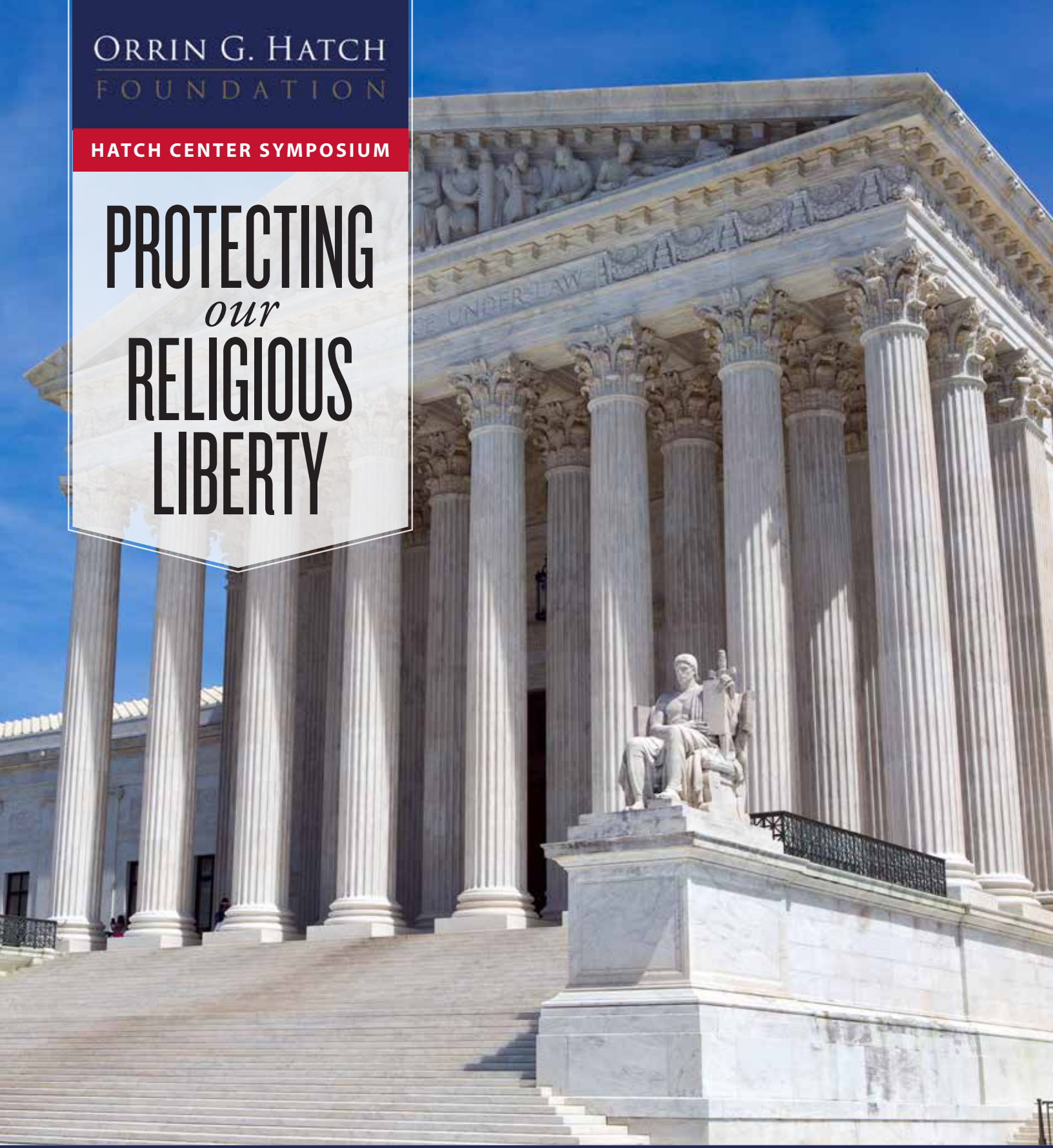


ORRIN G. HATCH
FOUNDATION

HATCH CENTER SYMPOSIUM

PROTECTING
our
RELIGIOUS
LIBERTY



SYMPOSIUM REPORT

June 2019



Leonard Leo

Leonard Leo is Executive Vice President of the Federalist Society, joining the organization over 25 years ago. Since that time he has been instrumental in helping the organization top 70,000, focusing on the growth of lawyers membership, operations and activities advancing limited, constitutional government. In addition to his work at the Society, Leonard has advised President Donald J. Trump on judicial selection, assisted with the Gorsuch and Kavanaugh Supreme Court selection and confirmation process, and served as a member of the transition team. He also organized the outside coalition efforts in support of the Roberts and Alito U.S. Supreme Court confirmations. Leonard was appointed by

President George W. Bush to three terms to the U.S. Commission on International Religious Freedom as chairman. He was also a U.S. Delegate to the UN Council and UN Commission on Human Rights during the Bush Administration. Leonard was the recipient of the 2009 Bradley Prize, along with the other founders and directors of the Federalist Society, for his work in advancing freedom and the rule of law. He is the coeditor of *Presidential Leadership: Rating the Best and the Worst in the White House*, as well as the author of opinion editorials in the New York Times, the Wall Street Journal, and the Washington Post. Leonard holds degrees from Cornell University and Cornell Law School. He resides in Northern Virginia, where he and his wife Sally have raised their seven children.



Baroness Emma J. Nicholson of Winterbourne, LRAM ARCM

Baroness Nicholson of Winterbourne is a Peer of the Realm and a member of the House of Lords where she sits as a Conservative on the government benches. She is the Prime Minister's Trade Envoy to Azerbaijan, Iraq, Kazakhstan, and Turkmenistan. She co-chairs the All-Party Parliamentary Groups for Foreign Affairs and the Prevention of Sexual Violence in Conflict and is a member of the Bicameral Select Committee on Human Rights. Baroness Nicholson served as Vice Chairman of the Conservative Party from 1983–1987. She was elected to the House of Commons in 1987. She was appointed to the House of Lords in 1997. She served two terms of office in the European Parliament from 1999–2009, followed by membership of the UK Delegation to the Council of Europe Parliamentary Assembly from 2011–2014. She has served

as official Election Leader and Observer in thirty two nations. In her private time she chairs the AMAR International Charitable Foundation. She is President of the Iraq Britain Business Council (IBBC), chairs the Romanian Children's High Level Group, is a Vice President of the Mary Hare School for Deaf Children, Patron of the Caine Prize for African Writing, Chairman of the Booker Prize for Russian Fiction, and Vice Chairman of the Booker Prize for English Fiction. She has been awarded eight Honorary Doctorates, has published two books and edited various others, and received a number of awards. She studied at The Royal Academy of Music and qualified there and at The Royal College of Music before entering the computer software industry, following which she worked for several major international children's charities. She is a member of the Church of England; the Royal Academy of Arts; the Reform Club; and the Royal Over-Seas League.

FAITH LEADERS' ROUNDTABLE



Avais Ahmed was born in Nigeria to Pakistani parents, but grew up in Kaysville, Utah, making the Beehive State his home for the last 31 years. The Ahmed family

has been involved in the leadership of the Islamic Society of Greater Salt Lake City, with Avais serving in various positions, including treasurer, vice president, Sunday school teacher, and currently, the chair of the outreach committee. He currently chairs the Utah Muslim Civic League, which was founded in order to encourage the 60,000 Muslims in the Salt Lake Valley to participate and take ownership in the civic process. Avais has a bachelor of science degree from the University of Utah and is involved in several e-commerce businesses as an investor, advisor, and co-founder.



Pamela J. Atkinson received her early education in England, earned a bachelor of science degree from the University of California, and a master of arts degree from the University of Washington. Over her career,

Pamela has held a variety of positions in health care and now works directly with the homeless, refugees, and low-income individuals and families, and with nonprofit and government entities that serve these populations.

Pamela was appointed to the State Board of Regents for ten years. She has also served on the State Board of Education, the Utah College of Applied Technology Board and now serves on the State Homeless Coordinating Committee, Envision Utah, Utah Coalition Against Pornography, the State Refugee Advisory Board, and as a policy advisor to Utah Governor Gary Herbert.



Elder Jack N. Gerard was sustained as a General Authority Seventy of The Church of Jesus Christ of Latter-day Saints on March 31, 2018, at age 60. He received a bachelor of arts degree in

political science and a juris doctor degree, both from The George Washington University. During his career, he has worked as president and CEO for several entities, including McClure, Gerard & Neuenschwander, Inc.; National Mining Association; America Chemistry Council; and most recently, American Petroleum Institute.

Elder Gerard has served in a number of LDS Church callings, including full-time missionary in the Australia Sydney Mission, ward mission leader, counselor in a bishopric, nursery leader, stake president, scoutmaster, young men adviser, and bishop. He married Claudette Neff in 1984. They are the parents of eight children.



The Honorable Orrin G. Hatch

Over more than four decades of public service, he established himself as a leading voice in the United States Senate. By all objective measures, he was one of the most effective and impactful legislators of modern times, passing more bills into law than anyone alive today. As Chairman of the Senate Finance Committee, he authored historic tax reform legislation and expanded trade opportunities for thousands of American businesses. And as a long-time member and former Chairman of the Senate Judiciary Committee, he fought to uphold the Constitution and defend our individual liberties.

Among Senator Hatch's most noteworthy achievements is the seminal Religious Freedom Restoration Act of 1993—a bill he co-authored with the late Senator Ted Kennedy. This landmark legislation prohibits substantial government burdens on the free exercise of religion, allowing all Americans to live, work, and worship in accordance with their deeply held personal beliefs. Of the more than 750 bills Senator Hatch shepherded into law, he considers this his most important legislative accomplishment. Senator Hatch is also the author of *Protecting Our Religious Liberties*, an eight-part discourse on the rights of conscience. He has long been a champion for religious liberty, and he continues to advocate for our First Amendment freedoms to this day.



Professor Brett G. Scharffs

Brett Scharffs is the Rex E. Lee Chair and Professor of Law at Brigham Young University's J. Reuben Clark Law School and Director of the International Center for Law and Religion Studies. His teaching and scholarly interests include law and religion, legal reasoning and rhetoric, philosophy of law, and legislation and regulation. Professor Scharffs is a graduate of Georgetown University, where he received a BSBA in international business and an MA in philosophy. He was a Rhodes Scholar at Oxford University, where he earned a BPhil in philosophy. He received his JD from Yale Law School where he was Senior Editor of the Yale Law Journal.

York law firm, Sullivan & Cromwell. He has previously taught at Yale University and the The George Washington University Law School. For the past ten years, he has been a visiting Professor at Central European University in Budapest, Hungary, and for the past seven years he has helped organize a Certificate Training Program on Religion and the Rule of Law in Beijing, China, in partnership with Peking University Law School's Center for Administrative and Constitutional Law. He also co-organizes similar programs in Vietnam and Myanmar. He has also been working to develop a masters-level course on Shari'a and Human Rights with two universities in Indonesia. He has been a visiting professor at the University of Adelaide School of Law in Australia (2012) and Doshisha University in Kyoto, Japan (2015).

Professor Scharffs was a law clerk on the U.S. Court of Appeals, D.C. Circuit, and worked as a legal assistant at the Iran-U.S. Claims Tribunal in The Hague. Before teaching at BYU, he worked as an attorney for the New

In his 18-year academic career, Professor Scharffs has written more than 100 articles and book chapters, and has made over 300 scholarly presentations in 30 countries. He is married to Deirdre Mason Crane Scharffs, and has three children, Elliot, Sophia, and Ella.



Dr. Neale Neelameggham

came to Utah 50 years ago and received his doctorate degree from the University of Utah, graduating in 1972. Dr. Neelameggham and his wife, Indra, were instrumental in the development and construction of the Sri Ganesha Hindu Temple and provided the Temporary Abode for Sri Ganesha (the main deity in Hinduism) in their house for eight years until the building of the permanent Temple that now stands in South Jordan, Utah.

Dr. Neelameggham is one of the founding trustees of the Temple and a Lifetime trustee of Sri Ganesha Hindu Temple and India Cultural Center. He serves on the board of the Salt Lake Interfaith Roundtable and other nonprofits. Professionally, Dr. Neelameggham works for IND LLC and consults internationally in metals and chemicals, energy technologies, and agricultural uses of coal.



Rabbi Avremi Zippel

was born in Toronto, Canada, and moved to Salt Lake City with his parents in 1992 when they relocated to establish Chabad Lubavitch of Utah, the local branch of the world's largest Jewish outreach movement. The oldest of six, Avremi was home-schooled through his Bar Mitzvah (13th Birthday), then left home for 8th grade and on to pursue a more full-time Jewish education. He attended a Jewish High School in Chicago and attended Rabbinical College in London. Avremi participated in Jewish outreach and humanitarian missions in Denmark, Germany, France, Italy, Wales, and across the U.S. He was ordained at the Rabbinical College of America in Morristown, New Jersey, in 2013, married Sheina in 2014, and moved to Utah later that year to work at Chabad in the capacity of Directors of Young Jewish Professionals Utah. Avremi and Sheina are the proud parents of two young sons, Menny and Menachem.



The Orrin G. Hatch Foundation is an incubator for policy scholarship, a forum for political discourse, a springboard for civic engagement, and a world-class repository of modern American legislative history known as the Orrin G. Hatch Collection. To learn more, go to www.orrinhatchfoundation.org. By means of its policy arm, the Hatch Center, the Foundation acts to further important causes, including the protection of religious liberty. As an advocate for religious liberty, the Hatch Center is pleased to release this report based on and inspired by its April 11, 2019, symposium, “Protecting Our Religious Liberty,” held at The University of Utah’s S.J. Quinney College of Law.

Simply the Thing I Am Shall Make Me Live: **Combating Religious Persecution through Renewal and Reconciliation**

Baroness Emma J. Nicholson, Founder of the AMAR Foundation¹

The opening speaker of the symposium, Baroness Emma J. Nicholson, delivered a message concerning the power and necessity of friendship to renew the hopes and faith of religiously persecuted groups. The Baroness noted that “in a moment now when anti-Semitism is growing, we have to think about what is going on” around us and throughout the world. We must be aware of the plights, both religious based and otherwise, of our neighbors. To illustrate this point, the Baroness recounted details of the AMAR Foundation’s (AMAR) work with the Yazidi people, an Iraqi group that has been persecuted and displaced by ISIS/Daesh.² The Baroness stressed that the conditions plaguing the Yazidi people (persecution and violence from within their own nation; living in camps with little to no access to their culture, music, or art; and many other deplorable conditions) stem directly from religious persecution. In light of this, the Baroness offered advice on how other religious and charitable groups can use friendship, love, and faith to play an inclusionary humanitarian role.

This begs the question: Why should we (using this term abstractly to capture various groups) extend the hand of friendship to defend the beliefs or lifestyles of different faiths? In the words of the Baroness, “The second of the great commandments is to love thy neighbor as thyself; and to understand, therefore, that your neighbor is just as good as yourself—has many skills—but may be in a much more difficult situation,” a situation for which others may have the solution. As an example of this principle in action, the Baroness



described how AMAR values defending faith as equally essential as other humanitarian priorities, including healthcare, education, and employment. Her reasoning for such an assertion? It is faith that often defines who we are. Quoting Shakespeare, the Baroness asserted that “simply the thing I am shall make me live.” Faith is indeed something for which many persecuted peoples, like the Yazidi, continue to live.

What else, then, must be done to help groups like the Yazidi from continued religious persecution? The Baroness opined that “we have a huge amount to do, we cannot allow civilization to go on like this. This constant assault of people; groups persecuted because of their religious belief. We have to work harder.” Indeed, we need to reconcile our differences and extend the hand of service to facilitate the inclusion of persecuted peoples.

The work and reconciliation, through the efforts and friendship of various faiths and groups, have already begun. The Baroness explained that many are answering the call. For example, The Church of Jesus Christ of Latter-day Saints and AMAR have exercised collaborative efforts to provide genealogical work to the Yazidi people, which will help them identify and locate lost loved ones. Moreover, AMAR has undertaken an initiative to bring culturally significant music back to the Yazidi. Such efforts must only be the beginning of the “magic thread” of friendship—to use the Baroness’s words—that binds our different beliefs and cultures together.





From Human Dignity to Religious Freedom

Professor Brett G. Scharffs, Director of the International Center for Law and Religion Studies, Brigham Young University³

“All human beings are endowed by their creator with inherent and inalienable human dignity. This dignity is the foundation for human rights, and one of the most powerful justifications for religious freedom for all.” From the many insightful comments offered by the symposium’s second speaker, BYU Law Professor Brett Scharffs, this principle encapsulates best the theme of his discourse. Professor Scharffs painted a convincing picture of this proposition by comparing human dignity to a common, childhood tool: the Swiss Army Knife. A Swiss Army Knife is an all-in-one device, containing scissors, toothpicks, a screwdriver, a knife, and numerous other helpful instruments. Professor Scharffs explained that just like the “many tools included in this single, perfectly crafted tool,” human dignity is the “Swiss Army Knife of human rights and religious freedom,” containing many tools and solutions for a wide array of rights-based issues.

The evidence for this can be seen in diverse examples. Of note, Professor Scharffs discussed Uruguay’s recently adopted Punta del Este Declaration on Human Dignity for Everyone Everywhere.⁴ After invaluable efforts from many groups, including the International Center for Law and Religion Studies, the Punta del Este Declaration became a reality in December 2018, bringing renewed protections for, and attention to, rights like religious freedom in Uruguay. This Declaration is foundationally based on the same operative and inalienable principles of human dignity incorporated 70 years prior in the Universal Declaration of Human Rights.⁵

And the power of human dignity can be seen elsewhere. For example, Professor Scharffs commented on the success that Ján Figel—the EU Special Envoy for Freedom of Religion and Belief Outside the EU—experienced when using the concept of human dignity to spark religious freedom conversations and conferences in Pakistan, a country often opposed to such efforts. “This little concept of human dignity became the door opener, the bridge builder, the conversation starter,” noted the Professor. This is no coincidence,

for human dignity “is at once the foundation of human rights, but also the telos, or the end, of human rights. And so, when we ask, ‘What’s the purpose of human rights?’—it is to achieve human dignity for everyone.” (See the list below for more on the practical uses of human dignity.)

In closing his remarks, Professor Scharffs referred to Steve McCurry’s⁶ beautiful portraits of individuals worldwide, emphasizing that no matter the state of the portrayed individual, viewers are always drawn to the eyes. “Reminding us all that we are each created in the image of God, are his children, and have a dignity, value, and status that are inestimable.”

Human Dignity: The “Swiss Army Knife” of Human Rights and Religious Freedom

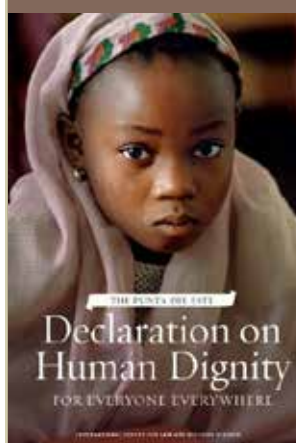


Photo Source: Punta del Este Declaration on Human Dignity for Everyone Everywhere

- A “door opener, bridge builder, and conversation starter” for discussions on religious freedom;
- Both the foundation and the objective of human rights;
- A metric for measuring human-rights performance by countries worldwide;
- A concept for human rights education;
- A tool through which courts reconcile conflicts between diverse groups;
- A focus to address the most egregious violations of human rights and religious freedom; and,
- A means by which we look to human-rights progress.



Religious Freedom and the Changing Federal Judiciary

Leonard Leo, Executive Vice President of the Federalist Society⁷

Remarks by Orrin G. Hatch

Emeritus Chairman, Orrin G. Hatch Foundation

Orrin G. Hatch was the symposium's third speaker. Before introducing the keynote speaker, Leonard Leo, Senator Hatch took a moment to reinforce the importance of Professor Scharffs and Baroness Nicholson's remarks—stressing that “religious liberty deserves our attention at home and abroad.” The Senator also praised the efforts of Leonard Leo as the Executive Vice President of the Federalist Society, praising Leo and the Federalist Society for advancing the cause of religious liberty “by equipping a new generation of lawyers with a profound appreciation for the Constitution and an unwavering commitment to defend the Constitution.”

“It is ultimately impossible to bolster the freedom of religion without respecting and enforcing the structural limits on government power contained in [the U.S.] Constitution. And the judicial selection enterprise we are witnessing today, by appointing structural constitutionalists, will do more than most imagine to preserve the freedom of religion.” The keynote speaker of the symposium, Leonard Leo, offered this proposition as the focal point of his remarks.

In support of his argument, Leo asked the symposium audience to consider the “true genius” of the American Constitution. Such genius, as Leo explained, does not lie solely in its words or institutions. Similar words and institutions have been used by governments and dictatorships worldwide as a “mirage” to cover acts of “rank and cruel persecution.” The “real genius of the American Constitution lies in the space between those words and the clash between those institutions. There, we find principles that give our system life and verve: the separation of powers, checks and balances, federalism,

enumerated powers, and the sovereignty of the American people.” To attach a moniker, Leo calls these underlying principles “the structural constitution.” The value of this structural constitution in the realm of religious liberty cannot be overstated. Indeed, as Leo explained, if we “look to any number of incursions on conscience rights and the free exercise of religion, you’ll often find some departure from [these] structural limits on government power.”

But, recent appointments to the federal judiciary have the country on the brink of a watershed moment, “one which should give advocates of religious liberty some real hope.” Specifically, Leo explained that although he has seen much incursion into religious liberty in recent years, the U.S. Supreme Court is close to reviving the structural constitutional principles explained above. This revival bodes well for freedom of belief because it indicates a state of affairs in which the federal courts can return to a system with less government intrusion and more individual liberty. Such a change “naturally opens up space for a vibrant civil society, and religion is at the center of that civil society.”

Even so, Leo warned that combating intolerance against religious freedom, at least in the United States, will still not be an easy fight in federal courts. The reason? It has become fashionable in American society to tread upon religious freedom. Specifically, Leo addressed two concerning cultural trends of which he has taken notice—here in the U.S. and abroad.

First, freedom of religion (which implies hard legal protections) is giving way to freedom of worship (a much more airy concept). Freedom of worship affords limited defense to belief and has a narrow application, leaving many religious activities and practices without constitutional protection. Freedom of religion, in contrast, is a tangible concept, one which “protects the right of conscience, not just in houses of worship but in workplaces, schools, hospitals, government offices, and anywhere else we go in the world.”



FAITH LEADERS' ROUNDTABLE

To close the symposium, local faith and community leaders sat down with the speakers and conducted an open discussion on numerous faith-related and religious-liberty topics. Notable remarks have been included below.

- Dr. Neale R. Neelameggham discussed the importance of mutual understanding and service between religious and civil groups of different backgrounds. To illustrate this point, he recounted the aid the Utah Hindu community received from community and religious leaders during the construction of the Sri Ganesha Hindu Temple. Of note, Dr. Neelameggham said the following: “Without the community help, we wouldn’t be here. Everyone has faith; live and let live. Everyone helped.”
- Pamela Atkinson discussed the success she has seen from hosting lunches with Utah Governor Gary Herbert and leaders of diverse faiths. “It is absolutely wonderful to see how people interact from the different faiths together. . . . There are a lot of business cards being handed out, there is a lot of sharing, and those friendships continue well after the luncheon.”

Second, Leo voiced his concerns that as the U.S. government (and other governments) become more begrudging of religions, society inevitably follows this same path. For example, when a government agency criticizes and burdens a religious minority or group, the press and other members of society follow suit. This, ironically enough, raises concerns for advocates of religious liberty because our Constitution is fundamentally meant to protect the rights of all, especially minority viewpoints. Perhaps then, voiced Leo, “you just have to hold the *right* minority view” when it comes to religious freedom.

Fortunately, Leo emphasized that the current administration is committed to appointing men and women who can act in their appropriate judicial capacity to halt such trends and reinforce the

- Responding to a self-posed question of how society and religions can break the “us vs. them” mentality, Avais Ahmed offered this solution: “Learn how to make very good tea. . . . Just go out and meet your neighbors, go out and spend time with other folks. . . . We can make a lot of strides with simple solutions.”
- “As human beings, when we speak about the idea of religious liberty and combating rising trends in anti-Semitism and hostilities towards other minorities, it really starts with us. It behooves us to take into account the way we view other people and how that affects our initial reaction to them and the feeling we give them.”— Rabbi Avremi Zippel
- “There are those who would like to define religious liberty in a much narrower way than it has been historically as protected under the Bill of Rights. So yes, there is a challenge before us. We should come together with common interests but also get into the broader community to express our concern and see if we can’t find a mutually respectful way—a fairness for all—to resolve some of these challenges.” — Elder Jack N. Gerard

principles of limited government. In this regard, Leo recounted his experience in which the President gave him, along with other appointment officers, instructions as to whom should be nominated and appointed for federal judiciary positions. The President demanded that men and women needed to be found who would embody sound principles. That is, candidates who were (1) prudent, (2) would do justice in their service, (3) would model temperance, and (4) would not be weak in their duties—having fortitude to stand firm. Just as these federal judges must stand firm, Leo invited the symposium attendees to stand for and reaffirm the structural limitations inherent in the Constitution. To echo his words: “Now, let us stand together and stand courageously.”

The symposium speakers' commentaries give a convincing picture of the necessary nature of, and action needed with regard to, religious liberty—both in the U.S. and abroad. In an era when the rights appurtenant to religious liberty are commonly under attack⁸ or stripped of their original meaning,⁹ it behooves advocates of freedom of belief—and advocates of all rights contained in the Constitution—to stand firm and stand together, regardless of political or religious backgrounds. This section reviews recent cultural and political trends affecting religious liberty, giving specific attention to efforts to amend the Religious Freedom Restoration Act (RFRA), and offers some preliminary insights into the future of religious liberty, commenting on the importance of the changing federal judiciary as it relates to the future of religious liberty.

Recent Trends in Religious Liberty: RFRA Reformation

What is the current status of religious liberty in the United States? Admittedly, it is difficult to gauge a direct answer to this question, as rarely does any particular group or party perform an open-attack on religious liberty,¹⁰ and the victories achieved in religious-based court cases often offer little insight into the underlying issues crucial to this discussion. Indeed, the ebb and flow of religious liberty's status requires a more nuanced look.¹¹

If we were to answer this question based solely on recent U.S. Supreme Court decisions, then religious liberty could easily be construed as standing firm in the face of increasing conflict and cultural assault.¹² After all, the Court's holdings in cases like *Trinity Lutheran*, *Masterpiece Cakeshop*, and *Hobby Lobby* (to name but a few) ended in rulings favorable to the petitioning religious groups. The snapshot viewed from these cases, however, does not adequately capture trends in the United States that may indicate religious liberty is at a critical juncture. To be more precise, what such a limited review fails to capture is the resultant backlash that has come about in response to these cases—that is, The Do No Harm Act (the DNHA).¹³

The Do No Harm Act, in its current proposal form, asks that Congress amend RFRA so that it cannot be interpreted to authorize religious exemptions when the exemptions would “impose . . . meaningful harm, including dignitary harm,” or “permit discrimination against other persons.” The full text of the bill reads as follows:

- (1) *the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption from generally applicable law that imposes the religious views, habits, or practices of one party upon another;*
- (2) *the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption from generally applicable law that imposes meaningful harm, including dignitary harm, on a third party; and,*

- (3) *the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption that permits discrimination against other persons, including persons who do not belong to the religion or adhere to the beliefs of those to whom the exemption is given.*¹⁴

What started in 1993 as a piece of legislation over which diverse political, faith, and secular leaders could agree, has now become a target of reform and complaints. Senator Orrin G. Hatch, one of the chief authors of RFRA, once said the following in regard to its adoption: “For all of our divisions, for all of our disagreements, we all managed to find common ground in defense of religious liberty.”¹⁵ And now, despite previous agreement, RFRA is being labeled as a “guise” through which religious individuals discriminate against others.¹⁶ Agreement and union are giving way to distrust and division.

Of course, society's balancing between freedom of religion and other rights often leads to conflicts and disputes—the cases cited previously provide ample evidence of this—which can even, and regularly do, lead to one side or the other claiming some form of discrimination.¹⁷ But the push behind the DNHA raises concerns beyond just recognizing and seeking to resolve discrimination-based conflicts. Indeed, the latest efforts, successful or not, are a symptom of the greater issue: Religious liberty has become a popular and continual target in today's society.

Looking to the Future: The Changing Federal Judiciary and Court Packing

The basic nexus between the judiciary and religious liberty is neither complex nor truly novel. At its core, religious liberty is a right given robust protection in the First Amendment.¹⁸ Therefore, all that this right needs to flourish is a judge committed to interpreting the Constitution (and other statutes) impartially and *as they are written*. This phrase, *as they are written*, carries a heavy implication. It means that the judge will refrain from adopting an internal or political interpretation of law—that is, an interpretation originating from *anything* beyond what the law was intended to be. By committing to an impartial, as-the-law-is-written approach, the judge will inevitably enforce the Constitution in an independent manner that furthers vital rights—including protection of religious freedom.

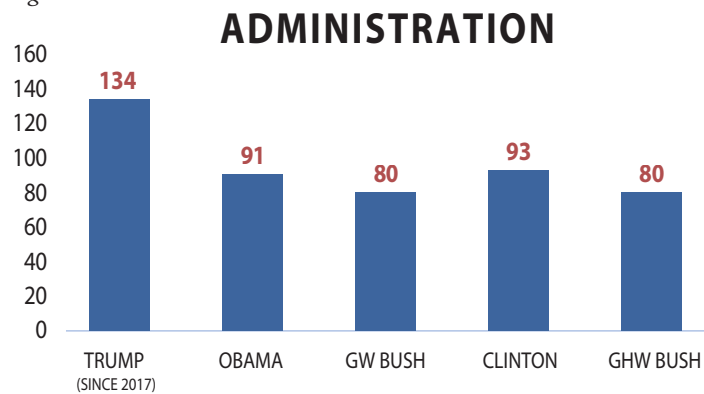
Conversely, if an administration appoints judges who interpret the Constitution based on some amalgamation of internal factors and political influence—even influence favorable to religions—then religious liberty loses ground. Historically, it was a political judiciary that quickly and significantly changed religious freedom in America.¹⁹ Freedom of religion and belief does not need “religious freedom judges;” it needs men and women dedicated to an impartial interpretation of the Constitution. Simply promoting religious freedom through judicial agents partial to the cause will not create the necessary progress religious liberty needs in this day. Rather,

religious liberty stands its best chance of being revitalized if current and future administrations find independent judicial appointees who can return to the impartial, as-written interpretation of the Constitution.²⁰

In this regard, the President plays a pivotal role as the official responsible for appointing this kind²¹ of judge to federal vacancies. But it is not only the kind of judge the President appoints that impacts the judiciary (and rights upon which the judiciary rules and interprets), but also the *number* he appoints and the kind of judges his appointees replace. To this point, for the first time in six years, judicial vacancies were in the triple digits when President Trump took office; moreover, the federal judiciary is in the longest period of triple-digit vacancies since the early 1990s (See Figure 1 for a comparison of the average number of vacancies during each of the previous four administrations' first three years).²² This high number of vacancies affords the current administration the chance to appoint more judges than any of the previous four administrations, opening the door to significant change in the makeup of the federal judiciary.²³

But the number of judicial vacancies a president fills is only one part of the judicial impact of an administration—that is, the kind of judge the appointee *replaces* is also significant to affecting change. For example, President Trump's appointment of Justice Neil Gorsuch to replace Justice Antonin Scalia may not materially change the Supreme Court's composition because these two judges are the same kind of judge. But President Trump's appointment of Justice Brett Kavanaugh to replace Justice Anthony Kennedy may have a more significant impact because these two are arguably different kinds of judges. President Trump's impact on the courts, however, extends beyond the Supreme Court.²⁴ To date, the Senate has confirmed 121 Article III judges nominated by President Trump, including 41 judges for the U.S. Courts of Appeals and 78 judges for the U.S. District Courts.²⁵

Figure 1:



Data courtesy of Tom Jipping of the Heritage Foundation.

The appointment of impartial judges can only facilitate the progression of religious liberty so far in the face of an unsettling (and still unfulfilled) proposal that has recently been gaining ground in U.S. politics: court packing. Because of the potential and very real harms court packing poses to religious liberty, Senator Hatch published an op-ed discussing this topic during the week of the symposium.²⁶

To quote the Senator:

Since 1869, we have had only nine justices on the U.S. Supreme Court. That number has been fixed, and for good reason; it constrains the administration in power—be it Republican or Democrat—from installing an unspecified number of judges to dramatically shift the ideological balance of our courts.

This time-honored norm has moderated our politics for well over a century. But a growing number of elected officials, including several presidential candidates, want to dispense with it altogether. Instead, they want to “pack the court”—that is, increase the number of justices serving from nine to whatever number they deem necessary to win political control over the judicial branch.

*The consequences of such action would be catastrophic and irreversible . . . [and] [i]t is the effect this practice would have on our right of religion that concerns me most.*²⁷

Senator Hatch's warning is intricately linked to the concepts raised above—specifically, the connection between religious liberty and the changing federal judiciary. Any traction gained by appointing impartial judges who honor the Constitution would be stalled, and potentially reversed, by an administration using its power to appoint any number of judges it sees fit.

CONCLUSION

With society's increased assault on faith and belief, how can we measure the progress and protection of religious liberty? And what hope does religious liberty have in the face of continued efforts to reform longstanding protections of this indispensable right? To revisit Leonard Leo's remarks, we are on the brink of a promising future where independent federal judges with a deep respect for the structural and foundational principles of the Constitution are beginning to take a stand. Religious liberty, and the many other rights enshrined in the Constitution, need these judges. Judicial appointees who act independently and within their proper scope to impartially interpret the Constitution *as it is written*—not by what they internally divine or infer from political influences—provide a real opportunity for religious liberty to regain traction. Though progress may be slow-going, it is progress nonetheless. In the end, we—using the term as broadly as possible to capture all faiths and affiliations—must continue to stand together to fight in defense of our first²⁸ freedom.

Endnotes

1. For Baroness Nicholson's full discourse (and all other speakers' remarks), see Hatch Center Press Team, *Hatch at Religious Freedom Symposium: Religious Liberty Deserves Attention*, ORRIN G. HATCH FOUNDATION (April 12, 2019, 1:03 PM), <https://www.orrinhatchfoundation.org/hatch-at-religious-freedom-symposium-religious-liberty-deserves-attention/>. Additionally, for further details on the AMAR Foundation, see AMAR U.S.: REBUILDING LIVES, <https://www.amarfoundation.org/en-us/> (last visited April 18, 2019).
2. The plight of the Yazidi people has been at the forefront of much of the AMAR foundation's work. See Sarah Hollis, *AMAR's Windsor Conference Addresses Religious Persecution*, AMAR (Feb. 8, 2017), <https://www.amarfoundation.org/en-us-usa-news/amars-windsor-conference-addresses-religious-persecution/>.
3. For further details on the Center, see <https://www.iclrs.org/>.
4. For more information on the Punta del Este Conference and subsequent report, see Human Dignity: For Everyone Everywhere, <https://www.dignityforeveryone.org/>.
5. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
6. Steve McCurry is a world-renowned photographer known for his beautiful and captivating portraits. See Steve McCurry: Bio, <https://stevemccurry.com/bio>.
7. For more information on the Federalist Society, see <https://fedsoc.org/>.
8. See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869 (2014) (arguing the law relevant to protecting religious liberty "has become far more controversial than it used to be," and warning that "[t]he consequence of fighting" current cultural trends "may be to permanently turn much of the country against religious liberty").
9. Examples of these attacks are not difficult to find. See Michael Brendan Dougherty, *The Coming Test Acts Will Challenge Religious Freedom*, NAT'L REV. (Jan. 21, 2019) ("Instead of allowing the flourishing of various religious bodies in a democratic republic, the language of the First Amendment is [being] used to cultivate a special disgust and suspicion of religious people when they act in public or in the civic space. Its 'restriction' of religion is now widely interpreted as a license for America's best and brightest to establish ideas and ideologies so long as those ideas are detached from religion. Even when those ideas trespass on the free exercise of religion."). Moreover, the Pew Research Center reports that government restrictions on religions worldwide have been increasing. See Pew Research Center, *Global Uptick in Government Restrictions on Religion in 2016* (June 21, 2018), <https://www.pewforum.org/2018/06/21/global-uptick-in-government-restrictions-on-religion-in-2016/>.
10. Indeed, the arguments for reformation of religious liberty come in a variety of forms and often call for the protection of other classes, decisions, actions, or rights. Such arguments do not overtly seek to remove religious liberty; rather, they call for limits beyond what our First Amendment provides for. For an example of this, see The Do No Harm Act, H.R. 1450, 116th Cong. (2019) (seeking "[t]o amend the Religious Freedom Restoration Act of 1993 to protect the civil rights and otherwise prevent meaningful harm to third parties").
11. Scholars in the field of religious-liberty writing have taken note of this. See William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J.L. & PUB. POL'Y 67, 67 (2018) ("[T]he debate over religious exemptions has unfortunately devolved to polemics with insults and mischaracterizations being freely levelled by both sides.").
12. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (finding that the Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality when reviewing the dispute between a cakeshop owner and a same-sex couple who sought to use the cakeshop owner's services); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (holding a state agency committed an act "odious to our Constitution" when the agency denied a church-affiliated preschool "from a public benefit for which it was otherwise qualified, solely because [the preschool was] a church"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding the Health and Human Services contraceptive mandate could not survive RFRA's strict scrutiny review).
13. The Do No Harm Act, H.R. 1450, 116th Cong. (2019). This is not the first effort to push the DNHA through Congress. Such efforts began as early as 2017.
14. *Id.*
15. Senator Orrin Hatch, *Judges and Religious Liberty*, HARV. L. REV. BLOG (Dec 1, 2017), available at <https://blog.harvardlawreview.org/judges-and-religious-liberty/>.
16. See Gwen Aviles, *Congressional Democrats Reintroduce the Do No Harm Act*, NBC NEWS (Mar. 1, 2019, 9:43 AM MST), <https://www.nbcnews.com/feature/nbc-out/congressional-democrats-reintroduce-do-no-harm-act-n978101>. "[T]hey discriminate on the basis of religion by limiting membership . . . to those who actually believe the religion. A religion that cannot make distinctions on the basis of religion is not likely to survive as a religion." LAYCOCK, *supra* note 8, at 868.
17. Laycock, *supra* note 8, at 868–69 ("Most of these issues can also be put in the frame of discrimination. . . . Discrimination is a powerful charge.").
18. The First Amendment prohibits a narrow "establishment of religion" and protects a broad "free exercise of religion." See U.S. CONST. amend. I.
19. In 1947, for example, the Supreme Court broadened the meaning of establishment of religion to include a "wall of separation between church and state." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). As another example, in 1990 the Supreme Court narrowed the First Amendment's protection of the free exercise of religion to cases in which the government is explicitly and directly targeting religion. See *Emp't Div v. Smith*, 494 U.S. 872 (1990); see also Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (1993) (discussing how the *Smith* opinion "totally ignores both the text and the history of the Free Exercise Clause").
20. This very idea was commented on by members of the J. Reuben Clark Law Society. See *The Importance of Religious Freedom and Strong Judicial Administration to Protect Religious Minorities*, JRCLS, available at <http://www.jrcls.org/publications/TalksFromJRCLSEvents/The%20Importance%20of%20Religious%20Freedom.PDF> ("First and foremost, the judiciary can promote religious tolerance by acting from a position of judicial independence – independence from other governmental departments and independent from powerful people, religious leaders, and others who would interfere with a judiciary acting independently") (last visited May 2, 2019).
21. Our usage of the term "kind" is an intentional reference to one of two types of judges. The first is an *impartial* judge (described above) who properly interprets the constitution as it is written, without bias and political influence. The second is a *political* judge, one who focuses on the result he or she desires, not the one mandated by the Constitution.
22. Appreciation to Thomas Jipping of the Heritage Foundation for providing this data. See *Judicial Appointment Tracker*, Heritage.org, <https://www.heritage.org/judicialtracker> (last visited May 7, 2019).
23. President Trump's appointments have met stiff resistance, with only 57.3% of his nominees receiving approval to date. *Id.* Yet, even with such resistance, the Trump Administration has appointed more than 100 federal judges. *Id.*
24. See Jordain Carney, *Senate Confirms Trump's 100th Judicial Nominee*, THE HILL (May 3, 2019 7:02 PM EDT), <https://thehill.com/blogs/floor-action/senate/442089-senate-confirms-trumps-100th-judicial-nominee>.
25. Carrie Severino, *Law & the Courts: Judicial-Nominations Update*, NAT'L REV. (June 17, 2019), <https://www.nationalreview.com/bench-memos/judicial-nominations-update-48/>.
26. Orrin Hatch, *This Dangerous Idea Gaining Traction in American Politics Could Harm Religious Liberty*, DESERET NEWS OPINION (Apr. 10, 2019 8:00 AM), <https://www.deseretnews.com/article/900064991/orrin-hatch-this-dangerous-idea-gaining-traction-in-american-politics-could-harm-religious-liberty-court-packing.html>.
27. *Id.*
28. See Franklin Delano Roosevelt, *The Four Freedoms*, ADDRESS TO THE 77TH CONG. (Jan. 6, 1941), available at <https://fdrlibrary.org/four-freedoms>.



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