



4-2021

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### BYU ScholarsArchive Citation

Miner, Rachel (2021) "Religious Rites and Property Rights; Intersectionality in United States Case Law," *Brigham Young University Prelaw Review*. Vol. 35 , Article 10.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol35/iss1/10>

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## RELIGIOUS RITES AND PROPERTY RIGHTS: INTERSECTIONALITY IN UNITED STATES CASE LAW

*Rachel Miner<sup>1</sup>*

Religious liberty and property extend into the original strands of American founding and history. In 1701, William Penn, the founder of Pennsylvania, published the Charter of Privileges, ensuring the protection of freedom of religion and delineating the intersection between religion and property. Article I states, “no Person or Persons, inhabiting in this Province or Territories, ...*shall be in any Case molested or prejudiced, in his or their Person or Estate*, because of his or their conscientious Persuasion or Practice, not be compelled to frequent or maintain any religious Worship, Place or Ministry contrary to his or their Mind, or to do or super any Act or Thing, contrary to their religious Persuasion.”<sup>2</sup> Penn recognized the nature of persecution intrinsically involves property both in the nature of worship and through the nature of ownership. In time, property rights in connection to freedom of religion or belief secured their place in the United States legal framework primarily through the Constitution, including in the First, Fifth, and Fourteenth Amendments.<sup>3</sup> Religious liberty and property are distinctly protected rights. And yet, analysis of both rights in a shared framework provides nuances for strengthening religious liberty.

Careful analysis of the First, Fifth, and Fourteenth Amendment reveal several foundational clauses which apply to both property and

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1 Rachel is a senior in the Economics program at Brigham Young University. She intends to pursue a graduate degree in economics before attending law school. She wishes to give a special thanks to her editor Carolina Costa.

2 CHARTER OF PRIVILEGES OF 1701, art. I, para. 1.

3 U.S. CONST. amend. I, V, XIV.

religious liberty. The Establishment Clause and Free Exercise Clause of the First Amendment<sup>4</sup> of the Bill of Rights illustrate how interconnected religious liberty is to the manifestation of freedom; religious liberty is a set of beliefs and practices, public and private. Without the freedom to assemble and gather in public spaces (property), religious liberty loses its *forum externum*. Both religious liberty and property rights were deemed essential in the ultimate framework of natural and civil rights as originally crafted by John Locke, Thomas Jefferson, and James Madison. Their timeless analysis of “life, liberty, and property,” ultimately incorporated in the Declaration of Independence and into the Fifth and Fourteenth Amendments of the Bill of Rights, illustrates the intersection between religion or “life” and property. Property is defined through physical possessions and through ownership of ideas and services. Considering both of these definitions at the intersection of religious liberty is foundational to the analysis offered in this paper.

Religious liberty, like property, is protected in the Constitution through the Free Exercise Clause and Establishment Clause of the First Amendment.<sup>5</sup> The Supreme Court has adopted various evolving frameworks to protect religious liberty including the Lemon Test (prevents excessive “government entanglement” in religious matters),<sup>6</sup> the Sherbert test (requires strict scrutiny in determining “compelling government interest”<sup>7</sup> when free exercise is burdened), and the Smith test (overturned Sherbert and allows government to burden religious freedom in the presence of a “valid and neutral law with general applicability.”)<sup>8</sup> Likewise, Congress in response to the overturning of the Sherbert test, passed the Religious Freedom

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4 U.S. CONST. amend. I, § 1.

5 *Id.*

6 *Lemon v. Kurtzman*, 403 U. S. 613 (1971).

7 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

8 *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982)).

Restoration Act<sup>9</sup> to ensure that strict scrutiny would remain. Religious liberty has a complex history and is less secure as the legal frameworks instituted by the Supreme Court are beginning to fray. COVID-19, sexual orientation laws, religious scandals, and an overall intolerance for religious practice threaten the robust frameworks that once ensured religious liberty. On the other hand, property rights remain intact, vigorous, and secure. The legal framework that protects property can offer important insights for the ongoing protection of religious liberty.

## I. BACKGROUND

The right to own property and religious liberty are fundamental human rights. Each right is protected through a different and yet amazingly similar legal framework; property is protected through tangible boundaries and societal contract whereas freedom of religion or belief is protected through separation of church and state. Compartmentalizing human rights can be harmful because human rights are inherently connected; when one human right is threatened, elements of other human rights are threatened as well. Therefore, property rights and religious liberty can be strengthened by adapting a legal framework that protects both rights enabling comparable expectations of security.

Property rights in the United States stem primarily from the Fifth and Fourteenth Amendments<sup>10</sup> to the Constitution. The Fifth Amendment states persons shall not “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>11</sup> This phrase highlights two primary clauses that establish property rights in United States law.

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9 Religious Freedom Restoration Act, H.R. 1308, 103d Cong., (1993) (enacted).

10 U.S. CONST. amend. V, XIV.

11 U.S. CONST. amend. X, § 1.

### A. The Due Process Clause

The first is the Due Process Clause which states that no one shall “be deprived of life, liberty or property, without due process of law.”<sup>12</sup> Originalist interpretation of the Constitution commonly argues the physical or tangible definition of property as outlined in the due process clause. However, in *Flemming v. Nestor*<sup>13</sup>, the definition of a “vested property interest” was expanded to include intangible property possessions such as employment or welfare. Although this decision expanded the definition of property, courts continue to dictate what can be claimed as a property right. This provision does not allow arbitrary assignment of the definition of property. In order to have expanded property rights protected, *Board of Regents v. Roth*<sup>14</sup> established that the owner of property must be able to prove “legitimate” claim to employment or other possession. Therefore, in order to protect freedom of religion or belief, a legitimate claim of sincere religious practice must be present. We see this question arise in cases where the legal question stems from delineating the “legitimate claim” to religious liberty or the sincerely held beliefs of those with religious beliefs.<sup>15</sup> Just as property frameworks do not explicitly define property in a narrow sense, religion is not defined in a narrow sense but protected narrowly as a belief and not always as an action or practice.

Another application of property rights for religious liberty occurs where both legal frameworks are further protected through the intersection of other Constitutional rights. In *Perry v. Sindermann*,<sup>16</sup> the “Unconstitutional Conditions” doctrine was established which states that an individual cannot be denied property on the basis of constitutionally protected interests, such as freedom of religion or belief. The

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12 *Id.*

13 *Flemming v. Nestor*, 363 U.S. 603, 631 (1960).

14 *Bd. of Regents of State Coll.s v. Roth*, 408 U.S. 564, 579 (1972).

15 See *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm’n*, No. 16-11 U.S. 584 (2018); *Burwell v. Hobby Lobby Store, Inc.* 573 U.S. 682 (2014).

16 *Perry v. Sindermann*, 408 U.S. 593 (1972).

Due Process Clause protects property as both ownership and “interest.” Religious liberty can be defined in similar terms as “expression” and “interest.” Therefore, the interpretation of the Due Process Clause is essential when examining the precedence of religious rites in the United States because freedom of religion or belief can be protected as a property interest.

*B. The Matthews Test*

Due process serves as the foundational mechanism for protecting property rights and interests. However, the Matthews test further structures the implications of due process in terms of how specific property rights must be analyzed in order to be upheld. In *Mathews v. Eldridge*<sup>17</sup> a three-prong due process test was established to protect property rights. Consideration must be adequately given to the following criteria, “first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”<sup>18</sup> This test requires due diligence and substantive burden of proof in determining the ultimate impact of depriving an individual of property rights. In the context of freedom of religion or belief, a mechanism to ensure that property rights are not arbitrarily removed is critical to both individual and public expression. The Matthews Test mirrors the Lemon Test for protecting religious liberty. In *Lemon v. Kurtzman* the Court established a three-prong test to uphold the Establishment Clause and requires, “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster ‘an excessive

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17 *Mathews v. Eldridge*, 424 U.S. 319, 96 (1976).

18 *Id.*

government entanglement with religion.”<sup>19</sup> In both property law and religious liberty law, account for government “interest” or “entanglement” illustrating that limited government involvement in both cases creates a more potent framework.

### C. *The Fourteenth Amendment*

The Fourteenth Amendment further underscores the importance of due process with a clause that mirrors the Fifth Amendment. The Fourteenth Amendment certifies that no “State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>20</sup> The Fourteenth Amendment plays a critical role in establishing the fundamental freedoms of the Bill of Rights in connection with “life, liberty, or property”<sup>21</sup> building on the importance of property interests such as employment or welfare. As stated in the annotated Constitution, “in *Gitlow v. New York*, the Court in dictum said: For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>22</sup> Due process ensures protection of religious liberty as well; the government cannot arbitrarily burden religious liberty, target minorities, or overturn the legal framework that protects individual rights. In this context, the Fourteenth Amendment is critical to uphold all fundamental rights including the Bill of Rights, and therefore freedom of religion or belief. Justice Harlan in *Adamson v. California*<sup>23</sup> stated, “that the language of the first section of the Fourteenth Amendment,

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19 *Lemon v. Kurtzman*, 403 U. S. 602, 613 (1971) (internal quotation marks omitted).

20 U.S. CONST. amend. XIV, § 1.

21 *Id.*

22 Cong. Rsch. Serv., *Constitution of the United States: Analysis and Interpretation*, <https://constitution.congress.gov> (last visited Mar. 2, 2021).

23 *Adamson v. Cal.*, 332 U.S. 46, 75 (1947).

taken as a whole...sufficiently explicit to guarantee that thereafter *no state could deprive its citizens of the privileges and protections of the Bill of Rights.*" The Due Process clause as outlined in the Fifth and Fourteenth Amendment, cannot be overstated as the most critical mechanism for protection of individual human rights outlined in the Bill of Rights. Furthermore, the Due Process clause ensures that property interests such as "life, liberty, and property"<sup>24</sup> can be protected in a shared context with other essential human rights such as freedom of religion or belief. The Fourteenth Amendment ensuring due process, bring protection of property and religious liberty full circle. In each case, property and religious liberty are defined and outlined in separate Amendments but coalesce in the Fourteenth Amendment through the promise of protection at a federal and state level.

#### *D. The Takings/Just Compensation Clause*

The second property clause in the Fifth Amendment is the Takings/Just Compensation Clause which states "nor shall private property be taken for public use, without just compensation."<sup>25</sup> The Takings Clause establishes the requirement that in order for the government, either state or federal, to claim eminent domain or ownership of property from a private holder, "public use" must be sufficiently defended and justified. There are obvious connections to religious liberty as religious property has been directly affected by the Takings Clause.<sup>26</sup> If property is thus taken for public use, whether religious or secular, it cannot be taken without proper and appropriate compensation. The implications of the Takings/Just Compensation Clause become interesting when considered in the context of religious liberty. The Clause suggests first the potential that rights can be taken away for public use which directly points to the "separation of church and state." However, it also suggests that if rights are

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24 U.S. CONST. amend. V, § 4.

25 Id.

26 *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1252 (Colo. 1973).

taken away for public use, compensation is required. Compensation or reparation in light of potentially threatened religious rights is critical when considering the full scope and consequence of freedom of religion or belief. Ultimately, the Due Process Clause and the Takings/Just Compensation Clause are critical in analyzing how property rights intersect with religious rites and provide interesting case studies for where courts have upheld religious liberty in some circumstances, completely trampling religious liberty in others.

## II. PROOF OF CLAIM

Various religious bodies have expressed the intersection between property and freedom of religion or belief. The Catholic church believes that “property, correctly understood and properly regulated, is a preserver of peace, a method for harmonious human activity, and a means toward human flourishing. It is also a guarantor of religious freedom—a role that becomes ever clearer as respect for Christianity erodes in Europe and the Americas. The links between property rights, economic liberty, and religious liberty are clear in the social teaching and they are clear in history.”<sup>27</sup> The intersectionality between these two human rights is best illustrated in the broader context of democracy.

Property protection rests on several fundamental assumptions including: “(1) that every person is entitled to become an owner, (2) that opportunities to acquire property are freely available, (3) that ownership is widely dispersed, (4) that owners are presumptively free to use their property as they wish and to determine the course of their own lives, and (5) that people are entitled to quiet enjoyment of their property.”<sup>28</sup> The application of these assumptions for religious liberty illustrate that property law and freedom of religion can share a similar approach in policy implication. Freedom of religion or belief

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27 Robert A. Sirico, *The Rights to Private Property and Religious Liberty: Mutually Reinforcing Bonds*, *Journal of Markets & Morality*, 457, 465 (2016).

28 Joseph W. Singer, *Property as the Law of Democracy*, *Duke Law Journal*, 1287, 1300 (2014).

assumes (1) that every person is entitled to ownership of conscience or a belief system, (2) that opportunities to acquire a belief system are freely available, (3) that ownership is widely dispersed, (4) that owners are presumptively free to use their conscience and belief system as they wish and to determine the course of their own lives, and (5) that people are entitled to the private and public practice of their beliefs. Property rights and freedom of religion are “bundled rights” and mutually “reinforcing bonds.”<sup>29</sup> Both are fundamental human rights that stress the nature of ownership, which is critical in the interchange between individuals and society as a whole; Protecting the connection between property rights and freedom of religion strengthens legal leverage to protect religious liberty using a property framework and vice versa.

Frequently, as illustrated with the Takings Clause, religious liberty and property rights are not just related, they are inextricably connected. Consider the following examples from individual states: “In Arizona, a Protestant pastor was arrested for holding Bible studies in his home, authorities alleging that he thereby violated zoning laws that prohibit regular assemblies in residences. In Pennsylvania, Washington, DC, and many other places, Catholic dioceses with financial problems have been unable to manage their own properties responsibly due to opponents who use historic preservation codes to prevent the alteration, sale, or demolition of church structures. In Massachusetts, Illinois, and other jurisdictions, Catholic agencies have been forced to abandon their adoption services in the face of mandates to place children with same sex couples. These mandates have force because the state controls the licensure of adoption agencies.”<sup>30</sup> These instances elucidate the critical relationship between property rights and freedom of religion and prove the necessity for legal framework connecting freedom of religion or belief to property in nuance and in application. The following two cases studies reveal how the legal framework protecting religious liberty and

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29 *Id.*

30 Robert A. Sirico, *The Rights to Private Property and Religious Liberty: Mutually Reinforcing Bonds*, *Journal of Markets & Morality*, 457, 465 (2016).

property are mutually reinforcing and can strengthen the protection of religious minorities in extreme cases involving property.

*A. Calvary Chapel Dayton Valley v. Steve Sisolak*<sup>31</sup>

In July of this year, freedom of religion or belief was threatened on the basis of property law because of COVID-19. In Nevada, Governor Sisolak implemented a phase two reopening plan that allowed casinos, businesses, restaurants to again hold in-person gatherings; however, the Governor severely limited religious freedom by putting a cap of 50 people on religious gatherings. The Calvary Chapel of Dayton Valley sued, citing the restriction on religious gatherings was discrimination and therefore unconstitutional under the first Amendment. They further asserted that the ban on only religious gatherings causes irreparable harm to the members of the congregation and therefore injunctive relief was necessary. The case went from the District Court of Nevada to the Court of Appeals at which point, Calvary Chapel requested an emergency judgement from the Supreme Court. The Court denied certiorari to *Calvary* in a 5-4 decision stating that Nevada could restrict religious gatherings as they served a different purpose than social gatherings.<sup>32</sup> Justice Kavanaugh, Alito, Gorsuch, and Thomas wrote dissenting opinions. In the opening summary of their joint dissension Justice Alito states, “The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance.”<sup>33</sup> Dismissing the Constitutional provisions protecting religion and property is extremely harmful to the framework of our democracy as it undermines the essence of inalienable rights.

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31 *Calvary Chapel Dayton Valley v. Steve Sisolak*, No. 20-639 (2020) (cert. denied January 25, 2021).

32 Amy Howe, Justices decline to intervene in dispute over Nevada COVID-19 restrictions, SCOTUSblog (Jul. 24, 2020, 10:55 PM), <https://www.scotusblog.com/2020/07/justices-decline-to-intervene-in-dispute-over-nevada-covid-19-restrictions/>.

33 *Calvary Chapel Dayton Valley v. Steve Sisolak*, No. 19A1070, 591 U. S. \_\_\_\_ (2020).

A greater framework that incorporates property rights and religious freedom could have better protected the religious liberty claims brought forward in this case. If the court applied property law to the case and asserted the Matthews Test, which requires a heavy burden of proof for deprivation, the religious liberty may have been defended on stronger ground. The Matthews test requires, as previously stated, due consideration for “first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”<sup>34</sup> The private interest of hundreds of people who gather to worship at Calvary Chapel remains an essential qualifier for the implications of the Matthews Test in this case. Additionally, the erroneous deprivation of worship in light of the thousands allowed to gather in casinos further violates the test. Substitute procedural requirements would not add fiscal or administrative burden to Government interest, as the Church expressed willingness to comply with state COVID-19 mandates and in fact, practiced an abundance of caution prior to the court ruling.<sup>35</sup> The Matthews Test offers critical protections for freedom of religion or belief as a property right. The case was largely complicated “because Calvary Chapel could not show that the Governor’s directive only ‘specifically target[s] places of worship’ for adverse treatment, the district court identified no free-exercise violation.”<sup>36</sup> The Matthews Test can protect houses of worship when there is a lack of evidence to argue “free-exercise violations.”

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34 *Matthews v. Eldridge*, 424 U.S. 319, 96 (1976).

35 *Calvary Chapel Dayton Valley v. Steve Sisolak*, No. 19A1070, 591 U. S. \_\_\_\_ (2020).

36 Petition for Writ of Certiorari at 15, *Calvary Chapel v. Sisolak*, No. 20-639 (2020).

*B. Tanzin v. Tavir*<sup>37</sup>

A second case study illustrates the breadth of property protection rights and due process. The *Tanzin v. Tavir* case is a prime example of the intersection between freedom of religion and property rights. The Fourteenth Amendment protects property in the context of life, liberty and due process.<sup>38</sup> Tanzin is a Muslim who was asked by the FBI to be an informant of suspicious Muslim behavior. When he denied on religious grounds, the FBI retaliated and put him on a no flight restriction list, ultimately violating his property rights and due process. Tanzin sued for money damages citing the 1993 Religious Freedom Restoration Act which states, “A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.”<sup>39</sup> The Takings Clause from the Fifth Amendment further emphasizes the need for ‘appropriate relief’ when it states, “nor shall private property be taken for public use, without just compensation.”<sup>40</sup> The Supreme Court ruled 8-0 on the case, affirming that those persecuted on the basis of religion can seek money damages.<sup>41</sup> The outcome is bellwether in correlating the relationship between property and freedom of religion violations because current property law include the Takings clause allows monetary compensation for property rights violations. The decision to allow monetary relief for religious liberty further allows compensation from government, defying immunity doctrine and securing the sympatico nature between property rights and religious liberty. In the Opinion for the Court, Justice Thomas

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37 *Tanzin v. Tanvir*, No. 19-71, 592 U.S. \_\_ (2020).

38 U.S. CONST. amend. XIV, § 1.

39 Religious Freedom Restoration Act, H.R. 1308, 103d Cong., (1993) (enacted).

40 U.S. Const. amend. V, § 4.

41 *Tanzin v. Tanvir*, No. 19-71, 592 U.S. \_\_ (2020).

connected religious liberty to property law when he cited *Philadelphia Co. v. Stimson*<sup>42</sup> which states, “The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.” This citation connects *Tanzin*’s persecution to “wrongful evasion of property” allowing him to seek monetary damages. The *Tanzin* case fortifies religious liberty in the context of property law, further strengthening both human rights with tangible outcomes and critical precedence.

The *Calvary Chapel* and *Tanzin* cases illustrate the importance of property laws in protecting freedom of religion or belief. Because property and religion are both human rights centered on individual “ownership,” it is critical that current efforts to protect religious liberty be viewed in the powerful precedence of property law. Strengthening the intersection of these two frameworks as mutually reinforcing creates greater protection for all human rights.

### III. CONCLUSION

Freedom of religion or belief is fragile, nuanced, and increasingly complicated. Property law is robust and provides critical insights for religious liberty. Intellect, employment, and the pursuit of happiness have all come to be characterized as bundled rights under the Fourteenth Amendment property clause and extend to include freedom of religion or belief. Both the *Calvary Chapel* and *Tanzin* cases illustrate that isolating freedom of religion or belief in a human rights vacuum does not ultimately achieve greater protection nor can it prove “the least restrictive means of furthering that compelling governmental interest”<sup>43</sup> as established by the *Sherbert* test and reinforced with the Religious Freedom Restoration Act of 1993.<sup>44</sup> Analysis of the property law framework in the Fifth, and Fourteenth

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42 *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

43 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

44 Religious Freedom Restoration Act, H.R. 1308, 103d Cong., (1993) (enacted).

Amendment reveal that the fundamental view of “ownership” that is protected by due process applies to freedom of religion or belief.<sup>45</sup> In order to fully practice one’s religion or belief, ownership is critical. Freedom of religion or belief is a truly intersectional human right that relies on freedom of speech, assembly, and property. In the United States efforts to uphold the establishment clause, freedom of religion or belief has inadvertently become a singular human right instead of a pluralistic one. Defending freedom of religion or belief in the legal property framework enhances the protection and promotion of religious liberty in pluralism. Ensuring the protection of freedom of religion or belief and property rights strengthens and reinforces other related and paramount human rights.