

2021

## Propertied Rites

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### Recommended Citation

Kellen R. Funk, *Propertied Rites*, 36 CONST. COMMENT. 175 (2021).

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## PROPERTIED RITES

**BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION.** By Jack N. Rakove.<sup>1</sup> Oxford: Oxford University Press, 2020. Pp. 240. \$22.95 (Hardcover).

**CHURCH STATE CORPORATION: CONSTRUING RELIGION IN US LAW.** By Winnifred Fallers Sullivan.<sup>2</sup> Chicago: University of Chicago Press, 2020. Pp. 192. \$27.50 (Paperback).

*Kellen R. Funk*<sup>3</sup>

A pious fan once asked the humorist Mark Twain if he believed in infant baptism. (To preview themes to come: Even the most liberal individual likes to know her faith is shared in community.) “Believe in it?” he exclaimed in response, “Hell, I’ve seen it done!”<sup>4</sup>

Although it may be only mildly humorous (though I confess laughing every time I hear it), there is a profound turn in the playful substitution of physical facts for theological truths in the ambiguity of “belief.” At first, the inversion looks like a dodge. A difficult and highly fraught question of Christian theology, one over which communities have been torn and blood has been shed,<sup>5</sup> turns at once into a seemingly simple question of observation, like whether one can believe in the unicorn or the platypus. The

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4. The authenticity of the interview is argued in TOM QUIRK, *MARK TWAIN AND HUMAN NATURE* 1–2 (2013).

5. See, e.g., Brad S. Gregory, *Anabaptist Martyrdom: Imperatives, Experience, and Memorialization*, in *A COMPANION TO ANABAPTISM AND SPIRITUALISM, 1521–1700*, at 467 (John D. Roth & James M. Stayer eds., 2007).

implicit threat behind the question—that an errant answer will sunder fellowship in the here and now, and forfeit life in the world to come—is apparently disarmed, violence exchanged for laughter, swords beaten into ploughshares.

But sit a moment with the humorist's answer and it becomes far less clear that one is watching a simple dodge. In a way, Twain's joke anticipates the course of late-nineteenth century religious ethnography and neatly encapsulates in a line the upshot of William James's *The Will to Believe* and related writings: first observe the rite, in order to grasp the faith (or be grasped by it).<sup>6</sup> The threat of the question is thrown back on the inquirer. Start with the fact that millions of Christians have observed this rite over thousands of years, most with the steady confidence that they were performing the will of the one true God for their lives. If you *don't* believe in infant baptism, how do you account for this massive fact of human experience?<sup>7</sup> If one were to tackle the fraught theology of infant baptism, a good place to start is seeing it done.

Moreover, the joke works only because it involves a rite like baptism, a rite that can be experienced, even if not believed. In baptism, Christian belief engages the world of the material stuff. People gather to bear witness; the waters are moved.<sup>8</sup> And there the complications of experience arise. The water must come from somewhere. The persons celebrating the baptism either do or do not have the legal authorization to access, possess, or even own the material stuff that makes up the rite. Baptism, in short, is a propertied rite, one that ultimately depends on the property rights of the corporate body performing the ritual act. Experience turns out to be a much more complicated affair than mere belief.

Over the last decade, a certain skepticism has confronted the

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6. See William James, *The Will to Believe*, in 5 *THE NEW WORLD* 327 (Charles Carroll Everett et al. eds., Houghton, Mifflin & Co., 1896); WILLIAM JAMES, What Makes a Life Significant, in *ON SOME OF LIFE'S IDEALS* 47 (1900). On the experiential shape of James's study of American religious experience, see LINCOLN A. MULLEN, *THE CHANCE OF SALVATION: A HISTORY OF CONVERSION IN AMERICA* 270–85 (2017). On the course of late-nineteenth-century religious ethnography, see TERENCE KEEL, *DIVINE VARIATIONS: HOW CHRISTIAN THOUGHT BECAME RACIAL SCIENCE* (2018); HENRY YU, *THINKING ORIENTALS: MIGRATION, CONTACT, AND EXOTICISM IN MODERN AMERICA* (2001).

7. As a credobaptist myself, I think there are good answers, but I appreciate the force of the question.

8. For a potent description of this material engagement, see MARILYNNE ROBINSON, *GILEAD* 63 (2004).

field of law-and-religion, targeting in particular the First Amendment's guarantee that no law shall abridge the free expression of religion.<sup>9</sup> Books with titles like *The Impossibility of Religious Freedom* and especially *The Myth of American Religious Freedom* have challenged not just the practices of free exercise doctrine but the very notion that religious expression is protected or protectable on equal terms in a liberal republic.<sup>10</sup> A cottage industry of what we might call Neo-Madisonian argument has arisen in response, some of it more historically inflected than the rest, but all contending that the basic framework of religious rights in the liberal tradition can and does succeed at protecting the fundamental autonomy of individuals while keeping the peace between communities.<sup>11</sup> While most of this conversation has been carried on by lawyers for lawyers, two recent works offer us the historians' approach to these questions. While coming to radically different conclusions, each takes the question of whether one can believe in American religious freedom and shows the ways each author has seen it done.

This Essay reviews Jack Rakove's *Beyond Belief, Beyond Conscience* and Winnifred Fallers Sullivan's *Church State*

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9. Of course, by its terms the First Amendment binds only Congress, but its incorporation against all government institutions state and federal is now well established. For a leading study of the Religion Clauses, see KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008). On the history of the incorporation of the Amendment, see SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010).

10. DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM (2010); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2007). The theological tenets of legal secularism have long been recognized. For examples from widely differing perspectives, see TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003); JOSEPH BOTTUM, AN ANXIOUS AGE: THE POST-PROTESTANT ETHIC AND THE SPIRIT OF AMERICA (2014); LARRY SIEDENTOP, INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM (2014); John Finnis, *On the Practical Meaning of Secularism*, 73 NOTRE DAME L. REV. 491 (1998).

11. See, e.g., Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331 (2020); JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2010); NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2006). I do not mean to indicate that all of these titles are responses to the skeptics of legal secularism or religious neutrality, but despite their many different prescriptions, each in its way contends for the workability of the basic structure of federal Religion Clause jurisprudence.

*Corporation* with an eye towards the complex management of religious property in U.S. constitutional doctrine. Part I summarizes Rakove's book and highlights its value in the context of recent scholarship on early American legislative theory. Part II critiques Rakove's turn from description towards advocacy of James Madison's liberal protestant political theology. Part III summarizes Sullivan's book as a particularly potent rebuttal to Rakove's. Part IV takes up Sullivan's method to consider the most recent crisis of religious property before the Supreme Court, that of government lockdowns in the Covid-19 pandemic. Part V concludes.

#### I. CONSCIENCE IS THE MOST SACRED OF ALL PROPERTY: RAKOVE'S MADISONIAN FAITH

Jack N. Rakove's *Beyond Belief, Beyond Conscience* opens by announcing the twin postulates that made Madison and Jefferson "radical" legislators (the latter sometimes receives equal casting, sometimes plays a bit part). First, "[f]reedom of conscience and the public expression of religious beliefs were natural rights that every individual owned, just as they owned their property" (p. 2). Second, government was limited to the powers delegated by the sovereign people, and therefore "there were areas of human activity that its lawmaking power could not reach" (p. 2). In the "view from Montpelier and Monticello," religious freedom "was the most liberal right of all," as "[r]eligion was a wholly private matter, a duty to be discharged by autonomous individuals and the voluntary religious associations (call them churches, synagogues, congregations, or meetings) where worshippers gathered" (pp. 2–3). Rakove announces that the purpose of the book "will be less concerned with critiquing judicial notions of religious freedom" than with exploring the "conditions and tensions embodied in our historical experience" surrounding Madison's ideas (pp. 5–6).

To help us appreciate the radicalism of these ideas, particularly as compared to religious toleration in the Old World, Rakove's first two chapters tour through European and early American styles of toleration. The central point, Rakove tells us, is that the traditional "practice of tolerance meant having to shoulder an offensive burden" (pp. 13–14). Tolerance did not mean that one could accept a disagreeable idea but precisely that one *could not*, but was going to endure its presence in civil society

anyway. To be tolerated was to be simultaneously marked as odious.<sup>12</sup> The first chapter offers a brief chronicle of Europe's stumbling attempts towards and reversals away from modes of tolerance. In the main, Rakove summarizes, "[r]eligion was too important a matter, too much an element of state policy, to be treated as a personal right that ordinary individuals simply or naturally possessed" (p. 22).

In excavating this history, Rakove finds two early stirrings towards American-style religious freedom. The first was the elevation of individual conscience among radical sects of Baptists, Anabaptists, and Quakers. Despite harsh repression and persecution of these sects, Rakove concludes that "[o]nce released, the genie of conscience and the desire to lead a religious life consistent with one's moral commitments could not be restrained" (p. 29). The second source was the writings of John Locke, which Rakove is careful to note were more exemplary of thought at the time rather than the one original source of it. The key move in Locke's *Letter Concerning Toleration* ("the one with the greatest constitutional significance" (p. 37)) was the separation of religious and temporal spheres, the severance of "the Business of Civil Government from that of Religion."<sup>13</sup>

In Locke's schema, religion concerned private beliefs on which turned one's destiny in the world to come. To civil government belonged everything else in the here and now. On the one side: individual belief; on the other: the literal commonwealth of life, liberty, and especially property. Rakove notes in passing that Locke's division had "a fundamentally Christian, even Protestant character" (p. 37). One might say *especially* Protestant (if one could not settle on a more precisely sectarian label). We will return to the point later, but it suffices to note for now that the separate spheres of private belief with eternal consequences and temporal conduct in a desacralized world of property and regulation is ineluctably a theological (and contestable) proposition.

In the American colonies, the tense dynamics of European toleration played out along similar lines, Rakove suggests, with

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12. See ALEXANDRA WALSHAM, *CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500–1700* (2006); Andrew R. Murphy, *Tolerance, Toleration, and the Liberal Tradition*, 29 *POLITY* 593 (1997).

13. JOHN LOCKE, *A Letter Concerning Toleration*, in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 7, 12–15 (Mark Goldie ed., 2010).

the notable difference that sectarian Protestants had a much freer rein without the constant engagement with and contestation over Catholic iconography that distracted their overseas counterparts (pp. 44–45). The final set piece to prepare the stage for Madison and Jefferson was, in Rakove’s accounting, the Great Awakening. The proliferation of dissenting sects through conversion put the established churches on the defensive, ironically moving Anglicans by the end to demand toleration for “the detested prerogatives of an established church” (p. 64). Furthermore, “[b]ecause so many of these preachers [during the Awakening] taught a Gospel of conversion nurtured by Baptist or Methodist convictions, they made every individual’s claims for a sovereignty of conscience a paramount concern” (p. 65). Thus, both of the radical innovations that would flow from Madison’s pen were prefigured and grounded in an increasingly liberalized Protestant theology of conversion. “Liberty of conscience mattered to Americans,” Rakove concludes, “because that was something they were routinely urged to exercise, and to treat as a right they could never alienate” (p. 65). Believe in the sovereign individual conscience? By the 1780s, Rakove argues, Americans had already seen it done.

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The heart of the book is its central chapter, on Madison and Jefferson’s “Great Project” to disestablish the Anglican church and to constitutionalize religious liberty. Unsurprisingly, the chapter is the book’s strongest, brimming with insights and reading like a guided tour of the times from Mr. Madison himself. Rakove deftly leads his readers through the often confusing array of debates and legislation in Revolution-era Virginia, illustrating the subtle differences between Jefferson and Madison and showing how the latter’s thought could evolve and expand as the political occasion allowed. The central achievement of Jefferson and Madison, the chapter contends, was, first, to wed the Protestant valorization of individual conscience with the revolutionary impulse to sunder state support of religion and, second, to elevate this union to the level of constitutional principle.

Rakove begins in 1774, when Madison denounced the imprisonment of Baptists for illegal preaching and Jefferson received their petition for relief in the legislature. That episode

formed the backdrop to the 1776 Virginia Declaration of Rights, whose religion article Madison principally drafted and revised. Where Madison's first draft "shifted the discussion of religious freedom from a toleration yielded by the community to the idea of an inherent right possessed by all" (pp. 72–73) and sought to dismantle the legal establishment of the Church of England, subsequent drafts had to abandon the latter aim (for the moment). Also abandoned were limiting clauses proposed by Madison ("unless the preservation of equal liberty and the existence of the State are manifestly endangered") and Jefferson (permitting the prosecution of "seditious behavior.") (p. 73). Ultimately, the Declaration's final article concluded that "religion, or the duty which we owe to our Creator . . . can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion . . . ." <sup>14</sup>

In the 1786 Statute for Religious Freedom, as Rakove narrates, Jefferson finally accomplished the disestablishment Madison had sought twelve years before. By relieving people from state-compelled support of "any religious worship, place, or ministry whatsoever," the Statute effectively "disestablished" religion, as Rakove puts it, and eliminated "heretical or merely heterodox ideas" as legally cognizable concepts (pp. 77, 79).

But as Rakove points out, what one legislature could disestablish, the next could re-establish. Marking the problems for religious liberty posed by the nature of early republican legislation is one of this volume's chief contributions, one likely to be missed by law-and-religion scholars mining the record for quotations to deploy in court briefs. <sup>15</sup> "Whole chapters could be written about" the Statute in the context of early American legislation, Rakove notes (p. 78). While not developed in this volume, some of those possible chapters are hinted at throughout. For instance, Rakove observes that most legislation in the eighteenth century was not "conceived [of] as broad statements of public policy" but rather stemmed from ad hoc answers to "petitions and requests coming from individuals and

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14. VA. DECLARATION OF RIGHTS of 1776, art. XVI.

15. For an admirable exception, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020) (exploring practices of equitable statutory interpretation in the Early Republic that may have substituted for early practices of religious exemptions).

communities” (p. 79). Legal historians have recently turned their attention in earnest to the quasi-judicial character of early American legislatures and the significant role of petitions in shaping policy and giving voice to some legally and socially ostracized minorities.<sup>16</sup> Rakove’s chapter tantalizingly invites us to think further about religious freedom within the context of this back-and-forth dialogue between legislators and their legally disfavored petitioners.

The quotidian nature of legislation raised further problems. Although some political theorists were grasping their way towards the notion that certain rights were fundamental, none had yet articulated a theory that certain statutes were more fundamental than others. For Jefferson, a “constitution” was defined not by its inherent superiority to ordinary legislation, but rather by the cumbersome or extraordinary procedures required to amend it. Given the endless revisability of statutory law, Rakove argues, Jefferson and Madison could only hope that their declarations and statutes had an educative effect: or, to put it another way, an altar call. Rather than an unalterable declaration of pre-existing rights, the Virginians’ legislation was a call to believe.<sup>17</sup>

That such a call could be declined was the threat against which Madison deployed his famous *Memorial and Remonstrance*. Having eliminated state support for the Anglican Church specifically, the Virginia legislature considered a proposal to support religious bodies generally with an assessment that could be distributed to churches without preferential treatment by the state. Rakove suggests that Madison’s rejoinder has been misread as an early assertion of the theory that religious expression deserves exemption from certain generally applicable laws.<sup>18</sup> Although Madison wrote that religious “duty is precedent,

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16. See Kristin A. Collins, “Petitions Without Number”: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements, 31 L. & HIST. REV. 1 (2013); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018); Jane Caroline Manners, Congress and the Problem of Legislative Discretion, 1790–1870 (Nov. 17, 2018) (PhD dissertation, Princeton University), <https://dx.doi.org/10.2139/ssrn.3344925>.

17. See also Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) (arguing that Founding Era elites held to a view of natural rights that were expansive in scope but weak in determinate legal effects); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020) (showing that early American statesmen applied stricter textual tests to “private” statutes and equitable, purposive tests to “public” statutes).

18. Rakove takes particular aim at Michael W. McConnell, *The Origins and*

both in order of time and in degree of obligation, to the claims of Civil Society,”<sup>19</sup> Rakove contends that Madison was too much a disciple of Locke and his philosophy of education to believe that children’s minds could form religious opinions before those same children were subject to all manner of civic duties and obligations.<sup>20</sup> Instead, Rakove argues, Madison’s unfortunately phrased rebuttal was meant not to establish the superiority of religion over secular law, but rather the anterior quality of religious conviction that formed in the mind before citizens acted in the public square (pp. 82–85). As thought precedes conduct, so duties of thought can precede duties of conduct. But for Rakove, as for Madison, duties of thought that arise from religion need not—and in republican society, cannot—control duties of conduct established by secular law.

The *Memorial* left open two related questions Rakove posits Madison was unable to answer until the further development of his thought year later, when he crafted his contributions to the *Federalist Papers*. Given that the legislature, in Madisonian thought, was the central institution for protecting the people’s rights, how could a majority be checked in its attempt to oppress a religious minority? And how could any check endure if one legislature could succeed another and overturn its prior acts?

Madison’s first solution, developed by 1787, was his factionalism thesis, best known from Federalist No. 51. By recognizing freedom of conscience, the state would encourage diverse consciences to proliferate in ways that would naturally stifle the formation of an oppressive majority.<sup>21</sup> The second solution Rakove locates in Madison’s 1792 Essay on Property. Where years earlier Madison had surmised that the free exercise of religion “is held by the same tenure with all our other rights,” Madison now declared that man “has a property of peculiar value in his religious opinions.” In an intriguing passage, Madison

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*Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), an article that becomes a part of Rakove’s story in Chapter 5 (see below).

19. JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973) (1785).

20. On Lockean philosophy and contemporary debates about the spiritual and civic responsibilities of children, see HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005).

21. Some have read into Madison’s multiplicity-of-sects idea a general antipathy to religion itself and a hope that pluralism would in essence cancel itself out. See Thomas Lindsay, *James Madison on Religion and Politics: Rhetoric and Reality*, 85 AM. POL. SCI. REV. 1321 (1991).

turned the question of property rights on its head: “In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.” And among those rights, “[c]onscience is the most sacred of all property.”<sup>22</sup>

Rakove insists that we do not read too much into the Essay. By emphasizing the propertied nature of the rights of conscience, Madison was not coming to trust in courts as the protectors of rights. He still “doubted that courts would have the temerity to enforce these protections against the political will of a dominant legislature and the impassioned popular majority it represented” (p. 94). Nor was it apparent that conscience-as-property solved the revisability problem posed by the legislative process. It was by no means clear whether property had a pre-political definition or could be defined and redefined by legislation, and the same legislature that imposed restraints on alienation today could revise those restraints tomorrow.<sup>23</sup>

In the end, Rakove tells us, Madison came to understand his various declarations and bills of rights as so many articles of faith. Rakove doesn’t use that particular term, but he insists that Madison’s solution to the revisability problem was to repeatedly, forcefully, and simply declare the freedom of conscience, trusting that over time—as Madison himself put it—“fundamental maxims of free Government, [will] become incorporated with the national sentiment.”<sup>24</sup> Like a creed, the proclamation of rights would “inculcat[e] norms and attitudes that would mitigate the evils of religious prejudice” (p. 94). In this instance, faith would have to come before sight.

Rakove concludes the central chapter by summing up the differences between Madison and Jefferson, apparently so that he

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22. James Madison, *Memorial and Remonstrance against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 295, 304 (Robert A. Rutland et al. eds., 1973) (1785); James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 266–67 (Robert A. Rutland et al. eds., 1983).

23. On the undefined nature of property in the Constitution of 1789, including in paradigmatic cases of “takings,” see Paul J. Larkin Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1 (2016); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

24. Letter from James Madison to Thomas Jefferson, (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland & Charles F. Hobson eds., 1977).

can shed Jefferson from the later narrative.<sup>25</sup> Jefferson spent four pivotal years “in Paris observing the abuse of power by an absolutist monarchy, while Madison was sorting out the vices of republican government [i.e., venal and amateur legislators] at home” (p. 93). Jefferson hoped that free and honest religious debate would convert all Americans to a shared religion of liberal Protestant Unitarianism. The record “only evinces Madison’s conviction that religious matters should remain deeply personal and private” (p. 71). Jefferson was comfortable with laws punishing sabbath-breaking, while Madison was not. But both were committed Lockean and, as Rakove insists numerous times, both were “fundamentally Protestant” in their orientation towards the sovereignty of the conscience and the severability of belief from conduct (pp. 37, 78).<sup>26</sup>

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In the fourth and fifth chapters, Rakove attempts to synthesize recent scholarship on nineteenth- and twentieth-century collisions of church and state and the resulting case law. The driving concern is to show how subsequent events showcased the genius of Madison’s approach by way of both positive and negative examples. Invoking Nathan O. Hatch’s well-known *Democratization of American Christianity*,<sup>27</sup> Rakove suggests that the entrepreneurial evangelicals of the so-called Second Great Awakening showed that Madison was spot on in his expectations that disestablishment and the sovereignty of the individual conscience would lead not to the demise but to the flowering of religious liberty and enthusiasm. What Madison did not anticipate, however, was the coalescence of what David Sehat calls the “moral establishment.”<sup>28</sup> While evangelical associations splintered endlessly over doctrine,<sup>29</sup> it turned out they could make

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25. Jefferson reappears at points of contestation over the religious education of children, including Rakove’s narration of *Board of Education v. Minor* (pp. 123–24), and the twentieth-century cases concerning compelled patriotism, Bible-reading, and prayer (pp. 158–61).

26. Rakove’s argument accords with a burgeoning literature that traces the genealogy of secularism to Protestant theology. See *supra* note 10.

27. NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989).

28. SEHAT, *supra* note 10, at 285.

29. The *Dictionary of Christianity in America* reports that, by the twentieth century, over 20,000 unique Protestant denominations had formed in the United States.

common cause politically to pass a host of religiously inflected regulations—on Sabbatarianism, blasphemy, and the prohibition of lotteries, liquor, and prostitution.<sup>30</sup>

Rakove isn't entirely clear on how the formation of moral establishments should affect our evaluation of Madison's program. Just as Madison's thesis on the multiplicity of sects failed to anticipate the rise and integration of political parties in the United States,<sup>31</sup> his entirely correct prediction that religious dissenters would proliferate did *not* lead to a natural condition that made religious coercion impossible in a liberal society. Rakove is dismissive of Madison's oversight, arguing that Madison's liberalism remains a fundamentally sound guide to American religious freedom. So long as we "make the free exercise of religion as private an activity as possible, and remember that the great objective of protecting religion was to secure the minority against the majority," Rakove concludes, Madison's thought provides us other tools for defanging a religious establishment (p. 128).

The two late nineteenth-century cases that prove this, according to Rakove, are *Board of Education v. Minor* and *Reynolds v. United States*, a surprising choice of just-so stories to illustrate the genius of American religious freedom. *Minor* was litigated in Cincinnati, heartland of the "Bible Wars" in which Catholic school children were harassed and sometimes beaten when they did not participate in Protestant prayer and Bible reading.<sup>32</sup> By the late 1860s, the exodus of Catholics to parochial schools had become so extensive the Cincinnati board of education prohibited Bible reading entirely, hoping to attract Catholics back into the public school system. The Ohio Supreme Court narrowly affirmed the school board's decision (holding, in a passage not remarked by Rakove, that Bible reading in schools was for the legislature and not the courts to regulate).

*Reynolds* involved the federal antipolygamy prosecution of a

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DICTIONARY OF CHRISTIANITY IN AMERICA (Robert D. Linder, Daniel G. Reid, Bruce L. Shelley & Harry S. Stout eds., 1991).

30. See, e.g., JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* (2014).

31. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2007).

32. *Bd. of Educ. v. Minor*, 23 Ohio St. 211 (1872). See STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION* (2012).

Latter-day Saint living in the Utah Territory.<sup>33</sup> In its first application of the Free Exercise Clause, the U.S. Supreme Court ruled that the Clause protected only belief and not conduct, thereby affirming Reynold's conviction and sentence for acting on his belief in the divine sanction of plural marriage. Commentators have sometimes seen both *Minor* and *Reynolds* as low points in the history of American religious freedom, the moments at which the mask slipped and the illiberalism of the de facto liberal Protestant establishment shone through.<sup>34</sup> Rakove admits that neither resulted in a happy consensus, but on the whole he celebrates these cases for "[k]eeping faith" with Madison's creed (pp. 128–29).

Rakove continues to keep the score on those following the faith of Madison in his survey of twentieth-century cases in the book's final chapter. First up is the Court's well-known turnaround on the compulsion of Jehovah's Witnesses to salute the American flag in school. The Court sustained the compulsion in *Gobitis* only to overrule itself three years later in *Barnette*.<sup>35</sup> Rakove observes that "*Gobitis* remains an anomalously strained decision that one struggles to defend," just after offering a pretty sturdy defense along Madisonian lines: "No one was asking the Gobitas<sup>36</sup> children to abandon their beliefs; all the school board wanted was to have them engage in an activity supporting the patriotic ethos on which the protection of American liberties ultimately depended" (p. 148). Indeed, one could hardly object that compelled patriotic *conduct* without compelled *belief* runs

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33. *Reynolds v. United States*, 98 U.S. 145 (1878). See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

34. See, e.g., Danielle N. Boaz, *Practices "Odious Among the Northern and Western Nations of Europe": Whiteness and Religious Freedom in the United States*, in *RELATING WORLDS OF RACISM: DEHUMANISATION, BELONGING, AND THE NORMATIVITY OF EUROPEAN WHITENESS* 39 (Philomena Essed et al. eds., 2019) (tracing twentieth-century echoes of *Reynolds* in cases preserving European norms and casting doubt on claimants' beliefs); TISA WENGER, *WE HAVE A RELIGION: THE 1920S PUEBLO INDIAN DANCE CONTROVERSY AND AMERICAN RELIGIOUS FREEDOM* 153–55 (2009) (chronicling the Bureau of Indian Affairs' reliance on *Reynolds* to suppress Indian rites and uphold a de facto Protestant establishment); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 360–75 (2002) (arguing that Protestant nativism underlay the secular separation of church and state in restrictions of Bible reading in schools).

35. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

36. The official caption in the Supreme Court reporter misspells the name. See SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 9 n.17 (2000).

afoul of the Madisonian creed. Nevertheless, Rakove insists that Madison's partiality for persecuted minorities against majority factions shows that *Barnette* is the properly orthodox ruling (pp. 147–49).

Next up is another pair of cases involving the Jehovah's Witnesses, *Cantwell* and *Chaplinsky*. In the one, the Supreme Court overturned a conviction for breaching the peace by proselytizing; in the other, the Court sustained the conviction.<sup>37</sup> The fact that the latter case is often regarded a "free speech" rather than a "free exercise" case Rakove regards as a positive development. It trends in the direction of "privacy of religious belief and behavior, minimizing the need for the state to deal with religion at all" (p. 153). The subsuming of religious speech into the general rights of free speech (and its exceptions, like *Chaplinsky's* "fighting words") lowers the temperature, turning "[a]dherents of ardent religious beliefs" into ordinary purveyors of objectionable speech (pp. 151–53).

The chapter concludes with a brief account of the "RFRA cycle," as Rakove narrates the landmark religious exemption cases that led to *Smith*, *Smith's* repudiation in the Religious Freedom Restoration Act, and the twists and turns in the Supreme Court's application of that statute.<sup>38</sup> Rakove's colleague and occasional conversation partner, Michael McConnell, is a major character steering the courts towards the recognition of religious exemptions as a historical imperative, a position Rakove forcefully argues lacks a basis in Madisonian thought or the framing of early American religious freedom statutes.<sup>39</sup> Rakove offers his narrative not as a "definitive history" (p. 174) of the RFRA cycle, but mainly to argue that religious exemptions from generally applicable laws would violate the Madisonian imperative that belief must be regarded separately from conduct. After wrestling with the *Hobby Lobby* decision for some pages, Rakove concludes that the owners of Hobby Lobby should have to keep their theologies of human life a matter of private opinion, and comply with the mandates of the Affordable Care Act (pp.

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37. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

38. *Emp. Div. v. Smith*, 494 U.S. 872 (1990); Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

39. See McConnell, *supra* note 18; MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* (2d ed. 2006).

175–76, 180–81).<sup>40</sup>

The book closes by leaving us with a rule of thumb in applying Madison’s thought, which Rakove terms “Madison’s Razor.” Recognizing some tensions between equal rights of conscience and unequal duties to obey generally applicable laws, as well as the failure of Madison’s multiplicity-of-sects thesis to neutralize majoritarian moral establishments, Rakove advises that we recognize two principles as the core of Madison’s thought and the essence of our liberal creed: “First, the more we treat religion as a matter of private belief . . . the better off we will be,” and “[s]econd, the more we allow the spheres of church and state to overlap, . . . the greater danger we run” (pp. 184–185). The sovereignty of the individual conscience and the principle of disestablishment together form “a happy formula for civic peace” (p. 185).

## II. MADISON’S RAZOR AND THE SWORD OF DAMOCLES: THE LIBERAL BARGAIN OF AN UNPROPERTIED FAITH

For a slender volume covering well-trod ground, *Beyond Belief, Beyond Conscience* offers several clear and original insights. It situates Madison’s (and to a lesser extent, Jefferson’s) thought within the context of an evolving American Protestantism without getting caught up in the intractable debate of whether America was “founded as a Christian nation.”<sup>41</sup> It provides confident guidance to the developing thought of one of the great complex thinkers of the Founding Era. The debate over originalist understandings of religious exemptions under the Free Exercise Clause will have to contend with Rakove’s deeply contextual arguments about the nature of eighteenth-century legislation, which so often consisted of ad hoc provisional and endlessly revisable statements of unclear legal force.

Rakove’s analysis is particularly rich as he sets the context to

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40. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Rakove’s conclusion on *Hobby Lobby* is in some tension with his reading of *Gobitis* and *Barnette*. On the one hand, the imperatives of the Affordable Care Act regulate conduct and not belief; but on the other, a religious minority (depending on how one interprets the demographics) was, in all three cases, complaining about the repression by a majority faction.

41. For a valiant attempt to retire the debate on clear terms and an assessment of the equivocal evidence, see JOHN FEA, *WAS AMERICA FOUNDED AS CHRISTIAN NATION? A HISTORICAL INTRODUCTION* (2011).

Madison's famous declaration that "[c]onscience is the most sacred of all property" (p. 90). Rakove shows that for Madison, the transubstantiation of conscience, and indeed religion, into property provided an initial answer to the problem of revisable legislation, offering believers a kind of "tenure" they could assert in the familiar legal language by which all tenures were defended. Moreover, Rakove shows the thoroughly Lockean understanding of Madison's religion-as-tenure, one which conformed neatly to Locke's separation of the world into spiritual and civil, individual and public, sacred and secular spaces. For Madison, the conscience was the *only* religious property there was—inalienable, but also immaterial. The rest of the world of property belonged to the civil authorities.

Rakove tells us in a footnote he regularly wears the conscience-as-property slogan on a t-shirt (p. 197 n.29), but this particular habit of liberalism (pun intended) is where problems arise, as Rakove shifts the narrative from description of Madison's thought to a call to faith (intended literally). The separation of religion from civic space and regulation is, of course, not only a contestable proposition but a squarely theological one. While Rakove appreciates that certain liberal strands of Protestantism contributed to Madison's thought, he appears not to appreciate the implication of this genealogy: Madisonian-style religious freedom, taken seriously, consists only in the freedom to live like a liberal Protestant.

The identification of American secularism with Protestant genealogies is sometimes asserted without theological precision, so it is worth pausing to consider the swirl of theologies that make possible—that make believable—the twin prongs of what Rakove calls "Madison's Razor." Thousands of denominations of all kinds of organization and theological commitments come under the banner of Protestantism, and very few sects would affirm all points of the Madisonian faith.<sup>42</sup> Many Protestants, especially Baptists, denied the very existence of sacraments and indeed sought to strip away from worship all sensual elements—pejoratively, the "smells and bells" of Catholicism—but

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42. For an overview of the Christian topography of the early United States, see E. BROOKS HOLIFIELD, *THEOLOGY IN AMERICA: CHRISTIAN THOUGHT FROM THE AGE OF THE PURITANS TO THE CIVIL WAR* (2003); MARK A. NOLL, *AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* (2002); SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1972).

Lutherans, Anglicans, and Presbyterians retained sacramental liturgies.<sup>43</sup> The Madisonian faith prefers the Baptists.

While some millenarians thought they could hasten the age-to-come by explosive revolutions in the here and now,<sup>44</sup> and the Mormons developed a robust theology of a re-founded Kingdom of Heaven on earth,<sup>45</sup> others increasingly put their hopes in a disembodied spiritualized heaven that remained impassive to temporal politics, singing hymns of being “called up yonder.”<sup>46</sup> The Madisonian faith prefers the hymnists.

Firebrand revivalists like Charles Finney developed sophisticated theologies of complicity with sin that showed how the individual abolitionist’s soul could nevertheless be tainted with the sin of a nation.<sup>47</sup> Moral theologians founded the right of revolution on the violation of a Christian oath.<sup>48</sup> The Calvinists committed regicide long before it became popular among French liberals.<sup>49</sup> The Madisonian faith prefers, well, none of these

43. A generation of scholarship bluntly divided Jacksonian Christianity into broadly evangelical camps of Whigs and “liturgical” Democrats. More recent scholarship has attended to religious demography and ethnocultural studies with more precision. See RICHARD J. CARWARDINE, *EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA* (1993); D.G. Hart, *Mainstream Protestantism, “Conservative” Religion, and Civil Society*, 13 J. POL’Y. HIST. 19 (2009).

44. See PAUL E. JOHNSON & SEAN WILENTZ, *THE KINGDOM OF MATTHIAS: A STORY OF SEX AND SALVATION IN 19TH-CENTURY AMERICA* (1995).

45. See CLAUDIA LAUPER BUSHMAN & RICHARD LYMAN BUSHMAN, *BUILDING THE KINGDOM: A HISTORY OF MORMONS IN AMERICA* (2001); BENJAMIN E. PARK, *KINGDOM OF NAUVOO: THE RISE AND FALL OF A RELIGIOUS EMPIRE ON THE AMERICAN FRONTIER* (2020). For an intriguing counter-reading of early Mormonism as theological critique of American imperialism, see PETER COVIELLO, *MAKE YOURSELVES GODS: MORMONS AND THE UNFINISHED BUSINESS OF AMERICAN SECULARISM* (2019).

46. See MATTHEW AVERY SUTTON, *AMERICAN APOCALYPSE: A HISTORY OF MODERN EVANGELICALISM* (2017); Caleb J.D. Maskell, *Secularism, Synthesis, and Antebellum Evangelical Self-Understanding*, 84 CHURCH HIST. 616 (2015). For an alternative reading, one that credits evangelicals more than the Transcendentalists for Americans’ turn to nature for a theology of immanence, see BRETT MALCOLM GRAINGER, *CHURCH IN THE WILD: EVANGELICALS IN ANTEBELLUM AMERICA* (2019).

47. See, e.g., MICHAEL P. YOUNG, *BEARING WITNESS AGAINST SIN: THE EVANGELICAL BIRTH OF THE AMERICAN SOCIAL MOVEMENT* (2006); W. CALEB MCDANIEL, *THE PROBLEM OF DEMOCRACY IN THE AGE OF SLAVERY: GARRISONIAN ABOLITIONISTS AND TRANSATLANTIC REFORM* 159 (2013).

48. See WILLIAM WHEWELL, *2 THE ELEMENTS OF MORALITY: INCLUDING POLITY* 87–88 (New York, Harper & Bros. 1845). On the early political theology of oathtaking in America, see Jud Campbell, *Testimonial Exclusions and Religious Freedom in Early America*, 37 L. & HIST. REV. 431 (2019).

49. See DAVID R. COMO, *RADICAL PARLIAMENTARIANS AND THE ENGLISH CIVIL WAR* (2018); BLAIR WORDEN, *GOD’S INSTRUMENTS: POLITICAL CONDUCT IN THE ENGLAND OF OLIVER CROMWELL* (2012); NICHOLAS TYACKE, *ANTI-CALVINISTS: THE RISE OF ENGLISH ARMINIANISM C.1590–1640* (1990).

Calvinists certainly. One could go on,<sup>50</sup> but hopefully it is clear enough how highly specific, and specifically constrained, are the allowable theologies of the Madisonian state.<sup>51</sup>

Perhaps for these reasons, the Virginian's political theology seems not to have been particularly influential in practice across the American states, despite Rakove's assessment that Madison gifted them the "founding principles of American constitutionalism" and the best approach to free religious expression (p. 100). Virginia may have persisted in treating the individual conscience as the only kind of religious property in existence, but most other states took a different tack.<sup>52</sup> The legal structure that did far more to govern religious expression was a contribution of New York's, in its statute granting general incorporation rights to all religious societies.<sup>53</sup> Rakove addresses the statute and church property disputes that arose under it in his chapter on entrepreneurial democratization of American religion, but doing so tends to give the impression that general incorporation was an outgrowth of Madisonian liberalism and a textbook example of how Madison's approach encouraged the proliferation of contending sects (pp. 111–117). Instead, New York recognized the power of religious entities to hold and dispose of property for religious purposes in 1784, predating both Virginia's Statute for Religious Freedom and Madison's *Memorial and Remonstrance*. And while Virginia, alone among the states, denied corporate formation to religious bodies, almost every other state outside New England followed New York to the letter, including the newly formed states that made up the heartland of the Revival.<sup>54</sup>

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50. While the history of political theology in the United States remains understudied, the subject is receiving renewed attention, particularly from Reformation scholars. See DAVID P. HENRECKSON, *THE IMMORTAL COMMONWEALTH: COVENANT, COMMUNITY, AND POLITICAL RESISTANCE IN EARLY REFORMED THOUGHT* (2019); DAVID CHAN SMITH, *SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616* (2014); DIARMAID MACCULLOCH, *THOMAS CROMWELL: A REVOLUTIONARY LIFE* (2018).

51. See J. JUDD OWEN, *MAKING RELIGION SAFE FOR DEMOCRACY: TRANSFORMATION FROM HOBBS TO TOCQUEVILLE* (2015).

52. See THOMAS E. BUCKLEY, *ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON'S STATUTE IN VIRGINIA* (2013).

53. See 1784 N.Y. LAWS 613–18; 1813 N.Y. LAWS 212.

54. See 1785 N.J. LAWS 255–58; Del. LAWS 10–14 (1786–1787); 1790 Pa. LAWS 40–43; 1796 N.C. Sess. LAWS 93; 1802 Md. LAWS Ch. CXI; 1805 Ga. LAWS 15–16; 1811 Mass. ACTS 387–89; 1813 Ky. ACTS 211–12; 1817 Tenn. Pub. ACTS 82; 1816 Ohio LAWS 72–74; 1819 Ala. LAWS 100–01; ME. STAT. tit. 135 (1821); 1824 Ind. ACTS 265–67; 1834 ILL. LAWS 147–49;

The law of religious corporations in the early United States was hardly a paradigm of “neutral” disentanglement of church and state. State chancery courts all over the union took up theological disputes and attempted to resolve them on their merits.<sup>55</sup> And as Sally Gordon and others have shown, the incorporation statutes functionally forced a kind of congregationalist, even Baptist, polity on all religious bodies by conferring corporate status only on local congregations of limited property holdings and governed by a plurality of trustees.<sup>56</sup> The Catholic church officially came to call this the “American heresy.”<sup>57</sup> But as I have argued elsewhere, despite these aspects of manifest illiberalism, the religious corporation laws did open up space for theologies that did not have the sanction of the liberal state to nevertheless arrange and re-order the real world of material property and to force recognition and respect for these arrangements from the civil courts.<sup>58</sup>

Nevertheless, the history of American religious corporations law also vividly illustrates the limits of the state’s recognition of and respect for religious difference. As Nathan Oman has recently written in painstaking work chronicling the corporate formation

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ARK. CODE § 125 (1837); 1838 MISS. LAWS 57–58; MICH. COMP. LAWS §10.1 (1838); 1838–1839 Wis. Sess. Laws 136. Rhode Island and Louisiana appear not to have adopted general incorporation legislation but granted charters to all religious societies which sought them. See 1 DAVID BENEDICT, A GENERAL HISTORY OF THE BAPTIST DENOMINATION IN AMERICA, AND OTHER PARTS OF THE WORLD 449–50 (Boston, Lincoln & Edmands 1813); 1 A GENERAL DIGEST OF THE ACTS OF THE LEGISLATURE OF LOUISIANA 149 (L. Moreau Lislet ed., New Orleans, Benjamin Levy 1828). In 1820, Missouri became the only state to follow Virginia’s model by providing in its constitution that “no religious corporation can ever be established in this state.” MO. CONST. of 1820, art. XIII, § 5.

55. For a sampling of such cases in New York, see *Kniskern v. Lutheran Churches*, 1 Sand. Ch. 439 (N.Y. Ch. 1844); *Lawyer v. Clipperly*, 7 Paige Ch. 281 (N.Y. Ch. 1838); *First Baptist Church in Hartford v. Witherell*, 3 Paige Ch. 296 (N.Y. Ch. 1832). For other representative cases from New England, the Mid-Atlantic, and the South, see A FULL REPORT OF THE CASE OF STACY DECOW, AND JOSEPH HENDRICKSON, VS. THOMAS L. SHOTWELL (Philadelphia, P.J. Gray 1834); REPORT OF THE CASE OF EARLE VS. WOOD (Boston, Little, Brown & Co. 1855); *Wilson v. The Presbyterian Church of John’s Island*, 19 S.C. Eq. (2 Rich. Eq.) 192 (1846). For a partial list of the many other cases of this type, see CHARLES Z. LINCOLN, THE CIVIL LAW AND THE CHURCH (1916).

56. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307 (2014); MARK DE WOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 44–47 (1965).

57. See Gordon, *supra* note 56, at 351; Patrick Carey, *The Laity’s Understanding of the Trustee System, 1785–1855*, 64 CATH. HIST. REV. 357, 371–72 (1978).

58. Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J.L. & RELIGION 263 (2017).

of the Latter-day Saints, the laws of religious incorporation help to correct “whiggish stories that emphasize religious freedom and fail to recognize . . . mechanisms for controlling and coercing churches that strayed too far from [Protestant] assumptions.”<sup>59</sup> Indeed, while the conviction upheld in *Reynolds* was a serious setback for the Saints, Mormons did not abandon their theology of polygamy until 1890—the year the Supreme Court definitively forfeited the Church’s main property holdings and revoked its corporate status.<sup>60</sup> The Court and its anti-polygamy allies in Congress understood well what Rakove’s account seems to overlook: that it is the rare faith that can lead a disembodied—and dis-propriated—existence.

Rakove notes the tensions between the typical corporate form and the official Catholic and Mormon theologies of church governance, but he is comforted at least by the regime’s consistency with Locke, who defined a church as “a voluntary Society of Men, joining themselves together of their own accord” (p. 116). And the American heresy proved highly popular, Rakove contends, as even the Catholic laity came to enjoy their state-compelled measure of democratic control (pp. 116–117). That is perhaps the clearest statement in the book of the Madisonian bargain: You are free to believe however you like in your heart, so long as you live everyday a heretic in practice.<sup>61</sup> As it has turned out, conscience may be sacred and inalienable property, but only because all other property can be forfeited to the state. If that is granted, as it was at the height of the anti-Mormon crusade, then Madison’s Razor becomes apparent for what it really is: a Sword of Damocles. Stay within the theological lines sanctioned by the state, or your kingdom shall be broken, and shall be scattered to the four winds. Ultimately the book’s title becomes curious, for Rakove’s Madisonianism seems to deny anything to religion *Beyond Belief, Beyond Conscience*.

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59. Nathan B. Oman, “Agreeable to the Laws of Our Country”: *Mormonism, Church Corporations, and the Long Legacy of America’s First Disestablishment*, 36 J.L. & RELIGION (forthcoming) (manuscript at 4) (on file with author).

60. See *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890). On the connection of *Late Corporation* to President Woodruff’s 1890 Manifesto abjuring the doctrine of polygamy, see Ken Driggs, “*Lawyers of Their Own to Defend Them*”: *The Legal Career of Franklin Snyder Richards*, 21 J. MORMON HIST. 84, 105–07 (1995).

61. For a powerful depiction of the “freedom” to believe while strictly conforming one’s conduct to state decrees, see *SILENCE* (Paramount Pictures 2016).

### III. THE VARIETIES OF PROPRTIED RELIGIOUS EXPERIENCE: SULLIVAN'S COMMENTARIES ON THE COURT'S POLITICAL THEOLOGY

*Church State Corporation*, on the other hand, means every word of its title. Sullivan declares in the opening pages that the “dominant narrative” of an American religious liberty centered on “the individual and the individual’s conscience” is everywhere “haunt[ed]” by the collectivity and aggregate personality of “the church and of her sovereign companions—the state and the corporation, collectives that have legal capacities of their own that exceed those of their members” (pp. 4–5). Where Rakove and others have applauded the Supreme Court for grasping the basic tenets of the Madisonian vision,<sup>62</sup> Sullivan has written elsewhere of her dismay that the current Supreme Court justices “know little religious history and have no political theology.”<sup>63</sup> Her earlier work has addressed defects with the Court’s received history of free expression.<sup>64</sup> In this work, Sullivan aims to excavate the unstated premises of the current Court’s facile public theology.

Sullivan’s introduction and first two chapters offer a close and richly textured reading of the 2011 Term’s unanimous opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, focusing on its closing line: “The church must be free to choose those who will guide it on its way.”<sup>65</sup> What does it mean for the Court to invoke the definite article, she asks? What, indeed, is the Court confessing?

Sullivan answers that “American law has shown that it cannot think religion without the church—that the space for religion in US law is a church-shaped space” (p. 10). Her adoption of a Christian frame is unapologetic. While Christianity’s favored status in American law “might be lamented, it is not disputable” (p. 5 n.16). The Lockean, Madisonian definition of a church as a wholly voluntary association of autonomous individuals Sullivan discards as a legal fiction. “[R]eligion is inevitably social and embodied and cannot accurately be reduced to individual beliefs and associated motivated practices,” she writes (p. 15). Where

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62. See Donald L. Drakeman, *Reynolds v. United States: The Historical Construction of Constitutional Reality*, 21 CONST. COMMENT. 697 (2004).

63. Samuel Moyn & Winnifred Fallers Sullivan, *Jurisdictions of the Church*, IMMANENT FRAME (Oct. 5, 2020), <https://tif.ssrc.org/2020/10/05/jurisdictions-of-the-church/>.

64. See e.g., SULLIVAN, *supra* note 10.

65. 565 U.S. 171, 196 (2012).

Rakove locates almost all civil law “beyond belief, beyond conscience,” Sullivan locates nothing in the great beyond—all ecclesiology implies a certain legal order, all legal orders assert an ecclesiology in turn. What makes for *a* church, like a corporation or a state, is a claim to collective sovereign action over bodies in space, a normative and consequently rivalrous alternative that defines its sphere of authority against its legal kin, an image Sullivan invokes with the phrase “the church-in-law.”<sup>66</sup>

Sullivan claims to offer her work as an “experiment in taking religion seriously without establishing it,” an experiment “in speaking back theologically to the law” (p. 20). The line captures both a strength and weakness of the book. Taking religion seriously is its great strength. Few other works on Religion Clause jurisprudence evince so thorough an understanding of Christian ecclesiology and its deep-seated tensions with the liberal state.<sup>67</sup> But in casting the work as an “experiment,” Sullivan hedges a bit. One is never quite clear when her conclusions are offered provisionally or with credal assurance. And for a lawyer, Sullivan is surprisingly reticent about how the cases and opinions she criticizes could or should have come out differently. If theology speaks back to law, what would we see done?

Sullivan’s aversion to counseling the Court on remedies is evident from her opening discussion of *Hosanna-Tabor*. In its opinion, the Court ruled that Cheryl Perich, a “called” teacher in the Evangelical Lutheran Church, was a “minister” and therefore an employment discrimination suit against the church could not be entertained. Should the Court have instead awarded damages, finding that the ministerial exception did not apply, or should it have dispensed with the exception entirely? Sullivan scolds that “[i]f the Court is going to undertake a . . . definition of orthodoxy, it might start by getting its theology right,” but she never quite tells what a right theology in this case would be, or what it would do (p. 42).<sup>68</sup>

Nevertheless, Sullivan provides a masterful explication of the

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66. On the meta-jurisdictional aims of state and church sovereigns, see CÉCILE LABORDE, *LIBERALISM’S RELIGION* (2017), a work Sullivan engages frequently in her book.

67. On this score, Sullivan’s book joins the enviable company of HOWE, *supra* note 56, and Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

68. Perhaps it would keep the case from arising in the first place. *See infra* text accompanying note 94.

theological premises of the Court's opinion. The Chief Justice's opinion engages in several "sleights of hand," she finds (p. 32). It narrates an early modern history of royal prerogative over (Roman Catholic and then Anglican) church offices, but then safeguards "the freedom of the church" for a particular Lutheran denomination that had no recognition and certainly would have suffered legal disabilities under the very English laws the Court valorizes (pp. 32–35). Most surprisingly, the Chief Justice Roberts wrote that *Smith's* denial of religious exemptions to generally applicable laws "involved government regulation of only outward physical acts," not "government interference with an internal church decision."<sup>69</sup> As Sullivan points out, this is well beyond the Madisonian conduct-belief distinction underlying *Reynolds* and—one would have thought—*Smith*. Certainly commissioning, "calling," hiring, and firing teachers counts as conduct, yet now under the ministerial exception, Sullivan concludes, "[t]he church requires protection that individuals do not" (p. 38).

"For the Court to make this distinction is for it to do theology," Sullivan argues (p. 39). It assumes that a church's "sovereign self-understanding has been and must be acknowledged in US law" (p. 40). It foists upon all churches a particular sacramental division between members and officers that is highly contested within all major branches of Christianity, to say nothing of non-Christian traditions (pp. 40–45). It "juridifie[s]" the church, functionally preferring a pre-Vatican II theology of the Body of Christ as a mediated series of offices rather than an undifferentiated sacramental community (p. 44).

Could the Court have avoided doing bad theology if it had adhered to *Smith* and subjected the Evangelical Lutheran Church to the antidiscrimination policies of the EEOC? Sullivan implies such a move would have merely exchanged particular Protestant theologies for Catholic ones, a critique she makes of Justice Alito's concurrence (pp. 49–53). Instead, Sullivan invites us to wonder what possibilities might arise if we spoke a different theology entirely to law, one arising from a feminist, "antinomian" tradition such as that espoused by Anne Hutchinson.<sup>70</sup> After all, the tragic irony of the *Hosanna-Tabor*

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69. *Hosanna-Tabor*, 565 U.S. at 190.

70. Sullivan here cites Marie Ashe's feminist critique of Cover, *supra* note 67. Marie Ashe, *Beyond Nomos and Narrative: Unconverted Antinomianism in the Work of Susan Howe*, 18 YALE J.L. & FEMINISM 1 (2006). On Anne Hutchinson and the antinomian

case is that a church is protected by the “ministerial exception” from a suit by someone the church would never sacramentally recognize as an *actual* minister on account of her sex.<sup>71</sup> “Is it possible to have a nonpatriarchal theory of the church . . . ?” (p. 57). Sullivan leaves the question hanging in the air.

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Sullivan’s second chapter follows *Hosanna-Tabor’s* digression into the “church property” cases, principally *Watson v. Jones* and *Kedroff v. St. Nicholas Cathedral*.<sup>72</sup> In both cases the Supreme Court, as thousands of American civil courts have done over time, was asked by private claimants to decide which faction in a theological dispute properly owned the lands, edifice, and other “temporalities” of a church.<sup>73</sup> Sullivan deftly argues that both the ministerial exception and the church property cases are two products of the “unresolved [and unresolvable?] tension” between the First Amendment’s two Religion Clauses (p. 60). On the one hand, “[d]eciding who is the rightful spokesperson for the church”—who counts as a minister, who holds the property, and, if these things are disputed, who decides who decides—comes “perilously close to the prohibited establishment role for government that Americans want to avoid” (p. 60). Yet recognizing and respecting the ecclesiastical arrangements churches use “to enable the continuity of religious life in the church” may also be the specific command of the Free Exercise

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tradition in America, see *THE ANTINOMIAN CONTROVERSY, 1636–1638: A DOCUMENTARY HISTORY* (David D. Hall ed., 2d ed. 1990); *ANNE HUTCHINSON: TROUBLER OF THE PURITAN ZION* (Francis J. Bremer ed., 1981).

71. While the ordination of women to pastoral office is a subject of contention in the Lutheran Church Missouri Synod, of which *Hosanna-Tabor* is a member, the official position of the Synod since 2004 has been that women may “serve in humanly established offices” so long as they do not perform the “distinctive functions” of the pastoral office. The Service of Women in Congregational and Synodical Offices, Res. 3-08A, CONVENTION PROCEEDINGS OF THE 62ND REGULAR CONVENTION OF THE LUTHERAN CHURCH—MISSOURI SYNOD 132–33 (2004). If “minister” were straightforwardly defined as a “pastor,” then, Ms. Perich clearly would not count. Only by deferring to denominational definitions of ministers and their inclusion of “called” teachers like Ms. Perich can the question of the ministerial exception even arise. On the nature of the “called” teacher office in *Hosanna-Tabor*, see Brief of Lutheran Church—Missouri Synod as Amicus Curiae Supporting Petitioner, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2011) (No. 10-553).

72. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

73. See *HOWE*, *supra* note 56; *Gordon*, *supra* note 56.

Clause (p. 60).

The burden of the chapter is to once again chide the Court for theologizing sloppily and to explicate the hidden premises of the Court's "belie[f] in the church" (p. 81). Here the corporation enters the stage, as Sullivan notes that the Court's frequent reliance on Madison to interpret the First Amendment ignores just how eccentric Madison's vision was in its own time and since. Madison's "Commonwealth has always been an outlier among the states" in the way it forbid the incorporation of religious bodies and viewed "church governance as existing wholly apart from civil law" (pp. 66–67). Outside of Virginia, however, nearly all churches in the U.S. have been "creatures of state law" through corporate formation (p. 68). Besides skewing the Court's received history, the Madisonian view would be unworkable, or at least unsatisfying, in a case like *Hosanna-Tabor*, Sullivan implies, because a wholly voluntary church would have no employees subject to the EEOC's rules and therefore Ms. Perich would lose her claim anyway. So since the Madisonian theology is not the lived religion of the church corporations or the courts who adjudicate their disputes, what has been the official theology, Sullivan asks?

Like the ministerial exception, the church property disputes raise the question of how much the state ought to defer to "the" church, but with the added complication that "by definition in such cases, there are at least two churches at issue," and a court must decide "how to resolve two churches into one" (p. 69). Sullivan argues that the Supreme Court's theological preferences for spotting the one true church in these cases has shifted over time. *Watson*, a post-Civil War case that awarded church property to the antislavery wing of a Kentucky Presbyterian church, "reflect[ed a] thoroughly protestant ecclesiology" by treating a church as a voluntary association whose members "consented to the church's jurisdiction" and were thus bound to the practices and procedures of their original incorporation (pp. 72–73). But in more recent cases, Sullivan finds a "little whiff of incense" wafting through the Court's ecclesiology (p. 73). In *Kedroff*, the mid-twentieth-century Court recognized the authority of the Patriarch of Moscow over a Russian Orthodox church in New York, state law attempts to sever denominational control over local congregational property notwithstanding. Sullivan argues the decision, unlike *Watson*, recognized the "freedom of the

corporeal church, not of its members” (p. 74). Despite having a local, voluntary association of Russian Orthodox in New York, the Court found that the state was unduly interfering with and trampling over the Russian Orthodox theology of hierarchical authority and unbroken lines of apostolic descent. Sullivan concludes that the Court “bought the argument of the appellants that the church—the hierarchical church—is a sacramental as well as a sovereign entity entitled to extraconstitutional legal deference” (p. 80).

Sullivan laments a “sad irony” in the way courts affirm the authority of hierarchical churches: even in the act of declaring the sovereignty of the church, the courts necessarily proclaim and enact their own superior sovereignty to declare and arbitrate the doctrine and dogma of a church (p. 82). It is somewhat unclear what makes this irony sad. After all, unlike cases invoking the ministerial exception, the church(es) engaged in civil property disputes have *asked* the courts to arbitrate their doctrine. Or, to use the quasi-sacramental and technical legal terms, they have pleaded and prayed for the relief of the courts, instead of trusting to their own sacramental authority to induce congregant loyalty through excommunication. That is not to deny that courts necessarily engage in theology to answer this call. At a minimum, they agree implicitly with the church litigants that St. Paul’s prohibition on “going to law” does not bind the churches and does not divest the state courts of jurisdiction.<sup>74</sup> (Perhaps this is one occasion where American juridical theology departs from early Baptist practices.<sup>75</sup>) Whereas state incorporation law tends to favor a congregational ecclesiology, the courts’ doctrines of deference, as Sullivan argues elsewhere in the chapter, tend to make the hierarchical churches the favored churches of the law (pp. 63–64).

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74. 1 Corinthians 6:1–8. On the possible applications and potential problems with treating this passage as a call to Christian arbitration, see Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

75. Early Baptists not only fined their members for engaging in civil litigation, they often prohibited members from even becoming licensed attorneys in the local polity. See Curtis D. Johnson, *The Protracted Meeting Myth: Awakenings, Revivals, and New York State Baptists, 1789–1850*, 34 J. EARLY REPUBLIC 349 (2014).

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How far doctrines of deference can extend is the subject of the book's third chapter, on *Hobby Lobby v. Burwell*, yet another essay concluding with open questions and profound silences. Yet this chapter is perhaps Sullivan's strongest, the one that most forcefully bears out her opening promise to take religions seriously and speak theology back to law. While many commentators admire Justice Ginsburg's Madisonian dissent and its stark separation of the world of material commerce from the world of spiritual belief, Sullivan recognizes that even here we find profound theological commitments. A chalice and a peace pipe, an edifice and burial ground, a particular river or a closely held corporation of 500 arts-and-crafts retail stores—the world abounds in theologies that might regard all of these properties as equally sacred, equally sanctified to do the work of religion. The sanctity of even commercial property, Sullivan contends, has “a long pedigree in religious history,” particularly among shades of “low church” Protestantism (pp. 96, 118).

Of course, a major difference between *Hobby Lobby* and the cases that preceded it is that those cases concerned *church* corporations, usually formed under specific laws for incorporating religious bodies, while *Hobby Lobby* is a closely held for-profit corporation formed under Oklahoma's general incorporation laws. But “[p]henomenologically speaking,” Sullivan argues, “it is *the* church that the Court recognizes in *Hobby Lobby*, just as it did in *Hosanna-Tabor*” (p. 95). Sullivan finds in the Court's treatment of *Hobby Lobby* a parallel to the status of the East India Company in English law, a corporation in which material pursuits, state power, and religious ambitions (she points to the hundreds of chaplains among the Company's employees) marked “a profound interchangeability among the church, the state, and the corporation—the state and the corporation borrowing from the church the sign of the sovereign as sacred” (p. 94). In rejecting the dissent's facile separation of commerce and faith, she implies, the Court for once gets something theologically right.

But the trouble with *Hobby Lobby*, Sullivan finds, is that the Court believes the faith of the store's owners without seeing it done. Because the Court steadfastly refuses to test the sincerity of religious belief, it merely accepted the assertion of the owners' theology “without reference to religious authorities or texts” (p.

100).<sup>76</sup> Sullivan aims to do the ethnographical work the Court assumes away. While many evangelical denominations have robust traditions and sophisticated theologies of avoiding “complicit[y]” with sin (pp. 171–172), Sullivan finds as a religious historian a pretty mixed record on whether Mennonites (the parent faith of Hobby Lobby’s owners) even regard abortion as a sin one could be complicit in (pp. 112–117). She accuses the Court of too quickly accepting a modern, secular politics of gender subordination as a religious faith adhering to any significant Christian tradition.

Yet, almost immediately, Sullivan recognizes the peril of her argument. Far be it from her, she disclaims as a mere legal commentator, to declare the “official” theology of the Mennonites, or to demand that theologies of sin and human reproduction remain frozen in their pre-1970s instantiation. After all, the hallmark of Anabaptist traditions like the Mennonites’ is “low church ecclesiology” (p. 118), emphasizing the authority and even the duty of lay members to live in accordance with their (evolving) consciousness of sin and purity. In this sense, the Court’s easy acceptance of Hobby Lobby’s theology could have afforded more struggle but ended up at the same place, affirming and respecting a theology of complicity that may indeed be novel and developed at the grassroots of the church, but should not be rejected for all that.

How then to decide the case? Between the hierarchical deference of *Kedroff* and the low-church preferences of *Hobby Lobby*, should the Court lean towards one theology or another? Is there a way to make space for religious freedom and theological difference without one sort of deference or another? Sullivan raises the questions but by way of answer only enigmatically cites Robert Cover’s famous *Nomos and Narrative*. Sullivan joins Cover in urging that we do not too quickly “dismiss those alternative worlds” constructed by the religious faithful, for “only by acknowledging the promise and danger of a plural set of nomoi would a robust engagement with the zero-sum sovereignty

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76. As Sally Gordon has shown, the modern Court has increasingly relied on the assertion of “sincerely held” beliefs to rid itself of the problem of officially defining “religion,” a move that would surely raise Establishment problems. See GORDON, *supra* note 9, at 210–11. See also Ann Pellegrini, *Sincerely Held; Or, the Pastorate 2.0*, 34 SOC. TEXT 71 (2016).

claimed by the modern state be possible” (p. 125).<sup>77</sup>

#### IV. CROSSING AND DWELLING: THE RELIGIOUS PEOPLE PROPERTY MAKES

Sullivan’s fourth and final chapter is certainly the most different, yet possibly the most promising. Provocatively titled “The Body of Christ in Blackface,” the chapter does not take up a recent Supreme Court case, but rather analyzes the stark absence of the black church<sup>78</sup> from the Court’s implicit political theology. Instead, Sullivan offers a tentative legal and religious history of the Angola prison to show how symbolic “consolidations of black religion have been and continue to be put to use in law enforcement and corrections today in the US” (p. 128). Tentative, because Sullivan notes up front that “[w]riting about African-American religious life is today, for a white author, difficult terrain,” and her engagement with the literature can only convey “a piece of that story” (pp. 126–127 n.2).

Much of the chapter is, in this reader’s view, somewhat distracted by Sullivan’s long-running debate with Michael Hallett, the scholarly champion of the religious accommodations and faith-based initiatives carried out at Angola.<sup>79</sup> Sullivan has been criticized in the past for maintaining as a scholarly position that American religious freedom law is impossibly incoherent, while serving as an advocate to deploy a rigid Establishment Clause

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77. While Cover too could be the most Delphic of law and religion writers, he was too good of a proceduralist to let a case commentary pass without offering his sense of the best remedy. I take from *Nomos and Narrative*, for instance, that Cover believed the Court came near the right answer; he just lamented that neither party in the case nor the Court itself seemed to really *believe* its own theology. See Cover, *supra* note 67, at 67 (“Bob Jones University seemed uncommitted and lackadaisical in its racist interpretation—unwilling to put much on the line. The IRS ruling was left shamefully undefended by an administration unwilling to put *anything* on the line for the redemptive principle. The Justices responded in kind: they were unwilling to venture commitment of themselves, to make a firm promise and to project their understanding of the law onto the future.”).

78. Sullivan duly notes the powerful argument of Barbara Dianne Savage that “there is no such thing as the black church.” BARBARA DIANNE SAVAGE, *YOUR SPIRITS WALK BESIDE US: THE POLITICS OF BLACK RELIGION* 9 (2008), but she responds that there *are* “black collective christian imaginaries” that either do or do not wield power, and her task is to assess the presence, and especially the absence, of the black church-in-law (p. 127).

79. See, e.g., MICHAEL HALLETT ET AL., *THE ANGOLA PRISON SEMINARY: EFFECTS OF FAITH-BASED MINISTRY ON IDENTITY TRANSFORMATION, DESISTANCE, AND REHABILITATION* (2016); Michael Hallett, *Faith at Angola Prison*, COMMONWEAL, Apr. 14, 2017, at 10.

doctrine against religious initiatives in prisons,<sup>80</sup> and one might forgive Hallett for finding more certain prescriptions in Sullivan's writings than she intended.

Nevertheless, her critique of Hallett is powerful. Taking up the latter's astonishing *commendation* that Angola recapitulates the vitality of "slave religion" by making space for black-controlled religious expression, Sullivan succinctly answers that in carceral political theology, "[b]ad black religion is seen as singularly political and therefore usually policed as criminally dangerous, not as religion" (p. 146). As ever, state-sanctioned theologies urge law "to make room for the right kind of religion," one that neatly fits the Madisonian preference (p. 136). Black prisoners are welcome to adopt the private beliefs especially of a liberal Protestantism, so long as their conduct does not disrupt the almost literal re-enslavement of their bodies.

Surprisingly, then, it is the chapter that is least concerned with the corporation as such that may have the most to say in counter to Rakove's Madisonian individualism. In recent work, both Sally Gordon and Martha Jones have celebrated the possibilities that incorporation brought to the early American black church.<sup>81</sup> In an era when even freedmen were denied the rights of full citizenship, black men and even women (doubly disfavored by the law) could through their church corporations hold property, transact business, and crucially, vote on policies of local import. Sullivan brings a different focus. The same corporate form that unlocks these possibilities also "stabiliz[es] the church for purposes of capture" (p. 158). Far more than the revolutionary Virginians could appreciate, access to the corporate form and the property it protects works to domesticate religious expression and defang its own revolutionary impulses.

That is certainly not to say that Sullivan finds the Madisonian goal worth valorizing, and, indeed, her final chapter offers the clearest repudiation of the Madisonian theology commended in *Beyond Belief*. Sullivan would have us understand that the

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80. See Sarah Barringer Gordon, *Where the Action Is—Law, Religion, and the Scholarly Divide*, 18 *RELIGION & AM. CULTURE* 249, 257–60 (2008).

81. Sarah Barringer Gordon, *The First Wall of Separation between Church and State: Slavery and Disestablishment in Late Eighteenth-Century Virginia*, 85 *J.S. HIST.* 61 (2019); Sarah Barringer Gordon, *The African Supplement: Religion, Race, and Corporate Law in Early National America*, 72 *WM. & MARY Q.* 385 (2015); MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 71–88 (2018).

avored theology of the American state is not just the liberal Protestantism of James Madison, but the *white* liberal Protestantism of the Virginian slaveholder. After all, the Madisonian denial of religious property rights beyond the individual conscience finds its total and complete expression not in the juridical conquest of the Mormons, but in the everyday law of slavery: believe however you like, only conform your conduct to your master's law. Rakove remarks that "[t]he religious violence that Mormons suffered . . . has no parallel in American history" (p. 130), apparently forgetting the lesson that Alfred Raboteau long ago taught us, that American slavery represents the greatest Christian persecution in the history of the western hemisphere.<sup>82</sup> Theologies of property that accommodated slavery gradually became the official theology of at least half of America's churches, and in turn the official theologies of the antebellum state.<sup>83</sup> "Whether racism is or is not latent in Christianity as some have argued, it was arguably control of the churches by slaveowners that led to creation of the black church-in-law in North America and the Caribbean," Sullivan concludes (p. 143).

The racial cast to the official political theologies of the United States helps to make sense of some of the Court's most recent cases on free expression: the review of state lockdown orders in response to the Covid-19 pandemic and the approval of the Trump administration's notorious "Muslim Ban" after several rounds of revision. In *Trump v. Hawaii*, the Court upheld travel restrictions imposed on predominantly Muslim nations notwithstanding the apparent racial and religious animus of the administration's calls for, to take one example, a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."<sup>84</sup> In the Covid-19 cases, the Supreme Court narrowly sustained state restrictions on religious gatherings with the warning that states must regulate religious gatherings no more severely than "comparable" secular activities. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, a five-member majority of the Court, writing in a per curiam opinion, found that New York had crossed the line

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82. ALBERT J. RABOTEAU, *SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH* 333–34 (updated ed. 2004).

83. See CHRISTINE LEIGH HEYRMAN, *SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT* (1998); MARK A. NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS* (2006).

84. 138 S. Ct. 2392, 2417 (2018).

by limiting religious gatherings to 10 or 25 congregants in certain high risk zones while permitting “essential businesses” to admit any number of patrons.<sup>85</sup>

One prominent scholar has recently linked the two groups of cases, declaring the Court’s *Roman Catholic Diocese* to be a twenty-first century “Anti-Korematsu,” referring to the “anti-canon” case that sustained Japanese internment and was declared overruled (rather indirectly) in *Trump v. Hawaii*.<sup>86</sup> The argument makes a certain legal sense: In *Korematsu*, the Court overlooked significant evidence of racial animus and deferred to the Executive in a case of apparent emergency; in *Roman Catholic Diocese*, the Court enjoined a state executive in the midst of an emergency to protect individual rights.<sup>87</sup> But that reading makes little theological sense.

Consider the religious sensitivities of *Roman Catholic Diocese*. The per curiam and concurring opinions engage in remarkable theological sympathy with the petitioners, a group of churches under a single Catholic diocese and an association of Orthodox Jewish synagogues. Propertied rites are so ever present in the opinions they are rarely analyzed as such. The majority assumes that gathering together on a specific parcel of land, engaging the material world of air, space, and time in all the ways that might raise medical risks are nevertheless the essence of religious exercise.<sup>88</sup> While livestreams of religious services can be viewed at home, the Court finds that “remote viewing is not the same as personal attendance.” Christians “cannot receive communion.” More vaguely, “there are important religious

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85. 141 S. Ct. 63 (2020) (per curiam). *See also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.) (sustaining a directive limiting in-person worship services to 50 people); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.) (sustaining an executive order limiting in-person worship to the lower of 25% capacity or 100 attendees).

86. Cass R. Sunstein, *Our Anti-Korematsu* (December 29, 2020) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.3756853>. On “anti-canonical” cases, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

87. Sunstein, *supra* note 86.

88. The dissents engage in theological imagination too. Justice Breyer, relying on the district court’s findings, takes it for granted that propertied rites in churches are akin to “similar gatherings” at “public lectures, concerts, or theatrical performances,” rather than the ebb and flow of bodies through a marketplace. *Cuomo*, 141 S. Ct. at 76 (Breyer, J., dissenting). Justice Sotomayor makes the same comparison and assumes throughout that singing must take place at church services, essentializing a religious rite the petitioners themselves claimed they had foregone during the pandemic. *Id.* at 79 (Sotomayor, J., dissenting).

traditions in the Orthodox Jewish faith that require personal attendance.”<sup>89</sup> Justice Gorsuch’s concurrence infers the theological judgment of the New York government in declaring businesses “essential” but churches inessential. In justifying the extraordinary process of a temporary injunction originating out of the high court, Justice Gorsuch vividly imagines the anxieties of rabbis approaching “the High Holy Days . . . , or priests preparing for Christmas.”<sup>90</sup>

One wonders where this religious imagination was in *Trump v. Hawaii*. Despite the presence of a Muslim mosque among the petitioners, nowhere does the majority concern itself with theologies of sacred gatherings, religious crossings and dwellings,<sup>91</sup> or anxieties that the Court’s order might disrupt Ramadan observances. One might respond as the Court majority largely did: Neither the mosque nor its many amici actually asserted a religious freedom claim. Instead, they argued under the Establishment Clause and thus took on the burden of showing that a facially neutral law was instituting a religious preference.<sup>92</sup> But that seems to be the precise point to which Sullivan’s work would call our attention. Religious freedom claims are for localized, propertied, truly liberal believers. The Court does not have, because it has not developed, the capacity to think theologies of God’s chosen people on national or supranational scales, to believe a religious exercise claim can be made by massive groups who do not all engage in the propertied rituals the Court is used to seeing done. To make those claims is to speak another language, and to fall subject to another Clause, another law, another theology.

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89. *Id.* at 68.

90. *Id.* at 72 (Gorsuch, J., concurring).

91. See THOMAS A. TWEED, *CROSSING AND DWELLING: A THEORY OF RELIGION* (2008). Tweed seeks “a theory of religion that ma[kes] sense of the religious life of transnational migrants and addresse[s] three themes—*movement, relation, and position*,” making the work particularly valuable for thinking about propertied rites. *Id.* at 5.

92. See, e.g., Brief for Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965); Brief for Interfaith Group of Religious and Irreligious Organizations as Amici Curiae Supporting Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965); Brief for National Association of Muslim Lawyers and Other Muslim Bar Associations as Amici Curiae Supporting Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965); Brief for Muslim Justice League et al. as Amici Curiae Supporting Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965); Brief of Episcopal Bishops as Amici Curiae Supporting Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965); Brief for Freedom from Religion Foundation as Amici Curiae Supporting Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965).

## V. CONCLUSION

How shall we then live?<sup>93</sup> Rakove propounds a political theology that has wrought disastrous and violent consequences throughout American history and can hardly be tallied as a victory for religious freedom. Sullivan's careful and nuanced ethnography of the Supreme Court's political theology refrains from answering ultimate questions of remedy.

Or maybe it would be more precise to say that the opinions of the Supreme Court are *penultimate* questions of remedy that Sullivan disregards. Elsewhere Sullivan has written that the Court's decisions handed down since the publication of her book have been unsurprising but also uninteresting. Whichever way the Court rules, she seems to regard the real tragedy that the cases have arisen in the first place. "The new ACA contraception cases reflect the failure to create universal health care. The school voucher cases reflect the deliberate failure to invest in quality public schooling," she concludes.<sup>94</sup> The current flash points of religious freedom, that is, address merely the mild systems and not the root causes of the liberal regime of property and religion in the U.S. In a nation with a superabundance of property but a hollow conception of the common-wealth, a certain rivalry cannot be avoided between a church and state that must scramble over the artificially induced scarcity of goods fit for human flourishing.

In her conclusion, Sullivan takes up the *Masterpiece Cakeshop* decision.<sup>95</sup> Like her discussion of *Hobby Lobby*, Sullivan avoids telling us how the case should come out, but does offer more specific guidance on how a court should approach such a case. As with *Hobby Lobby*, *Masterpiece Cakeshop* is "not doing something new in mixing business and God," but Sullivan laments the Court's sustained reluctance to engage with the actual theology at issue in the case (p. 174). The Court's repeated acceptance of theological assertions under the assumption they are sincerely held beliefs means "[i]t has become impossible for

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93. The question is drawn from Ezekiel 33:10 and 2 Peter 3:11, two key texts of political theology in the Christian scriptures, but the question as worded was most popularly posed by Francis Schaeffer's 1970s documentary on the decline of Christian civilization, a documentary that, for better and for worse, may have done more than any other work to mobilize modern evangelical politics in the U.S. See, e.g., R. Albert Mohler Jr., *How Will We Live Now? Francis Schaeffer's 'How Should We Then Live?' After 40 Years*, 84 S. SEMINARY 25 (2016).

94. Moyn & Sullivan, *supra* note 63.

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

the Court to talk about religious stuff with any seriousness” (p. 170). Instead, Sullivan invites the courts to take up the theological conversation specifically. Ask the owner of the cakeshop about the precise contours of his theology, challenge him with the possible inconsistencies and tensions that might arise, “[a]nd then listen to his response” (p. 175).<sup>96</sup> If “[t]he liberal state does coerce people to live by the will of its God”—and Sullivan is sure that it does—at least it can exhibit a “humility about the reach and commitment of [its] own imaginations and possibilities” and exchange the rancid individualism of the liberal order for the political community that might grow out of the serious exchange of juridical theology (pp. 162–63, 176–77).

As someone who has studied the rancorous theological debates that erupted in civil courts adjudicating church property disputes, I admit that even I see the appeal of courts speaking theology more explicitly (rather than, as so many now do, speaking theology covertly). True, theology is beyond the professional competencies of most U.S. judges, but of course many, if not most, property adjudications require generalist judges to specialize in unfamiliar domains if only for the duration of a case. The common law tradition is nothing if not a set of techniques for managing respect for and adaptation of local folkways and foreign laws binding on a particular property.<sup>97</sup> The common law has its use for fictions, too, to manage the tensions that may arise, but at this point the fiction that the secular liberal state can coherently secure a right of religious freedom to all is likely doing more harm than good.<sup>98</sup>

But if courts were to more clearly talk theology, we should be clear about the limits of Sullivan’s approach. Most likely, space for religious dissidence would not expand all that much. For what Madison and Jefferson did quite properly understand was that

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96. Sullivan’s suggestion accords with recent commentary by Jamal Greene, also on *Masterpiece Cakeshop*: “Courts should be reminding us what we have in common. They should be granting just enough leverage on each side that we have no choice but to sit across from each other at the table, to look each other in the eye, and to speak to and hear each other.” JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* 163 (2021). Compare with Sullivan’s powerful image of gathering the *Masterpiece Cakeshop* litigants around a table at 178.

97. See, e.g., KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2013).

98. Lon Fuller essentially defined legal fictions as lies nobody believes. The danger of legal fictions arises, he surmised, when people start to actually believe the fiction. LON L. FULLER, *LEGAL FICTIONS* 9–10 (1967).

religion is dangerous to the state. Calvinists behead kings; jihadists crash planes into symbols of public wealth and power; white Christian insurrectionists storm the Capitol and offer prayers of consecration over the Senate podium.<sup>99</sup> Though scholars debate the precise extent of influence, nearly all agree that religious fervor was critical fuel to the American Revolution, the abolition of slavery, and the Civil Rights Revolution, all of which fundamentally transformed state structures and the ownership and deployment of property.<sup>100</sup> We should not expect that a court speaking theology will speak it against the safety of the state very often.

That is all to say that Sullivan's proposal for a juridical ethic of humility is itself a commitment of political theology, one that will occasion cases that set limits on the boundaries and police them, even violently.<sup>101</sup> But humility may be a good place to start, for all that. It recalls the powerful image of Augustine's *City of God*—the Christian church as *civitas peregrina*, denizens on pilgrimage, or, as it may best be translated today, resident aliens.<sup>102</sup> Political theologians most often use the *civitas peregrina* concept to instruct the Christian faithful towards humility, if not quietism, within the public order in which they find themselves. But recent readings of Augustine have found in the image a rebuke of state power itself.<sup>103</sup> As all civilized states recognize that

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99. On the religious origins and inflections of the events of January 6, 2021, see Emma Green, *A Christian Insurrection*, ATLANTIC (Jan. 8, 2021, 1:36 PM), <https://www.theatlantic.com/politics/archive/2021/01/evangelicals-catholics-jericho-march-capitol/617591/>. For video of the prayer, see *A Reporter's Footage from Inside the Capitol Siege*, THE NEW YORKER (Jan. 17, 2021), <https://www.newyorker.com/news/video-dept/a-reporters-footage-from-inside-the-capitol-siege>.

100. See, e.g., THOMAS S. KIDD, *GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION* (2012); HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* (2008); DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* (2009).

101. Here we might turn to Robert Cover's other pathbreaking work in political theology. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

102. See M.A. Claussen, "Peregrinatio" and "Peregrini" in Augustine's "City of God," 46 TRADITIO 33, 39, 50 (1991).

103. Political Augustinianism has seen a revival over the last decade. See, e.g., MICHAEL J.S. BRUNO, *POLITICAL AUGUSTINIANISM: MODERN INTERPRETATIONS OF AUGUSTINE'S POLITICAL THOUGHT* (2014); ERIC GREGORY, *POLITICS AND THE ORDER OF LOVE: AN AUGUSTINIAN ETHIC OF DEMOCRATIC CITIZENSHIP* (2010); CHARLES MATHEWES, *THE REPUBLIC OF GRACE: AUGUSTINIAN THOUGHTS FOR DARK TIMES* (2010). On the application of Augustine's *City of God* to theologies of state humility, see especially OLIVER O'DONOVAN, *THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* (1996); OLIVER O'DONOVAN, *THE WAYS OF JUDGMENT* (2008). For an application of O'Donovan's thought to American evangelical

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within their midst they will have travelers of divided loyalties whose lives and chattels must nevertheless be protected and activities tolerated to a certain extent, so the state in the saeculum<sup>104</sup> must humbly recognize the religious others within its midst and accommodate their propertied rites within its own limited jurisdiction.

A humble state facing and accommodating a humble church, which faces and accommodates its potential rivals in turn, is, to be sure, not something one has seen done very often. Still, “blessed are they who did not see, but being blind, believed.”<sup>105</sup>

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politics, see JAMES K. A. SMITH, *AWAITING THE KING: REFORMING PUBLIC THEOLOGY* (2017).

104. On the secularism not as an absence of religion but as a period of theological time, see R. A. MARKUS, *SAECULUM: HISTORY AND SOCIETY IN THE THEOLOGY OF ST. AUGUSTINE* (1988).

105. G. K. CHESTERTON, *THE MAN WHO WAS THURSDAY: A NIGHTMARE*, at v (1908).

