

Equipped to Defend Religious Freedom

If we are to preserve religious freedom in a culture that no longer seems to comprehend, much less care about, the vital role religious freedom plays in a free society, then we must each become an ambassador for religious freedom. We must be equipped to discuss religious liberty cogently but simply, with the hope of perhaps persuading our fellow citizens that everyone has an interest in preserving religious freedom.

The purpose of this article is to highlight a handful of articles and books that will equip someone who has never read a Supreme Court decision about religious liberty or a book about the First Amendment to articulate a strong defense of religious liberty. Because the best scholars increasingly write in laymen's terms, these articles and books are readily accessible to non-lawyers, law students, and lawyers alike. Most are short articles, and all are easy reads and particularly worth reading.¹

The past 40 years represent a "Golden Age" of religious liberty scholarship. In suggesting the following articles, I am recommending writings published within the past four years. In making my selections, I have excluded older works for which these authors are better known and have neglected several religious liberty scholars whose work contributes significantly to the defense of religious liberty. This is an eclectic, rather than comprehensive, list.

Nor do I agree with everything that is said in these articles or with every position these scholars take. These are brave voices in an increasingly alien academy. They are staking reputations and taking hits for our religious liberty. Reading their work and using it to advance religious liberty in our circles of influence (work, school, church, friends, etc.) honors their efforts on behalf of us all.

Why Religious Freedom? Four years ago, a well-known University of Chicago philosophy professor, Brian Leiter, wrote a book, *Why Tolerate Religion?*, in which he questioned the need for protecting religious liberty.² Unfortunately, his doubts as to whether religious freedom is "worthy" of protection represent a swelling chorus throughout law school faculties that we ignore at our peril. Fortunately, Professor Michael McConnell and Professor Michael Paulsen not only have read his book, but each has written a thoughtful rebuttal that not only dismembers the doubts but also reinforces the core reasons why religious freedom must be protected in a free society. McConnell's and Paulsen's arguments overlap to some extent, but they offer rationales for religious freedom that differ enough as to substance, and their style and tone are so individualistic, that each piece deserves to be read on its own merits.

- 1) Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013)
- 2) Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014)

¹ Many of these articles will be gathered on one CLS webpage to facilitate finding them. See <https://clsnet.org/religiousfreedomtoolkit>.

² Brian Leiter, *Why Tolerate Religion?* (Princeton U. Press, 2012).

Learning to speak to a foreign culture: Like any good ambassador, we must learn to speak the language of an increasingly unfamiliar culture if we are to promote religious liberty. First, of course, it helps to understand how the culture came to perceive religious freedom as a threat rather than an asset. Professor Doug Laycock has written several articles explaining the forces opposed to religious freedom from his perspective as a nonbeliever committed to a pluralistic society in which religious liberty is robustly protected. His warning that our culture is about to squander religious freedom is haunting when he writes: “For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle -- suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”³ Professor Laycock expands on the cultural forces at work, as well as his criticism of what he perceives to be the hypocrisy of both religious liberty opponents and advocates, in two articles addressing the culture wars and religious liberty.

Professor Tom Berg has written three articles to reclaim religious freedom as a right to be championed by those who view themselves as political liberals. The articles identify common ground that should be a meeting place in support of religious liberty for both liberals and conservatives. For example, Professor Berg explains in a 2013 article how typical “progressive” goals are advanced by religious liberty. In the process, he addresses how to define which third-party harms do and do not justify restrictions on religious freedom. In a 2015 article, he again presents religious liberty as consonant with liberals’ expansive understandings of the role of government while explaining why the welfare state must leave religious freedom substantial breathing space in which to thrive. In his 2016 article, Professor Berg explains why recent liberal attempts to limit religious freedom for religious institutions that provide social services -- for example, the Obama Administration’s initial regulation limiting the religious exemption in the HHS Mandate to houses of worship that primarily serve and employ only members -- demonstrate many liberals’ fundamental failure to understand the need to protect religious organizations’ freedom to maintain their distinctive requirements for members’ and leaders’ conduct, even as they fully participate in the provision of social services to their communities.

Learning to frame the arguments for religious freedom in terms that persons of varying political and social persuasions may share is vital to reclaiming the public square for religious freedom. Familiarization with Professor Laycock’s and Professor Berg’s recent works are essential to this endeavor.

- 3) Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839 (2014)
- 4) Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011)
- 5) Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013)
- 6) Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J. L. & Gender 103 (2015)

³ Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011).

- 7) Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341 (2016)

Drilling down on pluralism: The declining commitment to religious liberty has not occurred in a vacuum. Instead, a similar decline in our society's commitment to free speech and pluralism parallels the loss in commitment to religious freedom. Professor John Inazu's 2016 book, *Confident Pluralism*, is a short (130 pages), highly readable, and engaging plea for a recommitment to pluralism in order to undo the severe erosion of the First Amendment rights of free exercise of religion, free speech, and assembly that has occurred in recent years. Professor Inazu identifies the basic constitutional detours that threaten our society's commitment to these First Amendment rights, as well as three "aspirations" necessary to a pluralistic society: tolerance, humility, and patience. In a time when strident voices threaten to drown out rational discourse, Professor Inazu delineates a path that may appeal to millennials and their elders who hope to preserve freedom and pluralism by finding common ground with those who disagree with them. Law students in particular should take a study break to read this book in order to more fully participate in class discussions.

Similarly, yet in a more targeted way, scholars Stephen Monsma and Stanley Carlson-Thies explore the great good that religious organizations provide their communities, nation, and world through various social service programs. Those of us in faith communities take for granted that our congregations contribute in numerous ways to those around us, regardless of whether our neighbors share our faith. Increasingly, however, those outside our faith communities think that only the government provides social services, and they fail to understand why employees of faith may sometimes provide social services more effectively and efficiently than similar government programs. It is imperative that our faith communities publicize their contributions to their communities in a way that makes clear that the faith component is essential to their good works. A new study by Brian and Melissa Grim roughly calculates in dollars (approximately \$ 1.2 trillion) the tremendous good that religious organizations, congregations, and faith-based businesses contribute to the United States society.

- 8) John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (U. Chicago Press 2016)
- 9) Stephen V. Monsma and Stanley W. Carlson-Thies, *Free to Serve* (Brazos Press 2015)
- 10) Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis* 12 *Interdisciplinary J. of Research on Religion* 3 (2016), <http://www.religjournal.com/pdf/ijrr12003.pdf>

Religious Freedom Recast as Discrimination: Current conflicts between religious liberty and the new orthodoxy of sexual autonomy, particularly in the abortion or LGBT contexts, have been addressed in several must-read articles.

a. Religious Organizations' Right to Employ Based on Religion: Title VII of the 1964 Civil Rights Act excludes religious organizations from its prohibition on discrimination on the basis of religion in employment decisions. But there is a strong push to amend Title VII to prohibit discrimination in employment on the basis of sexual orientation and gender identity, in

addition to its longstanding prohibitions on discrimination on the basis of race, color, national origin, religion, and sex.

After the Supreme Court's re-definition of marriage in 2015, some academics have argued strongly that while Title VII protects the right of a Baptist college to hire only Baptist faculty, it should not allow the college to refuse to hire a professor who claims to be Baptist but is in a same-sex marriage. In other words, these academics claim that a religious employer can look only to the faith claims of an employee in deciding whether to employ him but cannot look at the employee's conduct to determine whether he or she sincerely shares the employer's faith. Professor Carl Esbeck masterfully dismantles this argument in a recent article that is a must-read for anyone wanting to understand an issue likely to be heard by the Supreme Court in the next decade.

- 11) Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Oxford J. L. & Rel. 368 (2015)

b. Dignitary harm: In many recent cases involving LGBT or abortion claims, the asserted harm has been a "dignitary harm." The claimant cannot point to any physical or monetary harm, except that he or she has been offended. There is a similar move to restrict free speech because one person's speech offends another. Of course, the Supreme Court has uniformly rejected the notion that "offense" to one citizen justifies restricting another citizen's speech, but the idea reigns on college campuses. Many scholars, perhaps a majority, promote the idea that "offense" can justify restricting First Amendment rights, including speech and religious exercise.

For opponents of religious liberty, a recent article by Professor Douglas NeJaime and Professor Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religions and Politics*, 124 Yale L.J. 2516 (2015), is often cited as the best liberal exposition of the theory of "dignitary harm." Fortunately, one need not read that article because Professor Laycock explains and then demolishes its basic premises in a pithy article that concludes: "the dignitary harm of receiving a civilly communicated refusal to assist behavior that a conscientious objector views as immoral [does not] create[] a compelling government interest that overrides the right to conscientious objection."⁴

As already noted, this reliance on "offense" threatens tremendous harm to all students' First Amendment rights on college campuses, but the religious student groups remain most vulnerable. College administrators often woodenly misinterpret their colleges' nondiscrimination policies to prohibit religious student groups from publicly stating that they require their leaders to agree with the religious groups' religious beliefs. Numerous scholars have criticized the Supreme Court's decision in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), which allowed one state university to use an "all-comers policy" to discriminate against a religious

⁴ Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, Yale L.J. Forum 369 (March 16, 2016), http://www.yalelawjournal.org/pdf/Laycock_PDF_wgmv6xbh.pdf.

student group although, importantly, *Martinez* actually sidestepped deciding whether a nondiscrimination policy could constitutionally be used to restrict religious groups' right to choose leaders of their same faith. Criticism of *Martinez* is a theme of Professor Inazu's book and much of his other writings because it is irreconcilable with a pluralistic society that respects speech, assembly, and religious exercise as core constitutional rights. Professor Paulsen also has decimated Justice Ginsburg's majority opinion in an article that deems *Martinez* one of the worst decisions of the past fifty years, even while noting its limited viability.

Professor Richard Garnett has written several articles wrestling with the critical question of when discrimination is invidious, when it should be unlawful, and when it is permissible to protect religious freedom or other freedoms necessary to a free society. His approach is thoughtful and designed to engage the reader in thinking in broader terms about the importance of this discussion for our society.

A variation on the "harm" theme is an oft-repeated claim that religious exemptions somehow violate the Establishment Clause if they, in any way, cause third-party harms. Professor Esbeck has demonstrated the fallacy of this argument in briefs and articles.

- 12) Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. Forum 369 (March 16, 2016)
- 13) Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 Regent U. L. Rev. 283 (2012)
- 14) Richard W. Garnett, *Religious Accommodations And – And Among – Civil Rights: Separation, Toleration, and Accommodation*, 88 S. Cal. L. Rev. 493 (2015)
- 15) Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in Austin Surat, ed., *Matters of Faith: Religious Experience and Legal Response* (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087599
- 16) Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 58 J. Church and State 1 (Mar. 14, 2016), <http://jcs.oxfordjournals.org/content/early/2016/03/14/jcs.csw003.extract>

c. RFRA's critical importance: Of course, the much-maligned Religious Freedom Restoration Act (RFRA) is the single most important legal protection for religious freedom at the national level, and state RFRA's exist in 22 states. All of the above scholars have written about RFRA's importance. With more than a little embarrassment, I will add three pieces that I (assuredly not a scholar) have authored to highlight their arguments in congressional testimony and two short pieces. Yet again, inaptly-named legislation, the "Do No Harm Act" has been introduced this Congress to eviscerate the federal RFRA. These pieces explain in laymen's terms why RFRA is critically important to the defense of all Americans' religious freedom.

- 17) Kimberlee Wood Colby, Written Statement Before the Subcomm. on the Constitution and Civil Justice of the House Judiciary Comm., *Hearing on The State of Religious Liberty in the United States*, June 10, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/06102014-Colby.pdf>

- 18) Kim Colby, *How the Religious Freedom Restoration Act Benefits All Americans* (two-page summary of RFRA's benefits), <http://clsnet.org/document.doc?id=803>
- 19) Kim Colby, *The Religious Freedom Restoration Act*, Christian Leadership Alliance, Outcomes Magazine, Summer 2016, <http://clsnet.org/document.doc?id=967>

Reading one or all of these articles will equip the reader, whether a lawyer, law student, or layperson, to defend religious liberty over coffee, over the fence, or over work. Religious freedom may well depend on the ability of all of us to make a ready defense of this unalienable human right to our friends, neighbors, and co-workers.