

RELIGIOUS LIBERTY PRAGMATISM*

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A review of THOMAS C. BERG, *RELIGIOUS LIBERTY IN A POLARIZED AGE* (Eerdmans 2023)

In his book *Religious Liberty in a Polarized Age*, Professor Tom Berg lays out a thorough and compelling case for religious liberty’s role in helping to tame polarization in American society. After a careful review of the evidence showing increased polarization, Berg challenges the common misconception that religious liberty disputes must continue fanning the partisanship flames. Instead, Berg argues that religious liberty, properly understood, can protect diverse viewpoints, decrease fear and resentment, and channel societal conflicts into more productive discussions within our civic system.

To make this argument, Berg starts by highlighting the ways in which religious liberty is misunderstood or misused today. First, Berg addresses those who discount the importance of religion and religious identity. In part by drawing upon social science research and analogizing to other deeply held identities, Berg convincingly explains how an individual’s religious beliefs are often core to their identity and, therefore, deserving of robust protection by society. Berg also turns the mirror around on “conservative Christians,” calling out what he views as their failure to adequately protect the beliefs and practices of religious minorities—as well as their lack of interest in finding points of compromise and common ground when asserting their own rights.

* 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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Having thoroughly chastised both sides, Berg next sketches out his understanding of religious liberty as a tool for depolarization. According to Berg, religious liberty has often played an important role in helping to ease civil conflicts throughout history. And Berg makes the case that even today, a robust conception of religious liberty could do the same. To support his claim, Berg explains how religion and religious liberty advance the common good. For example, Berg argues that without the freedom to exercise their religious beliefs in the public square, religious ministries that provide valuable social services (like foster care agencies and soup kitchens) would shutter—leaving us all worse off as a result. Berg then expands on this point, ultimately arguing that religious freedom for all is a societal value worth protecting.

But, despite recognizing the numerous benefits that religious freedom can offer, Berg ends by turning to several “principles” of religious liberty that he views as necessary to shape and constrain this right so that it can have its desired depolarizing effect. He argues that whatever protections are enshrined in law must be equally applicable to all religions, that religious liberty must be context-sensitive and consider burdens on religious exercise from all angles, and that religious liberty must be bounded by and balanced against “the rights of others and the interests of society.”¹

While these principles (at least in the abstract) are generally sensible and even laudable, Berg provides little legal or constitutional basis for them. And—perhaps as a result—when it comes to applying these principles to difficult and sensitive topics, Berg seems to be relying largely on his own notions of right and wrong as a guide.

Recognizing these largely self-imposed limitations to Berg’s approach, we nevertheless commend *Religious Liberty in a Polarized Age* to all readers interested in better understanding the roots of religious liberty, its current contours, and its potential pitfalls. Berg’s decades of experience and scholarship shine through as he masterfully breaks down complex legal issues in a way that is both accessible to a lay audience and insightful for those already familiar with the topic.

I. THE PROBLEM OF POLARIZATION

Berg begins with the problem of political polarization. Drawing from a medley of social science and punditry, he argues that the self-sorting “mega-identities” of Right versus Left have usurped the place of “loose coalitions of

¹ THOMAS C. BERG, *RELIGIOUS LIBERTY IN A POLARIZED AGE* 173 (2023).

disparate interests” in the traditional political arena.² The cost of this shift isn’t just a bifurcation of the nation into partisan tribes interlinked with every aspect of identity—including religiosity—but a lack of sympathy for the other side. As Berg explains, we seem to be in a polarization spiral: increasingly polarized voters elect politicians with a “confrontational approach to governing,” whose actions further polarize voters in an endless feedback loop.³

It is precisely in such a resentful state of affairs, Berg argues, that threats to liberty run high and “protection of constitutional freedoms becomes particularly important.”⁴ With the stakes clear, Berg appeals “[a]cross polarized lines,” challenging the notion that religious liberty “heavily favors conservatives.”⁵ In so doing, he first calls upon progressives to value religious freedom “as a source of security for all persons in their deep commitments.”⁶ He then challenges conservatives to “protect all faiths,” even “those slotted into the liberal mega-identity.”⁷ If society can accept religious liberty as a principle, Berg suggests, religious liberty “might be the cross-cutting issue we need” to “reduce the[] sense of fear and resentment” and ultimately to counter polarization.⁸

Berg also expresses dismay at the willingness of partisans to twist religious freedom to support their own ends. As Berg makes clear, he believes neither camp is innocent in this regard. Conservatives have failed to safeguard Muslim rights, selectively averting their eyes when their policies imperil a minority faith and undermine equality under law.⁹ And progressives have opposed protections for religious adherents whose beliefs conflict with liberal policies, maligning conservative religious practices as invidious and demonstrating, at best, a “callous indifference” to the importance of these deeply held beliefs.¹⁰ If religious liberty is only in vogue when it supports one’s preferred *political*

² *Id.* at 26-27.

³ *Id.* at 32, 34.

⁴ *Id.* at 29.

⁵ *Id.* at 32, 36.

⁶ *Id.* at 32, 53.

⁷ *Id.* at 32, 53.

⁸ *Id.* at 33, 53 (quoting ASMA T. UDDIN, *THE POLITICS OF VULNERABILITY: HOW TO HEAL MUSLIM-CHRISTIAN RELATIONS IN A POST-CHRISTIAN AMERICA* 194 (2021)).

⁹ *See, e.g.*, *United States v. Rutherford County*, No. 3:12-cv-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (TRO enjoining county’s refusal to process mosque’s zoning permit); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁰ Berg, *supra* note 1, at 70 & n.8 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). *See* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

outcome, all religious liberty conflicts risk being turned into proxy wars. As experience has shown, this does not end well for the First Amendment.

Berg presents the Supreme Court's docket in October Term 2017 as a ready example of this problem. Two religious liberty cases, *Masterpiece Cakeshop* and *Trump v. Hawaii*, concerned government hostility to sincere religious beliefs.¹¹ In *Masterpiece*, cake baker Jack Phillips challenged a Colorado law that required him to bake custom wedding cakes expressing a message that violated his sincere religious beliefs. In *Trump*, Hawaii challenged a federal travel ban that predominantly targeted Muslim-majority countries. Yet mere weeks after Jack Phillips prevailed under the Free Exercise Clause due to government "animosity to religion," Hawaii's challenge to the "Muslim ban" under the Establishment Clause failed.¹²

This juxtaposition of outcomes, in Berg's view, mirrors the starkly divided amicus support and public polling around the two cases. In *Trump*, liberals united in support of Hawaii's Establishment Clause claims and conservatives defended the government. In *Masterpiece*, conservatives united in support of Jack Phillips, and liberals defended the government. This rank-and-file support for arguably¹³ contrasting legal positions suggests to Berg that factors outside the text of the Religion Clauses influenced the party lines. It also shows that both sides can—in the right circumstances—empathize with the importance to believers of staying true to their religious identities.

II. IS RELIGIOUS LIBERTY WORTH DEFENDING?

Before diving into the contours of religious liberty protections, Berg starts by asking a fundamental question: why should we care about defending religious liberty at all? Understanding that some may be unmoved by the guarantees of the First Amendment alone, Berg instead appeals to the integral role

¹¹ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Trump*, 138 S. Ct. 2392.

¹² *Masterpiece*, 138 S. Ct. at 1731; *Trump*, 138 S. Ct. at 2417.

¹³ Berg points to the lack of amicus support for Hawaii by pro-religious liberty groups, but he notes the Becket Fund for Religious Liberty's brief in support of neither party arguing that the travel ban should be analyzed under the same rubric as was applied in *Masterpiece*: religious targeting under the Free Exercise Clause. Berg, *supra* note 1, at 3 & n.8. See *Trump*, 138 S. Ct. at 2418 (noting Hawaii's claim "differ[ed] in numerous respects from the conventional Establishment Clause claim"); *id.* at 2439 (Sotomayor, J., dissenting) (citing *Masterpiece* as basis for her conclusion that Trump's religious hostility made the travel ban unconstitutional). *But see* Brief of Plaintiffs in *International Refugee Assistance Project v. Trump* as Amici Curiae Supporting Respondents at 3-5, *Trump*, 138 S. Ct. 2392 (No. 17-965) (focusing only on Establishment Clause arguments).

religion plays in the personal identity of many believers, ordering and providing meaning to all aspects and stages of life. This central role of religion in the lives of many Americans, Berg argues, parallels the important role that other core identities—like race, gender, or sexual orientation—play for many Americans. Therefore, by recognizing in religion the same importance to personal identity, Berg hopes that secular and pious alike can better understand the “special identity-related harms” suffered by those forced to violate their religious beliefs.¹⁴ And he suggests this can be done “without necessarily saying that those harms reflect that God or divine obligations exist.”¹⁵ Rather, avoiding needless suffering imposed by the state is justification enough.

Berg cites some examples to make his point,¹⁶ and a few other recent court decisions further highlight the interconnected nature of religious exercise and personal identity. These decisions cement the free exercise principle that religious beliefs should not need to be checked at the door in the workplace, when gathering in public, or when faithfully serving others.

In *Singh v. Berger*, for example, adherents of the Sikh faith sought to enlist in the Marine Corps but were barred from boot camp unless they “surrender[ed] their [religious articles of] faith.”¹⁷ Sikh men are obligated by their faith to maintain unshorn hair and facial hair (*kesh*) and wear a turban (*patka*), metal bracelet (*kara*), and further articles if they’ve undergone initiation. A unanimous D.C. Circuit found unpersuasive the Marines’ defense that their “expeditionary” nature and need to “break down recruits’ individuality” warranted stripping these recruits of their religious identity.¹⁸ The Sikh recruits’ rights were violated, the Court explained, because they were “subjected to the ‘indignity’ of being unable to serve” for reasons unrelated to their performance and “forced daily to choose between their religion . . . and nobl[y] . . . defen[ding] . . . the nation.”¹⁹

¹⁴ Berg, *supra* note 1, at 93.

¹⁵ *Id.*

¹⁶ *Id.* at 94-95 (citing *Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990) (“regret[fully]” dismissing Hmong family’s religious claim to damages over an autopsy they believed imprisoned their son’s spirit); *Masterpiece*, 138 S. Ct. at 1719).

¹⁷ *Singh v. Berger*, 56 F.4th 88, 110 (D.C. Cir. 2022).

¹⁸ *Id.* at 94, 105.

¹⁹ *Id.* at 110.

A similar conflict arose in *Groff v. DeJoy*.²⁰ In that case, a postal carrier, Gerald Groff, worked for USPS until the service signed a contract with Amazon to deliver packages on Sundays, which conflicted with his religious belief in faithfully observing the Sabbath. The Supreme Court in *Groff* ultimately clarified that employers can't point to just any minor cost or inconvenience when denying an accommodation; instead, they have to show an actual *undue hardship* on their business to overcome the assumption that religious exercise will be accommodated.

Both *Singh* and *Groff* lend further support to Berg's theory. In each case, the court recognized the deep personal significance of adhering to one's religious beliefs and not being forced to act in contradiction to them. These beliefs were also given great respect and weight in the courts' analyses. In both, the court even required the government to modify its operations and incur real costs—even altering military protocol—to accommodate the religious exercise.

But, as Berg argues, religious liberty isn't worth defending solely because of its centrality to personal identity. Surveying the history of religious liberty—or lack thereof—from the Reformation through the American colonies and adoption of the First Amendment, Berg argues that the entrenchment of the right to religious freedom was an intentional step taken to reduce and ameliorate civil division. In the time leading to the American founding, “governmental efforts to impose religious uniformity” utterly failed.²¹ This is because religious beliefs are “important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.”²² The lesson we should draw from this history, Berg argues, is pragmatic: respecting religious beliefs and convictions, no matter who wields political power, helps reduce conflict by enabling peaceful pluralism.

Another benefit of protecting religious liberty is that it protects religion's contribution to the common good. As Berg points out, many faithful discern a call to serve others. And religious charities do a great service to their communities by providing healthcare, foster care services, and education (to name

²⁰ 143 S. Ct. 2279 (2023); see also Nick Reaves, *Groff v. DeJoy: Hardison is Dead, Long Live Hardison!*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 39 (2023), available at <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/09/Reaves-Groff-v-Dejoy-vf.pdf>.

²¹ Berg, *supra* note 1, at 121 (quoting Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996)).

²² *Id.*

just a few)—all contributing to the common good. Yet if laws burden religious organizations’ freedom to serve and require them to violate their religious identity, faith-based charities may have no choice but to shut down. It is therefore in the service of the common good that religious exercise should be accommodated.

One example Berg points to which illustrates the value of robust religious accommodations is *Fulton v. City of Philadelphia*. In that case, Catholic Social Services (CSS) had “served the needy children of Philadelphia for over two centuries” as a well-respected foster agency providing crucial support for some of the most difficult-to-place children in the City.²³ But its license and contract were revoked after the City learned CSS would not certify and endorse same-sex couples as foster parents due to its religious beliefs. After several years of litigation, the Supreme Court ruled unanimously for CSS and held that the “refusal of [the City] to contract with CSS . . . unless it agree[d] to certify same-sex couples” “violates the First Amendment.”²⁴ As relevant here, the Supreme Court also weighed in on the societal benefits of accommodating even politically controversial religious beliefs. Surveying the facts of the case—which showed CSS hadn’t prevented a single same-sex couple from fostering and was one of over twenty foster agencies in the City—the Court concluded that providing a religious accommodation for CSS “seems likely to increase, not reduce, the number of available foster parents.”²⁵

Or take a very different situation that arose earlier this year—not from explicit animus, but from ignorance of religious obligations. A federal agency in Oklahoma threatened to shut down Saint Francis Health System for having a candle perpetually burning (within a glass and metal enclosure) in its chapels to alert worshippers to the presence of God in the chapel’s tabernacle.²⁶ Until an about-face after threat of litigation, the government’s actions imperiled access to healthcare for 400,000 patients annually, the employment of 11,000 Oklahomans at the state’s largest hospital, and the receipt of hundreds of millions of dollars in Medicare, Medicaid, and CHIP funding, “[a]ll because Saint Francis refuse[d] to abandon its religious beliefs and extinguish

²³ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874 (2021).

²⁴ *Id.* at 1882.

²⁵ *Id.*

²⁶ *BREAKING: Feds see the light, give up attack on Catholic hospital’s sanctuary candle*, The Becket Fund for Religious Liberty (May 5, 2023), <https://perma.cc/N6ZY-4MZM>.

the sanctuary lamp.”²⁷ The cost of failing to accommodate religious exercise is far from trivial.

III. PUTTING PRINCIPLES INTO PRACTICE

Having articulated *why* he believes religious liberty is worth protecting, Berg turns to *how* he believes religious liberty should be protected. To start, he posits that religious liberty must have some limits if this freedom is to be respected in the long term. Berg articulates three principles that give shape and bounds to his understanding of the proper scope of religious freedom today. First, Berg asserts that religious liberty claims must be balanced with “the rights of others and the interests of society.”²⁸ Second, he advocates for “practical reali[sm]” (a position he admits is not grounded in the Constitution), and “cautions religious claimants” to temper their accommodation requests if it comes at the expense of the “common good.”²⁹ If accommodating religion comes at too high a cost, he says, “decision makers [will be less likely] to weigh . . . religious freedom heavily in the balance.”³⁰ Third, he posits that the right to free exercise must protect against threats to religious freedom from all angles: “outright hostility” to religion, governments “[t]reating religious exercise less well than . . . other activities,” and “unnecessary burdens on religious exercise.”³¹

Berg next applies these principles in three circumstances to show how they might work in practice.

A. COVID-19

The selective burdening of religion became a flash point during the COVID-19 pandemic when public-health restrictions (like social distancing) burdened in-person religious gatherings more than comparable secular gatherings. Most notably, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court enjoined enforcement of a New York City ordinance that

²⁷ *Id.*; Letter from Lori Windham, Vice President and Senior Counsel, The Becket Fund for Religious Liberty, to Hon. Xavier Becerra, Secretary, Dep’t of HHS, et al. 3 (May 2, 2023), <https://perma.cc/Z2KM-QT8R>.

²⁸ Berg, *supra* note 1, at 173.

²⁹ *Id.* at 174.

³⁰ *Id.* at 174.

³¹ *Id.* at 188-89; *see also* Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., No. 22-15827, 2023 WL 5946036, at *16 (9th Cir. Sept. 13, 2023) (en banc) (similarly “[d]istill[ing] . . . three bedrock requirements of the Free Exercise Clause” from *Fulton*, *Tandon*, and *Masterpiece*).

“singled out houses of worship for especially harsh treatment,” limiting their gatherings to either 10 or 25 worshippers while permitting “hundreds of people shopping” at neighboring “essential” businesses.³² New York’s rule, the Court explained, didn’t treat religious exercise as well as other forms of comparable activity, so the restriction could only survive if it was narrowly tailored to serve a compelling government interest.³³

Berg praises the Supreme Court for carefully scrutinizing claims that religious worship was treated worse than comparable secular activities. New York’s disregard for the centrality of worship to the religious identity of those who attend “Mass on Sunday or services in a synagogue on Shabbat,” Berg agrees, was indefensible in the face of lax restrictions on activities (like shopping at Macy’s) that lacked anything close to the same level of significance and meaning.³⁴ But Berg also criticizes the Court for not deferring more to public-health considerations. As Berg points out, in the same breath, the Court both chastised New York’s COVID response and admitted that “[m]embers of th[e] Court are not public health experts.”³⁵ Public health is a weighty and complex societal interest, which, to Berg, suggests that courts should exercise restraint, consider impacts on third parties, and pragmatically exercise deference when it comes to assessing whether “comparable” activity presents similar transmission risks.

B. “Minority” Faiths

If religious liberty is to fulfill its goal of decreasing polarization, Berg argues, it must defend all faiths in both practice and principle. Berg echoes his prior discussion of *Masterpiece* and *Trump* by calling upon conservative Christians to support minority religious identities and by urging liberals to recognize that in some circumstances, conservative Christians *are themselves* a minority identity.

When addressing Christians, Berg makes a pragmatic argument: religious liberty for Christians (whether they like it or not) is dependent on the good *and* the bad precedent created by litigants of minority faiths. It is therefore beneficial for everyone that a wide range of religious minorities continue to successfully obtain legal protection in the courts. In *Singh*, the Sikh Marine recruits’ articles of faith were accommodated precisely because the D.C.

³² 141 S. Ct. 63, 66-67 (2020).

³³ *Id.*

³⁴ *Id.* at 67.

³⁵ *Id.* at 68.

Circuit recognized that “whatever line is drawn [on external indicia] cannot turn on whether those indicia . . . reflect the faith practice of a minority.”³⁶ The Religion Clauses aren’t neatly divided into “rights for Christians” and “rights for others.”

Instead, these rights intertwine and overlap constantly: Relying on the Religious Freedom Restoration Act—the same federal statute that had protected the Little Sisters of the Poor from being required to provide insurance covering contraceptives—a Native American religious leader won back his ceremonial eagle feathers seized by federal agents because he “demonstrate[d] their religious need.”³⁷ And—citing *Hobby Lobby*, which protected Christian business owners—the Supreme Court in *Holt v. Hobbs* protected a Muslim inmate’s right to grow a half-inch beard “in accordance with his religious beliefs.”³⁸ Christians, Berg argues, should celebrate these wins—if for no other reason (though there are many other good ones) than because they expand their own right to free exercise.

Berg also takes an expansive view of who today qualifies as a minority. Though a majority of Americans, Congress, and even the Supreme Court identify as Christian, Berg argues that traditional Christian beliefs can still qualify as a minority identity depending on the circumstance. In many parts of the country, Berg acknowledges, conservative Christians are already “a minority or are unpopular, at least among people in power.”³⁹ This dynamic—that status as a minority entity often changes across time and geographic space—counsels in favor of “adopting constitutional rules that protect minority rights *whoever* the minority happens to be.”⁴⁰

For Berg, recent efforts to advance Native American free exercise rights provide a model for garnering bipartisan support to protect religious minorities. When thinking about Native American religious exercise generally, Berg urges special care and “imaginative[] empath[y]” to avoid imposing “thresholds or exclusionary rules” that devalue religious practices which may look different than those more frequently the subject of First Amendment cases.⁴¹

As Berg points out, First Amendment rights don’t disappear on government property. For example, religious exercise remains protected in both the

³⁶ *Singh*, 56 F.4th at 103.

³⁷ *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 477 (5th Cir. 2014).

³⁸ *Holt v. Hobbs*, 574 U.S. 352, 355-56 (2015).

³⁹ Berg, *supra* note 1, at 235.

⁴⁰ *Id.* at 239.

⁴¹ *Id.* at 250, 256.

prison and military contexts, where the government wields a high degree of coercive control.⁴² Similar arguments should hold sway for Native American religious exercise on government land.

Berg criticizes the last half-century of Native American religious liberty law for failing to grapple with the true requirements of Native American spiritual practice. It is impossible to dispute that “Native Americans . . . are ‘dependent on government’s permission and accommodation’ for their religious exercise, tied as it is to specific lands.”⁴³ Yet the Supreme Court in *Lyng* completely ignored this dynamic, defining “‘burdens’ on religion by the baseline of property ownership . . . [and] wholly disregard[ing] the concrete need of Native American practitioners to worship at specific [government-owned] sites.”⁴⁴

Lower courts have felt constrained to follow suit. For example, the government’s destruction of a Native American sacred altar to make room for a highway turn lane (when numerous less destructive alternatives were available) went unchecked in *Slockish v. U.S. Federal Highway Administration* because the court discounted these precise harms, finding no “threat of sanctions or . . . government benefit [wa]s being conditioned upon conduct that would violate their religious beliefs.”⁴⁵ This same misunderstanding arose in another Ninth Circuit case, where the panel applied *Lyng* to hold that “no matter how . . . burdensome” turning a Native American sacred site into a “two mile[] wide and 1,100 f[oot] deep” copper mine may be to the Western Apache, it’s not a “penalty or den[ial] of benefit” because the land is government-owned.⁴⁶

As numerous First Amendment scholars have since pointed out, the failure to recognize that religious exercise can look *very different* when dealing with minority faiths leads to unfortunate and unprincipled outcomes. As Professor Stephanie Barclay noted, the Ninth Circuit’s justification for destroying sacred land in *Apache Stronghold* would be astonishing if translated into more familiar religious terms: “[i]f the government bulldozed a cathedral, nothing

⁴² *Id.* at 253.

⁴³ *Id.* at 251 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005)).

⁴⁴ *Id.* (citing *Lyng v. N.W. Indian Cemetery Protection Assn.*, 485 U.S. 439, 448, 451 (1998)).

⁴⁵ *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-cv-01169, at *1 (D. Or. June 11, 2021), *affd.*, *Slockish v. U.S. Dep’t of Trans.*, No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021), *petition for cert. withdrawn per settlement*, No. 22-321 (dismissed Oct. 10, 2023).

⁴⁶ *Apache Stronghold v. United States*, 38 F.4th 742, 755 (9th Cir. 2022), *vacated, en banc review granted*, 56 F.4th 636.

would prohibit [adherents] from still visiting that site and saying prayers . . . atop a pile of rubble.”⁴⁷

Dismayed by these outcomes, Berg praises the recent “[p]rincipled conservative support for Native American claims” that he sees in direct representations and amicus support.⁴⁸ In *Apache Stronghold*, for example, a diverse coalition of religious organizations—demonstrating a “healthy atmosphere of freedom for all”—supported the free exercise rights of Native Americans before the en banc Ninth Circuit.⁴⁹

C. LGBTQ Rights

The intersection of LGBTQ rights and religious liberty is a Gordian knot, but Berg thinks it could at least “be confined to fewer situations and a lower decibel level.”⁵⁰ According to Berg, this can be done by recognizing three things: First, that “protecting both sides means combining nondiscrimination laws with meaningful religious exemptions.”⁵¹ Second, that “[t]he unique prominence and destructiveness of racism in American history” distinguishes invidious race discrimination from religious accommodations to other nondiscrimination requirements.⁵² And third, that LGBTQ interests justify boundaries on religious liberty protections—most significantly by narrowing protections for business owners when there are no ready alternatives.⁵³

When the Supreme Court “stepped into the void” and created a constitutional right to same-sex marriage, Berg explains, it “protected both sides.”⁵⁴ But the balance of religious liberty and nondiscrimination is not a zero-sum game. In *Fulton*, for example, protecting Catholic Social Services’ right to continue serving kids in need didn’t prevent a single same-sex couple from fostering or adopting. Indeed, Berg takes pains to clarify that protecting religious exercise is compatible with the recognition “that gay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth.”⁵⁵ While *Obergefell* acknowledged a constitutional right to same-sex marriage, it also

⁴⁷ Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1359 (2021).

⁴⁸ Berg, *supra* note 1, at 253.

⁴⁹ *Id.* at 253, 256; see *Diverse coalition urges federal appeals court to protect Oak Flat*, The Becket Fund for Religious Liberty (Jan. 10, 2023), <https://perma.cc/C7FD-WNR8>.

⁵⁰ Berg, *supra* note 1, at 260.

⁵¹ *Id.*

⁵² *Id.* at 276.

⁵³ *Id.* at 260.

⁵⁴ *Id.* at 258.

⁵⁵ *Id.* at 278 (quoting *Masterpiece*, 138 S. Ct. at 1727).

recognized that “many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises[.]”⁵⁶

How does this play out in practice? Though Berg demonstrates his strong commitment to religious freedom, he emphasizes that there are “uncertainties and limits.”⁵⁷ He therefore advocates for policies to “limit the scope of exemptions” as a means to reduce harms to third parties and decrease civil conflict.⁵⁸ For example, he argues that businesses owned by religious individuals (like Masterpiece Cakeshop) should be afforded religious accommodations only if they’re “small” (in terms of staff and volume), “give notice” of their beliefs, and are not the only provider of a generally available good or service in town.⁵⁹

IV. RELIGIOUS LIBERTY ACCORDING TO BERG

Religious Liberty in a Polarized Age does a lot well. Berg covers significant ground in a short and accessible book, while still providing a thorough and engaging discussion of nearly all of today’s most important religious liberty questions. He also doesn’t hold back when challenging the entrenched assumptions of both conservatives and liberals—getting to the heart of the shortcomings on both sides. And he persuasively articulates the value of strong religious liberty protections in a way that should appeal to believers and non-believers alike. Indeed, his comparison between religious identity and other deeply held values should give pause to anyone who doubts the personal significance of religious beliefs.

Berg also articulates a justification for religious liberty *for all* that cuts across traditional party lines, attempting to bring conservatives and liberals together to support minority religious practices—whether that entails the protection of Native American sacred sites in Arizona or the freedom of conservative Christians to dissent from modern views on sexual ethics.

⁵⁶ *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015); see also *Fellowship of Christian Athletes*, 2023 WL 5946036, at *23 (“Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned.”).

⁵⁷ Berg, *supra* note 1, at 286.

⁵⁸ *Id.* at 295.

⁵⁹ *Id.*; see also *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2315 (2023) (recognizing distinction between “innumerable goods and services that no one could argue implicate the First Amendment” and services that involve private speech).

Berg's principles can be seen at work in the most recent Supreme Court term. As if on cue, the two blockbuster religious liberty cases of the 2022 term provide ready-made exemplars for Berg's principles. In *Groff*, the Supreme Court doubled down on the personal significance of religious belief, explaining that de minimis burdens on an employer's business are not sufficient to deny employees' religious accommodations; instead, an employer's hardship must be truly undue before an employee's right to religious accommodation under Title VII can be overcome. And the Court, à la Berg, recognized in *303 Creative* that protections for religiously motivated speech can exist alongside the right of LGBTQ individuals to "acquir[e] whatever products and services they choose on the same terms and conditions as are offered to other members of the public."⁶⁰

But Berg's theory of religious liberty seems to suffer from a few *limitations*—a term we use intentionally because they are not necessarily *flaws* so much as inevitable and necessary compromises that come with seeking to make religious liberty palatable to a diverse society. At a conceptual level, Berg's argument falls into the same trap he 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. This becomes clear, for example, in Berg's argument that protections for religious liberty must be balanced against competing interests; he says this argument is not based on an underlying theoretical or constitutional principle, but on a pragmatic necessity to achieve depolarization. Rather than treat depolarization as a beneficial *effect* of greater religious liberty, Berg seems to treat it as the primary goal.

By viewing religious liberty in this way, Berg introduces his own distortions into the doctrine. For example, rather than grapple with the weighty history and tradition that suggest religious liberty interests likely outweigh a government's interest in enforcing a nondiscrimination requirement under the First Amendment, Berg elevates asserted interests in preventing dignitary harms to the same level as constitutional rights without a principled justification (just a practical one). In the same way, many of Berg's policy prescriptions (like where to draw the line between respecting First Amendment rights and deferring to public health experts) come not from the Constitution or

⁶⁰ *303 Creative*, 143 S. Ct. at 2303.

case law, but from his own intuitions about where an appropriate line *should* be drawn.

None of this is to say, however, that Berg's approach lacks depth or wisdom. Few scholars have studied, debated, and grappled with religious liberty to the extent that Berg has. And Berg's principles, taken on their own terms—namely, that they come from his decades of experience and are not an attempt to plumb the depths of the Constitution's original meaning—are certainly worth careful consideration. Indeed, they should serve as both a guidepost and gut check for anyone litigating, writing about, or even just seeking to better understand the many complex religious liberty questions of our age.

Other Views:

- Andrew Koppelman, *The Increasingly Dangerous Variants of the 'Most-Favored-Nation' Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023), available at <https://ilr.law.uiowa.edu/volume-108-issue-5/2023/07/increasingly-dangerous-variants-most-favored-nation-theory-religious-liberty>.
- Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301 (2016), available at <https://scholarship.law.nd.edu/ndlr/vol91/iss4/2>.
- Emily London & Maggie Siddiqi, *Religious Liberty Should Do No Harm*, CENTER FOR AMERICAN PROGRESS REPORT (Apr. 11, 2019), <https://www.americanprogress.org/article/religious-liberty-no-harm/>.
- Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008), https://conservancy.umn.edu/bitstream/11299/170389/1/25_01_Leiter.pdf.