

## ESSAY: *VERITATIS SPLENDOR* AND STATE ACCOMMODATION OF RELIGIOUS FREEDOM

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It is my honor to speak at this conference, which has reflected so wonderfully on the theology and life of Saint John Paul the Great. I am by no means a scholar of Pope John Paul II. I was only a boy when he became Pope but, like many of you, he influenced my life growing up.

In addressing the topic of religious accommodation and John Paul II's encyclical, *Veritatis Splendor* (August 6, 1993), I will build on the groundwork already laid at this conference.<sup>1</sup> Several talks have focused on John Paul II's teachings about conscience. In fact, the formation and role of conscience constitute a large portion of the relevant teachings in *Veritatis Splendor*.<sup>2</sup> That encyclical, in turn, builds upon teachings found in Vatican II's Declaration on Religious Freedom, *Dignitatis Humanae* (December 7, 1965).<sup>3</sup> Another of John Paul II's encyclicals, *Redemptor Hominis* (March 4, 1979), also addresses the issue of religious freedom and conscience.<sup>4</sup> I will attempt to connect these various teachings on conscience with some of the topics I discuss in my legal scholarship dealing with the freedom of religion.

To that end, in our short time together I will focus on two conscience issues I see at the forefront of religious freedom litigation before the U.S.

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1. See generally Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church's Moral Teaching] (1993) [hereinafter *Veritatis Splendor*].

2. *Id.*

3. Pope Paul IV, *Dignitatis Humanae* [Declaration on Religious Freedom] (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 395 (Nat'l Cath. Welfare Conf. trans., 1967) [hereinafter *Dignitatis Humanae*].

4. Pope John Paul II, *Redemptor Hominis* [Encyclical Letter on the Redeemer of Man] pt. II, ¶ 10 (1979) [hereinafter *Redemptor Hominis*].

Supreme Court and the European Court of Human Rights. We have heard much in this conference about these two courts, especially the European Court. The courts have important similarities. They both oversee sovereign nations (or states). Further, they are designed with limited powers and with a duty to act deferentially toward the actions of those states.

My reflections today are a tale of some of the cases coming out of those two courts and, of course, a tale about Pope John Paul II.

### THREE PRINCIPLES DRAWN FROM JOHN PAUL II'S TEACHINGS

I will start the discussion with three principles I have drawn from the Church's teachings on conscience, some of which have already been explored by others at this conference.

The first principle involves the idea of the dignity of the human person in obeying God's will. John Paul II explains that our freedom—our dignity as persons—is drawn from obedience to our conscience, properly formed:

The relationship between man's freedom and God's law is most deeply lived out in the "heart" of the person, in his moral conscience. As the Second Vatican Council observed: . . . "[M]an has in his heart a law written by God. To obey it is the very dignity of man . . . ."<sup>5</sup>

That is God's will: writing His law in our hearts. What a beautiful concept.

John Paul II later talks about this freedom being a gift that has been given to us . . . this gift to obey. It is the basis of our dignity as persons created in God's image:

Human freedom . . . is given as a gift, one to be received like a seed and to be cultivated responsibly. It is an essential part of that creaturely image which is the basis of the dignity of the person.<sup>6</sup>

So, conscience and religious freedom are critical concepts.

The second principle, which *Veritatis Splendor* addresses extensively, is the importance of forming our conscience appropriately because conscience can err. What we *cannot* do is use our conscience as an absolute value,

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5. *Veritatis Splendor*, *supra* note 1, ch. II, sec. II, ¶ 54 (quoting Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] pt. I, ch. I, ¶ 16 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513 (Nat'l Cath. Welfare Conf. trans., 1967)).

6. *Id.* ch. III, ¶ 86.

saying that because my conscience tells me something, that is now the absolute morality that I can live by:

Certain currents of modern thought have gone so far as to exalt freedom to such an extent that it becomes an absolute, which would then be the source of values. . . . The individual conscience is accorded the status of a supreme tribunal of moral judgment . . . . [S]ome have come to adopt a radically subjectivistic concept of moral judgment.<sup>7</sup>

John Paul II spends a good deal of time in the encyclical trying to disabuse us of that modern notion of conscience. He seeks to help us understand what it means to develop our conscience properly in relation to the teachings of the Magisterium of the Church. Otherwise, we become a law unto ourselves and ignore moral objective truth—in other words, each person has their own truth (which may be where we have ended up in today’s culture).

The third principle—regardless of how well we form our conscience—is that, when it comes to the individual *vis-à-vis* the State, the State is supposed to respect our conscience as part of our religious freedom. Even if our conscience is ill-formed, the State must still respect it (within limits, of course):

[R]eligious freedom . . . and . . . respect for conscience on its journey towards the truth is increasingly perceived as the foundation of the cumulative rights of the person. This heightened sense of . . . dignity . . . represents one of the positive achievements of modern culture.<sup>8</sup>

So—even if God is going to slap me across the head later and tell me that I was in error—John Paul calls this one of the positive achievements of our modern culture . . . this idea that we have recognized that religious freedom and the formation of our conscience is a foundation of personal rights. The two are connected, and John Paul sees that as a positive development.

This, of course, builds on Vatican II, which (as we have discussed at this conference) affirms that it is not about *imposing* religious values, but about *proposing* them to the individual and society:

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7. *Id.* ch. II, ¶ 32 (emphasis omitted).

8. *Id.* ch. II, ¶ 31.

[T]he human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power . . . .<sup>9</sup>

It is our own conscience and freedom, and the State should not impose its values upon us. Even the Church should not impose values over and against the will of the individual. It is something we must accept voluntarily.

John Paul II further declares it unacceptable for society to curtail conscience rights and treat religious persons like second-class citizens, barely tolerated in the culture:

[C]urtailment of the religious freedom of individuals and communities is . . . an attack on man's very dignity, independently of the religion professed . . . . It is . . . difficult . . . to accept a position [where] . . . believers are . . . barely tolerated or are treated as second-class citizens . . .  
<sup>10</sup>

I would suggest that, on the issues I am about to address, that might be exactly where we are in many countries. Religious persons are barely being tolerated on critical issues of conscience.

## TWO CONSCIENCE ISSUES BEFORE THE COURTS

So, those are the three principles. Now to the two conscience issues for this talk—there are many others out there—but there are two categories I would like to focus on today.

The first category of cases involves health care. This includes issues such as the one that Professor Joseph J. Weiler discussed this morning, when he noted that it would be problematic if the State were to force a doctor or nurse to participate in an abortion against their conscience.<sup>11</sup> More recently, we have seen cases where the Government forces people to fund, insure, or perform gender-affirming surgeries in contradiction to their religious beliefs.<sup>12</sup>

In the United States, the Supreme Court addressed this issue in *Burwell v. Hobby Lobby Stores, Inc.*, in the context of the Affordable Care Act,

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9. *Dignitatis Humanae*, *supra* note 3, ¶ 2.

10. *Redemptor Hominis*, *supra* note 4, pt. III, ¶ 17.

11. Professor Joseph J. Weiler was another speaker at the “Saint John Paul II’s Natural Law Legacy & International Human Rights: Toward a Century of Persuasion” conference.

12. *See generally* Complaint & Demand for Jury Trial, *Am. Coll. of Pediatricians v. Becerra*, No. 1:21-cv-195 (E.D. Tenn. Aug. 26, 2021).

colloquially known as “Obamacare” because it is the health care law signed by President Barack Obama.<sup>13</sup> Individuals, non-profit organizations (e.g., the Little Sisters of the Poor), and even for-profit corporations (e.g., Hobby Lobby) complained that the federal act violated their consciences because it forced them to participate in the provision of morally offensive services, such as abortion and contraception.<sup>14</sup> Applying the federal Religious Freedom Restoration Act (RFRA)—not the U.S. Constitution—the Supreme Court found that the government had indeed violated Hobby Lobby’s corporate conscience rights, and that it was not the place of the courts to judge whether a religious belief was reasonable or not.<sup>15</sup>

The second category of cases also arises in the context of business, and it involves the State forcing people to use their God-given talents—skills such as baking cakes or taking photographs or making websites—to affirm or support activities that are morally objectionable under their religious beliefs.<sup>16</sup> This sometimes comes up where the State enforces non-discrimination laws, such as those involving LGBTQ+ rights.

John Paul II would find, no doubt, that both categories of these cases involve genuine matters of conscience. Objections to contraception or abortion or same-sex marriage are clearly based in the teachings of the Church.

#### CONSCIENCE PROTECTIONS APPLIED BY THE COURTS

Let us compare how the Supreme Court and the European Court of Human Rights have addressed these issues. Let us start by looking at the documents the two courts use to protect religious freedom.

In the United States, I already mentioned the *Hobby Lobby* case,<sup>17</sup> but recall that the Supreme Court did not decide that case on constitutional grounds. It did not apply the Free Exercise Clause of the First Amendment to the U.S. Constitution, which *does* protect religious practice, but does not give any guidance on how to do so.<sup>18</sup> The First Amendment merely states,

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13. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014).

14. *Id.* at 688-89, 700 n.9, 716.

15. *Id.* at 736.

16. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1723 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (2013); *303 Creative LLC v. Elenis*, No. 21–476, 2022 U.S. LEXIS 3752 (Oct. 3, 2022), *cert. granted*, 2022 U.S. LEXIS 840 (Feb. 22, 2022).

17. *Burwell*, 573 U.S. at 682 (2014).

18. U.S. CONST. amend. I.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>19</sup>

Until recently, the Supreme Court has been fairly weak in protecting free-exercise rights under the U.S. Constitution. In the landmark case of *Employment Division v. Smith*, the Court said that the “rational basis test” should be used to evaluate neutral and generally applicable laws that impact religious freedom—in other words, laws that do not specifically target religion.<sup>20</sup> So, after *Smith*, when a law unintentionally violates religious rights, the Supreme Court gives the State great deference and merely requires lawmakers to show they passed the law using a rational means that furthered a legitimate end.<sup>21</sup>

The European Court applies Article 9 of the European Convention on Human Rights and Fundamental Freedoms, which provides protections beyond religious conscience:

1. Everyone has the right to freedom of thought, conscience and religion . . . either alone or in community with others and in public or private . . . .
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>22</sup>

Unlike the U.S. Constitution, which limits its protection to religious conscience issues, the European Convention protects all manner of conscience rights, and it also gives courts a test to apply. Unfortunately, that test is essentially the same rational basis test that I just described from the *Smith* case. The European Court simply asks whether the law at issue is necessary in a democratic society “in the interests of public safety” or “public order, health or morals,” or for the “rights and freedoms of others.”<sup>23</sup> If so, the law stands. When making this determination, the European Court also uses the deferential “wide margin of appreciation” standard.<sup>24</sup>

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19. *Id.*

20. *See generally* Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).

21. *Id.*

22. COUNCIL OF EUROPE, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 11, art. 9 (1950), [echr.coe.int/documents/convention\\_eng.pdf](http://echr.coe.int/documents/convention_eng.pdf).

23. *Id.*

24. *Id.* at 6; *Eweida v. United Kingdom*, 37 Eur. Ct. H.R. 1, 37 (2013).

## CONSCIENCE CASES DECIDED BY THE COURTS

We have seen cases in the European Court involving conscientious objection to laws regarding abortion and same-sex marriage. In some cases, the European Court has simply refused to consider the matter—calling it inadmissible—because the conscience rights at stake were not recognized under the European Convention.

For instance, in *Van Schijndel and Others v. the Netherlands*, the European Court found no rights violated when abortion protesters were prosecuted for a breach of the peace for praying inside an abortion clinic without authority.<sup>25</sup> Similarly, in *Knudsen v. Norway* (Commission decision, March 8, 1985), the Court found no rights violated when Norway fired a vicar of its state-established religion.<sup>26</sup> There, the vicar had refused to perform certain state-related duties as a form of conscientious opposition to Norway's new law permitting abortion.<sup>27</sup> In both cases, the European Court found no protected rights at issue.<sup>28</sup>

More concerning is *Eweida and Others v. the United Kingdom* (Fourth Section decision, May 27, 2013).<sup>29</sup> There, the European Court reached the merits of several cases, including a public employee and private contractor fired from their positions because they did not want to affirm same-sex relationships.<sup>30</sup> The public employee did not wish to perform a same-sex marriage ceremony, and the private contractor did not wish to provide psychosexual counseling to same-sex couples.<sup>31</sup> The European Court concluded there was no consensus in Europe on the issue of whether these individuals had engaged in protected conscience activity.<sup>32</sup> Applying great deference, the Court found in favor of the United Kingdom.<sup>33</sup> As a result of this ruling, if a European country decides it is proper to fire public or private employees despite conscience-based objections to same-sex marriage, no relief should be expected from the European Court.<sup>34</sup>

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25. *Van Schijndel v. Netherlands*, App. No. 30936/96, ¶ 17 (Sept. 10, 1997), <https://hudoc.echr.coe.int/eng?i=001-3877>.

26. *Knudsen v. Norway*, App. No. 11045/84, 42 Eur. Comm'n H.R. Dec. & Rep. 247, 258 (1985).

27. *Id.* at 248.

28. *See id.*; *Van Schijndel*, App. No. 30936/96, ¶ 17-18.

29. *Eweida v. United Kingdom*, 37 Eur. Ct. H.R. 1, 41-43 (2013).

30. *Id.* at 1.

31. *Id.* at 8-10.

32. *Id.* at 42.

33. *Id.*

34. *Id.*

In the United States, the situation is not much better, although it may be improving. A new, more conservative Supreme Court has been affirming more religious rights than it used to, thanks in part to three Justices appointed by President Donald Trump.

In the past four years, the Supreme Court has decided two major cases in favor of religious liberty under the Constitution. In *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, the Court ruled in favor of a baker who had refused to bake a cake for a same-sex marriage ceremony and later was disciplined by a State commission.<sup>35</sup> Similarly, in *Fulton v. City of Philadelphia*, the Court found in favor of Catholic Charities when the City canceled the group's contract for foster care because the organization had a policy not to place children with same-sex parents.<sup>36</sup> In both cases, however, the Court did not overrule *Smith*—although it is clear that a majority of the current Justices do not like *Smith*.<sup>37</sup> Instead, the Court viewed the State action in both cases as targeting religion (i.e., not neutral and generally applicable).<sup>38</sup> In truth, we do not know what the Supreme Court would do today if it were presented with a truly neutral case involving these conscience issues. I suspect, however, that the current Court would find a way to protect conscience rights.

### CONCLUSION

To conclude, I will recall this conference's subtitle: "Toward a Century of Persuasion," in John Paul II's words.<sup>39</sup> I believe that what we can say about cases coming from the U.S. Supreme Court and the European Court of Human Rights is that salvation will not come from the courts on these issues of conscience—especially not in Europe. There may be more room for optimism in the United States under its new Supreme Court.

What that means is that those who seek to vindicate religious freedom in the face of abortion access or LGBTQ+ matters cannot rely on judges to protect conscience rights. Instead, those seeking to protect conscience must persuade the citizenry in states and nations throughout the world that the

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35. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

36. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

37. *See id.* at 1876-77; *Masterpiece Cakeshop*, 138 S. Ct. at 1734 ("*Smith* remains controversial in many quarters."); *Emp. Div. Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

38. *See generally Masterpiece Cakeshop*, 138 S. Ct. at 1738; *Fulton*, 141 S. Ct. at 1881.

39. The conference was titled: "Saint John Paul II's Natural Law Legacy & International Human Rights: Toward a Century of Persuasion."

majority needs to protect conscience rights as part of a healthy secularity, as mentioned earlier at this conference.

The majority must be persuaded that conscience is something that needs to be respected even when it is unpopular. In truth, society can achieve both goals, if it wants. Society can respect an individual's religious freedom and conscience while also furthering other policies, such as non-discrimination and healthcare access.

Thank you for this opportunity today.