

## IN DEFENSE OF PLURALISM: RELIGIOUSLY AFFILIATED LAW SCHOOLS, OLYMPIANISM, AND CHRISTOPHOBIA

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AS the Dean of a law school at a Christian university, I was pleased to receive the invitation to write an essay for the “Deans’ Issue” of *The University of Toledo Law Review*, which focuses this year on issues affecting religiously affiliated law schools. In my engagement of the legal academy, I have endeavored to be faithful to my school’s Christian mission, including, as necessary, dispelling misunderstandings about it. A Christian law school follows in the tradition upon which American liberties were built, including the rights of freedom of religion, conscience, and association:

From [Roger] Williams, John Clarke, and William Penn, the Founders learned that state control of religion corrupted faith and that coercion of conscience destroyed true piety. From the theorists Algernon Sidney and John Locke, they appropriated concepts such as inalienable rights, government by popular consent, and toleration for the religious beliefs of others.... These diverse ideas, derived largely from the intellectual currents flowing from the Reformation, influenced the colonists in developing not only their religious but also their political institutions.<sup>1</sup>

Acknowledging this tradition, Joseph Story, former Associate Justice of the United States Supreme Court, extolled the virtues of Christianity as essential to liberty:

Now, there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally, as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar

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1. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 3-4 (1990). See also Michael V. Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 655-59 (2004) (summarizing the Christian principles undergirding our nation’s commitment to religious liberty).

sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty. Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty....

Probably at the time of the adoption of the Constitution, and of [the First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship.<sup>2</sup>

Daniel Webster clarified that “Christianity, *general, tolerant, Christianity, Christianity independent of sects and parties*” was the foundation of our liberties and legal system.<sup>3</sup>

In the spirit of this tradition, I have explained in my scholarship that the law must zealously guard religious liberty for all, while the substance of law should be based on principles of truth knowable by and accessible to all and not on principles unique to one faith.<sup>4</sup> In other words, a Christian-based jurisprudence does not inherently involve the imposition of uniquely Christian principles and, thus, is not theocratic.<sup>5</sup> I have analyzed and criticized errors in our founding, specifically regarding the compromise on slavery and the treatment of natives, most notably the Cherokee Tribe.<sup>6</sup> I have also called for fellow Latinos/as to build bridges across racial divides,<sup>7</sup> and I have advocated for a just resolution to disputes over our immigration policies, balancing rule of law concerns with the need to treat *contra prohibition* immigrants fairly.<sup>8</sup> I briefly summarize these views to clarify the perspective undergirding this Essay, in which I argue that a principled pluralism rooted in the enduring traditions upon which this nation was built must include accommodating the right of religiously affiliated institutions to act in accordance with the principles of their faith.

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2. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 629-31 (Melville M. Bigelow ed., 5th ed. William S. Hein & Co. 1994) (1891).

3. Hernandez, *A Flawed Foundation*, *supra* note 1, at 660 (emphasis added).

4. Michael V. Hernandez, *Theism, Realism, and Rawls*, 40 SETON HALL L. REV. 905, 907-08 (2010); Michael V. Hernandez, *Theistic Legal Realism and Normative Principles of Law*, 2 LIBERTY U. L. REV. 703, 706-08 (2008).

5. Hernandez, *Theism, Realism, and Rawls*, *supra* note 4, at 907-08; Hernandez, *Theistic Legal Realism and Normative Principles of Law*, *supra* note 4, at 706-08.

6. Hernandez, *A Flawed Foundation*, *supra* note 1, at 645-52, 672-710.

7. Michael V. Hernandez, *Bridging Gibraltar: Latinos as Agents of Reconciliation in Relations Between Black and White America*, 11 LA RAZA L.J. 99, 104-06 (2000).

8. Michael V. Hernandez, *The Rule of Law, Historical Equity, and Mexican Contra Prohibition Immigrants*, 9 REGENT J. INT'L L. 29, 52-53 (2012).

## I. CHALLENGES TO RELIGIOUSLY AFFILIATED INSTITUTIONS

In my view, the most pressing issue facing traditional religiously affiliated colleges, universities, and law schools is the evolving interplay and tension between sexual mores and religious liberty. Until recently, a fair amount of good will and accommodation for all perspectives on these issues prevailed, including within the legal academy. Recently, however, several attacks have been mounted against the rights of traditional religiously-affiliated institutions, including, most prominently, the following:

- In 2014, the New England Association of Schools and Colleges (“NEASC”) threatened to revoke the accreditation of Gordon College, an evangelical Christian school in Massachusetts, due solely to its policy affirming traditional sexual behavior standards. After giving Gordon one year to demonstrate its policies and procedures were not discriminatory, NEASC relented, affirming Gordon’s right to maintain its faith-based mission and noting Gordon’s outreach to sexual minorities.<sup>9</sup>
- The California legislature considered legislation that would have empowered students to sue faith-based colleges and universities that disciplined students for violating church teachings regarding traditional sexual standards.<sup>10</sup> Faced with strong objections from religious liberty advocates, the sponsor of the legislation, State Senator Ricardo Lara, subsequently amended the bill to remove the right to sue provisions, while still requiring schools to disclose their religious exemption to anti-discrimination laws and to report student expulsions for sexual misconduct to the state.<sup>11</sup>
- North of the border, in a dispute likely headed for the Canadian Supreme Court, Canadian law societies and intermediate appellate courts have divided over whether Trinity Western School of Law’s graduates should be disqualified from licensure due solely to the school’s traditional sexual behavior standards.<sup>12</sup>
- At oral argument in *Obergefell v. Hodges*, Justice Alito asked Solicitor General Donald Verrilli about possible challenges to the tax-exempt status of colleges and universities that implement religiously based traditional student

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9. David A. French, *Gordon College Keeps Its Faith and Its Accreditation*, NAT’L REV. (May 1, 2015, 2:30 PM), <http://www.nationalreview.com/article/417788/gordon-college-keeps-its-faith-and-its-accreditation-david-french>. French provided legal counsel to Gordon College regarding its accreditation challenge.

10. Holly Scheer, *California Bill Would Ultimately Erase Religious Schools*, THE FEDERALIST (June 21, 2016), <http://thefederalist.com/2016/06/21/california-bill-would-ultimately-erase-religious-schools/>; Jane Meredith Adams, *California Bill Takes Aim at Religious Colleges that Seek to Bar Transgender Students*, EDSOURCE (May 31, 2016), <https://edsource.org/2016/california-bills-take-aim-at-religious-colleges-that-seek-to-bar-transgender-students/564869>.

11. Scheer, *supra* note 10; Adams, *supra* note 10.

12. Chelsen Vicari, *California Bill Targeting Christian Colleges Modified After Resistance*, JUICY ECUMENISM (Aug. 11, 2016), <https://juicyecumenism.com/2016/08/11/california-bill-targeting-christian-colleges-modified-resistance/>.

sexual conduct standards.<sup>13</sup> Verrilli replied, “You know, I—I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue. I—I don’t deny that. I don’t deny that, Justice Alito. It is—it is going to be an issue.”<sup>14</sup> Some commentators, following Solicitor General Verrilli’s not-so-subtle suggestion, immediately called for the revocation of the tax-exempt status of traditional religious schools.<sup>15</sup>

- The majority opinion in *Obergefell*, written by Justice Kennedy, stated that the belief in traditional sexual morality “demeans or stigmatizes” the LGBTQ community, “disparag[ing] their choices and diminish[ing] their personhood.”<sup>16</sup> Although the majority conceded that the First Amendment guarantees the right to “advocate” for or “teach” beliefs in traditional sexual morality,<sup>17</sup> the majority implied that it would restrict the right to uphold faith-based, traditional sexual moral standards. In dissent, Chief Justice Roberts responded, “The First Amendment guarantees, however, the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”<sup>18</sup>
- Following *Obergefell*, the American Bar Association (“ABA”) amended Rule 8.4 of the Model Rules of Professional Conduct to proscribe attorneys from expressing views considered biased towards sexual minorities, even when the attorney is engaged only in social activities.<sup>19</sup> Notwithstanding strong objections expressed regarding the obvious freedom of speech problems presented by this sweeping rule,<sup>20</sup> the ABA did not amend its proposal. (On the positive side, the state bars in Illinois, Pennsylvania, and Texas recently voted to reject the proposed model rule).<sup>21</sup>

13. See Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-574). Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591-96 (1983) (holding that the IRS could revoke the tax-exempt status of a private university engaged in activity deemed to be “contrary to a fundamental public policy” and “at odds with the common community conscience”).

14. Transcript of Oral Argument, *supra* note 13, at 38.

15. See, e.g., Mark Oppenheimer, *Now’s the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), <http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/>.

16. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

17. *Id.* at 2607.

18. *Id.* at 2625 (Roberts, C.J., dissenting).

19. MODEL RULES OF PROF’L CONDUCT r. 8.4 *ll.* 24-53 (AM. BAR ASS’N, Revision Draft 109, 2016), <http://www.americanbar.org/content/dam/aba/images/abanews/2016%20Annual%20Resolutions/109.pdf>.

20. Eugene Volokh, Opinion, *A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm\\_term=.d592a0832940#comments](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.d592a0832940#comments); Andrew Burger, *Attorney: Scathing Criticism of New ABA Harassment and Discrimination Rule Ill-Founded*, LEGAL NEWS LINE (Sept. 9, 2016, 9:41 AM), [legalnewslines.com/stories/511004265attorney-scathing-criticism-of-new-aba-harassment-and-discrimination-rule-ill-founded](http://legalnewslines.com/stories/511004265attorney-scathing-criticism-of-new-aba-harassment-and-discrimination-rule-ill-founded).

21. George Conk, *New ABA Rule on Discrimination Rejected in Pennsylvania and Illinois, Texas*, CONTEMPORARY PROFESSIONAL RESPONSIBILITY (Jan. 16, 2017), <https://contemporary>

- After *Obergefell*, the Obama Administration stated that it would not challenge the tax-exempt status of traditional religiously affiliated schools “at this time,”<sup>22</sup> but shortly thereafter, the United States Commission on Civil Rights issued a briefing report arguing that religious liberty must be proscribed when it allegedly conflicts with the rights of sexual minorities.<sup>23</sup> In his statement in support of the Commission’s recommendations, Chairman Martin Castro decried both “Christian supremacy or any form of intolerance” and Islamophobia.<sup>24</sup> Chairman Castro’s comments reflect both overt hostility and bias toward Christianity and intellectual inconsistency—unless one assumes Islam is not a religion, which is nonsensical, or should be favored in law, which would be unconstitutional, it is impossible to reconcile his call to defend Islam while providing narrow protection for religious liberty.
- Harvard Law Professor Mark Tushnet recently issued an extreme call for action consistent with Chairman Castro’s views, likening Christians to slave owners, Nazis, and segregationists:

[N]ow that [traditionalists have] lost the battle over LGBT rights, [they have] made [religious liberty] protections central—seeing them, I suppose, as a new front in the culture wars .... [T]aking a hard line (“You lost, live with it”) is better than trying to accommodate the losers .... Trying to be nice to the losers didn’t work well after the Civil War, nor after *Brown*. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) ...[T]he war’s over, and we won.<sup>25</sup>

In a subsequent piece, Tushnet doubled down on his assessment, arguing:

“[T]aking a hard line” means opposing on both policy and constitutional grounds free-standing so-called “religious liberty” laws .... It also means being pretty leery about ... agreement by Christian conservatives to support extending general nondiscrimination laws to cover the LGBT community in exchange for including “religious liberty” exemptions.<sup>26</sup>

Notwithstanding these troubling developments, I remain hopeful that goodwill and reason will prevail and that a principled commitment to liberty—

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professionalresponsibility.com/2017/01/16/new-aba-rule-on-discrimination-rejected-in-pennsylvani  
a-and-illinois-texas/.

22. Samuel Smith, *IRS Commissioner Vows to Not Target Christian Colleges Opposed to Gay Marriage... ‘At This Time’*, THE CHRISTIAN POST (July 31, 2015, 12:41 PM), <http://www.christianpost.com/news/irs-commissioner-vows-to-not-target-christian-colleges-opposed-to-gay-marriage-at-this-time-142148/>.

23. U.S. COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 1 (Sept. 2016), <http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF>.

24. *Id.* at 29.

25. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKIN (May 6, 2016, 1:15 PM), <http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.

26. Mark Tushnet, *What Does “Taking a Hard Line” Mean?*, BALKIN (May 9, 2016, 8:28 PM), <https://balkin.blogspot.com/2016/05/what-does-taking-hard-line-mean.html>.

including for, but not limited to, all people of faith—will be preserved. Those who are intellectually honest, fundamentally fair, and committed to our nation’s founding principles should see that efforts to strip the liberty of religious traditionalists would create several untenable inconsistencies.

## II. INTELLECTUALLY INCONSISTENT ATTACKS ON RELIGIOUS LIBERTY

### A. *Exalting Implicit, Penumbral Rights over Explicit Constitutional Rights*

It would be unjustifiable to subordinate an explicit constitutional right to an implicit, penumbral one. The right of privacy and the right to marry, while important, are not protected by the text of the Constitution. *Obergefell* was based on emerging conceptions of liberty, not on an explicit textual right.<sup>27</sup> By contrast, the First Amendment facially protects the right to exercise one’s faith and to associate with others of like belief.<sup>28</sup> The Court should not protect implicit rights at the expense of explicit ones. It would be ironic, if not hypocritical, to employ a penumbral right flowing from the Fourteenth Amendment—which was ratified to restrain government from undermining fundamental liberties—to eliminate or minimize the fundamental freedoms of conscience, religious exercise, and association. Falsely suggesting that the rights at issue cannot be harmonized creates a destructive dichotomy, but to the extent a conflict between those rights is forced, an explicit right should prevail over a penumbral one.

### B. *Inconsistent Notions of Liberty*

Silencing traditional religious beliefs would also be inconsistent with the conception of liberty upon which *Obergefell* was based. In what Justice Scalia coined the “sweet-mystery-of-life passage,”<sup>29</sup> Justices Kennedy, O’Connor, and Souter, in *Planned Parenthood v. Casey*, defined constitutional liberty in autonomous terms:

[M]atter[s] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.<sup>30</sup>

Religious conviction is the most personal, intimate, and fundamentally existential personal belief. *Casey* and *Lawrence* were premised on the right to be left alone: in *Casey*, the right of the mother to be left alone by the father of the child in her

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27. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

28. U.S. CONST. amend. I.

29. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

30. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

womb,<sup>31</sup> and in *Lawrence*, the right of consenting homosexuals to be left alone from governmental intrusion while they have sex.<sup>32</sup> *Obergefell* went further, mandating that government sanction the private choice of same sex couples to enter into a marital union.<sup>33</sup> In other words, *Obergefell* implicitly establishes that constitutionally protected liberty mandates state action to validate and preserve autonomous choices rooted in individual belief. Unless the Court embraces the indefensible and dehumanizing view that sexual activity, either solely or preeminently, implicates the mysteries of life, it cannot logically harmonize attacks on traditional religious expression with the right to autonomous liberty established by the mystery passage and its progeny, including *Obergefell*.

C. *Inherent Tension Between Autonomous Liberty and the Establishment Clause*

Those opposed to traditional religious expression may invoke the Establishment Clause to argue that neutrality must prevail in the public square. The mystery passage and its progeny are not premised on neutrality; to the contrary, the consistent application of autonomian liberty should mandate protection, not suppression, of individually chosen religious expression. The Court's Establishment Clause jurisprudence not only intrinsically conflicts with autonomian liberty, but it also has a questionable historical pedigree.

Roger Williams, the founder of the Rhode Island settlement, developed a theological basis for separation of church and state solely to keep the state from corrupting the church.<sup>34</sup> Similarly, William Penn, the Quaker founder of Pennsylvania, rooted protection of religious liberty in Christian beliefs.<sup>35</sup> Penn helped draft the Charter of Fundamental Laws for the settlement of West New Jersey in 1677, which recognized:

[N]o men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters, therefore it is consented, agreed and ordained, that no person or persons ... shall be any ways upon any pretence whatsoever, called in question, or in the least punished or hurt ... for the sake of his opinion, judgment, faith or worship towards God in matters of religion.<sup>36</sup>

These early Christian-based colonial experiments in religious freedom were the foundation of the religious freedom protections embedded in the First Amendment, including the Establishment Clause, and of parallel religious liberty protections in state constitutions.<sup>37</sup>

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31. *Id.* at 898.

32. *Lawrence*, 539 U.S. at 578.

33. *Obergefell*, 135 S. Ct. at 2607-08.

34. JAMES CALVIN DAVIS, ON RELIGIOUS LIBERTY 2 (2008).

35. ADAMS & EMMERICH, *supra* note 1, at 6.

36. CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, *reprinted in* SOURCES OF OUR LIBERTIES 185 (Richard L. Perry & John C. Cooper eds., 1978).

37. ADAMS & EMMERICH, *supra* note 1, at 8-20.

Thomas Jefferson notably sought to protect the church from governmental intrusion. In his letter to the Danbury Baptists, Jefferson evoked the well-known wall metaphor, which Dr. Daniel L. Dreisbach has shown was envisioned to protect the institutional church from the federal government, not as a barrier between government writ large and individual religious expression.<sup>38</sup> The Supreme Court misapplied this metaphor in *Everson v. Board of Education*, converting Jefferson's limited, protective shield into a weapon to suppress religious exercise in the public square.<sup>39</sup> At a time when many Americans are concerned about the implications of building a physical wall to exclude potential immigrants seeking the blessings of America, including religious liberty,<sup>40</sup> it would be hypocritical to advocate building a higher and less penetrable metaphorical wall against religious expression and belief.

*D. Inconsistent Standards Governing Use of Public Funds*

Opponents of traditional sexual morality could argue that the tax-exempt status of traditionalists should be revoked because principles of neutrality and non-imposition must control the disposition of the public fisc, even at the expense of the freedom to exercise an explicit constitutional right.<sup>41</sup> Many such opponents would presumably and ironically support public funding of Planned Parenthood to safeguard a penumbral right, notwithstanding the resulting imposition on citizens who sincerely object to publicly funded abortion on moral grounds.<sup>42</sup> People of good will can genuinely disagree over the proper use of public funds to support ideologically-motivated activities, but the principles governing the disposition of those funds must be applied consistently and fairly.

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38. See generally DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION OF CHURCH AND STATE (2003). See also Samuel W. Calhoun, *Getting the Framers Wrong: A Response to Professor Geoffrey Stone*, 57 UCLA L. REV. DISCOURSE 1, 8-12 (2009).

39. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947). The author of *Everson*, Justice Hugo Black, was an officer of the Ku Klux Klan who rose to prominence as an attorney representing Klansmen who murdered an unarmed Catholic priest in Alabama. Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 274 (2014); Dr. Jeff Mirus, *The Murder of a Priest*, CATHOLIC CULTURE (Jan. 15, 2010), <http://www.catholicculture.org/commentary/articles.cfm?id=420>. Justice Black's virulent anti-Catholicism, which was rooted in secularism, not Protestantism, harkened back to the dark, religiously segregated days of the notorious Blaine Amendments. Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545, 568-69 (2007); Hernandez, *A Flawed Foundation*, *supra* note 1, at 661-63.

40. See, e.g., Aaron Klein, *Donald Trump's Plan to Build a Wall is Really Dangerous*, BROOKINGS (Apr. 7, 2016), <https://www.brookings.edu/opinions/donald-trumps-plan-to-build-a-wall-is-really-dangerous/>.

41. See Oppenheimer, *supra* note 15.

42. See, e.g., *The Ethics of Defunding Planned Parenthood*, VCU UNIV. 112 BLOG (Dec. 4, 2015), <http://rampages.us/paradeofplants/2015/12/04/the-ethics-of-defunding-planned-parenthood/> (acknowledging that "several groups of people (most commonly religious groups) have moral objections to the federal funding of Planned Parenthood," yet still arguing against defunding Planned Parenthood because "[t]he women ... who depend on these clinics should have the right to access" their services).



*E. Guilt by Association and Selection Bias*

Attacks on the rights of religious traditionalists have been justified based on the prior bad acts of some alleged adherents to their faith.<sup>43</sup> These attacks reflect the logical fallacies of guilt by association and selection bias and are highly ironic at a time when, for example, many people are concerned that criticism of Islamic-rooted terrorism paints too broadly and reflects Islamophobia.<sup>44</sup> Just as it is unfair to taint all Muslims with the atrocities of a few, it is wrong to deny liberty to all traditionalists based on the perceived bad acts of a few. It would be particularly hypocritical to defend Muslims from guilt by association while denying protection to traditionalist Christians, given that, for example, there is presently no extant or seriously proposed theocratic Christian analogue to Sharia law, which, among other things, sanctions non-Muslims and imposes the death penalty for apostasy and homosexuality.<sup>45</sup>

Regarding selection bias, for every historical failing of a segment of Christianity, there are many countervailing examples of Christianity's positive influence. Christianity's influence on the development of American liberty was described briefly above.<sup>46</sup> Christian principles also drove the Abolition and Civil Rights movements. Puritan Samuel Sewall published the first anti-slavery tract, entitled *The Selling of Joseph*, in which he argued that all human beings, including those of African descent, are "the Sons and Daughters of the First Adam, the Brethren and Sisters of the Last ADAM, and the Offspring of God; They ought to be treated with a Respect agreeable."<sup>47</sup> As the Seventh Circuit Court of Appeals noted:

Not only Abolitionism, but the Civil War itself, had both drawn on and stimulated religious emotions and expression. One has only to think of the "Battle Hymn of the Republic," and of Lincoln's second inaugural address, with its pervasive religious imagery (as in: "Yet, if God will that (this mighty scourge of war) continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the sword, as

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43. See, e.g., William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011) (providing a selective historical overview that ignores Christian contributions to personal freedoms, abolition, and civil rights in order to argue that Christianity has perpetuated racism, with Christians supporting civil rights only reluctantly and under compulsion of law).

44. See, e.g., Abukar Arman, *Islamophobia and Radicalized Perceptions*, HUFFINGTON POST (Aug. 24, 2016), [http://www.huffingtonpost.com/entry/islamophobia-and-radicalized-perceptions\\_us\\_57bd4403e4b07d22cc3a3bde](http://www.huffingtonpost.com/entry/islamophobia-and-radicalized-perceptions_us_57bd4403e4b07d22cc3a3bde).

45. Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 606-07 (2013) (citing Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 HUM. RTS. L. REV. 603, 621-22 (2009)).

46. See *supra* notes 1-3 and accompanying text.

47. Mark A. Peterson, *The Selling of Joseph: Bostonians, Antislavery, and the Protestant International, 1689-1733*, 4 MASS. HIST. REV. 1, 1 (2002) (footnote omitted).

was said three thousand years ago, so still it must be said ‘the judgments of the Lord, are true and righteous altogether.’”<sup>48</sup>

The efforts of Civil Rights leaders to combat racial inequality were rooted in Christian principles.<sup>49</sup> For example, in 1961, the Student Nonviolent Coordinating Committee advertised its first large-scale meeting through a handbill that asserted:

We believe in the Fatherhood of God and the brotherhood of man. We believe that God made of one blood all nations for to dwell on all the face of the earth. If we are of one blood, children of one common Father, brothers in the household of God, then we must be of equal worth in His family, entitled to equal opportunity in the society of men....

We are called upon, therefore, to love our fellow men, all of them, with all the risks that that implies and all the privileges that it promises.<sup>50</sup>

The Reverend Dr. Martin Luther King Jr.’s Christian faith motivated him to fight against segregation and racial inequality.<sup>51</sup> Dr. King considered segregation “a sin and an evil that was inimical to God’s perfect plan for humankind.”<sup>52</sup> He advocated “the worth of individual human beings ... [who] were valued by God” and that “racist systems treated people in ways not intended by the Creator.”<sup>53</sup> Dr. King understood that racism contravenes the biblical teaching that “[t]here is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus.”<sup>54</sup>

Notwithstanding the flaws of some believers, Christianity directly influenced the development and preservation of American liberty. Given Christianity’s undeniable overall beneficial impact, the sins of a few Christians do not justify eviscerating the rights of the whole.

#### F. *Misguided Loving Analogy*

Opponents of traditionalists often equate traditional sexual mores to the invidious racism undergirding the anti-miscegenation laws struck down in *Loving*

48. *Am. Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (internal citations omitted).

49. CHARLES MARSH, *THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE FROM THE CIVIL RIGHTS MOVEMENT TO TODAY* 2-3 (2005) (internal footnote omitted).

50. *Id.*

51. Dennis C. Dickerson, *African American Religious Intellectuals and the Theological Foundations of the Civil Rights Movement, 1930–55*, 74 *CHURCH HIST.* 217, 217-18 (2005), <http://www.jstor.org/stable/27644548>. See also Samuel W. Calhoun, *May the President Appropriately Invoke God? Evaluating the Embryonic Stem Cell Vetoes*, 10 *RUTGERS J.L. & RELIGION* 1 (2008) (explaining how Dr. King’s message was based on scriptural and natural law principles and describing the “overwhelming evidence of the centrality of King’s Christian faith to the struggle for civil rights”).

52. Dickerson, *supra* note 51, at 218.

53. *Id.*

54. *Galatians* 3:28 (New International Version).

*v. Virginia*.<sup>55</sup> As I have argued elsewhere, law should be based on principles of reason knowable to all and verified by human experience across cultures and time.<sup>56</sup> Although people tend to gravitate toward others like them, there is no basis in reasoned observation or cross-cultural human experience that a mixed race couple cannot join in a procreative union. Anti-miscegenation was rooted solely in racism, and the concept of “race” did not even exist until the 18th century.<sup>57</sup> Contrary to the common but mistaken presumption that belief in traditional marriage is attributable to irrational fear,<sup>58</sup> the traditional view is based on the observable biological complementarity of the sexes, the inherent procreative nature of male/female unions, and the fact that marriage has been recognized as a male/female union across cultures and time, including today in most parts of the world.<sup>59</sup>

### G. *Familiarity Breeds Understanding*

Fair-minded proponents of traditional sexual morality and their counterparts would do well to get to know each other better. Many non-traditionalists might be surprised to discover that many traditionalists have strong libertarian impulses. One generally known example and one noteworthy personal anecdote immediately come to mind. In his dissenting opinion in *Lawrence v. Texas*, Justice Thomas, a devout Roman Catholic,<sup>60</sup> explained that while he disagreed with the majority’s constitutional interpretation, were he a legislator, he would vote to repeal sodomy laws, which he considered “uncommonly silly.”<sup>61</sup>

As for the personal anecdote, I vividly recall the day I was sitting next to my friend, John, in a Criminal Law class at the University of Virginia School of Law. John was apparently the only student in the class who was unaware that Jerry Falwell, Jr. was our classmate. In response to our professor’s question about criminalizing private sexual behavior, John said, “People like Jerry Falwell

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55. *Loving v. Virginia*, 388 U.S. 1 (1967). See, e.g., *Watch: Kenji Yoshino’s Reasoned Defense of Same-Sex Marriage*, SIGNATURE (Aug. 11, 2016), <http://www.signature-reads.com/2016/08/watch-kenji-yoshinos-reasoned-defense-of-same-sex-marriage/> (equating historical arguments in favor of anti-miscegenation laws with modern arguments against same-sex marriage).

56. Hernandez, *Theism, Realism, and Rawls*, *supra* note 4, at 905-09; Hernandez, *Theistic Legal Realism and Normative Principles of Law*, *supra* note 4, at 703-21.

57. Hernandez, *A Flawed Foundation*, *supra* note 1, at 674-75.

58. See, e.g., Zack Ford, *Why We Shouldn’t Placate People with Anti-Gay Beliefs Just Because They Don’t Know Better*, THINKPROGRESS (Dec. 16, 2013), <https://thinkprogress.org/why-we-shouldnt-placate-people-with-anti-gay-beliefs-just-because-they-don-t-know-better-7e2a5b056e31#9c60bxab8>.

59. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 252-55 (2011) (explaining the reasons why marriage historically has involved a union of a man and a woman).

60. See generally CLARENCE THOMAS, *MY GRANDFATHER’S SON* (2007) (relating his Catholic upbringing, his early desire to attend seminary and enter the priesthood, and his Catholic faith in general).

61. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

want the state to dictate what you can do in the privacy of your bedroom.” (This was about a year before the Court decided *Bowers v. Hardwick*.<sup>62</sup>) Our professor smiled and said, “Mr. Falwell, would you like to respond?” As John’s jaw hit the floor, Jerry explained that, although his father believed in traditional sexual morality, he had no interest in dictating what my friend or anyone else did in private.<sup>63</sup>

Many traditionalists embrace libertarian principles and seek to minimize governmental intrusion into private matters. Many millennial Christians are likewise drawn to the unique mission provided by schools targeted by the threats described at the beginning of this essay.

### III. PRINCIPLED PLURALISM V. OLYMPIANISM AND CHRISTOPHOBIA

The challenges to traditional religiously affiliated schools reflect what Kenneth Minogue, the late Emeritus Professor of Political Science and Honorary Fellow at the London School of Economics, termed *Olympianism*:

[T]he project of an intellectual elite that believes that it enjoys superior enlightenment and that its business is to spread this benefit to those living on the lower slopes of human achievement....

We may define Olympianism as a vision of human betterment to be achieved on a global scale by forging the peoples of the world into a single community based on the universal enjoyment of appropriate human rights.<sup>64</sup>

Minogue warned that Olympianism commonly devolves into what he labeled *Christophobia*: the opposition to Christianity rooted in the fear of and opposition to Christ, His exclusive truth claims, and/or the followers who espouse them.<sup>65</sup> The overt hostility to Christianity displayed by Chairman Castro and Professor Tushnet, allegedly in the spirit of tolerance, are two particularly ironic Olympian attempts to target religious liberty and expression.<sup>66</sup>

The Olympian impulse to strip the public square of traditional religious influence is both ahistorical and contrary to our nation’s commitment to religious liberty.<sup>67</sup> As Professor Samuel Calhoun has argued:

Anyone seeking to squelch religiously motivated argument and action exposes himself or herself as someone lacking a true commitment to diversity. Consider the illogical conclusion to Frank Rich’s *New York Times* editorial lambasting President Bush’s stem cell vetoes. Rich endorses the criticism of Senator Joe Lieberman by

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62. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

63. To be fair to John, I must round out this story by noting that he immediately went to Jerry after class, apologized for his impertinent comment, and struck up a friendly conversation.

64. Kenneth Minogue, “*Christophobia*” and the West, *NEW CRITERION* (June 2003), <http://www.newcriterion.com/articles.cfm/-ldquo-Christophobia%E2%80%93and-the-West-1355>.

65. *Id.*

66. See *supra* notes 23-26 and accompanying text.

67. Calhoun, *supra* note 51, at 23-31.

the Anti-Defamation League, which deemed his “incessant Bible thumping (while running for vice president in 2000) ... ‘inappropriate and even unsettling in a religiously diverse society such as ours.’” Astoundingly, and ironically, Rich and the League appear quite content to exclude Bible-thumpers as legitimate participants in political debate in our “‘religiously diverse society.’” To them, diversity obviously has its limits.

A diverse discourse is valuable precisely because it contains points of view and leads to action that some participants will disagree with or even abhor. The clash of competing ideas will sometimes, perhaps often, create discomfort, but this is an inevitable cost of a genuine allegiance to democratic ideals.<sup>68</sup>

Fortunately, a Christophobic outcome is far from inevitable. I remain hopeful that a consistently principled approach to liberty will prevail,<sup>69</sup> and I look forward to working with my fellow deans and others to defend liberty for all, not just for an Olympian elite. I also look forward to working with fellow Christians to see the attributes at the heart of the Gospel—God’s love, mercy, grace, forgiveness, and redemptive power—demonstrated clearly and consistently to all.

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68. *Id.* at 37-38 (internal footnotes omitted).

69. Some scholars have attempted to strike a viable balance between the competing interests that gave rise to this essay. *See, e.g.,* Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 *GEO. J. GENDER & L.* 485, 540-41 (2014). These efforts have most notably led to the adoption of legislation that struck a surprisingly politically viable balance between protection of religious liberty and sexual minorities in Utah’s antidiscrimination laws. *See* Laurie Goodstein, *Utah Passes Antidiscrimination Bill Back by Mormon Leaders*, *N.Y. TIMES* (Mar. 12, 2015), [https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?\\_r=0](https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?_r=0).