that there are certain claims that Caesar, or state authority, makes on us, and other claims that God, or divine authority, makes on us.

Today the key characteristics of a dualist understanding of the state is that the state is justified in large measure by its success in protecting individual liberty, that government is subject to specific limitations and the rule of law.²⁸

²⁷ University of San Diego law professor Stephen Smith made a similar distinction between monism and dualism in an address at the Religious Freedom Annual Review at BYU Law School on July 16.

²⁸ The Declaration of Independence, for example, explicitly states that “Governments are instituted among Men” only to secure unalienable rights, and “that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.” The Declaration of Independence, para. 2. See also Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (New York: Broadside, 2016), 23 (arguing that the inclusion of the word “just” in the Declaration of Independence's discussion of governmental power implies that “the lawmaking power must itself be limited by law” to only those powers that will secure the rights that predated the formation of government).

A. DUALISM VERSUS MONISM

Political systems can be founded on either dualist or monist understandings of the scope of the state's power, jurisdiction, and authority.

In the fourth century there was a world-defining struggle between the Roman Empire and emergent Christianity. For the Romans, Caesar was a god, so there was no dualism between the things that are Caesar's and the things that are God's. But since the fourth century, in Europe at any rate, this dualism has persisted.

To be sure, when we posit dualism, we don't have the answers to all our questions: but we focus on what *the* question is—what are the proper boundaries between religion and the state; between conscience and state power; between individuals' inalienable rights and the legislative and regulatory demands of the state?

Answering the questions will require ongoing navigation, but one answer is off the table: that is the statist answer found among statist of all varieties, be they religious or secular, that there are no limits on the state's power or jurisdiction, and that rights are really just gifts bestowed by the state on individuals, gifts that can be taken as well as given.

To a very significant extent, the human rights project at the end of World War II that culminated in the Universal Declaration of Human Rights was a reaction to the strong state monism of the Nazi regime, where state power trumped conscience, and where the government invoked emergency powers to overcome claims to political and civil rights.²⁹

The preamble of the UDHR begins, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."³⁰ This initial recognition reflects the dualist intuition that there are interests weighty enough to be constituted inalienable rights—things the state is obliged to respect and protect.

And then in a passage that must be read against the vivid recent memory of Nazi and Japanese imperialist atrocities, the preamble to the UDHR continues, "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."³¹ In these words we hear an echo of the conviction awakened by World War II, "Never again!"³²

29 See "Universal Declaration of Human Rights: History of the Document," United Nations, <http://www.un.org/en/sections/universal-declaration/history-document/> (accessed Dec. 5, 2016) (hereafter History of UDHR) ("The Universal Declaration of Human Rights . . . was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again").

30 UDHR, pmb.

31 Ibid.

32 See History of UDHR.

The UDHR then declares in article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³³

Note that this declaration posits a dualism that places limits on the state’s authority. Human rights are asserted to be things with which all people are born, endowments based on our human characteristics of reason and conscience, as well as our capacity to have genuine regard for each other.

I suggest that the unease many feel toward human rights is based on an erosion of the strong commitment to dualism that underlies not just the human rights worldview but most of Western history.

B. HISTORICAL DEVELOPMENT AND MANIFESTATIONS OF DUALISM

This dualism is present in many forms and has undergone many instantiations.

We find an early fifth-century Augustinian version of it: The church as a spiritual City of God, in contrast from the material Earthly City.³⁴ Augustine argued that although Christianity had been adopted as the official religion of the Roman Empire, the church should be concerned with the mystical heavenly city (the new Jerusalem), rather than with earthly politics.³⁵

He contrasted the early pleasures of the Earthly City with the eternal truths of the City of God.³⁶ He viewed human history as an engagement of universal warfare between God and the devil.³⁷ He identified the Catholic Church with the City of God and political and military powers aligned against it as the City of the Devil.³⁸

In the thirteenth century, St. Thomas Aquinas articulated another version, with an emphasis on natural reason, natural theology, and natural law.³⁹ Aquinas differentiates among four kinds of law: eternal, natural, human, and divine.⁴⁰ Eternal law is the law by which God governs all creation.⁴¹ Natural law is human “participation” in the eternal law and is discovered through reason.⁴² Natural law is based on first principles, including the first precept that good is to be done and evil avoided.⁴³

33 UDHR, art. I.

34 Saint Augustine, *The City of God, Books XVII–XXII*, trans. Gerald G. Walsh, Fathers of the Church 24 (Washington, DC: Catholic University of America Press, 1954).

35 *Ibid.*, 217–29, 292–94, 415–17.

36 *Ibid.*, 220–22.

37 *Ibid.*, 481.

38 See generally Augustine, *City of God*.

39 Saint Thomas Aquinas, *Summa Theologica* (New York: Benziger Bros., 1947).

40 *Ibid.*, 1328–1497 (questions 90–108).

41 *Ibid.*, 1332–33 (question 91).

42 *Ibid.*, 1333–34 (question 91).

43 *Ibid.*

We also see it in the idea of “two swords” articulated in the papal bull *Unam Sanctam*, issued in 1302 by Pope Boniface VIII, with one sword being the “spiritual sword” controlled by the church and the other being the “temporal sword” controlled by the state.⁴⁴

A variation of this dualism is also found in Martin Luther, and his two kingdoms doctrine, which held that God rules the world in two ways, the “left-hand kingdom,” through secular law and churchly government, and the “right-hand kingdom,” his spiritual kingdom through the gospel and grace.⁴⁵ According to Luther, the earthly kingdom includes everything we can do and see in our bodies, including things done in the church. The heavenly kingdom includes only faith in Christ, and is expressed in the slogans “Christ alone” and “faith alone.”⁴⁶

It is expressly evident in John Locke. In his influential *Letter Concerning Toleration*, Locke declares, “I esteem it above all things necessary to distinguish exactly the Business of Civil Government from that of Religion and to settle *the just Bounds* that lie between the one and the other. If this be not done, there can be no end put to the Controversies that will be always arising between those that have, or at least pretend to have, one the one side, a Concernment for the Interest of Mens [*sic*] Souls, and, on the other side, a care of the Commonwealth.”⁴⁷ He goes on to explain, “*The Commonwealth* seems to me to be a Society of Men constituted only for the procuring, preserving, and advancing of their own *Civil Interests*.”⁴⁸ “Civil Interests I call Life, Liberty, Health, and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like.”⁴⁹

C. AMERICAN AND FRENCH REVOLUTIONS . . . AND CANADA

1. THE UNITED STATES

By the time of the French and American Revolutions, this dualism was an important, defining feature of both revolutions and how they were conceptualized by the revolutionaries.

Consider, the central declaration used to justify independence from England in the US Declaration of Independence:

44 Pope Boniface VIII, *Unam Sanctam* (1302) (“We are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the temporal”).

45 Martin Luther, *Von weltlicher Obrigkeit* (1523).

46 Ibid.

47 John Locke, *A Letter Concerning Toleration and Other Writings*, ed. Mark Goldie (Indianapolis: Liberty Fund, 2010) (emphasis added).

48 Ibid. Locke describes the earthly kingdom, or “the Commonwealth,” as something purely secular. The Commonwealth is a group of people constituted for the purpose of ensuring the groups’ political rights, or “civil interests,” but not necessarily for the “Interest of Mens [*sic*] Souls.” See *ibid.*

49 Ibid.

We hold these truths to be self-evident, that all men *are created equal, that they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁵⁰

The right to revolution arises when governments fail to respect this dualism, when the basic unalienable rights are not recognized and protected.⁵¹

The Constitution specifically addresses the state side of the dualist equation, although the first ten amendments (the Bill of Rights) were in all probability a condition precedent of getting enough states to ratify the Constitution for it to take effect.⁵² The Free Exercise and Anti-Establishment provisions of the First Amendment reflect this dualism. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁵³ The prohibition of a national state church and the guarantee of the free exercise of religion both reflected the dualist mindset of articulating limits to state power.

2. FRANCE

Even the French Revolution, which was much more secular in orientation than the US Revolution, and much more of a revolution against an established church than the American Revolution,⁵⁴ expressed itself in similar natural law language that presumed a dualism with the state and religion representing different spheres or categories of social organization.

Strongly influenced by the doctrines of natural reason, natural law, and natural rights, the

50 The Declaration of Independence, §2 (U.S. 1776) (emphasis added).

51 The Declaration of Independence goes on to state, “Prudence, indeed will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States” (ibid.).

52 Matthew Holland, “Religious Liberty v. Secularity: Is the American Founding Still Useful?” (keynote address at the International Center for Law and Religion Studies Annual Review, July 2016), 8 (explaining that the adoption of the Bill of Rights was necessary before a requisite number of states would ratify the Constitution).

53 U.S. Const. amend. I.

54 Maura Kalthoff, “Faith and Terror: Religion in the French Revolution” (undergraduate honour’s thesis, University of Colorado, 2015), 2, http://scholar.colorado.edu/cgi/viewcontent.cgi?article=2091&context=honr_theses (“Religion was one of the most contentious issues of the [French] Revolution and the government’s treatment of it was one of the major causes for popular discontent and even counterrevolution. As the Revolution turned more radical it became more dangerous to follow traditional Catholicism”).

French declaration popularly known as the Declaration of the Rights of Man and of the Citizen asserted that the rights of human beings are universal, and valid at all times and in all places. Approved by the National Assembly of France on August 26, 1789, the preamble begins:

The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, *have determined to set forth in a solemn declaration, the natural, unalienable, and sacred rights of man*, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties.⁵⁵

Article 1 declares: “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.”⁵⁶ Article 2 states, “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.”⁵⁷

Like the American Revolution, there is a powerful and pervasive dualism underlying the French Revolution. The rights declared are asserted to be “natural, unalienable, and sacred,” things with which we human beings are born, and government is under a duty to protect these basic rights including freedom of religion, freedom of association, and freedom of speech.⁵⁸

3. CANADA

As Professor David Novak reminded us in his keynote address at the Oxford International Consortium of Law and Religion Studies conference in September 2016, the preamble of the Canadian Charter of Rights and Freedoms expresses a similar dualism, with a preamble that declares, “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”⁵⁹ Enumerated fundamental freedoms include “freedom of conscience and religion,”⁶⁰ as well as “freedom of thought, belief, opinion and expression,”⁶¹ the freedom of “peaceful assembly,”⁶² and the “freedom of association.”⁶³

55 Declaration of the Rights of Man, pmb. (emphasis added).

56 *Ibid.*, art. I.

57 *Ibid.*, art. II.

58 “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law” (*ibid.*, art. X). “The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law” (*Ibid.*, art. XI).

59 Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

60 *Ibid.*, 2(a).

61 *Ibid.*, 2(b).

62 *Ibid.*, 2(c).

63 *Ibid.*, 2(d).

I did find it interesting and noteworthy that Professor Novak acknowledged that many secularists dismiss this preamble language as a “sop” thrown to traditionalists, and he also agreed that only thirty years later it might be unlikely that such an acknowledgment of the limits on and foundations of state power would be included if the Charter were being adopted today.⁶⁴

4. DUALISM: FISH SEEING WATER

Indeed I would maintain that dualism is such a strong and axiomatic aspect of Western constitutional systems that we hardly see it for what it is—a remarkable rejection of the monist alternatives, various forms of statism that may find themselves in a strong alliance with a particular religion (Such as Russia and the Russian Orthodox Church,⁶⁵ or as exemplified increasingly today by Hindu nationalism in India⁶⁶), states who assert a posture of control over religion (such as China and its five recognized and state-sponsored and controlled official religions⁶⁷), or even states dedicated to the strict limitation of religion (here I am thinking of the Soviet Union⁶⁸), or

64 David Novak, “What Is Religious Freedom?” (keynote address at the Fourth Conference of the International Consortium of Law and Religion Studies, Oxford University, September 8, 2016), 4. A video of the presentation is available at the BYU Law International Center for Law and Religious Studies website, <https://www.iclrs.org/event.php/2016+ICLARS+Conference+in+Oxford/Media/English/3346>.

65 Over the years, a strong alliance has formed between President Vladimir Putin and the Russian Orthodox Church. During his first presidency, Putin would regularly meet with the head of the Russian Orthodox Church. Michael J. LaVelle, “A Russian Experience,” *Arizona Attorney* 42, no. 5 (2006): 30–34. During this time, the Russian government and the Russian Orthodox Church seemed to strengthen ties and common values. Robert C. Blitt, “One New President, One New Patriarch, and a Generous Disregard for the Constitution: A Recipe for the Continuing Decline of Secular Russia,” *Vanderbilt Journal of Transnational Law* 43 (2010): 1337, 1339–40. These ties have continued to the present day with President Putin approving laws that favour the Orthodox Church. See, e.g., Kate Shellnutt, “Russia’s Newest Law: No Evangelizing Outside of Church,” *Christianity Today*, July 8, 2016, <http://www.christianitytoday.com/gleanings/2016/june/no-evangelizing-outside-of-church-russia-proposes.html> (noting that a law that was approved by President Putin earlier this year that places restrictions on missionary activities is likely to be interpreted to exempt the Russian Orthodox Church from the enhanced scrutiny placed on other religious groups); Marc Bennetts, “Putin Brings God—and Potential Jail Time for Atheists—to Russia,” *Washington Times*, April 4, 2016, <http://www.washingtontimes.com/news/2016/apr/4/vladimir-putin-patriarch-kirill-alliance-puts-athe/> (describing a “law that makes it a crime to ‘insult the feelings’ of religious believers” that is viewed by some as “a symbol of the uncomfortably close ties between the Kremlin and the country’s dominant faith”). The Russian Orthodox Church is reportedly being granted trading concessions worth billions of dollars, and the church’s patriarch has called Putin “a miracle of God.” Mark Woods, “How the Russian Orthodox Church Is Backing Vladimir Putin’s New World Order,” *Christian Today*, March 3, 2016, <http://www.christiantoday.com/article/how.the.russian.%20-%20orthodox.church.is.backing.vladimir.putins.new.world.order/81108.htm>.

66 Even before he became prime minister of India, Narendra Modi had ties with Hindu nationalism. For several years, he had been a member of the nationalist party Rashtriya Swayamsevak Sangh, and later joined his current party, the Bharatiya Janata Party, another nationalist party. “Modi: From Tea Boy to India’s Leader,” *Al Jazeera*, May 27, 2014, <http://www.aljazeera.com/news/asia/2014/05/modi-from-tea-boy-india-pm-20145139742599119.html>. In 2002, while a member of the administration in the state of Gujarat, Modi was accused of complicity in the massacre of two thousand Muslims during violent sectarian riots, Tunku Varadarajan, “Modi Crushes Gandhi in India’s Election Landslide,” *The Daily Beast*, May 16, 2014, <http://www.thedailybeast.com/articles/2014/05/16/modi-crushes-gandhi-in-india-s-election-landslide.html>. During his campaign, Modi declared himself a “Hindu nationalist,” and was later condemned for it. Peerzada Ashiq, “Can’t be Hindu or Muslim Nationalist in India: J-K Court,” *Hindustan Times*, October, 12, 2013, <http://www.hindustantimes.com/india/can-t-be-hindu-or-muslim-nationalist-j-k-court/story-cVRKIDxPSe5dq0CtN5naN.html;jsessionid=0E91AE41D1560C8DE5322D5839CA29A2>. With his election, many Hindu nationalists felt encouraged that the country might become “purely Hindu by 2020.” Jean-François Mayer, “Hindu Nationalist Project Target Conversions to Christianity,” *Religion Watch Archives*, September 1, 2015, <http://www.rwarchives.com/2015/09/hindu-nationalist-projects-target-conversions-to-christianity/>.

67 See Liu Peng, Brett G. Scharffs, and Carl Hollan, “Constitutional, Legislative and Regulatory Change Regarding Religion in China,” in *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*, ed. Cristiana Cianitto, Cole Durham Jr., Sivio Ferrari, and Donlu Thayer (New York: Routledge, 2013), 247.

68 During the twenty years after the Bolshevik Revolution in 1917, the new regime “used discriminatory legislation, anti-reli-

even the obliteration of religion (Soviet-era Albania).⁶⁹

My thesis—or worry, really—is that today we are engaged in an epochal struggle between monism and dualism, between statist ideologies that do not recognize any power above and beyond the state, and dualist ideologies that base state legitimacy in large measure on the extent to which the state respects rights that precede and do not depend on the state for recognition.

D. HUMAN RIGHTS

The challenges to dualism today come from both the Right and the Left.

1. TRADITIONALISTS (Including Some Religious Voices)

The challenges to dualism today come from a variety of places, including non-Western voices who assert that human rights are simply a Western invention and Western imposition.⁷⁰ These are typically not the voices of the powerless, but of the powerful (typically those holding state power), who want to promote various nationalist or statist projects.⁷¹ Increasingly, in an era noteworthy for religion-inspired terrorism, many of those voices are more specifically targeted at religious freedom itself.⁷²

religious propaganda and violence to uproot all religion in Soviet society” (Bohdan R. Bociurkiw, “Church and State in the Soviet Union,” *International Journal* 14, no. 3 [1959]: 182–83). “The main target of the anti-religious campaign in the 1920s and 1930s was the Russian Orthodox Church, which had the largest number of faithful. Nearly all of its clergy, and many of its believers, were shot or sent to labor camps. Theological schools were closed, and church publications were prohibited. By 1939 only about 500 of over 50,000 churches remained open” (“Revelations from the Russian Archives: Anti-religious Campaigns,” Library of Congress (accessed November 30, 2016), <https://www.loc.gov/exhibits/archives/anti.html> (hereafter “Revelations”). The government was so successful in their campaign that in 1940, there were only 4,225 Russian Orthodox churches in use, down from 46,457 in 1917 (Bociurkiw, “Church and State”). Although the Soviet Union later turned to religion, and specifically the Russian Orthodox Church, to help unify its people during World War II, it retained its anti-religious legislation and later began to distribute anti-religious propaganda once more (ibid., 184–85, 189). Other religions and sects that were persecuted included Catholicism, Uniate, Judaism, and Protestant denominations (“Revelations”).

69 The Albanian government went to great lengths during the second half of the twentieth century to eradicate religion in the country. In 1945, the Agrarian Reform Law “nationalized most property of religious institutions, including the estates of monasteries, orders, and dioceses. Many clergy and believers were tried, tortured, and executed. All foreign Roman Catholic priests, monks, and nuns were expelled in 1946” (“Hoxha’s Antireligious Campaign,” Library of Congress, <http://countrystudies.us/albania/56.htm> (accessed December 1, 2016). Through various legislative decrees, the government outlawed all manifestations of religion, and renamed towns and places “with religious names” (ibid.). Criminal codes made it illegal to distribute or possess religious literature, imposing sentences ranging from three to ten years (ibid.). In the 1940s, “many clergy and believers were tried, tortured, and executed” and foreign Catholic clergy were expelled from the country in 1946 (ibid.). For more information regarding the Albanian government’s efforts to eradicate religion, see “Albania: Violations of the Right to Freedom of Thought, Conscience and Religion, Minnesota Lawyers International Human Rights Committee” (preliminary report of the Minnesota Lawyers International Human Rights Committee, 1988); Barbara Frey, “Violations of Freedom of Religion in Albania,” *Occasional Papers on Religion in Eastern Europe* 9, no. 6 (1989): <http://digitalcommons.georgefox.edu/ree/vol9/iss6/2/>.

70 Stephen Kinzer, “End Human Rights Imperialism Now,” *The Guardian*, December 31, 2010, <https://www.theguardian.com/commentisfree/cifamerica/2010/dec/31/human-rights-imperialism-james-hoge> (“Want to depose the government of a poor country with resources? Want to bash Muslims? Want to build support for American military interventions around the world? Want to undermine governments that are raising their people up from poverty because they don’t conform to the tastes of upper west side intellectuals? Use human rights as your excuse!”).

71 See Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff, 2001), 37: “American or European standards of the late 20th Century cannot be universal” (citing Lee Kuan Yew, “Democracy, Human Rights and the Realities,” Speeches, November–December 1992, 34); See also Joseph Dellapenna, Anthony D’Amato, and Bilahari Kausikan, “An Asian Approach to Human Rights,” *Proceedings of the Annual Meeting of the American Society of International Law* 89 (1995): 146.

72 Fred Lucas, “‘Back to the Soviet Era’: Putin’s New Law Could Lead to Religious Crackdown,” *The Daily Signal*, July 20,

2. PROGRESSIVE CRITIQUES (Including Some That Are Openly Hostile to Religion)

But there is a more specific and sustained attack not only on religion but also on religious freedom by those who find religion and those who defend religion in the name of religious freedom to be a backward and benighted obstacle of their progressive visions of an equalitarian society dominated by non-discrimination norms.⁷³ Never mind that those norms are also part of the universal human rights project. So one progressive strategy is to promote these non-discrimination norms to the exclusion of the freedom norms that also exist in human rights—not just freedom of religion, thought, conscience, and belief, but also freedom of speech, association, and assembly.

For example, in September 2016, in a report titled “Peaceful Coexistence,” the chairman of the US Commission on Civil Rights, Martin R. Castro, called the phrases “religious freedom” and “religious liberty” “code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, [and] Christian supremacy.”⁷⁴ He said that “today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality.”⁷⁵

One of the report’s principal findings was that “*religious exemptions* to the protections of civil rights based upon classifications such as race, color, national origin, disability status, sexual orientation, and gender identity, when they are permissible, *significantly infringe upon these civil rights*.”⁷⁶

Now, of course, it is not that religious freedom is never used rhetorically by racists, homophobes, Islamaphobes, and Christian supremacists, but there is something startlingly reductive about simply equating religious freedom as some sort of secret code for discrimination.

This is especially blinkered when so much of the discrimination that takes place around the world is discrimination against people on the basis of their religion, including contemporary genocides and massive forced migrations. To say that religious freedom is primarily an idea in conflict with civil rights displays a degree of ignorance that can only be described as stunning and massive.

But Castro’s conceptualization of religious freedom and civil rights as being in conflict has become quite common. In the United States, at least, for the past ten years or so, there has been a sustained and deliberate effort by the progressive Left to pit religious freedom against non-dis-

2016, <http://dailysignal.com/2016/07/20/back-to-the-soviet-era-putins-new-law-could-lead-to-religious-crackdown/> (“The anti-terrorism law prohibits religious gatherings in nonregistered areas, which could reportedly include private homes. It also restricts promoting religion on the Internet. Missionary work or sharing faith without possessing certain documents to do so would lead to fines of up to the equivalent of \$765 for a Russian citizen and up to \$15,000 for an organization, while a foreign violator would be deported”).

73 Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013) (“If a religion is a body of belief deliberately insulated from the ordinary apparatus of reason and evidence, why should a rational person expect epistemic benefits to accrue from the protection or privileging of such beliefs?”).

74 Chairman Martin R. Castro, “Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties” (U.S. Commission on Civil Rights, September 2016), 29.

75 *Ibid.*

76 *Ibid.*, 108 (emphasis added).

crimination. This is largely a product of the struggle over gay rights in general, and gay marriage in particular. In demanding complete social acceptance of gay marriage, any who oppose it on any grounds are quickly labelled as homophobic,⁷⁷ and any who would seek conscientious exemptions from participating in it, including religious groups, religiously affiliated institutions (such as religious universities), religious business owners, government employees, and even religious employees of secular businesses are under tremendous pressure to be silent in all respects with any opposition to the sexual rights agenda.⁷⁸

Last year the issue was gay marriage; this year it is transgender rights.

As I try to understand the zeitgeist behind these efforts, it is apparent that the primary value is equality, the primary legal mechanism for achieving equality is non-discrimination laws, and the definition of discrimination rests on a kind of radical subjective hedonic subjectivism.

The strong insistence on non-discrimination, and the wholesale rejection of accommodations or exemptions for those with conscientious objections to a legal mandate, reflects the attitude of monism. Accommodation becomes not an adjustment the state makes in the face of religious or other conscientious requirements; it becomes something the state demands from dissenters who are required to fall into line.

An insistence on a monistic view is illustrated in the opposition to Trinity Western University's decision to open a law school. The school requires students to sign a Community Covenant that, among other things, does not recognize same-sex marriage.⁷⁹ The Law Society of British Columbia decided not to approve the law school on the grounds that this was discrimination on the basis of sexual orientation. The Court of Appeals in British Columbia sided with Trinity Western, declaring, "A society that does not admit of and accommodate differences cannot be a free and democratic society—one in which its citizens are free to think, to disagree, to de-

77 Paul Brandeis Raushenbush, "No Cardinal Dolan, the Catholic Church Wasn't 'Outmarketed' on Gay Marriage," *Huffington Post*, November 30, 2013, http://www.huffingtonpost.com/paul-raushenbush/cardinal-dolan-gay-marriage-_b_4364273.html. ("Let's just be very clear here—if you are against marriage equality you are anti-gay. Done").

78 Sergio Hernandez and Huizhong Wu, "Texas Falls in Line With Same-Sex Marriage Ruling," *Mashable*, July 2, 2015, <http://mashable.com/2015/07/02/texas-same-sex-marriage-ruling/#VyOWdVYZSkq1> ("In Hood County, near Ft. Worth, County Clerk Katie Lang drew criticism after telling her office: 'We are not issuing [same-sex marriage licenses] because I am instilling my religious liberty in this office.' After a backlash, Lang quickly issued a statement saying she would 'personally refrain' from issuing the licenses due to 'the religious doctrines to which I adhere,' but that her office would make staff available and ready to issue marriage licenses to same-sex couples"); Paul Karp, "Marriage Equality: Law Would Protect 'Conscientious Objectors' Who Reject Same-Sex Weddings," *The Guardian*, September 14, 2016, <https://www.theguardian.com/australia-news/2016/sep/14/marriage-equality-law-would-protect-conscientious-objectors-who-reject-gay-weddings> ("Bill Shorten has said that lay people will be forced, with the threat of fines, to provide services to weddings they don't believe should be engaged in").

79 The Trinity Western University Community Covenant states in part, "Members of the TWU community, therefore, commit themselves to . . . observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce. . . . In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions: communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice . . . sexual intimacy that violates the sacredness of marriage between a man and a woman."

bate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is itself intolerant and illiberal.”⁸⁰ The Court of Appeals of Ontario, in contrast, sided with the Law Society there, emphasizing the harm caused to LGBTQ people by Trinity Western’s policy.⁸¹ The case in all likelihood is destined for the Supreme Court of Canada.

80 *Trinity Western University v. The Law Society of British Columbia*, British Columbia Court of Appeals (November 1, 2016), para. 193.

81 See *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518, para. 129, 132 (Can.).



III. Conscience

I will only briefly address my third reason for thinking we should all care about religious freedom. Without freedom of religion and belief, there is no reliable basis for protecting and respecting conscience.

Recall that article 1 of the UDHR identifies “reason and conscience” as two of the basic endowments that define us as human beings, and the basis of human dignity.⁸²

A. OFFICIAL IDEOLOGY: PUBLIC REASON

If the official ideology of dualism is some variation of natural reason and natural rights (or perhaps Kantian deontology or social contract theory), the official ideology of monism is public reason, with its tendency to discount conscience—either significantly or altogether.

The assertion that public reason is hostile to conscience needs some explaining. Recall that the first public reason theorist was not John Rawls or even Immanuel Kant. It was Thomas Hobbes, and he was absolutely clear that the sovereign spoke in the voice of public reason, and subjects gave up their claims of conscience in exchange for the protection offered by the sovereign from the state of nature, where life is nasty, brutish, and short.⁸³

Public reason (whether Hobbes’s, Kant’s, or Rawls’) always makes the same initial normative move, differentiating between public reason and private reason, and crediting the one and discrediting the other, at least in matters of public life.⁸⁴

⁸² UDHR.

⁸³ See Thomas Hobbes, *Leviathan* (1651), ed. Rod Hay (McMaster University Archive of the History of Economic Thought), 79 (“And reason suggesteth convenient articles of peace upon which men may be drawn to agreement”). Hobbes argues that even those who don’t consent to be ruled by the sovereign are under obligation to be so ruled, due to the consent of the majority. “Because the major part hath by consenting voices declared a sovereign, he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. For if he voluntarily entered into the congregation of them that were assembled, he sufficiently declared thereby his will, and therefore tacitly covenanted, to stand to what the major part should ordain: and therefore if he refuse to stand thereto, or make protestation against any of their decrees, he does contrary to his covenant, and therefore unjustly. And whether he be of the congregation or not, and whether his consent be asked or not, he must either submit to their decrees or be left in the condition of war he was in before; wherein he might without injustice be destroyed by any man whatsoever” (ibid., 109).

⁸⁴ See ibid. 27 (“But no one man’s reason, nor the reason of any one number of men, makes the certainty; . . . And therefore, as when there is a controversy in an account, the parties must by their own accord set up for right reason the reason of some arbitrator, or judge, to whose sentence they will both stand, or their controversy must either come to blows, or be undecided, for want of a right reason constituted by Nature”); see also Immanuel Kant, *Critique of Pure Reason*, trans. Norman Kemp Smith (New York: St. Martin’s, 1965), A739/B767 (“Reason must in all its undertakings subject itself to criticism. . . . Reason depends on this freedom for its very existence. For reason has no dictatorial authority: its verdict is always simply the agree-

The problem for those who value conscience is that it often speaks to us in registers that count paradigmatically as “private reason.” Consider the metaphors we use for conscience—a prick of the heart,⁸⁵ a feeling in one’s gut,⁸⁶ a powerful internal or even sometimes external voice that declares to us, “Here I stand, I can do no other.”⁸⁷ These are not public reasons; they are private reasons. And public reason is committed to the marginalization of private reason.

Consider the debate over religious exemptions—for doctors performing abortions, or public officials performing marriages. From a public reason perspective, there is no good reason to provide an exemption. For a statist, the key consideration may be a value such as non-discrimination, which demands that everyone be treated equally, and no special treatment should be afforded to those with special or idiosyncratic religious or conscientious views. Arguments like these are familiar in statist systems.⁸⁸

It is true that public reason may claim to value religious freedom or claim to value conscience (perhaps based on an argument from the “original position”), but we can also expect public reason to interpret religious freedom in a minimalist way, for example in the manner Justice Scalia treats it in *Employment Division v. Smith*, prohibiting laws that specifically target religion but permitting those that burden religion, even severely, as long as they are “general” and “neutral” in character.⁸⁹ General and neutral laws are a classic public-reason formulation of the type of regulation that is legitimate, but as we learned from the *Smith* case, this does not result in a robust protection of either conscience or religion.

ment of free citizens, of whom each one must be permitted to express, without let or hindrance, his objections or even his veto”). John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 213 (“Public reason is characteristic of a democratic people: it is the reason of citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political conception of justice requires of society’s basic structure and institutions, and of the purposes and ends they are to serve”).

85 Ronda Parrish, “The Blessings of Responding to a Prick of the Heart,” *Element3 Church* (blog), November 26, 2014, <https://e360blog.wordpress.com/2014/11/26/the-blessings-of-responding-to-a-prick-of-the-heart-by-ronda-parrish/> (detailing an experience when a “prick of the heart” led a religious person to go on a service tour).

86 Samantha Olson, “Your Gut Feeling Is Way More Than Just a Feeling: The Science of Intuition,” *Medical Daily*, March 12, 2015, <http://www.medicaldaily.com/your-gut-feeling-way-more-just-feeling-science-intuition-325338> (discussing how intuition or conscience might literally manifest itself as a feeling in the gut).

87 Martin Luther (quoted in Elesha Coffman, “What Luther Said,” *Christian History*, August 8, 2008, <http://www.christianity-today.com/history/2008/august/what-luther-said.html>) (explaining that in spite of the debate about whether Luther truly did make this statement before the Diet of Worms, Luther clearly would have agreed. “Luther asserted his conscience was captive to the Word of God and that he could not go against conscience”).

88 These arguments resonate in statist systems such as China. See, e.g., Emily N. Marcus, “Conscientious Objection as an Emerging Human Right,” *Virginia Journal of International Law*, 529 n.7 (1998) (explaining that China is one of 48 states that “have [military] conscription without a recognition of conscientious objection or alternative service”); T. Jeremy Gunn, “The Complexity of Religion and the Definition of ‘Religion’ in International Law,” *Harvard Human Rights Journal* 16 (2003): 207 (“China has attempted to prohibit all religious activity unless it operates under the direct authorization and control of the state”).

89 *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (“[The Supreme Court’s] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”).

B. HISTORY OF PROTECTION OF CONSCIENCE

It is important to remember that as a historical matter, freedom of religion was the foundation of the broader recognition of freedom of conscience. The history of conscientious objection began with claims by organized religious communities such as Quakers, who had religious doctrinal objections to serving in the military.⁹⁰ Over time (several centuries actually), the protection of conscientious objection for those who belonged to *religious groups* was expanded to cover *individuals* with religious objections even if their church did not itself have an institutional opposition to military service,⁹¹ and then to those with claims when the government was *unsure* about whether their conscientious objection was religious or not,⁹² and eventually—by analogy—to those who were adamant that their basis for objecting to military service was *not religious*.⁹³

The point is that it was not a general respect for conscience that led to conscientious protections of religious conscience, but the protection of religious conscience that led to a broader recognition of conscience as a fundamental human value.

C. FROM GOBITIS TO BARNETTE

US history offers cautionary tales about what happens when the values of uniformity are given priority over the value of conscience.

Consider the case of Jehovah’s Witness children who objected to being compelled to pledge allegiance to the US flag. In the late 1930s, at a time of national disunity, school boards began

90 When a few Quakers were first drafted into the George Washington’s forces during the French and Indian War, they refused to “bear arms, work, receive provisions or pay, or do anything that tends, in any respect to self-defense” (Paul F. Boller Jr., “George Washington and the Quakers,” *The Bulletin of Friends Historical Association* 49, no. 2 [1960]: 70, quoting John C. Fitzpatrick, ed., *The Writings of George Washington* [Washington, DC: US Government Printing Office, 1931–1944], 1:394). George Washington was directed to imprison the conscientious objectors and give them only a small amount of bread and water until they agreed to fight. Washington responded to his superior by saying that he “could by no means bring the Quakers to any terms. They chose rather to be whipped to death than bear arms, or lend us any assistance whatever upon the fort, or any thing of self-defense” (ibid., quoting Fitzpatrick, *Writings of George Washington*, 1:420). Washington later agreed that the Quakers’ conscientious objections should be protected by the government: “The liberty enjoyed by the People of these States, of worshipping Almighty God agreeably to their Consciences, is not only among the choicest of their *Blessings*, but also of their *Rights*—While men perform their social Duties faithfully, they do all that Society or the State can with propriety demand or expect; and remain responsible only to their Maker for the Religion or modes of faith which they may prefer or profess. [The Quakers’] principles & conduct are well known to me—and it is doing the People called Quakers no more than Justice to say, that (except in their declining to share with others the burthen [sic] of the common defense) there is no Denomination among us who are more exemplary and useful Citizens” (George Washington, “From George Washington to the Society of Quakers, 13, October 1789,” National Archives, Founders Online, <http://founders.archives.gov/documents/Washington/05-04-02-0188> [accessed December 1, 2016]).

91 In 1958, the US Congress exempted from military service “any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.” 50 USCS §3806(j) (2016).

92 See *United States v. Seeger*, 380 U.S. 163 (1965).

93 See *Welsh v. United States*, 398 U.S. 333 (1970).

passing rules requiring all students to pledge allegiance to the flag.

One of these rules was adopted in Minersville, West Virginia. The provision had been enacted specifically to coerce children who were Jehovah's Witnesses to salute the flag after they refused to participate in patriotic observances on conscientious grounds.⁹⁴ It was only after Lillian Gobitis (a seventh grader) and William Gobitis (a fifth grader) asserted religious reasons for not participating in the pledge that the school board in Minersville passed a resolution transforming the flag salute into a legal obligation.⁹⁵ Immediately thereafter, the school superintendent stood at a public meeting of the school board and dramatically expelled the Gobitis children for insubordination.⁹⁶ It was this "state action" that the Supreme Court would later uphold. Writing for the majority, Justice Felix Frankfurter declared: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."⁹⁷

The court held that the rule must apply to everyone because it was a neutral rule of general applicability. Ignoring the history of its enactment, the Supreme Court called the mandate "legislation of general scope not directed against doctrinal loyalties of particular sects."⁹⁸

The Supreme Court's decision set off a wave of anti-Witness persecution that swept the country.⁹⁹ Hundreds of instances of vigilantism against Jehovah's Witnesses who refused to salute the flag were reported in just the week following the decision.¹⁰⁰ These included mob beatings, burning of Jehovah's Witnesses Kingdom Halls, and attacks on houses where Jehovah's Witnesses were believed to live. As Harvard Law professor Noah Feldman has described the reaction, "To some horrified observers, it appeared that the Supreme Court, by denying the children the constitutional right to be exempt from saluting, had declared open season on the Witnesses."¹⁰¹

One of the most notorious episodes took place in York County, Maine:

94 See *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (D. Pa. 1938). Lillian and William Gobitis, members of the Jehovah's Witness faith, enrolled in Minersville Public School in 1935 and had refused to salute the flag during the "daily exercises of the Minersville Public School" (*ibid.*, 272). That same year, the Minersville School District created the school regulation requiring students to recite the pledge of allegiance or face expulsion (*ibid.*). The same day the regulation was passed, the superintendent announced publicly that the Gobitis children were expelled (*ibid.*, 273).

95 The Minersville School Board unanimously passed the following resolution: "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of the said schools be required to salute the flag of our Country as part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly" (David R. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* [Chicago: University of Chicago Press, 1962], 82-83).

96 After the resolution was adopted, Superintendent Charles E. Roudabush immediately stood and announced, "I hereby expel from the Minersville schools Lillian Gobitis, William Gobitis and Edmund Waslewski for this act of insubordination, to wit, failure to salute the flag in our school exercises" (*ibid.*).

97 *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940).

98 *Ibid.*, 594.

99 Manwaring, *Render unto Caesar*, 163.

100 *Ibid.*, 163-86.

101 Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010), 185.

Two Witnesses were beaten in Sanford on June 8, when they refused to salute. The following day in Kennebunk, a carload of men conveniently equipped with throwing-size rocks “just happened to stop” in front of the Jehovah’s Witness Kingdom Hall which doubled as the home of the company servant. The Witnesses, already jittery from a fortnight of tension, greeted the visitors with shotgun fire, seriously wounding one. Six Witnesses were arrested for attempted murder. In the meantime, an enraged mob of 2,500, failing to reach the prisoners, sacked and burned the Kingdom Hall, then drifted over to Biddeford to attack houses suspected of containing Witnesses.¹⁰²

Among other incidents, the whole adult population of Litchfield, Illinois, gathered to attack sixty Jehovah’s Witnesses; in Rawlins, Wyoming, a crowd led by the American Legion descended on a trailer camp set up by Jehovah’s Witnesses in preparation for a regional meeting and forced them across the state line; in Nebraska, a Witness was lured from his house, abducted, and castrated; in Little Rock, Arkansas, armed workers from a federal pipeline project beat Witnesses, shooting two; in Klamath Falls, Oregon, a mob of a thousand townspeople stormed a Kingdom Hall.¹⁰³ These reactions are a cautionary tale of how far people will go to coerce uniformity when the value of uniformity is viewed as being extremely important.

What is remarkable about this story is that only three years later, the US Supreme Court did something that—believe me—it does not do very often. It said it was wrong.

The Supreme Court reversed itself. In *West Virginia State Board of Education v. Barnette*, the court held that when state officials compelled participation in the flag salute and pledge, they “transcend[ed] constitutional limitations on their power and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”¹⁰⁴ In one of the most quotable (and quoted) lines in the history of the Supreme Court, Justice Jackson, writing for the court, declared: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁰⁵

Gone was all talk (except in Justice Frankfurter’s acerbic dissent) of this being “legislation of general scope not directed against doctrinal loyalties of particular sects.” David Manwaring describes Frankfurter’s dissent as “a prolonged and very personal cry of outrage.”¹⁰⁶ Feldman agrees: “Frankfurter took the reversal of his *Gobitis* opinion as a professional and personal calamity.” Feldman describes Frankfurter’s dissent as “the most agonized and agonizing opinion

102 Manwaring, *Render unto Caesar*, 166. Manwaring notes, “The well-publicized outburst in Maine may well have had as much to do with triggering persecution elsewhere as the *Gobitis* decision itself” (ibid., 164–65).

103 Ibid., 163–86.

104 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

105 *Barnette*, 319, U.S. at 642.

106 Manwaring, *Render unto Caesar*, 230.

recorded anywhere in the U.S. reports.”¹⁰⁷ Frankfurter gave an impassioned defence of his philosophy of judicial restraint, and again emphasized the secular regulatory character of the law. For Frankfurter, laws that burden religious exercise are constitutional. He describes the law as a “non-discriminatory law” that “may hurt or offend some dissident view.”¹⁰⁸

But it wasn’t easy. In all, it took the Jehovah’s Witnesses six trips to the Supreme Court to secure the conscientious right to be free from coercion with respect to the Pledge of Allegiance.¹⁰⁹

Occasionally courts conclude that laws which are general and neutral on their face are unconstitutionally targeted at a particular religion. In 1993 practitioners of the Santeria faith in Florida scored a victory for religious freedom when the Supreme Court found that ostensibly general and neutral city ordinances aimed at preventing that religion’s traditional animal sacrifices were unconstitutional, and struck them down.¹¹⁰ Five years later, the Third Circuit Court of Appeals found that a police department could not require two plaintiff policemen to shave their beards in violation of their Sunni Muslim faith, even though the requirement was supposedly general and neutral.¹¹¹

As these cases illustrate, not only can allegedly general and neutral laws have very different effects on different groups of people, but also the very claim that they are general and neutral at all is often highly suspect. In the current controversies over adoption agencies, same-sex marriage, and the HHS contraceptive mandates it is very difficult to view as general and neutral the underlying rules that aim to change the behaviour, if not the underlying attitudes.

Why do I recount this history of compelled patriotic observances, of the road from *Gobitis* to *Barnette*? Because it illustrates how strongly felt can be the idea that the values of unity and uniformity can justify forcing those who disagree to go along with the prevailing view or suffer severe consequences. What we learn from *Barnette* is that we do not have to force conformity.


107 Feldman, *Scorpions*, 229.

108 According to Frankfurter, “The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state’s support or incur its hostility. Religion is outside the sphere of political government. . . . Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. . . . It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong” (*Barnette*, 319 U.S. at 654 [Frankfurter, J., dissenting]).

109 Manwaring, *Render unto Caesar*, 249.

110 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (describing how city officials, concerned at the impending establishment of a church that practiced Santeria—including the ritual sacrifice of live animals—hurriedly adopted ordinances that forbade the killing of animals within city limits. Ostensibly, the ordinances—neutral and general in their language—were meant to protect the public morals, peace, and safety. However, they included exceptions that effectively allowed any slaughter unless for religious reasons. The presence of these exceptions led the court to conclude that the laws were not neutral or general, and failed under strict scrutiny).

111 *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1998) (holding that the city’s requirement that on-duty police be clean-shaven was meant to promote an image that would help the police fulfill their duty. However, an exception existed for policemen with a dermatological condition that made shaving impractical. The presence of a secular exception triggered heightened scrutiny, and the court found that as granting the religious exception would not undermine the aim of the requirement any more than the medical exception did, the requirement violated the Free Exercise Clause).



But public reason has no reason to respect conscience; public reason will demand that everyone be treated the same.

Conclusion

So in conclusion, Why religious freedom? Why should we care?

If we care about human rights, about human dignity, I do not believe these normative constructs can survive if we deny freedom of human beings to live according to the dictates of their conscience.

If we fear statism, monistic states that recognize no limits on their authority, and view rights as gifts bestowed by the state (gifts that may also be taken back by the state), then we need something like a dualist outlook, which differentiates between the sphere of state authority and other spheres of non-state authority. The intellectual resources for a dualist understanding of limited state power are rooted, historically and intellectually, in religious ways of viewing the world. Without religion, I'm not sure we have the intellectual, moral, or philosophical resources to resist the imperial logic of statism.

Finally, if we care about conscience, the existence of an inner feeling or voice that acts as a guide to the rightness and wrongness of our behaviour, we must protect religious freedom. The justifications for the protection of conscience were first and foremost religious justifications, and if religious conscience does not receive protection we should not expect other grounds for conscience to be respected either.



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