

# We Are Free for a Reason

By David F. Forte

## Religious Liberties Practice Group

### A Review of:

Free to Believe: The Battle Over Religious Liberty in America, by Luke Goodrich (Multnomah), <https://www.penguinrandomhouse.com/books/594481/free-to-believe-by-luke-goodrich/>

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### Note from the Editor:

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### Other Views:

- Marci Hamilton, *No, American Religious Liberty Is Not in Peril*, WALL ST. J. (July 26, 2019), <https://www.wsj.com/articles/no-american-religious-liberty-is-not-in-peril-11564153070>.
- Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing “Religious Liberty” to Allow Institutions to Discriminate*, GUTTMACHER INST. (May 16, 2018), <https://www.guttmacher.org/gpr/2018/05/bad-faith-how-conservatives-are-weaponizing-religious-liberty-allow-institutions>.
- Ronald Brownstein, *The Supreme Court Is Colliding With a Less-Religious America*, THE ATLANTIC (Dec. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/>.

There is hardly a person in America who can equal Luke Goodrich’s record of advocacy for religious liberty. Before the United States Supreme Court, Goodrich has succeeded in such seminal cases as *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*,<sup>2</sup> and *Little Sisters of the Poor v. Azar*.<sup>3</sup> He has defended Catholics, Evangelical Christians, Lutherans, Hutterites, Jews, Santerians, Muslims, and Native Americans in their religious practices and institutions. As senior counsel to the Becket Fund for Religious Liberty, he is respected by both supporters and opponents for his skill and his character.

Luke Goodrich is a Christian, and that is the reason for his work and for his book. His faith is not an addendum to his life and career. Rather, it is the very grounding of his practice of law. His advocacy is as much a product of his beliefs as it is of his legal training. That is why his book, *Free to Believe: The Battle over Religious Liberty in America*, is unusual. It is not the observations of an arm’s length expert (though expert he be) describing the trends, the doctrines, and the history of the religion clauses of the Constitution. It is not a memoir of the important place that he has occupied in the struggle of which he is a part. It is not a jurisprudential treatise. It is, instead, a reflection on why religious liberty—along with his defense of it—matters in his life and in the lives of his readers. It is not written for experts, but for the average interested reader. It is a Christian book, written by a Christian author. His book relies on biblical quotations as much as precedent or reasoning to justify his positions. At bottom, his book is a long letter by an Evangelical Christian to his co-religionists, though all readers can profit from his analysis and counsel.

In some way, all books are self-revelatory of their authors, but this book is explicitly so. When he speaks to his readers, one can see that Goodrich is also speaking to himself, developing his thoughts, refining his understanding of his place in his country and in his faith. Not all of his thoughts and positions are entirely consistent, nor should we expect that they would be in a person’s quest to discover just why his life and his work matter.

Goodrich begins with a twofold warning. First, unless Americans, specifically Christians, are well prepared to defend religious liberty, they risk losing it. Second, there will never be a time when religious liberty will be fully secured. Trouble will always be with us. The quest is ever, the struggle unending.

Goodrich first discusses three ways “Christians Get It Wrong” when it comes to religious liberty. “Pilgrim” Christians, he declares, hold that religious liberty is the source and objective of the American political experiment. They expect that the government will and should protect them. But Goodrich notes

1 573 U.S. 682 (2014).

2 565 U.S. 171 (2012).

3 *Zubick v. Burwell*, 136 S. Ct. 1557 (2016).

that “Scripture teaches just the opposite. It says we should expect to be persecuted.” He also emphasizes the plurality of American religious experience, the history of religious persecution in this country, including persecution by the original Pilgrims, and the reality that government promotion of Christianity is not necessarily good for Christianity. “Martyr” Christians, on the other hand, take the scriptural promise of persecution too far. They aver that persecution by any secular regime is, and will ever be, the lot of Christians. They opt to persevere in their faith, rather than engage in what they regard as a hopeless task of having the state ally with the values of religious freedom. But “the Martyr view” Goodrich avers, “distorts the teaching of Scripture.” True, there will always be persecution, but Goodrich declares, “The saints in heaven aren’t rejoicing at having been killed, they’re crying out with a loud voice for God to avenge their blood.” Further, Christian tradition going back to the early church has not seen persecution as a positive good, but has sought to resist it. Lastly, “Beginner” Christians value religious freedom, but are unsure of what its extent should be.

I found Goodrich’s taxonomy of Christian beliefs about religious liberty interesting, but not at all what I have observed. In my experience, most believing Christians are engaged in the project of protecting religious liberty, resisting or at least resenting secular attacks, and seeking to preserve the freedom of Christian social and charitable institutions to be able to fulfill their calling. However, there is a growing number of former Christians who simply do not care about religion, or who affirmatively dismiss it.

Goodrich believes he has “a better way” for Christians to approach the issue of religious freedom than those in his threefold grouping. In describing his approach, he distills from what he calls “biblical justice” the core sense of what he thinks most Christians do believe is the reason for religious liberty: “[H]uman beings are created for relationship with God.” That relationship “can never be coerced.” When government interferes in that relationship, it is “perpetrating an injustice.” Goodrich relies on both scripture and “centuries of religious tradition” to support his position.

Most religions would agree with the proposition that man is called upon to have some relationship with the divine. But some sects—including some Christians today and most Christians in the past—expect the government, or the prince, or the sultan, to affirmatively aid and further the particular favored religion. Goodrich, however, rejects any theocratic notion of America or its exceptionalism. Though many founders perceived a providential relationship between God and the United States, Goodrich declares frankly that America is not God’s chosen people. It is the church that is the chosen body. “[U]nlike Israel, Caesar and God are now separate.”

In other words, religion must be accorded a separate realm from the state within which man can seek the transcendent. That fundamental position is reflected also in Madison’s Memorial and Remonstrance Against Religious Assessments, which Goodrich references, and developed with a more nuanced analysis in the work of Rick Garnett.<sup>4</sup>

<sup>4</sup> See, e.g., Richard W. Garnett, *Do Churches Matter? Towards and Institutional Understanding of the Religion Clauses*, 53 *VILL. L. REV.* 273 (2008).

Part Two of the book covers the most serious threats to religious liberty, and Goodrich discusses the conflict between the right to religious association and anti-discrimination laws and norms. He helpfully lists three elements of religious independence from state control: 1) the right to determine belief and doctrine, 2) the right of self-governance, and 3) the right of religious groups to “choose their members and leaders in accordance with their beliefs.” This last, we might observe, is where contemporary demands for equality intrude the most into religious liberty. For example, in *Christian Legal Society v. Martinez*,<sup>5</sup> the University of California, Hastings College of Law disallowed its Christian Legal Society chapter from limiting who could be an officer or a member based on their religious beliefs. On the other hand, the expansion of the “ministerial exception” is giving religious institutions more of a safe harbor.<sup>6</sup>

Religion and the secular state, while institutionally separate, occupy the same physical and social space. Religion cannot be so free that its adherents are immune from state laws. No society of diverse religious beliefs (and non-beliefs) could operate on that basis. Goodrich suggests that “the limits of religious freedom are based on the government’s duty to protect *other* rights.” But in determining where one right can trump another, Goodrich does not offer a complete theory, a way to determine where the boundaries are between rights. Instead, he relies more on what he thinks that common sense and circumstance would determine as the proper balance among competing rights. His experience as a litigator representing different clients with distinctive situations and in particular circumstances leads to him proffer this variable formula. For those of us seeking a definable and appropriate standard for judges to follow, this litigator’s approach fails to satisfy. On the other hand, he wins cases.

Goodrich knows that in a pluralistic society non-religious reasons for protecting a realm of religious liberty must be found. He offers three. The first is consequentialist: religious liberty benefits society. To begin with, in accord with the near-unanimous position of the Framers, Goodrich argues that religion “produces the moral virtue necessary for democratic self-government.” Additionally, religions and their institutions bring forth an astounding amount of social benefit, from hospitals to food banks, from rehabilitation centers to homeless shelters. Religious individuals are more generous, law-abiding, and involved in their communities. Yet despite those documented facts, some persons today regard such religiously inspired good works as a threat. Goodrich has encountered that bias in his work. For example, he successfully defended the non-profit Boise Rescue Mission from a charge of discrimination under the Fair Housing Act, when the mission provided religious instruction to its residents.<sup>7</sup>

A second non-religious justification for religious liberty is that it protects other rights and liberties. In a powerful argument, Goodrich shows that rights are not created by the government, and

<sup>5</sup> 561 U.S. 661 (2010).

<sup>6</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. \_\_\_ (2020).

<sup>7</sup> *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988 (9th Cir. 2011).

that when religious liberty marks off an area free of government interference, it gives sanctuary to other human rights. This leads the author to his third justification, namely, that religious freedom is a “fundamental human right.” In other words, he grounds the justification for religious liberty in the natural law. Like Thomas Aquinas, the author argues that divine law (in his case, scripture) reveals what is also knowable by reason: that “when the government tries to coerce us in embracing its version of the truth . . . it is going against our very nature as human beings.” Such a natural law understanding impels Goodrich to defend the right of a Muslim prisoner to grow a beard<sup>8</sup> and of a Native American to possess feathers of federally protected eagles.<sup>9</sup> As he sums up: “you don’t have to care about the Bible to care about religious freedom.”

The heart of the book is a description of the multiple threats to religious freedom—and Christianity in particular—that are present in America now, and against which Goodrich has battled. The seminal case on the Free Exercise Clause, *Employment Division v. Smith*,<sup>10</sup> came down in 1993. The *Smith* Court held, in an opinion authored by Justice Antonin Scalia, that neutral, generally applicable laws that burden religion do not violate the Free Exercise Clause. *Smith* is a case over which originalists divide. Goodrich is on one side of that divide: he calls it “one of the worst religious freedom decisions ever,” giving two reasons for his condemnation. First, it overturned “decades of religious freedom precedent.” Well, perhaps, but *Sherbert v. Verner* was only 27 years in the past when *Smith* was decided. Second, it threatened all religious practices because a law could only be struck down if it specifically targeted religion. Goodrich criticizes the *Smith* decision, but he points out that, in response to it, the nation reacted vigorously. Conservatives and liberals formed coalitions that passed a federal Religious Freedom Restoration Act and versions of the same in over thirty states. The Supreme Court struck down the federal RFRA in *City of Boerne v. Flores*,<sup>11</sup> but the state RFRA remained effective.

Culturally, however, things became even worse. Twenty years later, many have come to see religion as a threat to equality, and an attempt to pass a RFRA in Indiana buckled before threats of boycotts by national companies and sports leagues. What has happened, of course, is that the drive for equality for gay and transgendered persons has gained such momentum that the moral distinctions that Christianity insists upon are regarded by many as bigoted discrimination. Indeed, Democrats in Congress are attempting to make that view into law. Goodrich chronicles how the cultural forces of moral relativism and the abortion rights lobby have increased the pressure to see religion as solely a private activity between consenting adults. In the meantime, religion as a cultural force in the United States has weakened. Fewer people attend church, and the Judeo-Christian cultural consensus has been diluted, as Goodrich sees it, by increasing secularism and religious diversity.

8 Holt v. Hobbs, 574 U.S. 352 (2014).

9 McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014).

10 494 U.S. 872 (1993).

11 521 U.S. 507 (1997).

Goodrich responds to the threat posed by these cultural shifts by observing that the essence of religious moral teaching is indeed a discrimination, i.e., an imperative differentiation between moral and immoral behavior. Religious persons have a right to associate with one another based upon shared beliefs and to discriminate against those within their association who do not share those beliefs. Goodrich regards cases affirming religious independence from the application of labor laws to ministers as a watershed victory, and he was more right than he knew when he wrote the book. What the Supreme Court wrought in *Hosanna-Tabor* was extended in 2020’s *Our Lady of Guadalupe School v. Morrissey-Berru*<sup>12</sup> to all persons who have a religious function within any religious organization. And, if commentary on the oral argument in *Fulton v. Philadelphia* is accurate,<sup>13</sup> the right of a religious institution to make moral distinctions and discriminations may come to be recognized for institutions such as religious adoption agencies.

In discussing the challenges to religious autonomy posed by those favoring abortion rights and gay rights, Goodrich recognizes the qualitative difference between racial discrimination and religious discrimination, the former having no moral basis and the latter grounded precisely on moral distinctions. He acknowledges that in cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>14</sup> distinctions may be difficult to define clearly. In the end, he returns to his earlier justification for religious liberty: people have a fundamental right to associate and to have their religion enjoy a realm of legally protected behavioral independence from state control. Yet he ends that discussion on a melancholy note: “it’s going to get worse before it gets better.” Looking at the implications of Justice Gorsuch’s opinion in *Bostock v. Clayton County*<sup>15</sup>—in which the Court held that Title VII’s prohibition of sex discrimination also prohibits discrimination on the basis of sexual orientation and transgender status—Goodrich may be correct.

After his discussion of the social and ideological threats to religion, Goodrich returns to the main theme of his meditation on what Christian evangelicals should do in light of these threats: why should we protect the religious freedom of all people? As one example, he confronts the fact that many—particularly many Christians—see Islam as a threat. If one is to defend Christianity against the government, why should one protect a religion that some see as a direct danger to Christianity? Moreover, if salvation comes only through belief in Jesus Christ, why protect a religion that will keep persons away from their chance to be saved?

Here he offers three arguments, the first being, as before, consequentialist. It is in the Christian’s self-interest to protect Muslim mosques against zoning discrimination, for example, for

12 591 U.S. (2020).

13 Jess Bravin, *Supreme Court Voices Skepticism of Philadelphia Nondiscrimination Ordinance Versus Catholic Agency*, WALL STREET J., November 4, 2020, <https://www.wsj.com/articles/supreme-court-voices-skepticism-of-philadelphia-nondiscrimination-ordinance-versus-catholic-agency-11604536048?page=1>.

14 584 U.S. (2018).

15 140 S. Ct. 1731 (2020).

if the government can do it to them, it can do it to us. Ultimately, self-interest may not be a sufficiently principled argument, for what if one could show that it would be Christianity's self-interest (and thus the interest of all people to be saved) to limit the spread of non- or anti-Christian proselytizing? But here, Goodrich's eye on contemporary society is acute, and he notes that without religious liberty protections, Christianity itself would be deemed "a dangerous ideology in this country long before Islam is." Additionally, history is Goodrich's side: "It's difficult to find *any* historical examples of governments that claimed the power to stamp out dangerous belief systems and then wielded that power well."

His second argument is more wish than reality: "it helps more Muslims come to Christ." Although there have been some conversions from Islam to Christianity because of the examples shown by Christians, they remain few, and may be outdone in America by Christians who have converted to Islam.<sup>16</sup> Stronger is his confronting of Christians' fear of Muslims. Why are Christians fearful, he asks, when they are commanded in Matthew 10:28-31 not to be afraid? Goodrich does not say in words what I took to be his meaning here, that one only fears another religion because of the lack of faith in one's own. He could have usefully referenced modern allies of his position, such as St. John Paul II's effective "fear not" theme of his papacy.<sup>17</sup> Lastly, however, Goodrich returns to his earlier natural law argument. Protecting others' religious liberty, he writes, is a matter of justice because of who they are as human persons. All persons have the right freely to seek transcendent truth.

Relying primarily on the work of Michael McConnell, Goodrich reviews the history of the Establishment Clause in light of the current controversy over the question of religion in the public square. He rightly criticizes *Everson v. Board of Education*<sup>18</sup> as overturning 150 years of Supreme Court jurisprudence that had previously left establishment issues to the states and summarily describes the competing tests before the Supreme Court as the "*Lemon Test*"<sup>19</sup> and a test that respects religion as part of the historical culture of the country, citing *Town of Greece v. Galloway*.<sup>20</sup> He believes the latter test is the best approach to applying the Establishment Clause. In fact, there are three competing tests: 1) The *Lemon Test*, 2) Justice O'Connor's endorsement test,<sup>21</sup> and 3) the coercion test.<sup>22</sup> Goodrich believes that the first two tests have merged, and, in a practical sense, he

may be right. In my view, his preferred test—religion as part of the historic traditions of the country—offers less protection to religion than the coercion test. The reason that Goodrich opts for more of a historical understanding of the role of religion is that he continues to be suspicious of a government that will support religious belief. The coercion test would allow governmental support of religion for social, moral, and educational ends. That may be going too far for Goodrich—too close a connection between government and religion. He emphasizes that it was the evangelical dissenting tradition in the early years of the country that called for a stricter separation, and he is wary of a test that might allow greater normative support by the government for religious belief.

Goodrich ends his work with a series of recommendations bred of his faith and his legal experience: let go of winning, strive only to do justice, love your enemies, return to Scripture, define your mission, seek alliances, rely on experienced legal advice, consider the political option, be Christlike.

This is a good and valuable book because it is exactly what it aims to be: practical advice in defending religious liberty from a scriptural Christian perspective. It often does not draw clear doctrinal lines or go very deep into theology, but theology is not the work of a lawyer who has real clients amid particular circumstances. The book understands, as a good lawyer and a good Christian would, that we are bound to advance the kingdom of God, but that the City of God cannot replace in our world the City of Man, and we should not indulge our pride by thinking we can bring it about.

The book also calls us back to first principles in understanding the nature of religion and liberty—that the latter is in the God-endowed nature of man, and that former is how men and women embrace as best they can, the Transcendent Good.

16 Besheer Mohamed & Elizabeth Podrebarac Sciapac, *The share of Americans who leave Islam is offset by those who become Muslim*, PEW RESEARCH CENTER (Jan. 26, 2018), <https://www.pewresearch.org/fact-tank/2018/01/26/the-share-of-americans-who-leave-islam-is-offset-by-those-who-become-muslim/>.

17 See John Paul II, *Redemptor Hominis*, March 4, 1979, available at [http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redemptor-hominis.html](http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis.html).

18 330 U.S. 1 (1947).

19 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

20 572 U.S. 565 (2014).

21 *Lynch v. Donnelly*, 465 U.S. 668, 690 (O'Connor, J., concurring) (1984).

22 *Lee v. Weisman*, 505 U.S. 577, 640 (Scalia, J., dissenting) (1992).

