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Religious Freedom in America

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In his 2014 address to the Tenth Annual National Catholic Prayer Breakfast, Robert P. George gave the following wake-up call that has application to all Christians who are the true catholic (i.e., universal) church:

> The days of socially acceptable Christianity are over. The days of comfortable Catholicism are past. It is no longer easy to be a faithful Christian, a good Catholic, an authentic witness to the truths of the Gospel. A price is demanded and must be paid. There are costs of discipleship—heavy costs, costs that are burdensome and painful to bear. Of course, one can still safely identify oneself as a "Catholic," and even be seen going to mass. That is because the guardians of those norms of cultural orthodoxy that we have come to call "political correctness" do not assume that identifying as "Catholic" or going to mass necessarily means that one *actually believes what the Church teaches* on issues such as marriage and sexual morality and the sanctity of human life. And if one in fact does not believe what the Church teaches, or, for now at least, even if one does believe those teachings but is prepared to be completely silent about them, one is safe—one can still be a comfortable Catholic. In other words, a tame Catholic, a Catholic who is ashamed of the Gospel—or who is willing to act publicly as if he or she were ashamed—is still socially acceptable. But a Catholic who makes it clear that he or she is not ashamed is in for a rough go—he or she must be prepared to take risks and make sacrifices. "If," Jesus said, "anyone wants to be my disciple, let him take up his cross and follow me." We American Catholics, having become comfortable, had forgotten, or ignored, that timeless Gospel truth. There will be no ignoring it now.[1]

[1] https://americanprinciplesproject.org/social-issues/robert-p-george-speaks-at-national-catholic-prayer-breakfast/; emphasis added. A video recording of the address, delivered on May 16, 2014, is available at https://www.youtube.com/watch?v=tSZY0IsYCFs. Robert P. George is the McCormick Professor of Jurisprudence and

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The events we see unfolding before us did not just begin but have their foundations much further back in time. From the beginning there have been difficulties for those who wished to worship and exercise their religious beliefs in peace. Religious persecution is arguably as old as man's first expressions of faith:

> In the course of time Cain brought to the LORD an offering of the fruit of the ground, and Abel also brought of the firstborn of his flock and of their fat portions. And the LORD had regard for Abel and his offering, but for Cain and his offering he had no regard. So Cain was very angry, and his face fell. The LORD said to Cain, "Why are you angry, and why has your face fallen? If you do well, will you not be accepted? And if you do not do well, sin is crouching at the door. Its desire is for you, but you must rule over it." Cain spoke to Abel his brother. And when they were in the field, Cain rose up against his brother Abel and killed him. (Gen 4:2-8).

What was the impetus for Cain's action? What was the force that drove him to inflict this level of hatred for his brother? Jealousy? Insecurity? Anger that his brother was accepted rather than he? Certainly all these things are arguably true, but at the base of it all was a difference and distinction in his faith as compared to that of Abel's. Rather than in faith trusting what God had said to him, Cain trusted his own sinful desires and acted upon his brother in the most severe expression of persecution. By murdering his brother he gave vent to his inner turmoil.

As far back as the serpent's temptation of Eve, the foundations for religious persecution were being set in an effort to destroy faith and to interfere with its free, unhindered, and unimpeded expression. At the core of every expression of religious persecution may be found this question: "Did God really say . . . ?" Rather than make an effort to see whether God had indeed said the very thing that is the point of controversy, some individuals find themselves driven to destroy those whom they perceive as different in their religious faith. It is strange that humanity would find it necessary to do so, rather than letting God defend Himself.

Christ was presented with these same circumstances while suffering in the wilderness. Satan came to our Lord with Scripture out of context, where sense and meaning had been twisted and turned to suit his argument. In response, Jesus presented us with the paradigm of how to answer

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heresy rather than to yield to the temptation to sin that Satan presented. The Word made flesh brought forth the spoken word in context, fullness, and clarity. It is this orthodox word that drove Satan away. As believers reliant upon this word, we, too, will be faced with various and sundry temptations to react poorly to those who depend upon heresy to affirm sinful desires or idolatry. Our response as Christians must be to resist the temptation to attack them. Instead, we must seize the opportunity to ring out the clarion call of God's truth. This is true especially when we are the ones being persecuted through all manner of lies and calumny.

Regardless of when it first began, mankind appears to have always struggled to acknowledge the rights of individuals to worship freely, to express their faith openly, and to live their lives according to the mandates of their consciences without experiencing severe and sometimes deadly persecution from others. Though I am Christian and my faith is that Christ is the only way to the Father, this study addresses general principles concerning religious freedom as it has been developed in the United States. It concerns the essential right of everyone to express freely their faith through their speech and their lawful actions, both privately and in the public square. Unless these rights are preserved and protected for everyone—including those who believe differently than we do or perhaps believe in nothing at all—then we will find our claim to religious freedom a hollow shell.

I. Old Beginnings in the New World

When the new world was discovered, access to it and escape from the old world order offered many the promise of a place in which they could truly begin to experience religious freedom. Exploitation of the natural resources of the new world was a huge factor in the development of these areas; however, opportunities for freedom in the vast open territories were also an attractive lure. Far from the reaches of the established governments of the old world, those who came here had the chance to create themselves anew with little restriction upon how they accomplished this—including opportunities to worship without interference.

Though many of us like to think of the colonies as havens of religious freedom, a fairer general description would be that they represented circumscribed areas in which individual Christian denominations flourished to the exclusion of other denominations. Religious prejudice was no stranger to the colonies. According to Professor Michael I. Myerson "[a]t least five colonies denied Catholics the right to vote, and many explicitly

excluded them from the guarantee of free exercise of religion."[2] Following the defeat of the British the landscape improved somewhat:

> The Church of England, associated with the newly defeated enemy, was no longer established in any state. With New York, Virginia, North Carolina and Georgia joining the states that never had an establishment,[3] eight states firmly embraced disestablishment as a fundamental principle. Five states had varying degrees of establishment, ranging from Maryland, which permitted, without ever implementing, a tax to benefit Christian churches, to South Carolina, which had established the Christian religion, to the New England states of Massachusetts, Connecticut, and New Hampshire, which maintained establishments that favored Congregational churches.
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> All states generally allowed people to practice their religion in peace. Rhode Island removed its restriction on Catholic voting by statute in 1783. Most states, however, imposed legal restrictions on non-Protestants. New Jersey, Delaware, North Carolina, Georgia, South Carolina, and Vermont barred Catholics, Jews, and other non-Protestants from serving in the government. Jews, but not Catholics, were excluded from the legislatures of Pennsylvania and Maryland, while South Carolina limited voting rights to those who believed in God. Each state's laws reflected its local concerns and varying degrees of religious homogeneity.[4]

Having come to a new land, the religious denominations that had had their origins in the old world brought with them their own prejudices and biases against those unlike themselves. These biases and prejudices were arguably the result of persecutions they had experienced themselves and a zealous desire for self-preservation. Moreover, this mindset appears to have underlain their desires to have religious freedom specifically set forth

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[2] Michael I. Myerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* (New Haven: Yale University Press, 2012), 56.

[3] In this quote, Prof. Myerson is referring to circumstances post-American Revolution as concerns establishment. As he indicates elsewhere, "The American *colonies* thus displayed a broad range of approaches to the establishment of religion. With the exception of New York, the colonies that established the Church of England were limited to the South. Maryland was the most northern of the clearly Anglican-established colonies. Georgia, chartered in 1732, declared the Church of England its established church in 1758, the five southern most colonies, Maryland, Virginia, North Carolina, South Carolina, and Georgia, shared a common established religion. The strength of this establishment varied, with North Carolina and Georgia having the weakest centralized church." Meyerson, *Endowed by Our Creator*, 26; emphasis added.

[4] Meyerson, *Endowed by Our Creator*, 82.

as protected under the Constitution. Rather than promote their own denomination as a potential national church (recognizing that politics could bring another denomination to the fore), they were more interested in ensuring their own preservation and protecting against their own demise.

Rev. John Leland, a Baptist minister in Virginia and a close friend of James Madison made it quite clear that he intended to run for public office against Madison, unless Madison included an amendment for religious freedom to the Constitution.[5] Demands for the inclusion of a Bill of Rights had begun even as the Constitutional Convention had concluded. The promise that these rights would be recognized in writing was ultimately important to the ratification of the Constitution. Rhode Island was the last state to ratify the Constitution on May 29, 1790,[6] with the Bill of Rights ratified by three-fourths of the states' legislatures on December 15, 1791.[7]

First among the amendments that are now known as the Bill of Rights is the affirmation that "Congress *shall* make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[8] Even during these very first years after the American Revolution, it is quite clear that the states considered this as a prohibition against federal action, fearing the power of a strong central government that might ultimately establish as a national religion something other than what they had themselves established in their own states.[9]

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[5] Robert P. George, "Religious Freedom & Why It Matters: Working in the Spirit of John Leland," *Touchstone: A Journal of Mere Christianity* 27, no. 3 (2014): 23; see also Meyerson, *Endowed by Our Creator*, 154–158.

[6] The provisions of the Constitution were that in order for ratification to occur, nine of the legislatures of the thirteen original states would need to accept the Constitution. North Carolina was the ninth state to ratify the Constitution on November 21, 1789 with a vote of 194 for and 77 against. Rhode Island's legislature ratified the Constitution on May 29, 1790 with a vote of 34 to 32. See http://www.usconstitution.net/ratifications.html.

[7] Virginia was the last state legislature to ratify the Bill of Rights on Dec 15, 1791. See http://billofrightsinstitute.org/founding-documents/bill-of-rights.

[8] The full text of the First Amendment reads: "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."

[9] Cf. Meyerson, *Endowed by Our Creator*, 175–179.

II. The Development of Jurisprudence on Religious Freedom

Until the first part of the twentieth century, very little jurisprudence or case law of significance is seen at the federal level, primarily because the First Amendment was generally considered applicable only to the federal government.[10] In *Cantwell v. State of Connecticut*, the Supreme Court found the prohibition of government action referenced in the First Amendment applicable to the states through the Fourteenth Amendment.[11]

Since this time, a substantial body of law has developed concerning religious freedom. The path that this area of constitutional law has followed has been rather peripatetic. Though the Supreme Court has appeared to be a strong protector of religious freedom in some areas, in others it appears to have no real clue as to the important correlation between a privately held belief and the open expression of this belief in the public square. For some on the Court, it would appear that religious freedom should be protected so long as it has no real impact on others.

Ian Millhiser[12] offered a brief commentary on *Holt v. Hobbs*, a recent decision concerning religious freedom by the Supreme Court of the United States (hereinafter sometimes referred to as SCOTUS).[13] A Muslim incarcerated in the Arkansas Department of Corrections had been denied a right to grow a half-inch beard that he asserted was in accord with his religious beliefs. In an opinion issued by Justice Alito, the Court held that this was a violation of the Religious Land Use and Institutionalized

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[10] Of the cases that do exist prior to the twentieth century, *Reynolds v. United States*, 98 U.S. (1879) does have some major impact on religious freedom. In this matter Congress had enacted legislation outlawing polygamy. Reynolds was charged with bigamy and raised as an affirmative defense that it was his religious duty to marry multiple women and as such under the First Amendment the law was ineffective against him. The decision stated in part that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Myerson, *Endowed by Our Creator*, 165.

[11] *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). This case dealt with Jehovah's Witnesses who had been charged with violation of a licensing solicitation ordinance and disturbance of the peace. Their convictions at the state levels were overturned by the United States Supreme Court as violative of the First Amendment protection of free exercise of religion.

[12] Ian Millhiser, "Justice Ginsberg Explains Everything You need To Know About Religious Liberty in Two Sentences," http://thinkprogress.org/justice/2015/01/20/3613196/justice-ginsburg-explains-everything. Millhiser is Senior Fellow at American Progress; his work focuses on the Constitution and the judiciary. See https://www.americanprogress.org/about/staff/millhiser-ian/bio.

[13] *Holt v. Hobbs*, 574 S. Ct. 853 (2015).

Persons Act of 2000, "which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest."[14] In discussing the import of the case Millhiser referenced a two sentence concurring opinion from Justice Ginsburg "explaining why . . . [the *Holt* decision] is a proper application of an individual's freedoms—and why she believes that the Court's birth control decision in *Hobby Lobby* was erroneous." Ginsburg writes, "Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share the petitioner's belief. On that understanding, I join the Court's opinion."[15] Millhiser went on to say:

> People of faith have robust rights to honor their beliefs and act on their legal conscience but they couldn't interfere with someone else's legal rights . . . . Unlike Hobby Lobby, Muhammed [Holt] sought a concession to his faith that has no impact on anyone other than himself. As Alito's opinion in *Holt* lays out, the prison's concern about the consequences of allowing him to grow a beard were unwarranted. And no one else will have to do anything with their facial hair (or for that matter, lose access to important medical care), because Muhammed will be allowed to grow a beard.[16]

The problem with this argument and line of reasoning is that it does not consider the implications it has for any constitutional right and freedom. Indeed, all decisions concerning constitutional rights and freedoms balance the effect of one constitutionally protected freedom against any competing freedom. In *Holt*, however, the determining factor was that there was no governmental interest in preserving the security of its facility and the other inmates that would outweigh Holt's religious freedom to maintain an appearance consistent with his faith.

The difficulty is that the tenor and tone of this argument and the comment of Justice Ginsberg imply that where religious freedom is concerned, this is a second-class freedom not deserving full protection and entitled to its exercise only when and where no one else is impacted thereby. It, and the long line of SCOTUS opinions which hint at this in their reasoning, ignore the fact that religious freedom is not only a freedom explicitly

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[14] *Holt v. Hobbs*, 853.

[15] Millhiser, "Justice Ginsberg Explains."

[16] Millhiser, "Justice Ginsberg Explains."

acknowledged by the Constitution, it is embodied in the very first amendment thereto—*first* among the Bill of Rights, whose ten amendments were a matter of extreme importance in having the Constitution ratified by the original states in the confederation.

Moreover, in the case of *Hobby Lobby*, where the owners of the corporation were motivated by their religious freedom to refuse participation in any arrangement that would support the use of abortifacients under a scheme of medical insurance, I can conceive of no opposing constitutional freedom that this would have been balanced against—either among their employees or anyone else.[17] I know of no Supreme Court decision case where there has been discovered a constitutionally protected right to have someone pay for abortions or the acquisition of abortifacients or, for that matter, of a constitutionally protected right to have one's employer pay for medical insurance.

The problem with the line of reasoning expressed by Justice Ginsburg, Ian Millhiser, and others like them is that if accepted, they allow the judiciary to shave away our constitutionally protected freedoms bit by bit in the name of protecting and preserving other legislation Congress may have enacted, any Executive Order that the Court may favor, or any other perceived right the Court may find that is not expressly stated in the Constitution.

The manner in which case law has developed in this particular area concerning constitutional freedom is directly related to humanity's insatiable desire for an autonomy that confuses license with freedom. If unchecked, the ultimate result will be anarchy. Rather than the full maturation of our society, we will see the Constitution stripped of its authority, and true religious freedom, along with other freedoms, becomes but a faint memory of something longed for but no more.

III. Where Things Began To Go Drastically Wrong

The sexual revolution of the 1960s has been Pandora's box for our society; once opened it unleashed untold misery upon us. Having lived through that time period, it was not a time highlighted by free love, peace, and flowers but rather a period of uncertainty. To understand more fully what happened then, imagine waking up while on a journey and finding that all your maps were completely useless. It was not that some of the roads had been altered. More than that, the entire landscape was shifting

[17] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

and changing, moment by moment, with each step taken. During this period, all values and morality that had been certain and sure only a short time before had been upended. Our society was like a child constantly challenging the boundaries to see where they were, only to find the boundaries constantly moving.

Making matters worse, the very "freedoms" being discovered during this period merely fed society's sense of licentiousness and irresponsibility. The mantra of "sex, drugs, and rock & roll" covered our culture like a numbing anesthetic until we could no longer find our way. The wreckage strewn along the course of the past decades appears much like the discarded battle gear left behind by a defeated army trying to escape the last battle: broken homes, destroyed family structures, people with lives ruined by addictions and various other social maladies arising from the so-called free lifestyles—all touted by those most fully committed to the course.

Though there are many cases we could consider as we track the path taken by the Supreme Court concerning religious freedom, there is one that is particularly fitting. About the time the decision in this case was handed down, I recall reading an article in which Justice Sandra Day O'Connor reportedly indicated that morality cannot be the basis for legislation. I thought it an idiotic comment then, and still find it incomprehensible that an individual chosen to serve in this highest position in our judicial system would have said something like this. In the case of *Lawrence v. The State of Texas*, the Supreme Court found unconstitutional a Texas state statute that made it illegal for members of the same sex to engage in what is commonly known as sodomy.[18] Though Justice Kennedy delivered the opinion for the Court, several justices appended concurring or dissenting opinions. In support of the constitutionality of the statute, Texas had argued that the statutes had as a rational basis the promotion of public morality. In her concurring opinion, Justice O'Connor wrote: "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"[19] Though Justice O'Connor was arguing a subtle distinction in the

[18] *Lawrence v. The State of Texas*, 539 U.S. 558 (2006).

[19] *Lawrence v. The State of Texas*, 583. Interestingly, Justice O'Connor also indicated "[t]hat this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—

basis for the ruling under the Equal Protection Clause, her relation of this argument to the issue of morality seems to say more than just a fine point of constitutional law. It echoed a quote from another case that Justice Kennedy had stated in the majority decision:

> For many persons these are not trivial concerns [that is, questions about sexual behavior] but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[20]

What bothered me most about these comments in the reasoning of the Supreme Court was that it seems to fly in the face of much I had understood about our judicial process and the reasons for laws, both criminal and civil. For me, it was the sound of fingernails across the chalkboard, yet quite revealing because it reflects the current landscape at the intersection of American jurisprudence and culture.

The structure and form of a government do not create morality in its people. As those saved by grace understand, no law can effectuate the result or the object of its command. Nevertheless, the legislation of a government will inevitably reflect the morality of its people, either in the way it is written or in the way it is enforced. There is a deterrent effect in some circumstances and in others a positive effect on the conduct a law may encourage. Secular law is simply a mirror of our culture—a snapshot of our condition in a certain timeframe. Witness the many laws still on the books in various jurisdictions that are no longer prosecuted.

Over thirty years ago, when I was the prosecuting attorney for a rural community in Virginia, I never had a case of adultery brought before me for criminal prosecution—and our community was certainly not a bedrock of marital fidelity. I believe it is still a crime to commit adultery, but in the time since then I still have not heard of a case of prosecution for this. As morality in our society has worsened and values have diminished, the lack of prosecution of a specific law is often argued as a reason to act more freely and without the burden of the law, such as the various arguments in

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the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group" (585).

[20] *Lawrence v. The State of Texas*, 571.

areas of sexual freedom and the de-criminalization of marijuana. Were our society different morally, I submit that these arguments would not be raised.

The dissenting opinion written by Justice Antonin Scalia in *Lawrence v. The State of Texas* (which was joined in by then-Chief Justice Rehnquist and Justice Thomas) does a tremendous job of outlining the pitfalls of this ruling and the potential future problems, many of which have come to fruition. It is a truism indeed that one cannot legislate morality. No law has ever been put into effect that has had the effect of changing wholesale the values of a people, but this is not to say that morality cannot be the basis, direction, and intent of any legislation. Consider the various laws for the solicitation of prostitution, public intoxication, and the like. In fact, in any court case, a party is entitled to impeach the testimony of any witness—that is, to raise the inference that it is not truthful—if they have been convicted in the past of a crime involving moral turpitude,[21] something that many states recognize as crimes involving lying, cheating, stealing, or making false witness.[22]

In this same case of *Lawrence v. The State of Texas*, numerous references are made to our ever increasing desire for autonomy in all things. In developing the argument of the majority decision, Justice Kennedy wrote that a review of the laws and traditions of the past century had shown ". . . an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"[23]

Quoting from another case, Justice Kennedy continued:

> [O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the

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[21] "Gross violation of standards of moral conduct, vileness, such that an act involving moral turpitude was intentionally evil, making the act a crime. The existence of moral turpitude can bring a more severe criminal charge or penalty for a criminal defendant." *West's Encyclopedia of American Law*, 2nd ed., s.v. "moral turpitude."

[22] See, for example, *Newton v. Commonwwealth*, 29 Va. App. 433 (1999); this can be found at https://www.courtlistener.com/opinion/1066400/newton-v-com.

[23] *Lawrence v. The State of Texas*, 572.

> liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[24]

In his dissenting opinion, Justice Scalia recognized the decision in *Lawrence* as essentially laying the ground work for the ultimate approval of homosexual marriages.[25] The difficulty has never been with the nature of whatever peculiar freedom or right the Supreme Court has been asked to identify or protect. Rather it has been with the manner and method through which the Court has discovered such freedoms and rights and then "balanced" them against freedoms and protections specifically stated in the Constitution. Early in our history of jurisprudence, the decision-making process used by our courts began to allow societal changes in our values and mores to be a determinative factor in how a statute would be read and how a constitutional provision would be interpreted. This process has occurred under the theory of a "living Constitution" that changes and develops through the creation of decisional law. Decisional law adjusts what the Constitution means through the passage of time depending on the societal developments without resorting to the process of amendment that was initially established for changing the document. Amending the Constitution is cumbersome and indeed difficult, one might argue, in order to protect the integrity of those freedoms referenced at the outset. Writing about this danger, Justice Scalia notes:

> If the courts are free to write the Constitution anew, they will by God, write it in a way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[26]

What we are seeing is a "right to privacy," which concept (as developed by the Court) has become the underlying basis for the reduction of

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[24] *Lawrence v. The State of Texas*, 574.

[25] *Lawrence v. The State of Texas*, 604–605.

[26] Antonin Scalia and others, *A Matter of Interpretation: Federal Courts and the Law (An Essay by Antonin Scalia)*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 47.

other freedoms or rights specifically stated in the Constitution, all for the purpose of promoting individual autonomy.

IV. What Hope Is There?

We must all be willing to do the hard work necessary to protect and preserve our rights as stated and acknowledged in the Constitution. These rights are essential to our existence as human beings. Our founding fathers were not afraid to leave a little of their blood on the floor in the process of doing so—many at that time and since have left their all. Those who have followed in their steps have also been asked to sacrifice.

Martin Luther King Jr. was willing to give his all and ultimately paid with his life for the voice of freedom. How can we consider any less of a commitment to the cause of our religious rights? In his famous "Letter from a Birmingham Jail," King noted: "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[27]

Our world is not as it was when I was a child, and in many ways I am thankful for that. Our country is also not as it was when I was a child, and in many ways I am thankful for that as well. All change, however, is not positive or constructive, and many of the shifts and movements that have taken place since have caused erosion in much we have valued. Since the 1960s, there have been many signs that our republic is experiencing many of the difficulties that Rome lived through in its last days as an empire. Yet, hope rises up as a breath of warm anticipation as we look to spring. We are a country born in the face of adversity and birthed by men who cherished their freedom enough to sacrifice and place their lives and fortunes at full risk in order to ensure the protection of those freedoms for their progeny and their future.

During the Vietnam era a certain phrase was popular among the military. Its sanitized version goes like this: "If you have them by their progenerative faculties, their hearts and minds will follow." The intention was that with enough force you can make things go the way you wish, and you can make people believe the way you force them to believe. But we all know that this is not true.

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[27] Martin Luther King Jr., "Letter from a Birmingham Jail," http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

The actual basis for the understanding that "hearts and minds will follow" originated during a counter insurgency program developed and directed by Brigadier General Gerald Templar, who at the time was in charge of fighting the Communists in Malaysia in the 1950s. In this he talked about "winning the hearts and minds of the people," which gave no thought to subduing a people by brute force. Instead, he recognized that if one truly wished to fight for a people and expected them to join in fighting for themselves, more had to be done than simply giving it one's all in the fight. The people had to be presented with a goal worth fighting for, something that required and understanding of their true needs.

Though General Templar's program included vigorous fighting against the insurgents, it also recognized the essential nature of having the support of the indigenous people. A great part of his efforts included programs focused on giving the people what they really needed—agricultural assistance, educational aid, health care, and the like. In much the same way, Christians in a struggle for religious freedom are fighting forces with Satan at their head. The battleground is set within our culture, where the opposing combatants both seek control over the "hearts and minds of the people." As with General Templar's program, we must look to the real need of the people—namely, the truth. We must continue our efforts in the courts, but more importantly, we must stand boldly in the public square, contending for those who are being misled by secularism. We must teach our people the truth, enabling them to recognize it and to distinguish it from the counterfeit forms offered them. We must engage the issues genuinely, fairly, and with the courage of our convictions.

Instead of angrily shouting down someone with opposing views, we must seek to engage them in genuine conversation. We cannot relinquish our right to speak, but we can everywhere offer the truth with "gentleness and respect," remembering that it is ultimately God's hand which provides the peace that passes all understanding and keeps our hearts and minds in Christ Jesus (Phil 4:7). Truth must ultimately inform culture. If we abdicate this part of the fight, it will matter little what we do in the courts and our various legislatures. Refusing to become directly involved in this responsibility makes us silent witnesses as circumstances grow worse. We cannot afford simply to stand by and watch as this precious freedom circles the drain in our society's return to paganism.

V. What If the Supreme Court Rules Incorrectly?

Though much fear hangs in the air as we reflect on the recent action of SCOTUS legalizing same-sex marriage,[28] we must never forget: the Supreme Court can be wrong. As a prime example (among many) we need only consider *Dred Scott v. Sanford*, which has been identified as one of the top ten worst decisions of the Supreme Court, some arguing that it has been the worst decision ever from this august body.[29] It took the bloodiest conflict we have ever experienced (with casualties greater than the total losses of all conflicts from our inception through the Vietnam War[30]) along with the Civil Rights Act of 1866 and the Fourteenth Amendment to correct. We must not be surprised when they get it wrong. We cannot expect them to be infallible. They are not gods. They have made wrong decisions. They have made bad decisions. They will continue to get things wrong. They will also get things wrong by overruling prior decisions which were actually correct. The question for us is this: "What shall we do when this happens?"

Abraham Lincoln said, "We the people are the rightful masters of both Congress and the courts, not to overthrow the Constitution, but to overthrow the men who pervert the Constitution."[31] We must continue all legal means available to us. We must fight our battles in the courts so our rights may be preserved, undiluted either by liberal politicians or an activist judiciary. We must speak out clearly against anyone seeking to expand manufactured "rights" and privileges at the expense of those core and basic freedoms so clearly set forth in the Bill of Rights.[32] No less an important front in this war exists in the hearts and minds of our people. There is a role for pastors to be active citizens of our nation and to encourage their congregants to do the same. Standing in the gap betwixt the government and the culture is the church. It is the church whose clarion call sounds out the truth when that which is not truth comes from either the government or culture, catching the people in the crossfire.

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[28] This study was written several months prior to the Court's *Obergefell v. Hodges* decision concerning same-sex marriage; see *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

[29] *Dred Scott v. Sanford*, 60 US 393 (1857); see also http://www.britannica.com/list/148/editor-picks-the-10-worst-us-supreme-court-decisions-part-one and http://faculty.washington.edu/sstreich/documents/ worstdecisionever.pdf.

[30] http://www.civilwar.org/education/civil-war-casualties.html.

[31] http://www.brainyquote.com/quotes/quotes/a/abrahamlin109278.html; see also http://declarationofdependence.org/abraham-lincoln.

[32] See also, R.R. Reno, "Religion and Public Life in America" *Imprimus* 42, no. 4 (2013): 1-8.

The development of jurisprudence in the area of religious freedom has resulted not so much in a coherent body of law that fits well together, but rather a patchwork quilt poorly pieced together. We impose coherence on it by a backwards view because we desire structure and order. The development of this area of jurisprudence has been directed by the influences of a changing culture whose sense of morality and human worth has ebbed and flowed in a generally downward direction.

It is the culture, by and large, that has driven the direction of judicial decisions. Over the course of our country's existence, one need only consider how new rights and privileges have been discovered by those on the highest courts of the land, generally to the detriment and diminishment of those freedoms originally asserted for our people in the Bill of Rights. These decisions are bound up in what appears to be an ever evolving subjective sense of what is right that is not measured by an outside, objective, and unchanging guide. The subtle influence of our secular society has been a powerful force exerting substantial effect over time, wearing down freedoms in one area and building up new ones in other areas. Regardless of these forces, however, we must not diminish our efforts.

VI. What Role for Christians?

Our task as a people of Christ is to stand secure in the in-between place—in the public square—and by our lives, our speech, and our actions to be witnesses to the truth and indeed martyrs where we must. When the Ukrainian conflict began in 2013–2014, there were photographs published in the various news outlets showing the forces of the government and those revolting arrayed across from each other in the public square.[33] In the middle between the opposing forces stood a lone, Orthodox priest in his vestments holding up a crucifix. This photograph depicted for me the raw necessity for religious expression in the public square. A priest stands between the state with all its force and might, and the citizens, with all their myriad voices raising a cacophony of issues. This photograph shows the public square in all its power, fury, danger, and immediacy. What would the secular humanist have happen here? They would remove the priest and have the public square devoid of religion—without the faith, values, and substantive force that could be brought to bear in the midst of

[33] See, for example, Max Fisher, "Dramatic Photos: Ukraine's Priests Take an Active Role in Protests," *Washington Post*, February 20, 2014, https://www.washingtonpost.com/blogs/worldviews/wp/2014/02/20/dramatic-photos-ukraines-priests-take-an-active-role-in-protests.

this ongoing struggle. This would be a public square naked and devoid of a voice that that can properly and valuably inform the public debate.[34]

As Christians who still hold firmly to the truth, we may legitimately ask ourselves what can we do to affect our culture and to be a voice in the public square? For one thing, we must continue doing what we are doing. In the case of our seminaries, that means continuing to develop and train men for the pastoral office so truth may resonate loud and clear wherever they are called to minister. Likewise, deaconesses can serve a vital role as beacons of light that pierce a world shrouded in darkness. We must encourage these young—and sometimes not so young—men and women to engage the culture wherever and however they may find opportunity. They can write columns on culture, morals, and values for their local newspapers, write letters to the editor, or start a blog. Now is the time to bring back Lutheran Laymen's League or Lutheran Women's Missionary League groups where they have gone dormant or seek to reinvigorate those still meeting, engaging them in topics designed to focus on a culture gone awry and how it can be brought back to center. Above all, they must be encouraged to integrate themselves into their communities, performing acts of mercy and telling those who ask about Christ that he is the reason they are impelled to do so.

Why should we be bold in engaging the culture surrounding us? We acknowledge the force and effect the word of God may have on indigenous cultures when we go into the mission field. If centuries ago someone had not been bold enough to take the Word to my people I would likely be worshipping at sacred oaks and following the teachings of the Druids. And yet paganism is once again rearing its ugly head, with a new temple to Odin recently built in Iceland, neo-Druids celebrating the spring and summer solstices at Stonehenge—and the world's religions on our very door steps with Ashrams, mosques, and who knows what else right around the corner.

From the words of R.R. Reno, editor of *First Things*:

> There is another, deeper argument that must be made in the defense of religion: It is the most secure guarantee of freedom. America's Founders, some of them Christian and others not, agreed in principle that the law of God trumps the law of men. This has obvious implycation: The Declaration of Independence appeals to the unalienable rights given by our Creator that cannot be overridden or taken away.

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[34] See generally, Richard John Neuhaus, *The Naked Public Square*, 2nd ed. (Grand Rapids: Wm. B. Erdman's Publishing Co.), 1986.

> In this sense religion is especially beneficial . . . . religion gives us a place to stand outside of politics, and without it we're vulnerable to a system in which the state defines everything, which is the essence of tyranny. That is why gay marriage, which is sold as an expansion of freedom, is in fact a profound threat to liberty . . . . [We should] focus not on fury but on the remarkable capacity for communities of faith to survive . . . . The Church did not need constitutional protections in order to take root in a hostile pagan culture two thousand years ago . . . . Over the long haul, religious faith has proven itself the most powerful and enduring force in human history.[35]

Our job as Christians is to stand in the gap—be present in the "in-between" place—and be the filter through which the discussions that matter take place—the substance that supports the values and mores being challenged and attacked by the culture and society. Our responsibility is to make clear our convictions regarding the truth and thereby to shore up those things that Satan is attempting to tear down.

Finally, consider Psalm 1, which gives us an image of society constantly infused with the word of God and contrasts it with a society where the word is completely absent:

> **1** Blessed is the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteth in the seat of the scornful. **2** But his delight is in the law of the LORD; and in his law doth he meditate day and night. **3** And he shall be like a tree planted by the rivers of water, that bringeth forth his fruit in his season; his leaf also shall not wither; and whatsoever he doeth shall prosper. **4** The ungodly are not so: but are like the chaff which the wind driveth away. **5** Therefore the ungodly shall not stand in the judgment, nor sinners in the congregation of the righteous. **6** For the LORD knoweth the way of the righteous: but the way of the ungodly shall perish. (KJV)

Where the word of God is, there is life in all abundance—prosperity and all good things. If it is absent, there is nothing but darkness and death. Let us be of good cheer, for he who is with us is greater than he who is in the world! May our gracious Lord, the giver of light and sustainer of all life, give us opportunities to work while the day is yet with us.

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[35] Reno, "Religion and Public Life in America," 7–8.