

RELIGIOUS LIBERTY APOLOGETICS*

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Nick Reaves and Matthew Krauter have written a fine review, in this journal,¹ of my recent book *Religious Liberty in a Polarized Age*.² I am grateful for the care and perceptiveness they brought to my work. They endorse my thesis that in our polarized times, “religious liberty, properly understood, can protect diverse viewpoints, decrease fear and resentment, and channel societal conflicts into more productive discussions within our civic system.”³ They helpfully add multiple examples of how religious liberty promotes both the dignity of human persons and the good of society—supporting my arguments for strong religious liberty by drawing on their own work for Becket, the leading public-interest firm advocating religious liberty for all.⁴

Reaves and Krauter also make two criticisms of the book. Their observations deserve a response—not so much to defend the book as to clarify its assertions and discuss its overall aim. Part I of this article provides some clarifications prompted by Reaves and Krauter’s criticisms; Part II, prompted by the title of their review, offers a metaphor for understanding the book’s central aim. With some justification, Reaves and Krauter describe the approach of *Religious Liberty in a Polarized Age* as “pragmatism” in arguing for religious liberty. But the book could also be described as “apologetics” for religious liberty. Part II explores that metaphor.

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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¹ Nick Reaves & Matthew Krauter, *Religious Liberty Pragmatism*, 24 FEDERALIST SOC’Y REV. 331 (2023), available at <https://fedsoc.org/fedsoc-review/religious-liberty-pragmatism>.

² THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (2023) (hereinafter *RLPA*).

³ Reaves & Krauter, *supra* note 1, at 331.

⁴ *Id.* at 335-38.

I. RESPONSES AND CLARIFICATIONS

Reaves and Krauter commend the book, as noted above. But they also make two criticisms of it.

A. Religious Liberty's Value: Inherent or Instrumental?

Reaves and Krauter's first criticism is that my argument, "[a]t a conceptual level, . . . falls into the same trap [it] accuses liberals and conservatives of falling into: that of using religious liberty as a means to advance other ends."

Berg criticizes both liberals and conservatives for treating religious liberty debates as a proxy war over other values. But one could argue that Berg himself does not seem to be interested in religious liberty for its own sake, but in religious liberty as a tool for mitigating polarization.⁵

I have two responses to the criticism. First, I affirm, and want to make clear, that religious liberty has inherent value (i.e., value "for its own sake"), not just instrumental value (i.e., value "as a tool for mitigating polarization"). My affirmation of religious liberty's inherent value may need emphasis because, admittedly, much of the book focuses on religious liberty's mitigation of polarization. But the book certainly makes arguments valuing religious liberty for its own sake. Chapter 3—the first of three central chapters with arguments for protecting religious liberty strongly—makes an extended case that religious commitment is especially important and pervasive in people's lives.⁶ As a result, I argue, people suffer serious injuries when they are punished or penalized for following that commitment.

The book emphasizes protection of religious exercise as a key aspect of personal identity, acknowledging that religion is not the only such key aspect. But that emphasis still accords religious exercise inherent value. I also emphasize that religious commitment is distinctive among aspects of identity precisely because of its distinctive content. Since religious commitment concerns itself with ultimate reality—the source and ground of all things—it tends to "draw[] [various] aspects [of life] together into . . . an 'expansive web of belief and conduct.'"⁷ Precisely because of this "comprehensiveness and connectedness," "frustration of one aspect of religious belief or practice can have

⁵ *Id.* at 344.

⁶ *RLPA* at 89–111.

⁷ *Id.* at 91 (quoting CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 61, 125–26 (2007)).

pervasive effects on a religious believer or institution.”⁸ Drawing in particular on the work of Kathleen Brady, I argue that

Religion’s concern with ultimate matters helps explain the variety of harms from denials of religious freedom . . . Religion is a commitment to connect with the highest good or to conform to its commands. Therefore, someone who’s prevented from following that commitment is distinctively prone to feel frustration or pain, or fear of eternal loss or punishment.⁹

True, the book emphasizes religious liberty as an instrument (or “tool”) for reducing polarization. But it treats religious liberty’s value as both inherent and instrumental, and in fact the two arguments work together: The instrumental value follows significantly from the inherent value. It’s *because* religious faith is especially central and comprehensive for true believers that impositions on religious liberty are especially likely to inflame polarization (and reducing the impositions may calm it). In the American founding era, James Madison famously set forth the argument that suppression of religious liberty causes polarization and conflict: “Torrents of blood have been spilt in the old world,” he wrote, “by the vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.”¹⁰ And as Douglas Laycock observes, the reason that “governmental attempts to impose religious uniformity had been such bloody failures” was precisely because they provoked resistance from people whose faith was central to their lives.¹¹ Thus, even my chapter that focuses on preventing polarization begins with a statement that connects that goal to the inherent value of religious freedom. I write, “the thesis of the previous chapter (people’s religious commitments tend to be particularly important to them) is related to the thesis of this one (impositions on religious commitment tend particularly to provoke anger and fear).”¹²

That response leads to my second. The argument that religious liberty reduces polarization may be instrumental in nature, but it has a strong pedigree in American (and European) history and tradition. Madison’s argument

⁸ *RLPA* at 92.

⁹ *Id.* at 94 (citing KATHLEEN BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 91–92, 103 (2017)).

¹⁰ James Madison, *Memorial and Remonstrance Against Religious Assessments*, at ¶ 11, available at <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

¹¹ Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISS. 313, 317 (1996) (quoted in *RLPA* at 96–97).

¹² *RLPA* at 121.

about “torrents of blood”—a key text in my book¹³—appeared in his *Memorial and Remonstrance Against Religious Assessments*, a classic defense of religious liberty. He went on to say there that the “true remedy” for the potential harms of religious conflict is “equal and compleat liberty” of conscience—which doesn’t eliminate conflict but “sufficiently destroys its malignant influence on the health and prosperity of the State.”¹⁴ Give wide room to religious belief and practice, Madison insisted, even when they provoke conflict, for suppressing them will make the conflict even worse. This was not the only argument of Madison or of religious liberty’s other historic proponents. But it was important: it was a central reason why Americans enacted religious-liberty guarantees, and thus it is relevant to understanding the nature of those guarantees.

Reducing polarization differs from other, more partial ends for which religious-liberty claims have recently been wielded as “tools.” I complain in the book that some groups use religious liberty solely as a device to make traditional social values dominant, and that others use it solely as a device to make progressive social values dominant or to upend the dominance of Christianity.¹⁵ When employed for one of these ends, religious liberty doesn’t protect everyone. Those with an underlying traditionalist-Christian project often oppose protection for Muslims and are reluctant to protect claims of progressive believers; those with a progressive project often refuse to protect traditionalists.¹⁶

In contrast, depolarization as a goal of religious liberty supports religious liberty’s status as a fundamental right for all persons, not just a contingent right for some. In Madison’s historic phrasing, it is “*equal and compleat liberty*”¹⁷ that reduces cycles of fear, retaliation, and resentment. Indeed, only religious liberty for everyone can counter those vicious cycles. In Reformation-era Europe, the cycles of resentment and retaliation spiraled when rulers supported freedom only for the Catholic Church, or only for one or more Protestant churches and groups.¹⁸ Today, the same thing happens when (many) progressives refuse to protect traditionalist Christians or Jews or when

¹³ See especially *id.* at 130–32.

¹⁴ Memorial and Remonstrance, *supra* note 10, at ¶ 11.

¹⁵ *RLPA* at 55–74.

¹⁶ *Id.*

¹⁷ Memorial and Remonstrance, *supra* note 10, at ¶ 11 (emphasis added).

¹⁸ *RLPA* at 122–26.

(many) evangelical Christians refuse to protect Muslims. Today, as before, only equal (and strong) liberty stands a chance of reducing conflict.

In short, the use of religious liberty as an instrument of depolarization—unlike its use for other ends—not only finds solid root in our religious-liberty tradition but also fits with its status as a fundamental value protecting everyone.

B. Limits on Religious Liberty

Reaves and Krauter's second criticism builds on their first. They say that my focus on religious liberty as a means to depolarization leads me to accept limits on religious liberty that I shouldn't—limits that might not be justified by originalist or other principled accounts of religious liberty. For example, they say that when I argue "that protections for religious liberty must be balanced against competing interests," I rest that assertion not "on an underlying theoretical or constitutional principle, but on a pragmatic necessity to achieve depolarization."¹⁹

I take some of their points here. In discussing the boundaries of religious liberty in the book, I could have spent more time connecting those boundaries to historical principles.

But had I said more about historical principles at that particular juncture, it would have largely reinforced the proposition that religious liberty has boundaries. The key question in recent years has concerned whether the Free Exercise Clause protects religiously motivated conduct broadly against even generally applicable laws, or more narrowly against only laws that treat religion worse than other interests. One of the strongest originalist arguments for the broader protection, articulated by Michael McConnell,²⁰ rests on provisions in all of the post-independence state constitutions, adopted from 1776 through the 1780s. Those provisions said generally that one has the right to follow religious conscience unless doing so interferes with public "peace" or "safety" (or, in some provisions, unless it causes "licentiousness").²¹ McConnell argues, convincingly, that such a standard implies that some generally applicable laws may still violate the right to exercise religion: even though generally applicable, they fail to be necessary to promote public peace

¹⁹ Reaves & Krauter, *supra* note 1, at 344.

²⁰ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

²¹ *Id.* at 1456–58 & n.242 (quoting provisions).

or safety.²² Equally convincingly, he argues that the meaning of “free exercise” in the First Amendment likely was understood to reflect this consensus found in the state provisions (since there is little indication that the federal clause was seen as a departure from accepted principles).²³ The standard of “public peace or safety” admits of limits on religious liberty. In the American tradition, “an accountability principle exists right alongside religious liberty and autonomy principles.”²⁴ Indeed, some have claimed that the standard of the founding-era state constitutions is significantly less protective than the “compelling governmental interest” standard that governed constitutional cases before *Employment Division v. Smith*²⁵ and that governs under federal and state religious-freedom statutes.²⁶

I disagree with that last claim above: I believe that the boundaries on religious freedom drawn from original understanding and original purposes are capacious and protective. Indeed, my book defends the “compelling governmental interest” standard for free-exercise claims based on, among other things, an application of founding-era principles to modern circumstances. I argue that laws at the founding, in limiting free exercise by concerns of “peace and safety,” focused largely on “direct invasions of others’ body or property,” many of which would count as compelling interests today—but that “[t]he modern regulatory state declares a far broader range of legal harms.”²⁷ The compelling-interest standard, I argue, rejects some of these broader definitions of harm as insufficiently compelling and thereby ensures that the modern expansion of government power will not simply crowd out the free exercise of religion. So, I argue, by applying original principles in today’s context, that protection should be strong.

Nevertheless, the original meaning and subsequent tradition clearly call for limits on religious freedom.

²² *Id.* at 1462 (“The ‘peace and safety’ clauses identify a narrower subcategory of the general laws; the free exercise provisions would exempt religiously motivated conduct from these laws up to the point that such conduct breached public peace or safety.”).

²³ *Id.* at 1456 (“[I]t is reasonable to infer that those who drafted and adopted the first amendment assumed the term ‘free exercise of religion’ meant what it had meant in their states.”).

²⁴ Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1305 (2023); see generally *id.* at 1292–1305.

²⁵ 494 U.S. 872 (1990).

²⁶ See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

²⁷ *RLPA* at 207; see generally *id.* at 204–05, 207–08.

For Reaves and Krauter, the conflict between nondiscrimination laws and religious freedom is the prime case where I've trimmed religious liberty to serve pragmatic purposes:

[R]ather than grapple with the weighty history and tradition that suggest religious liberty interests likely outweigh a government's interest in enforcing a nondiscrimination requirement, Berg elevates asserted interests in preventing dignitary harm to the same level as constitutional rights without a principled justification (just a pragmatic one).²⁸

In response, I have one rejoinder and one clarification. First, I indeed say that religious liberty interests outweigh nondiscrimination interests in the large majority of cases involving nonprofit institutions that hold themselves out as religious schools, social services, etc.²⁹ The book supports the various forms of protection that religious organizations enjoy or arguably enjoy: the absolute right to hire, fire, or discipline ministers and make other "internal governance" decisions;³⁰ the Religious Freedom Restoration Act;³¹ the religious-hiring exception in Title VII;³² and others.³³ I do say that protection should be narrower for commercial providers of ordinary goods and services, such as wedding vendors objecting to providing goods or services for same-sex weddings. But I support, and defend at length, protection for the small, personal vendors—the cake designer or website designer—when, as is typically the case, multiple alternative providers are available.³⁴

The clarification concerns the so-called dignitary harms that Reaves and Krauter say I elevate over religious-liberty interests. In fact, the term "dignitary harms" covers two kinds of asserted harms that the book distinguishes. One asserted harm is in the very fact that government is making any accommodation for a person who objects to facilitating same-sex marriages, since (assertedly) each and every instance of a permitted objection inflicts a serious harm. I'm quite clear in the book, however, that the interest in preventing this sort of harm—in "stigmatizing stigma, and making the pertinent prejudice into something that citizens instinctively reject"—"can't be a compelling

²⁸ Reaves & Krauter, *supra* note 1, at 344.

²⁹ *RLPA* at 283–86.

³⁰ *See* *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

³¹ 42 U.S.C. § 2000bb-1-7.

³² 42 U.S.C. § 2000e-1(a).

³³ *RLPA* at 286–90.

³⁴ *Id.* at 294–98.

reason to override religious conscience,” since it aims to eliminate or discourage a constitutionally protected belief and its expression.³⁵

But a different harm lies in the pervasive sense of insecurity that can come from the threat of repeated refusals to provide goods or services. That harm can be serious: studies show the “fear and stress” can produce “chronic pain” and multiple other effects.³⁶ But it comes only from threatened repeated refusals, not from isolated ones. And repeated refusals are very unlikely in any jurisdiction that is sufficiently hospitable to LGBTQ rights to enact nondiscrimination laws in the first place.³⁷ Objectors in such a jurisdiction are already in the minority; their numbers shrink further because for-profit businesses have economic incentives to accept paying customers rather than decline them.

In short, it is worthwhile to disentangle different harms that are all labeled “dignitary,” distinguishing between those that assertedly occur with every single act of declining service and those that arise only from a recurring pattern of such acts. If only the latter generate a compelling interest, then it is possible to strike a balance that protects most of the real-world objecting vendors—the small providers of goods or services directly to a wedding or marriage—while also vindicating nondiscrimination interests in most transactions.

II. APOLOGETICS FOR RELIGIOUS LIBERTY

Although I’ve offered responses and clarifications in the light of Reaves and Krauter’s review, I primarily want to discuss their thesis, reflected in the review’s title, that my book’s posture is one of “pragmatism” in advocating for religious liberty. I don’t object to that characterization; the book has the pragmatic goal of increasing the effectiveness of religious-liberty advocacy to the general public and across ideological lines. But I do want to present a different concept for understanding the book’s aims. It is an “apologetic” for religious liberty.

Apologetics, as a branch of theology, is defined as “the attempt to show that a faith is provable by reason, or at least consistent with reason”; “more generally,” it refers to “the attempts to defend a doctrine.”³⁸ By nature, an

³⁵ *Id.* at 280.

³⁶ *Id.*

³⁷ *Id.* at 298.

³⁸ *Apologetics*, Oxford Dictionary of Philosophy (Simon Blackburn ed., online 2016 ed.), <https://www.oxfordreference.com/display/10.1093/acref/9780199541430.001.0001/acref-9780199541430-e-220>.

apologetic defends the doctrine or faith to those who do not accept it. Christian apologetics, for example, seeks “to defend and explain the core themes of the Christian faith, and communicate these effectively and faithfully *to the wider world*.”³⁹

Apologetics “usually uses only methods of argumentation and criteria of knowledge acceptable to the adversary”—it “rule[s] out . . . appeals to sources of authority not recognized by one side in the debate.”⁴⁰ For example, Christians recognize the authority of the Bible, and Roman Catholics recognize the authority of official church documents such as papal encyclicals. But these sources do not operate as authorities in apologetics—at least, they do not operate as “*self-guaranteeing* authority sources.”⁴¹ That’s because their authority will not be taken as a premise by non-Christians or non-Catholics, the audience that apologetics seeks to reach. A ground of argument that is “accepted as an authority source by only one side in the debate” will not persuade others; it will “cut no apologetical ice.”⁴²

Apologetics is particularly important in contexts where outsiders either lack knowledge of the faith or doctrine in question or have misconceptions about them. As Alister McGrath’s textbook on the subject emphasizes, Christian thinkers began to engage in apologetics in the faith’s early decades to avoid being confined to a “religious ghetto, incapable of connecting with others beyond the church, or addressing their concerns about it.”⁴³ Today the need for Christianity to avoid “ghettoization” is again becoming acute, McGrath suggests, because of “[r]ecent developments [that] show a growing disconnection between Christianity and a wider culture.”⁴⁴ In his words, Christian apologetics aims to

explain and defend Christianity to an audience that is not familiar with its traditional vocabulary or its practices using terms and images that resonate with this audience. Apologetics is about building bridges from the community of faith to the wider culture.⁴⁵

³⁹ ALISTER MCGRATH, *CHRISTIAN APOLOGETICS: AN INTRODUCTION* xii (2023) (emphasis added).

⁴⁰ PAUL GRIFFITHS, *AN APOLOGY FOR APOLOGETICS: A STUDY IN THE LOGIC OF INTERRELIGIOUS DIALOGUE* 15 (1991).

⁴¹ *Id.* at 83 (emphasis added).

⁴² *Id.*

⁴³ McGrath, *supra* note 39, at 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

Religious Liberty in a Polarized Age is an apologetic for religious liberty, analogous in several ways to the features of apologetics described above. The book aims to “explain and defend” strong protection of religious liberty in a context (legal, political, cultural) in which that protection has come under attack. It does not make every potential argument that supports religious liberty. It emphasizes those arguments that are likely to reach people who question religious liberty, either as a general right or in its specific applications, perhaps because they misunderstand it as a concept or can’t perceive how it benefits a wide variety of people and indeed society as a whole. As I say at various places, the book aims to build bridges on religious liberty to people that I call “persuadable skeptics,” by presenting arguments “that can appeal to persons of varying views, including those who disagree sharply with any view that is receiving protection.”⁴⁶ I try to confine myself to arguments that “are more likely than others to appeal across the lines of a divided society.”⁴⁷

Thus, for example, I explain the importance of religious exercise in traditional believers’ lives by, among other things, drawing analogies to same-sex marriage and partnership, identity-based conduct for which progressive skeptics of traditional religion will have sympathy.⁴⁸ Another chapter in the book focuses on the argument that religious freedom benefits society by creating room for religious organizations and their members to serve others while following the values that inspire that service.⁴⁹ That chapter is an apologetic “to persons who reject religion in general or specific religious beliefs or practices . . . but who nevertheless are willing to consider the contributions that organizations with those beliefs make” to the good of others.⁵⁰

A recurring criticism against religious apologetics is that by relying only some of the rationales or criteria for the truth of a faith—those criteria “acceptable to the adversary”—the apologist will fail to convey the full meaning of the faith or will even trim that meaning to suit the adversary’s perspective. McGrath describes this view, citing Charles Taylor: “Many Christian apologists [have] felt that they had to use the tools and methods of this secular age in order to engage it credibly and effectively. Yet in doing so, they often ended up buying into its wider [secular, not Christian] outlook.”⁵¹

⁴⁶ *RLPA* at 9, 90.

⁴⁷ *Id.* at 90.

⁴⁸ *Id.* at 95.

⁴⁹ *Id.* at 151; *see generally id.* at ch. 5.

⁵⁰ *Id.* at 154.

⁵¹ McGrath, *supra* note 39, at 8.

Reaves and Krauter express an analogous concern about my argument for limits on religious freedom. They warn that emphasizing conflict reduction as a rationale for religious liberty might lead one to “buy[] into” the constraints on the content of religious liberty dictated by that rationale. As I’ve tried to clarify above, I don’t think that conflict-reduction is the only rationale for religious liberty, nor is it the only ground for boundaries on its scope. The boundaries on religious liberty that I endorse also find support in the original understanding and other sources of interpretation, and the book says so⁵²—although I acknowledge that it might have given greater emphasis to those interpretive sources in drawing the boundaries.

In any event, the history of religious apologetics counsels us that trying to persuade others based on premises they accept always runs the risk of “buying into” those premises entirely (or of appearing to buy into them). The apologist must guard against that risk, but the risk remains. Even so, the apologetic task is worth pursuing. Avery Cardinal Dulles has written, as to Christian apologetics, that the discipline does not provide a “sufficient condition for the saving act of faith,” but that it does play the important role of “challeng[ing] unbelief and remov[ing] obstacles to faith itself.”⁵³ Likewise, *religious-liberty* apologetics may not present every aspect of or argument for religious liberty. But it plays an important role today in preserving religious liberty in a legal and political culture that so often distorts or threatens it.

⁵² See *supra* notes 10-14, 20-26 and accompanying text.

⁵³ AVERY CARDINAL DULLES, A HISTORY OF APOLOGETICS 367 (2005).