

## 1

## Introduction

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising. . . .

– John Locke<sup>1</sup>

## 1.1 INTRODUCTION

For centuries, policymakers have struggled to identify the best way to address the relationship between law and religion in religiously pluralist states. John Locke was a first-hand witness to the violence and deprivation generated by nearly a century's worth of religious warfare in Europe and responded to the religio-political turmoil of his era by writing his famous treatise, "A Letter Concerning Toleration."<sup>2</sup> Although the concept of religious toleration predates Locke,<sup>3</sup> the Lockean vision of religious liberty has garnered a significant amount support among legal and political theorists around the world. Locke's influence is perhaps most deeply felt in the United States, due to the role that his writing played in the development of the First Amendment to the U.S.

<sup>1</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (Prometheus Books 1990) (1689).

<sup>2</sup> See *id.*

<sup>3</sup> See HEINER BIELEFELDT ET AL., FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 5–6 (2016) (discussing toleration in ancient Persia, Macedonia and Rome, as well as in later Islamic and Christian kingdoms and empires); KRISTINE KALANGES, RELIGIOUS LIBERTY IN WESTERN AND ISLAMIC LAW: TOWARD A WORLD LEGAL TRADITION 3 (2012) (discussing the work of Grotius, especially his *De Jure Belli ac Pacis*, as attempting to resolve religious conflict through law).

Constitution,<sup>4</sup> but Locke's views have been adopted elsewhere in the world, either directly or indirectly.<sup>5</sup>

As innovative as the principle of religious toleration was at the time, Locke's proposal failed to provide a lasting solution to the problem of religious pluralism and the inherent conflict between religious and political interests.<sup>6</sup> Over time, policymakers came to realize that toleration alone is an insufficient means of protecting religious minorities, since toleration can be withdrawn at the whim of the majority.<sup>7</sup> Instead, religious liberty must be established as a legal right.

Although a strong consensus surrounds the notion that religious belief and practice must be protected, the means by which those principles are to be implemented vary around the world. Contemporary societies still struggle to accommodate the demands of those whose allegiance does not lie primarily with the state while also protecting the rights of those who do not share the religious values of the majority. The situation has become even more complicated in recent years given the ever-increasing diversity of religious traditions found within and between states<sup>8</sup> and the concomitant expansion of what constitutes a religion<sup>9</sup> or religious practice.<sup>10</sup>

<sup>4</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430–31 (1990).

<sup>5</sup> See, e.g., Caylee Hong & René Provost, *Let Us Compare Mythologies*, in MAPPING THE LEGAL BOUNDARIES OF BELONGING: RELIGION AND MULTICULTURALISM FROM ISRAEL TO CANADA 1, 9 (René Provost ed., 2014) ("Secularism is a hallmark of liberalism: the separation of religion and politics, and of the private and the public, are critical, defining distinctions for the western liberal state."); Aldir Guedes Soriano, *Liberal Democracy and the Right to Religious Freedom*, 2013 B.Y.U. L. REV. 581, 582.

<sup>6</sup> See Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 383, 387–89 (Stephen M. Feldman ed., 2000).

<sup>7</sup> See, e.g., Metropolitan Church of Bessarabia v. Moldova, 35 Eur. H.R. Rep. 13 [105], [129] (2002) (noting "tolerance... cannot be regarded... as a substitute for [legal] recognition").

<sup>8</sup> See EQUINET, A GROWING AGENDA: THE WORK OF EQUALITY BODIES ON THE GROUND OF RELIGION OR BELIEF 9–10 (2015) (discussing religious pluralism in Europe); Pew Research Center, Global Religious Diversity: Half of the Most Religiously Diverse Countries are in Asia-Pacific Region 5 (Apr. 2014); id. Appx. 1 (containing an index of 232 countries in terms of religious diversity); STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016) (entry on "Religious Diversity (Pluralism)"); see also BIELEFELDT ET AL., *supra* note 3, at 39; MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 358–59 (2008) (noting scope of religious pluralism in the United States); Tom Bailey & Valentina Gentile, *Introduction*, in RAWLS AND RELIGION 3, 3 (Tom Bailey & Valentina Gentile eds., 2015).

<sup>9</sup> See BIELEFELDT ET AL., *supra* note 3, at 19; MARK JUERGENSMAYER, GLOBAL REBELLION: RELIGIOUS CHALLENGES TO THE SECULAR STATE, FROM CHRISTIAN MILITIAS TO AL QAEDA 18–19 (2008); see also Chapter 3.3.2 (discussing the definition of religion).

<sup>10</sup> For example, some people have claimed that the payment of government-mandated employee health insurance violates their religion, even though that act does not resemble any previously

Difficulties have also been caused by the ever-increasing competence of the state. Not only does the Habermasian “expansion of law” generate a rising number of tension points between law and religion,<sup>11</sup> it also results in the “juridification of religion,” whereby conflict is framed in legal terms and resolved through legal means.<sup>12</sup> Commentators in several countries have suggested that litigation of religious issues will likely increase in the coming years.<sup>13</sup>

Although the world is paying increased attention to the interaction of law and religion, many analyses are colored by emotion and concerns about violent extremism.<sup>14</sup> Although much of the analysis in this regard has focused on issues involving Islam, the Secretary General of the United Nations has

recognized form of religious practice or manifestation of religion. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014) (involving corporate shareholders who were “seeking to enjoin application of the contraceptive mandate insofar as it requires [the corporation] to provide health coverage for the four objectionable contraceptives”); S.I. STRONG, *Religious Rights in Historical, Theoretical and International Context: Hobby Lobby as a Jurisprudential Anomaly?*, 48 VAND. J. TRANSNAT’L L. 813, 835 (2015). Michael Perry has therefore suggested that religious freedom should be characterized as moral freedom. See Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 996 (2010) (framing moral freedom as “the right to freely practice one’s morality: to live one’s life in harmony with one’s moral convictions and commitments” and claiming the right to moral freedom has been respected by various domestic and international documents).

<sup>11</sup> 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 359 (1987) (defining the increased “juridification” of law primarily in terms of the “expansion of law, that is, the legal relation of new, hitherto informally regulated social matters,” as opposed to “the increasing density of law, that is, the specialized breakdown of global statements into legally relevant facts”).

<sup>12</sup> See RUSSELL SANDBERG, *LAW AND RELIGION* 194 (2011); LARS CHR. BLICHER & ANDERS MOLANDER, *Mapping Juridification*, 14 EUR. L.J. 36, 36 (2008); RUSSELL SANDBERG, *Conscience and Equality: Negotiating Emerging Tensions*, in *RELIGION AND EQUALITY: LAW IN CONFLICT* 3, 6 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016). The juridification of religious rights can be particularly problematic for members of those faith groups that value privacy as part of their religious beliefs and behaviors. See Ernest Willheim, *Australian Legal Procedures and the Protection of Secret Aboriginal Spiritual Beliefs*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 214, 215 (Peter Cane et al. eds., 2011) (noting “the Australian legal system establishes a non-Aboriginal process for the authentication of Aboriginal religious belief” which is “inherently offensive to Aboriginal people” and which requires the disclosure of secret practices and beliefs that are traditionally restricted to certain individuals or groups).

<sup>13</sup> See Julian Rivers, *The Secularisation of the British Constitution*, 14 ECC. L.J. 371, 377 (2012); Emma Green, *The Religious-Liberty Showdowns Coming in 2017*, ATL., Dec. 28, 2016, [www.theatlantic.com/politics/archive/2016/12/the-religious-liberty-showdowns-coming-in-2017/511400/?utm\\_source=msn](http://www.theatlantic.com/politics/archive/2016/12/the-religious-liberty-showdowns-coming-in-2017/511400/?utm_source=msn).

<sup>14</sup> See U.N. Secretary General, *Plan of Action to Prevent Violent Extremism*, ¶2, U.N. Doc. A/70/674 (Dec. 24, 2015) [hereinafter U.N. Plan of Action]; MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* 16–18 (2012).

recognized that “[v]iolent extremism is a diverse phenomenon without clear definition. It is neither new nor exclusive to any region, nationality or system of belief.”<sup>15</sup> Indeed, “virtually every religious tradition” gives “images of violence” a place of prominence, just as “every religious tradition teaches peace and tranquility and allows for violence only in the most extreme instances.”<sup>16</sup> Thus, religiously oriented violence can be found in ostensibly peace-seeking religions such as Christianity, Judaism and Buddhism as much as it can in Islam.<sup>17</sup>

While religiously oriented violence is the most visible form of religio-legal conflict in today’s society, it is not the only issue of concern. For example, social scientists have begun to appreciate the problems associated with “micro-aggressions,” particularly in situations involving religious belief, practice and identity.<sup>18</sup> While these types of intrusions may not appear significant to observers, the cumulative nature of these actions can wear an individual down to the point where more a more vigorous response occurs.<sup>19</sup> Concerns about micro-aggressions and similar phenomenon should be taken seriously, particularly in light of data indicating that religio-legal conflicts are often underreported.<sup>20</sup>

<sup>15</sup> U.N. Plan of Action, *supra* note 14, ¶2. <sup>16</sup> JUERGENSMEYER, *supra* note 9, at 213.

<sup>17</sup> See FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES, AND MILITANCE (Martin E. Marty & R. Scott Appleby eds., 1993) (discussing the potential for violence in a variety of religious traditions); Yatir Ettinger, *Violence Between Ultra-Orthodox Sects Rocks Jerusalem Neighborhood*, HAARETZ, Oct. 28, 2011, [www.haaretz.com/violence-between-ultra-orthodox-sects-rocks-jerusalem-neighborhood-1.392357](http://www.haaretz.com/violence-between-ultra-orthodox-sects-rocks-jerusalem-neighborhood-1.392357) (involving a violent dispute between members of the Hasidic Gerrer dynasty and the Sikrikam, another Jewish sect); Richard Fausset, *For Robert Dear, Religion and Rage Before Planned Parenthood Attack*, N.Y. TIMES, Dec. 1, 2015, [www.nytimes.com/2015/12/02/us/robert-dear-planned-parent-hood-shooting.html?\\_r=0](http://www.nytimes.com/2015/12/02/us/robert-dear-planned-parent-hood-shooting.html?_r=0) (involving a self-professed evangelical Christian who killed three people and wounded nine others in an attack on a Planned Parenthood clinic in the United States); Charles Haviland, *The Darker Side of Buddhism*, BBC NEWS MAG., May 30, 2015, [www.bbc.com/news/magazine-32929855](http://www.bbc.com/news/magazine-32929855) (involving violence at the hands of Buddhist monks in Sri Lanka).

<sup>18</sup> See DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010) (defining microaggressions as “brief and commonplace, daily, behavioral and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative, racial, gender, sexual-orientation, or religious slights and insults to the target person or group”); Kristina Benson, *The Freedom to Believe and the Freedom to Practice: Title VII, Muslim Women, and Hijab*, 13 UCLA J. ISLAMIC & NEAR E. L. 1, 16–17 (2014).

<sup>19</sup> See, e.g., BRIAN J. GRIM & ROGER FINKE, PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 8–10 (2011); *Jews in the Bible Belt’s Small Towns Face Curiosity, Ignorance*, HAARETZ, Aug. 31, 2012, [www.haaretz.com/jewish/features/jews-in-the-bible-belt-s-small-towns-face-curiosity-ignorance-1.462022](http://www.haaretz.com/jewish/features/jews-in-the-bible-belt-s-small-towns-face-curiosity-ignorance-1.462022) (discussing experiences of Jewish persons in small towns dominated by Christians).

<sup>20</sup> See EQUINET, *supra* note 8, at 19.

Policymakers involved in the area of law and religion must also recognize that many conflicts that appear to be religiously motivated are in fact generated primarily by questions of identity and control and only secondarily by religion.<sup>21</sup> Thus, any effort to address questions of religious freedom must also take broader social conditions into account.<sup>22</sup>

## 1.2 RESEARCH GOALS

Reported increases in both religious litigation and extralegal religious conflict suggest that existing approaches to religious rights are in need of improvement.<sup>23</sup> This book therefore seeks to identify a new theoretical paradigm that accords with contemporary concerns about the relationship between law and religion and makes the concept of religious liberty “more appealing to both reluctant traditionalists and reluctant liberals.”<sup>24</sup> The task is a difficult one, since it not only involves values and principles that are inherently resistant to compromise<sup>25</sup> but also requires the integration of both Western and non-Western religio-political philosophies.<sup>26</sup>

This study undertakes a cross-border, cross-cultural and cross-disciplinary approach that is somewhat unusual in a field that is dominated by studies reflecting a single national perspective.<sup>27</sup> For many years, researchers

<sup>21</sup> See JUERGENSMEYER, *supra* note 9, at 255; CLAIRE MITCHELL, RELIGION, IDENTITY AND POLITICS IN NORTHERN IRELAND: BOUNDARIES OF BELONGING AND BELIEF 1–2 (2006) (noting a consensus that the conflict in Northern Ireland is essentially “ethnonational” rather than religious).

<sup>22</sup> See U.N. Plan of Action, *supra* note 14, ¶¶24–31.

<sup>23</sup> See PEW RESEARCH CENTER, TRENDS IN GLOBAL RESTRICTIONS ON RELIGION 9 (June 23, 2016) (noting “a rise in religion-related terrorism” from 2013 to 2014) [hereinafter PEW RESEARCH CENTER, TRENDS]; Green, *supra* note 13; Rivers, *supra* note 13, at 377.

<sup>24</sup> BIELEFELDT ET AL., *supra* note 3, at 38 (noting a need to engage with both ends of the religio-political spectrum).

<sup>25</sup> See CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 64–65 (3d ed., 2003) (discussing a “circle of conflicts,” which includes conflicts of interests, structure, values, relationships and data as well as ways to address each concern); Robert Robinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 101 (2004–05).

<sup>26</sup> See KALANGES, *supra* note 3, at 4–5 (noting “variation among the religious traditions (and legal-political cultures) that dominate Western and non-Western states suggests a fundamental challenge to the universalizability of the principles upon which international human rights law [including religious rights] is based”).

<sup>27</sup> See, e.g., BORIS I. BITTAKER ET AL., RELIGION AND THE STATE IN AMERICAN LAW (2015); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008); IRA C. LUPU & ROBERT

considered this type of narrow concentration to be the only appropriate model for work involving religious liberty<sup>28</sup> because of the actual or presumed religious homogeneity of most countries and the notion that every constitutional system was the unique product of particular legal and cultural influences.<sup>29</sup> However, the globalizing tendencies of the late twentieth and early twenty-first centuries not only generated a significant increase in religious pluralism, they also triggered the rise of comparative constitutional law as a legitimate field of scientific endeavor.<sup>30</sup> As a result, an increasing number of scholars have begun to consider the interplay between law and religion from a comparative and international point of view,<sup>31</sup> although some academics continue to adopt a single frame of reference, such as that involving history, sociology or politics.<sup>32</sup>

W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* (2014); MARK HILL ET AL., *RELIGION AND LAW IN THE UNITED KINGDOM* (2011); SANDBERG, *supra* note 12.

<sup>28</sup> See Derek H. Davis, *Law, Morals, and Civil Religion in America*, 39 J. CHURCH & ST. 411, 415 (1997); W. COLE DURHAM, JR., *Perspectives on Religious Liberty: A Comparative Framework*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 1, 15–25 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); SILVIO FERRARI, *The New Wine and the Old Cask: Tolerance, Religion and the Law in Contemporary Europe*, 10 *RATIO JURIS* 75, 77–79 (1997); Johan D. van der Vyver, *Introduction*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE*, *supra*, at xi, xix–xx.

<sup>29</sup> See H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY & RESEARCH* 29 (2d ed., 1949); KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 39 (TONY WEIR trans. 3d ed., 1998); Durham, *supra* note 28, at 24.

<sup>30</sup> See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2014); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 5–8 (2014) (discussing methodological advances in comparative constitutional law); *id.* at 71–72 (noting the importance of balancing and proportionality in contemporary comparative constitutional law); *id.* at 91–93 (describing the role of international law in domestic constitutional legal analyses).

<sup>31</sup> See, e.g., NORMAN DOE, *LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION* (2011); CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2001); MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* (2008); CLAUDIA HAUPT, *RELIGION-STATE RELATIONS IN THE UNITED STATES AND GERMANY: THE QUEST FOR NEUTRALITY* (2012); MAPPING THE LEGAL BOUNDARIES OF BELONGING, *supra* note 5; RONAN MCCREA, *RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION* (2010); see also EQUINET, *supra* note 8, at 4 (calling for increased international networks of human rights experts and practitioners to address issues involving religious liberty); Harold J. Berman, *Comparative Law and Religion*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 739, 739–51 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW* 422, 422–40 (Tom Ginsburg & Rosalind Dixon eds., 2013).

<sup>32</sup> See, e.g., ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* (2008); LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT, *supra* note 12; DOMINIC

Over the last few decades, increasing interest in the relationship between law and religion has led to an exponential increase in the amount of scholarship concerning these matters. However, the literature reflects a number of gaps, most notably in the area of jurisprudence. Indeed, comprehensive, cross-border theoretical analyses of religio-legal concerns are virtually non-existent.<sup>33</sup> Furthermore, there is relatively little diversity in the nature of the research that is conducted. For example, while a number of scholars refer to the work of John Rawls<sup>34</sup> and John Finnis,<sup>35</sup> relatively few discuss other contributions to legal philosophy, such as Cass Sunstein's notion of incompletely theorized agreements in matters of constitutional law<sup>36</sup> or Ronald Dworkin's suggestions for compromise in politically and religiously charged conflicts, such as those regarding abortion.<sup>37</sup> Religious rights theorists have also paid scant attention to the work of H.L.A. Hart, Hans Kelsen, Lon Fuller and Joseph Raz, even though analyses regarding the interplay between law and morality, positivism and natural law, and internal and external perspectives on law would provide important insights into the debate about the relationship between law and religion in contemporary legal orders.<sup>38</sup>

This book attempts to redress these shortcomings by generating an extranational theoretical construct that provides a new and broadly applicable model of religious rights that is suitable for adoption in a large number of legal

MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE (2006); RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds & W. Cole Durham, Jr., eds., 1996); LORENZO ZUCCA & CAMIL UNGUREANU, LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (2012).

<sup>33</sup> Most theoretical analyses exist only on the national level. See, e.g., Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–53 (2012).

<sup>34</sup> See JOHN RAWLS, A THEORY OF JUSTICE 61 (1971); JOHN RAWLS, POLITICAL LIBERALISM (1996); see also DANIEL A. DOMBROWSKI, RAWLS AND RELIGION: THE CASE FOR POLITICAL LIBERALISM (2001); RAWLS AND RELIGION, *supra* note 8.

<sup>35</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85–86, 89–90, 98, 410 (1980); Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97, 131–34 (2005).

<sup>36</sup> See Cass R. Sunstein, *Constitutional Agreements Without Constitutional Theories*, 13 RATIO JURIS 117, 117 (2000).

<sup>37</sup> See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

<sup>38</sup> See LON L. FULLER, THE MORALITY OF LAW (rev. ed., 1969); H.L.A. HART, THE CONCEPT OF LAW (2d ed., 1997); HANS Kelsen, THE PURE THEORY OF LAW (2d ed., 1967); JOSEPH RAZ, THE MORALITY OF FREEDOM (1988); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. Hart, *Book Review*, 78 HARV. L. REV. 1281, 1287–88 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)); Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURISPRUDENCE 94 (1974).



systems. In so doing, the research utilizes an international and interdisciplinary methodology that relies on existing studies while simultaneously expanding the applicability of those works. As a result, this book not only incorporates various principles of international and comparative constitutional law, but also includes elements of legal and political philosophy, comparative religion and international relations.

This methodology is admittedly novel. However, as Steven Smith has noted, “if our present unsatisfactory condition is the product of inquiries and ways of thinking that [are] doomed from the start, then merely pursuing *those* inquiries and persisting more assiduously in *those* ways of thinking will only preserve, and perhaps even aggravate, our current confusion” about religious liberty.<sup>39</sup>

It is expected that the unusual nature of the current research will generate a certain amount of resistance. For example, some people may oppose this exercise because they fear that any change to the existing religious rights regime will injure their own position.<sup>40</sup> In fact, the theoretical paradigm outlined in the following pages provides a superior means of protecting the rights of both religious and non-religious people and harmonizes certain political principles that were once believed to be mutually exclusive. Therefore, when considering the proposals in this book, it is important to avoid assumptions and “directionally motivated reasoning,” which is an unconscious cognitive distortion that can affect the rationality of the decision-making process.<sup>41</sup> Special efforts should be made to resist the status quo bias, which is an empirically proven psychological phenomenon that leads individuals and institutions<sup>42</sup> to prefer the established course of action over other

<sup>39</sup> STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 16 (1995); see also Christopher L. Eisgruber & Lawrence G. Sager, *THE Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

<sup>40</sup> For example, liberals may worry that an increased emphasis on religious liberty will lead to theocratic legal regimes or morally restrictive social codes, while conservatives may be concerned that an expansion of religious rights will allow foreign or cult-like religions to gain increased cultural traction in their local communities. See John Witte, Jr. & Joel A. Nichols, “Come Now Let Us Reason Together: Restoring Religious Freedom in America and Abroad,” 92 NOTRE DAME L. REV. 427, 429, 434–35 (2016).

<sup>41</sup> Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* 2 (Feb. 11, 2016), [www.dartmouth.edu/~nyhan/opening-political-mind.pdf](http://www.dartmouth.edu/~nyhan/opening-political-mind.pdf) (noting individuals often rely on unconscious “biases in information processing that occur when one wants to reach a specific conclusion”); see also William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8–9 (1988).

<sup>42</sup> Although there are a number of key differences between individual and institutional (or group) decisionmaking processes, the status quo bias is not limited to individuals. See



options, even when those alternatives increase the welfare of the decision-maker.<sup>43</sup> The status quo bias is particularly problematic in the current context because it operates on an unconscious level and increases in direct correlation to the complexity of the issue under discussion.<sup>44</sup>

Other people may oppose the current research because they believe that this sort of analysis is unnecessary, based on research suggesting that the influence of religion is waning in contemporary society. While it is true that some countries are seeing a reduction in the role of religion in people's lives, globally the world is becoming both more religious and more religiously diverse.<sup>45</sup> For example, Tom Bailey and Valentina Gentile note that

[i]n the United States... while strong Christian forces have persisted, neo-Protestant movements and an unprecedented array of other new religious groups and sensibilities have also emerged. In Europe, while the traditional Christian churches have declined, they have been replaced not only by more "secular" cultures, but also by new forms of Christian and other religious influences, including the oft-emphasized Islamic ones.<sup>46</sup>

Finally, some people may oppose the current initiative because they believe that now is not the time to be expanding religious rights, given fears about violent extremism.<sup>47</sup> Indeed, Mary Ann Glendon has suggested that concerns

Samuelson & Zeckhauser, *supra* note 41, at 45; Ozan O. Varol, *Constitutional Stickiness*, 49 U. C. DAVIS L. REV. 899, 938 (2016). Instead, the principle also "influence[s] policymaking within organizations, both public and private. Once made, policies frequently persist and become codified implicitly or explicitly." Samuelson & Zeckhauser, *supra* note 41, at 45.

<sup>43</sup> See Samuelson & Zeckhauser, *supra* note 41, at 8. "The status quo bias is best viewed as a deeply rooted decision-making practice stemming partly from a mental illusion and partly from psychological inclination." *Id.* at 10.

<sup>44</sup> See Stephen M. Fleming et al., *Overcoming Status Quo Bias in the Human Brain*, 107 PROCEEDINGS NAT'L ACADEMY SCI. OF U.S.A. 6005 (2010), [www.pnas.org/content/107/13/6005.full](http://www.pnas.org/content/107/13/6005.full).

<sup>45</sup> See PEW RESEARCH CENTER, *THE FUTURE OF WORLD RELIGIONS: POPULATION GROWTH PROJECTIONS, 2010–2050*, 5, 9 (Apr. 2, 2015) [hereinafter PEW WORLD REPORT].

<sup>46</sup> Bailey & Gentile, *supra* note 8, at 3; see also MCCREA, *supra* note 31, at 28–29 (noting significant differences between the religiosity of agrarian societies and the United States on the one hand and Western Europe on the other); PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* 70, 74 (2004). Some commentators have suggested that a religious revival exists in Europe, although it is a movement that is driven by immigrants, particularly Muslims. See Ino Augsberg, *Religious Freedom as "Reflexive Law,"* in *MAPPING THE LEGAL BOUNDARIES OF BELONGING*, *supra* note 5, at 81, 82–83. However, generalizations can be difficult, given significant differences within various regions. See DOE, *supra* note 31, at 10–11 (providing statistics on religious affiliation in Europe); MCCREA, *supra* note 31, at 29–31 (noting differences in religiosity within Europe).

<sup>47</sup> See Witte & Nichols, *supra* note 40, at 429.

about certain religious groups have put religious freedom at risk of becoming “a second-class right.”<sup>48</sup> However, empirical studies have shown that religiously oriented conflict decreases in societies that provide robust protection for religious liberty, which strongly suggests the need for the type of research contained in this book.<sup>49</sup>

### 1.3 METHODOLOGICAL CONCERNS

Creating a methodology capable of developing a new theoretical paradigm that is both consistent with contemporary concerns about law and religion and that addresses the needs of people who hold a range of religious, political and philosophical perspectives is admittedly difficult. For example, theorists working in this field must find a way of balancing rights that are said to be inherently incommensurable<sup>50</sup> and that appear to reflect a zero-sum analysis (i.e., a situation where what is good for one party is bad for the other).<sup>51</sup>

Another issue that is particularly challenging in this type of analysis involves conflicts between two aspects of the same basic right. For example, the question of whether a municipality can engage in prayer at the beginning of its town council meetings can be framed as involving some people’s positive (i.e., affirmative) right to practice their religion as well as some people’s negative (i.e., defensive) right not to be required to participate in another person’s religious practices.<sup>52</sup> This so-called negative right is distinguishable

<sup>48</sup> Mary Ann Glendon, *Religious Freedom – A Second-Class Right?*, 61 EMORY L.J. 971 (2012).

<sup>49</sup> See GRIM & FINKE, *supra* note 19, at 2–3.

<sup>50</sup> See EQUINET, *supra* note 8, at 30–31 (discussing tensions between intersecting rights, including religious liberty); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 51 (1989); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1748 (1995) [hereinafter Sunstein, *Incompletely Theorized*]; Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 697 (1990). For example, “the metaphor of balancing ‘says nothing about how various interests are to be weighted, and this silence tends to conceal the impossibility of measuring incommensurable values.’” Virgílio Alfonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273, 275 (2011) (citation omitted).

<sup>51</sup> See da Silva, *supra* note 50, at 284, 299.

<sup>52</sup> See, e.g., *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1821–23 (2014) (holding that prayers opening town board meetings (which were almost universally Protestant Christian) did not need to be nonsectarian, since that would involve the government too much in religious matters and “[t]he First Amendment [of the U.S. Constitution] is not a majority rule”); see also *Lautsi v. Italy*, 54 Eur. H.R. Rep. 3 [31] (2012); *McGee v. Attorney General*, [1974] I.R. 284, 316–17 (Walsh, J.) (noting that Article 44.2.1 of the Irish Constitution is not “a constitutional guarantee of a right to live in accordance with one’s conscience subject to public order and morality” but a “right not to be compelled or coerced into living in a way which is contrary to