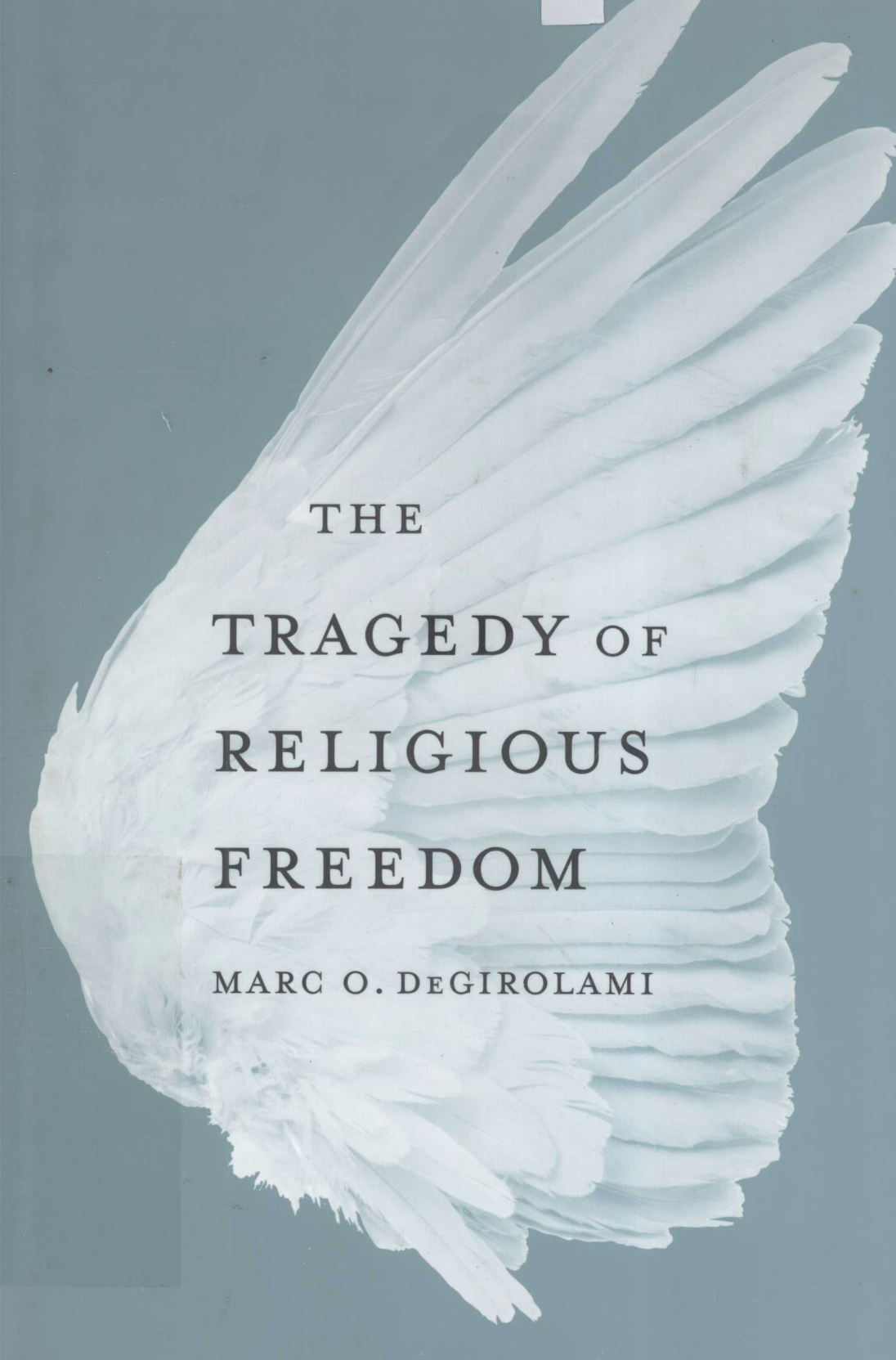

THE TRAGEDY OF RELIGIOUS FREEDOM

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The Tragedy of Religious Freedom

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For Lisa and Thomas,

and for my father

Conflict is perpetual: why then should we be deceived?
Stuart Hampshire, 1999

What has been missing in recent generations from the debate between positivists and legal naturalists is recognition of the normative significance of the historical dimension of law.
Harold J. Berman, 2005

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Introduction

Scholars of the law confront a predicament. To theorize about the law—to organize one's ideas into generalities that capture real legal phenomena—is the peak of scholarly achievement. And with good reason, for when legal theory explains the world of law without distortion or caricature, when it reflects crisply the legal world's infinite variety in subtle and elegant abstraction, it offers incomparable illumination. At its best, legal theory is a wonder, a pathway to wisdom. The trouble is that legal theory's ambition to evaluate and pass judgment can suffocate its capacity to explain and understand. At its worst—when it is puffed up with pride—legal theorizing tends toward legal dogmatizing.

In few areas is this propensity more pronounced than in the legal theory of religious liberty. The reasons are many but may be distilled to a single, fundamental incongruity. Legal theory seeks to fix crystalline conceptual categories, the better to praise or condemn the law's coercive demands. Legal theory is embarrassed by incoherence. It desperately wants to sort out and weigh up. Its critical eye is perpetually trained not only on the rules imposed by the law, but also, and inevitably, on the social and cultural objects of those impositions. But the social practice of religious liberty is resistant to legal theory's self-assured, single-minded drive to evaluate, justify, and adjudge.

For some time, and increasingly in recent years, scholars of religious liberty have criticized both the direction and coherence of the law.[1] It is no exaggeration to say that *Employment Division v. Smith*,[2] the Supreme Court's most important religious liberty decision of the last two decades, is commonly viewed by scholars as one of the great disasters of the law of church and state.[3] The doctrine encrusting the constitutional proscription against government "establishment" of religion fares little better by their lights.[4] Disaffection for their own field, one might say, is unique in uniting them.

Yet the root of their displeasure is not, as many thinkers insist, in the failure of courts to discover and apply the true or best principles of religious liberty. Neither, as claim others, does it lie in the refusal to accept the skeptical conclusion that the quest for theory is in vain because "principles" of religious liberty, timeless or otherwise, are academic phantoms. One or the other of these positions has informed more than a generation of academic writing about religious liberty, as scholar upon scholar either champions some principle of legal theory or rebels against the lot of them. In their enthusiasm to expound and justify their prescriptions for constitutional policy, many scholars have swept past the predicament of legal theory—that theory is both necessary and dangerously apt to distort the complexity of the world that it strives to understand.

In contrast with both positions, this book claims that the true impediment faced by those who study the law of religious liberty has been the failure to attend sufficiently to the predicament of legal theory. Any legal theory that reduces religious liberty to a set of supreme principles, let alone a single all-powerful imperative, is demanding far too much. Such theories are poorly equipped to understand and manage the untidy welter of values that are encompassed in the social and legal practice of religious liberty. Yet neither is skepticism the answer. Legal theory is inescapable if the values that characterize the sundry ideas of religious liberty are capable of sustained and insightful reflection. Theory is the academic's highest art: "To comprehend and contrast and classify and arrange," Isaiah Berlin once observed, "to see in patterns of lesser or greater complexity, is not a peculiar kind of thinking, it is thinking itself."[5]

Tragedy and History

This book defends a conception of religious liberty that avoids the twin dangers of reliance on reductive and systematic justifications, on the one hand, and thoroughgoing skepticism about the possibility of theorizing, on the other. The best theory of religious liberty will be flexible enough to acknowledge its own limits in the face of the frequently conflicting goods of religious liberty, even as it seeks to understand them. It will reflect a pluralistic perspective on the law of church and state that embraces the contingency and conditionality, but also the context independence, of the multitude of values of religious liberty. It will proceed with caution on the delicate terrain that is its subject. And, of greatest practical importance, it will offer an approach to conflict resolution that is neither a systematic decision procedure nor an ad hoc all-things-considered pragmatism, but instead reflects a particular cast of mind or disposition—a quality more than a theory.

The approach is called the method of tragedy and history, and it consists of five central theses. First, the clash of values of religious liberty—that the values which swirl around the conflicts of religious liberty are incompatible and incommensurable. Second, the inadequacy of skepticism—that notwithstanding the perpetual clash of values, a hard skepticism about the possibility of a principled approach to religious liberty under the Constitution is unavailing. Third, loss, sacrifice, and the disposition of custom—that the disposition or quality which issues from the clash of values of religious liberty is keenly attuned to the losses and sacrifices entailed in legal decision making, as well as the role that habit and custom play in the formation of conceptions of religious liberty. Fourth, the need for modest movement—that because of the tragic conflicts which attend many religious liberty cases, the best approach to these issues is gradualist and incremental. And fifth, the conciliations of history—that in light of tragic conflict, courts should use doctrinal and social history as guides to legal change.

A brief word about my use of the terms *comedy* and *tragedy*. A comedy moves from sorrow to joy. Its aim is to take an existing chaos and to order it through and through—to give it a satisfying and intimately worked-out architecture. In a comedy, everything falls into its proper, collision-less

place—a place in which a problem that at first seemed intractable has been fully worked out, completely resolved, with the result that the human condition has progressed and been improved.[6] Consider, in this vein, Dante Alighieri's *Divine Comedy*. Attention is seldom paid to the choice of the term *comedy*—Dante's own[7]—but it is an enlightening designation. When Dante ascends to the Empyrean, the perfection of God's triune universe—*Inferno*, *Purgatorio*, *Paradiso*—is at last revealed to him in its fully systematized splendor.[8] What begins in the anguish of a dark and tangled forest[9] ends in the contented, childlike comfort of divinely illuminated grace and understanding.[10]

A tragedy, by contrast, proceeds not from joy to sorrow, but from struggle to unresolved struggle. Aristotle discusses tragedy in some detail in his *Poetics*,[11] but in this context the meaning is perhaps closer to the sensibility evoked by the philosopher Martha Nussbaum in her study of Greek tragedy:

> That I am an agent, but also a plant; that much that I did not make goes towards making me whatever I shall be praised or blamed for being; that I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me to a position in which I cannot help being false to something or doing some wrong. . . .[12]

Tragedy is a study in opposition; comedy in consilience. Whatever leads the tragic hero to choose one course of action, elevating one conception of the good, also does irreparable damage to other viable conceptions and ultimately to his own ethical worldview. The roads not taken are also permanently closed down. In certain conflicts, though each opposing force may be itself ethically justified, "each can establish the true and positive content of its own aim and character only by denying and infringing the equally justified power of the other."[13] Tragedy arises when, as in law, there is partial order and partial disorder. And one feels tragedy's sting in the effort to make a single and perfectly harmonious whole—a comedy—of ineluctably clashing ideals.

These classical, literary, and philosophical meanings of comedy and tragedy are suggestive of this book's purposes. The first three theses

of the method of tragedy and history are tragic inasmuch as they challenge the reigning academic orthodoxy that it is theory's role to provide fully systematic and ever-improving—that is, comic—resolutions to legal dilemmas. The avatar of comic legal theory is the famous legal and political philosopher Ronald Dworkin, who has explained its core creed:

> It is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings. There is no alternative, except aiming at unhappy ones. . . . Telling it how it is means, up to a point, telling it how it should be. . . . That is a noble faith, and only optimism can redeem it.[14]

Most recently, Dworkin has mounted a thoroughgoing defense of the "hedgehog's" approach to political theory—the view that all political and legal value is monistic,[15] that value pluralism is deeply in error, and that "[t]he truth about living well and being good and what is wonderful is not only coherent but mutually supporting."[16]

Comic theorists of religious liberty take the view that legal theory's fundamental aim is to order the law so as to lend it both a clean predictability and a satisfying coherence.[17] For constitutional disputes in the area of religious liberty, comic theories hold out the promise that they can justify, in a rigorously systematic way, specific outcomes in line with their monistic premises. They also, at times, ignore or marginalize loss, regret, and the paradoxes of lived experience—the natural residue of each decided case.

Thus, on a comic view, if a group of Native Americans objects to the government's plan to build a road straight through its sacred lands, but it cannot translate its complaint into the language of "noncoercion," then there simply is no constitutional religious liberty interest at stake; that the result risks destroying the religion itself is, even if undesirable, irrelevant.[18] If Amish parents maintain that their children ought to be exempted from two years of high school education, and the state objects, some comic theorists of religious liberty argue that the only acceptable criterion by which to assess the validity of the respective positions is egalitarian;[19] anything else would be constitutionally inconsequential. If a religious organization claims that it ought to be permitted the freedom

to appoint an all-male clergy, that claim is rejected by the comic theorist as obviously in violation of antidiscrimination laws that are facially formally neutral. So powerful is the hold of comedy on the imagination of legal thinkers that even those writers who have called attention to the conflicting values of religious liberty inevitably revert to prescribing an answer that champions a small set of principles—a solution that is held out as somehow optimal or at least a distinctive progress beyond the previous state of affairs. Even for them, conflict is never truly foundational; it is an obstacle to be observed and tacitly circumnavigated.

The virtue of comic theory is that it brings the intellectual and psychological comforts of clarity, elegance, and system where an intolerable confusion is felt to reign.[20] No one would deny that comic theory provides simple and easily applied rules. But it does so at considerable cost. Where there is an irreconcilable clash of values of religious liberty, comic theories of religious liberty resolve it by flattening out the conflicts until they are coherent but often unrecognizable.

The tragic theses of the method of tragedy and history reject this view. In its place, they offer this conjecture: it is of the essence of the plural values contained in ideas of religious liberty—and of what we prize in them—that they resist the incursion and domination of other rival values. Each value struggles in perpetuity to avoid absorption and subordination by the others.[21] And this means that decision making in this area can never be fully systematized, and that it will be forever burdened by tragic outcomes, results that sacrifice important values whose loss cannot be compensated by the triumph of others. An aversion to the conceits of systematization and an embrace of the inevitability of tragic loss and sacrifice, therefore, must represent the cornerstone of any viable approach to religious liberty. The clash of values is not merely an impediment to be pointed out and bypassed. It is a permanent fixture of the human condition, made manifest with singular acuity in these First Amendment conflicts. It results both from the limits of human reasoning and from the conflict of human interests and aspirations.

The tragic theorist holds that the intellectual surrender required of the commitment to religious liberty demands the abandonment of the comic conviction that a single, integrated answer may be found to the question of why it is that religious belief and practice have value and

ought to be protected by law. It requires this relinquishment because the collisions of the values of religious liberty are foundational and constitutive features of our own lives. It is because the conflicts of religious liberty reflect a fundamental and often irreconcilable pluralism, rather than merely the appearance of conflict which judges, lawyers, and all manner of public intellectuals ought under ideal circumstances to resolve, that the tragic reconciliations of the past deserve particular regard.

It is here that the last two theses of the method of tragedy and history enter the scene. These theses are historically oriented in that they counsel a reticent yet still fully engaged role for both lawyers and courts that emphasizes doctrinal and social history as the benchmark of argument (for lawyers) and judgment (for courts). The first of the historic theses prescribes a modest and ascetic approach to doctrinal change. The second emphasizes the importance of existing legal doctrine and the nation's social history of engagement with questions of religious liberty in negotiating the tragedies of conflict.

A critic could not be faulted for pointing out that legal doctrine and American history may be vague, ambiguous, or unsatisfying guides. Legal doctrines may be unsettled. They may conflict. Or they may reflect outdated and otherwise unattractive values and practices. And the same may be said for the social traditions of the American nation as they have developed through time. Nevertheless, the historical theses of the tragic-historic method make the case that doctrinal and social traditions offer points of reference against which the tragedies of the conflicts of religious liberty may be managed. Only thus can the predicament of legal theory be competently managed.

The use of doctrinal and social history as a benchmark—a beacon—in managing conflict also renders the historical theses harmonious with the tragic theses. The answers offered by the historical theses do not purport to resolve the conflicts described by the tragic theses. That is an impossibility which comic legal theory only appears to accomplish by a beguiling but ultimately misleading appeal to system. Instead, doctrinal and social history offer a modality of conflict resolution that may not exacerbate the conflicts of religious liberty by indulging in legal theory's excesses.

In negotiating the conflicts of values, the method of tragedy and history is guided by the power of the past—that is, by the belief that the

force of social history and legal precedent is useful because it represents the collected wisdom of the past in managing the tragedies of the present. However he decides—whether for the church or the state—the tragic-historic judge will ensure that his opinion presents as thorough an accounting of the rival claims as can be accommodated. Just in virtue of presenting that account, he will affect the development of the law, for legal dicta—the nonbinding reflections that season judicial opinions—often influence future cases. And he will face backward—toward the litigants, the doctrine, and the history that precedes them—for guidance in moving forward.

In what follows, the method of tragedy and history will be explained, compared with other influential theories of religious liberty, tested in several concrete contexts, and defended against various criticisms. Taken altogether, the method of tragedy and history responds to the single greatest challenge posed by the religion clauses: how to account for the plurality of ideas about religious liberty—which is directly influenced by the plurality of ideas about religion itself—and the state's proper relationship to them.

While a detailed exposition of the tragic-historic method is pursued in later chapters, it may be helpful to preview three overarching commitments evinced by its theses when considered synthetically. These might be summarized as suggesting a tertium quid—a third thing—for legal theory: neither a monistic reduction nor a skeptical resignation, but a new possibility.

First, it is a strength of the tragic-historic method that it can accommodate the reasonable views of competing approaches while rejecting their more implausibly ambitious claims. In this way, it strikes a middle course between the prevailing monistic and thickly skeptical theories of religious liberty, a position that the intellectual historian Arthur Lovejoy once acutely described as "the delicate and difficult art" of theory, in which "since no fixed and comprehensive rule can be laid down for it, we shall doubtless never attain perfection."[22]

What is reasonable in the monistic accounts of religious liberty is the conviction that certain values or principles are important and ought to influence decision making. What is unreasonable is the inflation of those values or principles to inviolable status. What is reasonable in

the skeptical accounts of religious liberty is the disavowal of theories that aspire to fully systematic constitutional resolutions without tragic remainder. What is unreasonable are the further conclusions that there are no context-independent values of religious liberty, that judges and lawyers have no more (and perhaps much less) to say about religious liberty than anyone else, that the best that can be done is an intuitive, commonsensical "muddling through" unguided by any larger view, and that the category "religion" is incapable of any constitutional protection because it is merely the figment of the scholar's imagination or the object of the intellectual colonist's hegemony. The method of tragedy and history steers a path between these two poles, taking what is best from each and leaving the rest.

Second, in traveling this middle road, the method of tragedy and history also suggests a different answer to the question of what role public intellectuals ought to play. Both monists and skeptics believe that theory is and must be meant to solve the conflicts of religious liberty by recourse to an interpretive rule or doctrine that provides a clear-cut and general decision procedure across an entire swath of cases. Monistic theorists are sanguine about this role for theory. Skeptics are not. But both subscribe to the same fundamental view of legal theory's purposes. Likewise, it is a common view of the judicial role that judges are not following the Constitution—are not faithful to it—unless they can formulate principles applicable across discrete categories of constitutional dispute.[23] If they cannot do so, the argument goes, then decision-making authority ought to lie elsewhere.

The method of tragedy and history differs on all counts. It does not agree that constitutional fidelity and the rule of law are damaged when judges are forthright in confronting the clashing values that underwrite so many religious liberty cases. It does not count the widely decried "inconsistency" of the law of church and state as a flaw or an impediment to a properly functioning legal system. Certainly it does not expect or hope that intellectual energy, powerful and elegant as it may be, will ever solve this state of affairs.

To the contrary, the method of tragedy and history holds that it is exactly the theoretical unruliness of the multiple values of religious liberty that counsels a different role for legal theory—one that is guided by