Special Issue on Religious Liberty
Featuring:

“The First of All Freedoms is Liberty of Conscience”
Michael Novak

“Let Us Pray: Greece v. Galloway”
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“The Creation and Reconstruction of the First Amendment”
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The mission of the Wheatley Institution is to enhance the academic climate and scholarly reputation of BYU, and to enrich faculty and student experiences, by contributing recognized scholarship that lifts society by preserving and strengthening its core institutions.
Two Concepts of Liberty . . . and Conscience, Robert George

Conscience is one’s last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action. Conscience identifies one’s duties under the moral law.

Religious Liberty: The First Freedom?, Daniel Robinson

Religious liberty is dependent on liberty of thought and liberty of that inquiry and intellectual engagement that moves feelings toward the plane of understanding.

The Creation and Reconstruction of the First Amendment, Akhil Reed Amar

The precise text of the Fourteenth Amendment might enable sensitive interpreters to distinguish among different types of religious exercise in a textually defensible way—once we remember that the key text in almost all “First Amendment” cases is in fact . . . the Fourteenth Amendment.

Let Us Pray: Greece v. Galloway, Gerard Bradley

Praying publically moderates any tendency to political utopianism, and supplies a foundation for limited government secured by the common understanding that even the state and its political institutions and its laws are subordinate to God.

What Are We Really Arguing about When We Argue About the Freedom of the Church?, Michael Moreland

Religion, where it exists, exists in and through particularity. When we encounter such particular expressions it is on account of a group believing—credibly or not—that God is speaking to them in the world.
Securing the Free Exercise of Conscience, Cole Durham

The free exercise of conscience is an urgent concern, not only at our time but at all times.

The First of All Freedoms is Liberty of Conscience, Michael Novak

Liberty of conscience is the one liberty that roots itself most in the nature of God. It is our duty to recognize what He has done for us and the greatness of what He is.
John Henry Newman was a religious genius. And his understanding of religion enabled him to produce an account of freedom—in particular the freedom of conscience—from which we today have much to learn. Newman locates the foundation of honorable freedoms in a concern for human excellence and human flourishing. He is cognizant of both the need for restraints on freedom (lest men descend into vice and self-degradation) and of the supreme importance of central freedoms as conditions for the realization of values that truly are constitutive of the integral flourishing of men and women as free and rational creatures, creatures whose freedom and rationality reflect their having been made in the very image and likeness of God.

Newman, though the most powerful defender of freedom of conscience, held a view of conscience and of freedom that could not be more deeply at odds
with the liberal ideology that is dominant (even, dare one say, orthodox?) in the contemporary secular intellectual culture, and in those sectors of religious culture that have fallen under its influence.

Conscience, as Newman understood it, is the very opposite of “autonomy” in the modern liberal sense. It is not a writer of permission slips. It is not in the business of licensing us to do as we please or conferring on us “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Rather, conscience is one’s last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action. Conscience identifies one’s duties under the moral law. It speaks of what one must do and what one must not do. Understood in this way, conscience is, indeed, what Newman said it is: a stern monitor.

Contrast this understanding of conscience with what Newman condemns as its counterfeit. Conscience as “self-will” is a matter of feeling or emotion, not reason.

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**Conscience is one’s last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action.**

**Conscience identifies one’s duties under the moral law.**

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It is concerned not so much with the identification of what one has a duty to do or not do, one’s feelings and desires to the contrary notwithstanding, but rather, and precisely, with sorting out one’s feelings. Conscience as self-will identifies permissions, not obligations. It licenses behavior by establishing that one doesn’t feel bad about doing it, or, at least, one doesn’t feel so bad about doing it that one prefers the alternative of not doing it.

I’m with Newman. His key distinction is between conscience, authentically understood, and self-will—conscience as the permissions department. His core
insight is that conscience has rights because it has duties. The right to follow one’s conscience, and the obligation to respect conscience—especially in matters of faith, where the right of conscience takes the form of religious liberty of individuals and communities of faith—obtain not because people as autonomous agents should be able to do as they please. They obtain, and are stringent and sometimes overriding, because people have duties and the obligation to fulfill them.

The duty to follow conscience is a duty to do things or refrain from doing things not because one wants to follow one’s duty, but even if one strongly does not want to follow it. The right of conscience is a right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome strong aversion in order to fulfill it. If there is a form of words that sums up the antithesis of Newman’s view of conscience as a stern monitor, it is the imbecilic slogan that will forever stand as a verbal monument to the “Me-generation”: “If it feels good, do it.”

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This article is an abbreviated version of a lecture sponsored by the Wheatley Institution. This lecture and others have been compiled and accepted for publication by Cambridge University Press under the title Religious Liberty: Essays on First Amendment Law. To read the full chapter, look for the forthcoming publication in 2016.
Religious liberty, the topic of this essay, is at once a liberty of conscience but even more foundationally a liberty of belief. The main proposition is that religious liberty, understood in a certain light, is the first freedom and foundation for the rest.

We seem naturally inclined to look for the causes of things. We believe that recurring events are moved by recurring and similar antecedent events. The powers of the imagination are generative of such beliefs, some of which courageously—even if tentatively—come to be invested in what is taken to be divine. This is the sense I would have you attach to the notion of religious liberty being the first freedom, a freedom to employ sense, reason, and imagination in an attempt to know oneself and one’s place in the larger scheme of things. Put another way, we believe that
the diversity and complexity of natural events is a kind of surface noise and that the revealing signal becomes audible by way of an imaginative reconstruction of reality—a reconstruction that moves us to the first and to the final points in the arc of reality itself. There is religion here, even when the gods are nameless.

Note that I do not refer to freedom of the imagination, for by its very nature it is not subject to external authority. This greatest voyage of inquiry needs no vehicle and seeks no license. Experience and rational reflection work to redirect the imagination to yet other and more promising or truth-bearing possibilities more worthy of belief by pointing, not by commanding. One can be punished for a belief, but not commanded to surrender it. In a somewhat mysterious way, we seem to have little say in the matter of what we believe. Oppressive regimes hold on by confining the imagination through censorship, bread and circuses, but sooner or later the hostage breaks loose.

We tend to think of religious liberty as a modern development reaching back to such rich sources as Milton’s Areopagitica (1644), which offered an impassioned plea for and defense of freedom of the press, addressed to Parliament and directly opposing laws that had been put in place by Queen Mary and rendered ever more constraining by Elizabeth I. As early as 1559 the Crown had issued Injunctions Concerning Religion. No work in any language could be printed except with a license issued either by the Queen or her Privy Council, by the Chancellor either of Oxford or Cambridge, or by the Archbishop of Canterbury, York or London.

Under such controls, any government is able to manage—or, as one might say today, micro-manage—that part of thought and critical reflection otherwise enlarged and deepened by multiple and conflicting perspectives. In saying, then, that one should be free to embrace the tenets of a religion and discharge the duties
imposed by them, one must suppose that the beneficiary of the freedom has enjoyed the associated freedoms that render this one credible. Thus understood, religious liberty is dependent on liberty of thought and liberty of that inquiry and intellectual engagement that moves feelings toward the plane of understanding.

It matters not a whit whether the attempt to command or control comes from a tyrant, a king, an Imam, or alas, a Supreme Court. Resistance to such measures seems to be based on something broader than the particulars of a given faith. These measures presume to command assent while defeating the very powers in virtue of which assent itself is possible. Rational creatures with the impulse to imagine possibilities, frame plans of action, consider myriad options and the consequences plausibly contained in each are not merely worthy of the law’s respect but the ultimate ground of the law’s own authority. In very large numbers over all of recorded history, such creatures have been moved by a sense of the transcendent, a reverence for an unseen power behind the order of nature itself. Out of this would emerge idealized conceptions of civic life, cooperative and trusting associations, and strongly sensed duties to oneself and others. The unopposable freedom to imagine and to believe in the prospects made evident by the imagination would seem to be that first freedom rendering liberty itself intelligible.

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A federalism-inspired reading of the First Amendment has profound implications for the original meaning of the free-exercise clause. If the phrase “Congress shall make no law” really meant that Congress simply lacked enumerated power to intrude on religious freedom in the several states, the kind of intrusion prohibited must have been a congressional law that sought to abridge religious liberty as such—a congressional law targeted at the free exercise of religion. Such a law simply lay beyond Congress’s legitimate province—it was not a necessary-and-proper exercise of Congress’s secular enumerated powers—and it thus could be flatly barred: “no law . . . prohibiting the free exercise” of religion meant no law
designed to prohibit religious freedom. A law that regulated worship qua worship would be unconstitutional from the very moment of its enacting—its “mak[ing]”—and so would an artful sham phrased in seemingly secular terms but motivated by an attempt to target a given religion. (The sham would offend the McCulloch pretext test.) Though enforceable in courts after the fact, the First Amendment’s first addressee—its first word—was Congress, and it commanded conscientious congressmen to vote against offending bills, to “make no law” of a certain sort.

On this analysis, general laws designed to serve secular purposes enumerated in Article I would be a very different matter, even if, in operation, they had the effect of impairing some particular group’s religious practices. Imagine, for example, a congressional ban on the importation of some drug that a particular religion deemed central to its worship practice. The Congress that made the law might not even know that such practice existed; indeed, the practice might well have arisen only after the law was passed. And surely some religious practices, even if bona fide, must yield to neutral congressional laws. (Consider for example, human sacrifice of nonbelievers seeking to vote in federal elections.) But once some neutral laws trump contrary religious practices, why not all neutral laws? The apparent absolutist grammar and logic of the clause do not seem to invite a balancing of the federal interest against the religious interest. Rather, the clause seems to invite careful attention to the purpose of a given federal law, and its nexus to legitimate, secular, enumerated powers in Article I.

On this reading, the controversial Supreme Court decision in the 1990 case of Employment Division v. Smith would appear to have even more textual, structural, and historical support than its author, Justice Antonin Scalia, claimed for it. In limiting the protection of the free-exercise clause to laws targeting religion, the Court said only that “[a]s a textual matter, we do not think the words
[of the First Amendment] must be given [a broader] meaning” that would enable some religious practices to trump neutral, general, secular laws.

But Smith involved a state law, not a federal law. The true constitutional provision at issue was the Fourteenth Amendment, not the First. And perhaps a sensitive reading of text, history, and structure of the Reconstruction Amendment calls for a broader protection of some forms of religious worship, even against neutral secular laws. There are reasons to think that the federalism-based reading of the First Amendment may not have been foremost in the minds of the Reconstruction Congress as it reglossed the federal Bill of Rights and made its freedoms, and other fundamental privileges and rights, applicable against states. Though the language of the Fourteenth Amendment in several ways tracks that of the First—“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens”—in fact, subtle differences exist that might support critics of Smith. To begin with, the Fourteenth focuses not just on making laws but also on enforcing them. Perhaps this wording invites us to pay close attention to the clash between church and state not just at the time of enactment but also at the moment of application. And perhaps some religious practices that affect only the religious community itself (with no externalities imposed on religious nonbelievers) might be deemed “privileges” and “immunities”—islands of institutional privacy and communal autonomy against general laws. On this view, the precise text of the Fourteenth Amendment might enable sensitive interpreters to distinguish among different types of religious exercise in a principled and textually defensible way—once we remember that the key text in almost all “First Amendment” cases is in fact . . . the Fourteenth Amendment.
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Galloway vs. Greece, argued in the Supreme Court, is about legislative prayer. That is, genuine prayer for and in the presence of lawmakers, a prayer to God asking God’s guidance and help and wisdom for these people, these men and women, who are engaged in the act of lawmaking for the community. The Supreme Court could simply affirm its own prior case called Marsh vs. Chambers, decided in 1983. So there is this one precedent and it upheld the practice of legislative prayer. The Marsh court said that particular or sectarian prayers represent, now quoting the court, “tolerable acknowledgement of beliefs widely held by the people.” The message of these words, I think, is that prayers in a given assembly may, will, and should be indigenous, be expressive of that particular community’s religious viewpoint to be sensible and meaningful as prayers for that body of lawmakers.
I suppose that God hears all sincere petitions of human persons but, viewed from the bottom up, we can see readily that not just any prayer or any sample of prayers studiously selected from a global catalogue will do the job that legislative prayer is meant to do. The point of legislative prayer, which is to invoke divine assistance and wisdom for these people, depends upon the sentiments of the people present. The prayer is meant to put those present, especially the lawmakers, in mind of the existence of God, of our dependence upon this greater than human source of meaning and value. It is meant to put people in mind of their creaturely status. It is meant to put people in mind of the reality of divine providence, and a desire to live in some kind of harmony with God. That’s the point of legislative prayer.

This goal is scarcely accomplished by recitations of poetry. It is not accomplished by seeking the assistance of the devil. The good citizens and lawmakers of Greece might be called to order by the solemn recitation of an Aztec fertility prayer delivered in the native tongue, but there wouldn’t be any benefit in that to them as a prayer.

I think the court should uphold legislative prayer. I think this time, the court should leverage the intuitive appeal and the widespread support in our country for legislative prayer. I think what’s at stake in this case is more than the fate of a venerable practice, legislative prayer, one which happens to have an impeccable historical pedigree and a huge contemporary following. I think there is more at stake than that. Now, certainly our lawmakers could use all of the divine assistance we could summon for them, but aside from how many of our prayers are answered, the reality is that offering them helps us to recognize our creatureliness, to affirm our dependence upon God. Praying publicly moderates our tendencies towards locating the source of value in our choices.
of choice. That is to say, recognizing our dependence upon the greater than
human source of meaning and value will lessen the burgeoning value and sort
of investment we have in law and in culture and autonomy and authenticity, in
the view that what makes anything we choose valuable and good is our choosing
it. The view that what makes anything valuable is the act of choice, I think, is a
view one can only hold if one has stopped believing in God. If there is a greater-
than-human source of meaning and value, then at least part of the meaning and
value of my choices depends upon the order that God has established. Praying
publicly squarely affirms belief in divine providence, our creatureliness. I think
it moderates any tendency to political utopianism, which I think is something
we could use some moderating about, and supplies a foundation for limited
government secured by the common understanding that even the state and its
political institutions and its laws stand under and are subordinate to God.

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Theologically, advocates and skeptics of the freedom of the church are divided over whether theological claims—not apparently theological claims that are actually claims about something else, say rights of conscience or association, but genuinely theological religious claims—are legally cognizable and sensible. This is closely related to the ongoing debate in the law and religion field over whether religion can be regarded as special in any way for constitutional purposes. Liberalism, especially under certain Rawlsian formulations, cannot admit or adjudicate theological claims under strictures of public reasonableness. Little wonder, the argument
goes, that liberal starting points cannot admit that there are genuinely religious reasons for the formation of groups of believers in worship in the church. Any such theological reasons need to be, so the argument goes, translated into terms that are publicly reasonable. The church then comes to be seen as, at best, a voluntary association formed by the free consent of its members and little or no different, for legal purposes, from any such voluntary association.

This leads to a second issue, which I term loosely the metaphysical. For skeptics of the freedom of the church, churches are simply, and nothing more, aggregations of individual believers. The religious freedom issue with regard to churches is

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nothing less, and surely nothing more, than a claim about the right to religious freedom of the individuals who happen to belong to the church. This reflects a deep reservation about the status of groups more generally and about whether we can make any sense of groups as genuine right- and duty-bearing entities. Much remains to be said about why institutions rather than merely individuals or only individuals, are worthy of constitutional protection. But that question opens up to more difficult questions about whether it is meaningful to talk about groups with moral agency, intentions, identities, that are not reducible to the moral agency intentions and identities of the individuals that comprise the group.

Finally, the elephant in the room in many discussions of the freedom of the church is a moral question about human sexuality. I think this expresses something about the relation between certain institutional forms of religious belief and practice, most especially in Christianity, and the relation to sexual morality. I
suggest briefly that sexual morality, while undoubtedly an important context in which the contemporary discussion of the freedom of the church is conducted, also sometimes distorts that debate. What we might consider instead is how to relate most appropriately a set of important concerns about sex in various contexts and subject to government regulation—perhaps including family formation, reproduction, and so on—with the claims of religious believers and institutions to be free from interference by the state. One of the shortcomings in the current debate is it does not take seriously or often enough the particularity of religion, never encountered as religion or church in a generic sense anywhere. Religion, where it exists, exists in and through particularity. When we encounter such particular expressions it is on account of a group believing—credibly or not—that God is speaking to them in the world. While every account of the freedom of the church would emphasize the centrality of theological claims, the rights of groups, or debates about sexual morality, these seem to be the most salient ways in which the debate is being framed today in the United States.
Securing the Free Exercise of Conscience

W. Cole Durham, Jr.
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The free exercise of conscience is an urgent concern, not only at our time but at all times. It is important to focus on conscience, which lies at the core of religious freedom rights, and more generally at the core of human dignity. In part, securing freedom of conscience has an instrumental value as a framework for peace and for the flourishing of society, but even more, it has intrinsic value for the human soul.

Seventy percent of people on earth today live in a country with either high or very high restrictions on freedom of religion.¹ The numbers are actually increasing; this increase is in part because the countries with such restrictions include India, China, and a few other heavily populated countries. Nevertheless, it is sobering

to think that so many of our brothers and sisters are living under these kinds of restrictions, which cause many problems for people of faith.

To illustrate these government restrictions and their consequences, let me just give you some quick vignettes about things that are happening in the world.

There was an article in the *World Watch Monitor* indicating that Northern Iraq appears to no longer be safe for Christians.ii The once safe Kurdish North is increasingly dangerous; several bombings have caused panic in the community. Police and representatives of the government have told young Christians that they should not be in Iraq because it is a Muslim country. Police are not supposed to do things like that.

This is a report from Brunei: “Brunei Sultan announces Islamic laws that could include stoning and amputation”iii—that’s one of the meanings of imposing Sharia. It tends not to be done too strictly in most countries, but it’s a risk and a worry.

In Kazakhstan, four Russian citizens, not Kazaks, not Muslims necessarily, were detained in Kazakhstan’s northern Kostanay Region, located near the border with Russia, after a large number of religious books in Arabic were found in their car. They did not break any border-crossing regulations, but religious literature in Arabic was found in their car and therefore they were held up and stopped—clear censorship.

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The problem is, every day you can find literally hundreds of these kinds of incidents around the world and the question is, what do we do about it?

Freedom of religion or belief is foundational in a variety of contexts. It is historically foundational because so many of our other rights emerged as additional supports or expansions of legal protections originally designed to protect religious freedom. It is philosophically foundational because it protects the comprehensive belief systems and world views in which our other ideas are rooted and from which they derive their meanings. It is institutionally foundational because it protects and fosters the institutions that engender the vision, the motivation, and the moral support that translate religious and moral ideas into personal and communal practice. It is also empirically foundational in the sense that now we have extensive empirical evidence that religious liberty undergirds and fosters countless other social goods. It often overlaps with other rights, such as freedom of expression, freedom of association, rights to non-discrimination, rights to the protection of an intimate and private sphere, and so forth, but its sum is greater than its individual parts.

We’ve been so accustomed to life in a society blessed with religious freedom that we forget that religious freedom is really foundational for all our liberties and the way of life that they preserve. The famous German jurist and constitutional court judge Ernst-Wolfgang Böckenförde wisely remarked, “A free, liberal, and democratic state can only be built and sustainable on a foundation that it itself is unable to create.” Explaining this quotation, Judge Andra Sajo of the European Court of Human Rights stated, “Without supportive and dedicated public conviction, freedom cannot survive.”

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iv Ernst-Wolfgang, Böckenförde, Recht, Staat, Freiheit: Studien zu Rechtsphilosophie, Staats-theorie und Verfassungsgeschicht, (Frankfurt am Main: Suhrkamp, 1992), 112.

v Source quoted by author from unpublished source.
Cole Durham is internationally known for his contributions to protecting religious freedoms. The director of the International Center for Law and Religion Studies, W. Cole Durham, Jr. is Susa Young Gates University Professor of Law at J. Reuben Clark Law School. Professor Durham has received multiple honors, including appointment as co-chair of the OSCE Advisory Panel of Experts on Freedom of Religion or Belief, and service as vice president of the International Academy for Freedom of Religion and Belief.

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The First of All Freedoms is Liberty of Conscience

Michael Novak
Ave Maria University

The first liberty is liberty of conscience. The crux of the original American argument for religious liberty is found in three founding documents: The Virginia Declaration of Rights in 1776, the Virginia Bill for Establishing Religious Freedom enacted in 1786, and James Madison’s Memorial and Remonstrance Against Religious Assessments in 1785. The American argument is original and the evidence is in these three documents.

The Virginia Declaration of Rights defines religion as “the duty which we owe to our Creator and the manner of discharging it.” This definition was used

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throughout the founding period, codified in Webster’s dictionary; it was held to be self-evident. As James Madison later makes clear in his remonstrance, the right to fulfill one’s duty of gratitude and worship is not only self-evident, it is a self-evident right: If you know what a creature is and a creator is, it is self-evident. It is not only self-evident, but it is also inalienable, for two reasons.

First, it is inalienable because this duty “must be left to the conviction and conscience of every man. The opinions of man, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.” Thus, this duty inheres singly in each person and it cannot be shoved off on to any other; it is between you and God. That is why it is inalienable: It cannot be separated from you.

Secondly, it is inalienable because it is a duty written into human nature prior to the conventions and obligations of civil society, so this duty to God cannot be interfered with by any lesser authority. Another way of putting this is to say that God invited us into His friendship. In order to invite us into His friendship, he had to allow us to be free. If it is not free and it is coerced, it is not friendship; it is slavery.

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This country is the first to come into existence not by coercion or habit, but it was formed by an act of reflection and choice in which people were willing to sacrifice their lives for independence, and to build a government to proceed through its institutions by reflecting and choosing.

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All this begins in another important American document, the Federalist: “It has been frequently remarked that it seems to be reserved to the people of this country by their conduct and example, to decide the important question whether societies of men are really capable of establishing good government from reflection and choice.”

In other words, this country is the first to come into existence not by coercion or habit, but it was formed by an act of reflection and choice in which people were willing to sacrifice their lives for independence, and to build a government to proceed through its institutions by reflecting and choosing. A nation has to decide by reflection and choice its own destiny, its own fate.

Religious liberty or liberty of conscience, is the one liberty that roots itself most in the nature of God. It is our duty to recognize what He has done for us and the greatness of what He is. That duty cannot be abridged by anybody else—it is inalienable—it cannot be separated from us. All of our other liberties follow in that pattern.

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