

## THE HAROLD J. BERMAN LECTURE

### RELIGIOUS FREEDOM—A SECOND-CLASS RIGHT?

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#### ABSTRACT

*Although the Bill of Rights does not establish a hierarchy among the values it seeks to protect, Supreme Court decisions over time have classified certain rights as essential to a fundamental scheme of ordered liberty. The prominent place of the First Amendment's provisions protecting religious freedom on this "Honor Roll of Superior Rights" has seldom been openly challenged. Recent legal, political, and cultural developments, however, prompt the question whether religious freedom is becoming, de facto, a lesser right—one that can be easily overridden by other rights, claims, and interests.*

*On the legal front, as freedom of religion comes into increasing conflict with nondiscrimination norms and claims based on abortion rights and various lifestyle liberties, the rights of religious entities to choose their own personnel, and even to publicly teach and defend their positions on controversial issues, are coming under intense attack. The deferential standard of review adopted by the Supreme Court in 1990, moreover, has put a considerable damper on efforts to mount effective legal challenges to restrictions on free exercise.*

*A political consequence of the Court's deferential standard has been not only to discourage religious persons and groups from defending their rights but also to embolden those who aim to reduce the influence of religion—especially organized religion—in American society. Nor is the status of religious freedom as secure in American culture as it once was. Recent social science data indicates that, ironically, the social consensus behind religious freedom seems to be weakening just when pathbreaking work has begun to document the social and political benefits of religious freedom.*

*I conclude that among these legal, political, and cultural challenges, the most ominous is cultural. For, as Learned Hand once said, if liberty dies in the*

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*hearts of men and women, "no constitution, no law, no court can save it." That does not mean that the legal and political efforts carried on by friends of religious freedom are fruitless. Whether religious freedom retains a prominent place on the honor roll of superior rights will certainly depend to some extent on those efforts. But even more decisive will be the attitudes and behavior of religious believers and leaders themselves.*

I'm deeply grateful to the Center for the Study of Law and Religion and the Aquinas Center of Theology for the invitation to present this lecture in memory of my late colleague and friend Harold Berman. I am well aware that to speak about religious liberty at Emory University is something like presuming to lecture the Pope on moral theology. But I ask your indulgence, first, because religious freedom mattered deeply to Hal; second, because Emory is renowned for its hospitality to dialogue on the perennial questions in that field; third, because I hope it will be of interest to you to hear about the ideas and concerns that emerged from an international conference on religious liberty that was held at the Vatican in May 2011 under the auspices of the Pontifical Academy of Social Sciences;<sup>1</sup> and, finally, because I look forward to hearing your ideas about how seriously one should take these concerns.

Let me begin with just a word about the Pontifical Academy. It is a kind of think tank founded in 1994 by Pope John Paul II to help keep Catholic social thought abreast of current developments in law, politics, economics, and the other social sciences. To that end, its thirty-seven members are drawn from five continents and diverse disciplines. They include a number of non-Catholics as well as two Nobel Prize winners in economics. In an effort to be as well-informed as possible, we hold a four-day symposium each year to which we invite a group of distinguished outside experts to help us achieve a clear understanding of whatever problem we are currently studying.

This year we set out to explore the dilemmas that arise from maintaining that religious freedom is a universal right despite the manifest cultural, political, and religious differences that exist in the world.

But as so often happens in academic life, research begun on one question can lead to new questions that send one's thoughts in other directions. And so, as I reflected on the presentations at the Rome conference, I must say that I became less concerned about the dilemmas of universality and more uneasy about the status of religious freedom as a fundamental right. My thoughts turned in that direction not only because of the recent alarming increase in religious persecution around the world, and not only because of more subtle trends in Western nations, and not only because of the prevalence of negative attitudes toward religion in the academy, the media, and other influential

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<sup>1</sup> The contributions to this conference, the 17th Plenary Session of the Pontifical Academy of Social Sciences, can be found in *UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY: THE CASE OF RELIGIOUS FREEDOM* (Mary Ann Glendon & Hans F. Zacher eds., 2012). These contributions are referenced throughout this lecture.

sectors of society. What was new, at least to me, were indications that less value is being attached to religion and religious freedom in the places where I would have hoped that it was most secure—namely, in the minds and hearts of citizens in the liberal democracies, including the United States.

I would be very glad to be persuaded that this last concern is misplaced, not only because I believe in the importance of religious freedom as such but also because I believe with George Washington, Alexis de Tocqueville, and many others that religion and religious freedom are indispensable supports for our country's great experiment in ordered liberty. I also tend to think, as did Pope John Paul II, that the status of religious freedom is a kind of litmus test, or "touchstone," for the protection of human dignity generally.<sup>2</sup>

Those views, of course, are not universally shared. Although religious freedom has been acknowledged as a fundamental right by nearly every nation in the world, formal consensus, like that embodied in Article 18 of the Universal Declaration of Human Rights,<sup>3</sup> has not led to agreement on its meaning and foundations, nor on its relation to other fundamental rights, nor on modes of bringing the right to life under diverse cultural conditions. Hence the question I would like to explore in this lecture: whether religious freedom is becoming a lesser right, one that can be easily overridden by other rights, claims, and interests. That question, I hardly need to say, is a question about the status of religious freedom in the culture as well as in the law.

Let me begin with three items of disturbing news presented by social scientists at the Rome conference in May 2011.

The first involves recent assessments of the state of religious freedom worldwide. On the basis of the most extensive cross-national surveys of religious freedom ever made, the Pew Forum on Religion and Public Life has reported that nearly 70% of the world's people live in countries where there are "high restrictions" on religious freedom due to governmental policies or social hostilities or both.<sup>4</sup> Not surprisingly, the brunt of these restrictions falls on

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<sup>2</sup> Pope John Paul II, Address to the Diplomatic Corps (Jan. 9, 1989), in *PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, JOHN PAUL II AND THE FAMILY OF PEOPLES* 161, 168 (L'Osservatore Romano trans., 2002).

<sup>3</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 18, U.N. Doc. A/RES/217(III), at 74 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

<sup>4</sup> PEW FORUM ON RELIGION & PUB. LIFE, *GLOBAL RESTRICTIONS ON RELIGION 1* (2009) [hereinafter *GLOBAL RESTRICTIONS ON RELIGION*]; PEW FORUM ON RELIGION & PUB. LIFE, *RIISING RESTRICTIONS ON*

religious minorities. Worldwide, 75% of victims of violent religious persecution are Christian.<sup>5</sup>

There is also cause for concern for those of us who are fortunate enough to live in countries that impose only “low” to “moderate” restrictions on religious freedom. For, although the threats are much less dramatic in the United States and Western Europe, religious freedom in the liberal democracies is at heightened risk from, inter alia, the erosion of conscience protection for religious individuals and institutions, restrictions on the autonomy of religious institutions, and inroads on the rights of parents regarding the education of their children.<sup>6</sup>

The third—and in some ways, the most unsettling—item came from a presentation by sociologist Nicos Mouzelis of the London School of Economics who began by recalling three well-known aspects of modernity that have had an impact on religious trends: increased geographical mobility with a corresponding decline in people’s attachments to communities of memory and mutual aid, the increased separation among the various spheres of human activity (home, work, worship, education, recreation, and so on), and the rise of individualism.<sup>7</sup> Together, he said, those hallmarks of modernity have accelerated the spread of elite attitudes about religion from intellectuals, philosophers, and the educated classes to men and women in all walks of life.<sup>8</sup> He was alluding not only to the growth of secularism but to changes in the attitudes of people who describe themselves as religious. Noting the great growth of “non churchd religiosity” in Europe and the United States, Mouzelis concluded that, at least in the West, “the turn to an ultra-individualistic form of religiosity is here to stay.”<sup>9</sup> If that is true, it may well

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RELIGION 7, 17 (2011) [hereinafter RISING RESTRICTIONS ON RELIGION]. The studies cover 198 countries and territories, representing more than 99.5% of the world’s population. GLOBAL RESTRICTIONS ON RELIGION, *supra*, at 4; RISING RESTRICTIONS ON RELIGION, *supra*, at 9.

<sup>5</sup> Nina Shea, *Report: 3/4 of Religious Persecution Is Anti-Christian*, NAT’L REV. ONLINE (Mar. 17, 2011, 2:19 PM), <http://www.nationalreview.com/corner/262411/report-34-religious-persecution-anti-christian-nina-shea> (citing Terry Murphy, *New Report Reveals 75 Percent of Religious Persecution Is Against Christians*, AID TO THE CHURCH IN NEED (Mar. 16, 2011), <http://www.acnuk.org/news.php/205/ukinternational-new-report-reveals-75-percent-of-religious-persecution-is-against-christians>).

<sup>6</sup> See W. Cole Durham, Jr., *Religious Freedom in a Worldwide Setting: Comparative Reflections*, in UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY, *supra* note 1, at 359; Allen D. Hertzke, *Religious Freedom in the World Today: Paradox and Promise*, in UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY, *supra* note 1, at 108.

<sup>7</sup> See Nicos Mouzelis, *Modernity: Religious Trends*, in UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY, *supra* note 1, at 71.

<sup>8</sup> See *id.* at 75.

<sup>9</sup> *Id.* at 78.

have important implications for religious liberty. For the more that religion is seen as a private, solitary matter, the greater the likelihood that concern about free exercise of religion will become less intense.

My initial reaction to the Mouzelis paper was that his observations were far more applicable to Europe than to the United States. According to a recent survey by the European Union, only 52% of Europeans say they believe in God, though 27% more say they believe in a “spirit” or “life force.”<sup>10</sup> Another survey showed that, when given a list of twelve “values” and asked to pick the three that they consider most important, only 7% of Europeans listed religion.<sup>11</sup> Forty-six percent said they thought religion has too important a place in society.<sup>12</sup> Americans, by contrast, are much more likely to say they believe in God or a “universal spirit” (92%),<sup>13</sup> and a majority of those polled say that religion is “very important” in their lives.<sup>14</sup> A public opinion survey published twenty years ago found that most Americans ranked freedom of religion very high among fundamental rights—in fact, a bit ahead of freedom of speech.<sup>15</sup>

But on close examination, recent data on U.S. attitudes and practices is consistent with Mouzelis’s individualization thesis. Two of the most striking trends are the increasing proportion (16%) of Americans who decline to affiliate with any organized religion<sup>16</sup> and of those who describe themselves as “spiritual” instead of “religious” (between 18% and 33%).<sup>17</sup> Add to this that disillusionment with organized religion is widespread<sup>18</sup> and that the Pew Forum’s survey of young Americans between the ages of eighteen and twenty-

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<sup>10</sup> EUROPEAN COMM’N, SPECIAL EUROBAROMETER 225: SOCIAL VALUES, SCIENCE AND TECHNOLOGY 9 (2005), available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_225\\_report\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf).

<sup>11</sup> EUROPEAN COMM’N, STANDARD EUROBAROMETER 66: PUBLIC OPINION IN THE EUROPEAN UNION 28 (2007), available at [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf).

<sup>12</sup> *Id.* at 41.

<sup>13</sup> PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS BELIEFS AND PRACTICES: DIVERSE AND POLITICALLY RELEVANT 5 (2008), available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

<sup>14</sup> *Id.* at 22.

<sup>15</sup> ROBERT O. WYATT, FREE EXPRESSION AND THE AMERICAN PUBLIC 10 (1991).

<sup>16</sup> PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 20 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

<sup>17</sup> MARK CHAVES, AMERICAN RELIGION: CONTEMPORARY TRENDS 40 (2011); ROBERT C. FULLER, SPIRITUAL, BUT NOT RELIGIOUS 4–5 (2001); George H. Gallup Jr., *Americans’ Spiritual Searches Turn Inward*, GALLUP (Feb. 11, 2003), <http://www.gallup.com/poll/7759/americans-spiritual-searches-turn-inward.aspx>.

<sup>18</sup> ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 99 (2010).

nine found that they are considerably less religious than previous generations were at the same age.<sup>19</sup> I am not aware of any recent survey asking Americans to rank the importance of religious freedom, but it is reasonable to assume that as the idea of religion as a private, solitary activity spreads, interest in religious liberty will decline.

If Mouzelis is right that individualistic attitudes toward religion are spreading from elites to the population at large, many factors are doubtless involved. So far as the law is concerned, the Supreme Court has long been a stronghold of such attitudes. Since the 1940s, Supreme Court majorities have tended to treat religion as primarily an affair between the individual and his or her God.<sup>20</sup> These rulings have given short shrift not only to the vast numbers of Americans for whom the existence of a worshipping community is essential to religious experience but also to the social settings where religious “beliefs and practices [a]re generated, regenerated, nurtured . . . , and transmitted” from one generation to the next.<sup>21</sup>

This latter point has important political as well as religious implications. For, as Richard Garnett—commenting on recent legal trends in First Amendment law—has cautioned, there is reason “to worry that the individual conscience, standing alone, is not up to the task of creating and sustaining the conditions necessary to ensure religious freedom.”<sup>22</sup> Garnett points out that just as freedom of speech depends not only on one’s right to say what’s on one’s mind, but on the existence of institutions like newspapers, universities, libraries, parties, and associations, so freedom of religion also involves protecting the institutions that nourish individual free exercise.<sup>23</sup>

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<sup>19</sup> PEW FORUM ON RELIGION & PUB. LIFE, RELIGION AMONG THE MILLENNIALS 1 (2010), available at <http://pewforum.org/uploadedFiles/Topics/Demographics/Age/millennials-report.pdf>.

<sup>20</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (finding that “religious beliefs worthy of respect are the product of free and voluntary choice”); *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in judgment) (“Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals . . . .”); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (Douglas, J., concurring) (arguing that religion “must be a private matter for the individual”); *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause is “to secure religious liberty in the individual”).

<sup>21</sup> Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 543–44 (1991).

<sup>22</sup> Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008).

<sup>23</sup> *Id.* at 274.

Our legal system's neglect of the associational and institutional dimensions of religious freedom, though punctuated with some notable exceptions,<sup>24</sup> seems to be accelerating. As freedom of religion comes into conflict with claims based on nondiscrimination norms, abortion rights, and various lifestyle liberties, the freedom of religious entities to choose their own personnel, and even to publicly teach and defend their positions on controversial issues, is coming under increased attack. For example, the definition of "religious employer" in the regulations issued in 2011 by the Department of Health and Human Services<sup>25</sup> is so narrow as to deny conscience protection to most groups that would wish to claim it. Student religious groups at many universities have been denied recognition on the basis of their refusal to ascribe to school policies forbidding discrimination on the basis of religion or sexual orientation.<sup>26</sup> Moreover, the deferential standard of review adopted in *Employment Division v. Smith* puts a considerable damper on efforts to mount effective legal challenges to restrictions on free exercise.<sup>27</sup>

These developments have placed church-affiliated hospitals, schools, and social services in a difficult position. Faced with the choice between moral compromise and expensive litigation with an uncertain outcome, many have simply retreated from the field—as was the case when Catholic Charities of Boston decided in 2006 to close down its adoption services rather than mount a full-scale attack on state licensing requirements that would not have permitted

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<sup>24</sup> *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that states may provide tuition vouchers to families that will use them at religious schools); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that New Jersey's antidiscrimination statute did not override the association's right to maintain its policy against openly homosexual scoutmasters); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (holding that section 702 of the Civil Rights Act of 1964 does not violate the Establishment Clause by allowing religious employers to use religious criteria in hiring employees for nonreligious jobs); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding a tax exemption for religious properties used for worship); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (holding that a New York statute violated the free exercise rights of a church by interfering with its internal affairs).

<sup>25</sup> Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets, 76 Fed. Reg. 46,626 (Aug. 3, 2011) (to be codified at 45 C.F.R. § 147.130(a)(1)(iv)(B)).

<sup>26</sup> See Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2882 (2005). In 2010, a closely divided Supreme Court ruled that public universities can refuse to recognize student groups, like the Christian Legal Society, that restrict membership to persons who support the group's beliefs. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2973–74 (2010).

<sup>27</sup> See 494 U.S. 872, 884–86 (1990), *superseded in part by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2006), *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).



it to operate consistently with Catholic teaching about marriage.<sup>28</sup> On the horizon is the prospect that religiously affiliated hospitals may be required to choose between shutting down and providing services that violate their religious beliefs.

Do such developments mean that religious freedom is becoming a second-class right? Although the U.S. Constitution does not impose a hierarchy of rights, the Supreme Court has long classified certain rights as fundamental to our system of ordered liberty,<sup>29</sup> creating what Henry Abraham called an “Honor Roll of Superior Rights.”<sup>30</sup> It was on that basis that the Court held most of the Bill of Rights to have been incorporated by the Due Process Clause of the Fourteenth Amendment and thus to be binding on the states.<sup>31</sup>

The effect of the Supreme Court’s approach to incorporating the First Amendment’s religion language, however, was to drive a wedge between the free exercise and establishment provisions. Instead of treating these provisions as designed to work together to promote religious freedom, the Court has regularly subordinated free exercise to a broad construction of the nonestablishment language.<sup>32</sup> With the Court’s adoption of a deferential standard of review in *Employment Division v. Smith* in 1990, religious freedom has dropped a few more notches on its “honor roll.”

The legal academy, with some exceptions, has uncritically accepted the Court’s tendency to treat nonestablishment as the basic end to which some derogation may cautiously be permitted in favor of the free exercise of religion. Laurence Tribe, for example, has described the free exercise provision as carving out a zone where “permissible accommodation” of religious interests may take place.<sup>33</sup> Some legal scholars have even suggested that specific protection for religious freedom may be redundant in view of existing protections for freedom of expression and association and existing

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<sup>28</sup> See Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, CATHOLIC NEWS SERV. (Mar. 13, 2006), <http://www.catholicnews.com/data/stories/cns/0601456.htm>.

<sup>29</sup> E.g., *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (distinguishing between certain constitutional rights on the basis of whether they are “implicit in the concept of ordered liberty”), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>30</sup> HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT* 17 (8th ed. 2003).

<sup>31</sup> See 2 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 773 (2d ed. 1988).

<sup>32</sup> Glendon & Yanes, *supra* note 21, at 535.

<sup>33</sup> TRIBE, *supra* note 31, § 14-4, at 1169.

antidiscrimination law.<sup>34</sup> That, as Cole Durham has observed, is quite an interesting move because increased protection in most areas of human rights law is generally regarded as a sign of the importance of the rights in question.<sup>35</sup> “No one,” he points out, “seems exercised about redundant non-discrimination provisions.”<sup>36</sup> Meanwhile, legal developments, like the *Smith* decision, that discourage religious persons and groups from asserting their rights have emboldened the interest groups that aim to reduce the influence of religion, especially organized religion, in American society.

At the time when President Bush’s faith-based initiatives were being widely debated, Professor Noah Feldman claimed in a *New York Times Magazine* article to have found the “solution” to the problems of church–state law.<sup>37</sup> Feldman’s proposal is that the courts should “offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities.”<sup>38</sup> In other words: Let people have their holiday displays on public property, and even let them have a moment of silence at the beginning of the school day, but ban tuition vouchers and shut down experiments with the use of faith-based organizations to deliver social services.

Feldman argued that his approach should be welcomed by both secularists and evangelicals and that it would in fact “close the rift between them.”<sup>39</sup> Evangelicals, he wrote, should like his idea because they would only be giving up vouchers and, in return, would be getting recognition for the public symbols of religion.<sup>40</sup> Feldman was silent on what secularists would get from his solution, but his proposal sounds very much like a secularist divide-and-conquer strategy: Let’s destroy the religious right by driving a wedge between those who are more concerned about religion in public settings and those who are more concerned about protecting the existence and identity of religious institutions. Let’s marginalize the communities whose messages are most critical of the values of a materialistic and hedonistic society. Let’s penalize parents who do not wish to subject their children to secular proselytizing in

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<sup>34</sup> E.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6, 13 (2007); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 943 (2005); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 (2001).

<sup>35</sup> Durham, *supra* note 6, at 383.

<sup>36</sup> *Id.*

<sup>37</sup> Noah Feldman, *A Church–State Solution*, N.Y. TIMES MAG., July 3, 2005, at 28, 32.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

government schools. And as for the disadvantaged persons who are the primary beneficiaries of the services provided by faith-based organizations, let's leave them to the tender mercies of the state.

Regarding the various efforts to marginalize religion in American life, I think that stalwart defender of religious freedom, Michael McConnell, put it best when he said, "If religious liberty has become controversial again in our liberal society—and it has—it is not because either religion or liberty has changed, but because liberalism has changed. And not for the better."<sup>41</sup> Liberalism, he warns, may be becoming "not a set of political arrangements by which persons of widely differing views can live together in relative harmony, but a narrow and sectarian program enforcing its dogmas by force."<sup>42</sup>

At this point, I must make clear that I would not wish to be understood as minimizing the very real risks and dilemmas posed by direct or indirect public assistance to religious entities. Nor do I wish to minimize the difficulty of defining the scope and limits of a religious body to govern itself according to its own norms. As many critics of governmental faith-based initiatives have observed, the conditions attached to government assistance can cause religious organizations to stray from their distinctive mission and become dependent on the government.<sup>43</sup> But because the government controls so much of the nation's educational and social services, the vitality and mission of religious agencies are also threatened if religious schools, hospitals, and other bodies are denied assistance while secular bodies receive it.<sup>44</sup>

The point I wish to emphasize is that to ignore the associational and institutional dimensions of religious freedom not only harms the religious groups and the individuals to whom those groups are important; it also has implications for our democratic experiment. A society that aspires to be both free and compassionate cannot afford to neglect the health of the families, religious groups, and other communities of memory and mutual aid that are our principal seedbeds of character and competence.<sup>45</sup> As Emory's John Witte and Christian Green point out in the introduction to their latest book, the religious

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<sup>41</sup> Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000).

<sup>42</sup> *Id.* at 1259.

<sup>43</sup> See, e.g., Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1605.

<sup>44</sup> See *id.*

<sup>45</sup> MARY ANN GLENDON, RIGHTS TALK 137 (1991); Mary Ann Glendon, *The Cultural Underpinnings of America's Democratic Experiment*, in BUILDING A HEALTHY CULTURE 41, 41, 53 (Don Eberly ed., 2001).

institutions and other mediating structures that stand between the state and the individual not only help to create the conditions for the realization of civil and political rights but also provide many important social goods including education, health care, child care, and employment, among others.<sup>46</sup> And they often can do so far more efficiently, effectively, and humanely than agencies of the state.<sup>47</sup>

I believe that is why Harold Berman wrote twenty years ago that he hoped for a reinterpretation of the First Amendment's religion language that "would permit not only 'religion' to cooperate with 'government' but 'government' openly to cooperate with 'religion'—without discrimination for or against any belief system (and hence without establishment) and without coercion (and hence without restriction upon free exercise)."<sup>48</sup>

Having dwelt thus far on disquieting legal and cultural developments, I am glad to be able to report that some of the news the Pontifical Academy heard from social scientists last spring was quite encouraging—especially the new research that bears on the relation of religion and religious freedom to what one might call a country's moral ecology. Allen Hertzke, for example, reported on pathbreaking studies that challenge the oft-repeated claim that religion is a particular source of social division and strife.<sup>49</sup> That claim—almost a mantra in secular circles—implies that religion is practically a suspect category.<sup>50</sup>

Yet an important and growing body of empirical evidence reveals that the political influence of religion is in fact quite diverse, sometimes contributing to strife, but often fostering democracy, reconciliation, and peace.<sup>51</sup> Some studies indicate that violence actually tends to be greater in societies where religious

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<sup>46</sup> RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 16 (John Witte, Jr. & M. Christian Green eds., 2012).

<sup>47</sup> That argument was first powerfully made in PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 159–63 (Michael Novak ed., 2d ed. 1996).

<sup>48</sup> Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, in ARTICLES OF FAITH, ARTICLES OF PEACE 40, 53 (James Davison Hunter & Os Guinness eds., 1990).

<sup>49</sup> See Hertzke, *supra* note 6, at 114–17.

<sup>50</sup> For an analysis of the role that ideas about religious "divisiveness" have played in First Amendment jurisprudence, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

<sup>51</sup> Hertzke, *supra* note 6, at 113–17; see also MONICA DUFFY TOFT ET AL., GOD'S CENTURY: RESURGENT RELIGION AND GLOBAL POLITICS 7–8 (2011); Brian J. Grim & Roger Finke, *Religious Persecution in Cross-National Context: Clashing Civilizations or Regulated Religious Economies?*, 72 AM. SOC. REV. 633, 647–52 (2007).

practice is suppressed<sup>52</sup> and that promotion of religious freedom actually advances the cause of peace by reducing interreligious conflict.<sup>53</sup> Further research will be needed to discover the mechanisms that link religious freedom to religiously motivated violence or to its reduction in diverse societies. But the results thus far should give pause to those who claim that religion is inherently divisive.

For one thing, those who automatically associate religion with strife may be confusing religious conflicts with identity politics. It is often “the sacralization of identity”—rather than religion as such—that lies at the heart of conflicts to which religious labels have been attached.<sup>54</sup> The religious rhetoric and symbolism associated with such conflicts may have more to do with issues of individual and group identity than with theological differences.

A second important set of findings suggests a positive correlation between religious freedom and other important human goods.<sup>55</sup> The Pew Forum’s Brian Grim has found that “[t]he presence of religious freedom in a country mathematically correlates with . . . the longevity of democracy” and with the presence of civil and political liberty, women’s advancement, press freedom, literacy, lower infant mortality, and economic freedom.<sup>56</sup> Correspondingly, there is a significant correlation between the denial of religious freedom and the absence of these economic, social, and political goods. While more research is needed on these linkages, they provide encouraging empirical support for Pope John Paul II’s intuition that the state of religious freedom is a kind of litmus test for the state of human rights generally.

Now, if we put the news from the social scientists on changing religious attitudes together with the recent findings on the positive role of religion in society, we arrive at what Professor Hertzke calls “a profound paradox”—that just when pathbreaking work has begun to document the societal benefits of religious freedom, the longstanding social “consensus behind it is weakening, assaulted by authoritarian regimes, attacked by theocratic movements, violated

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<sup>52</sup> BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE 21ST CENTURY* 8 (2011).

<sup>53</sup> THOMAS F. FARR, *WORLD OF FAITH AND FREEDOM* 18–19 (2008).

<sup>54</sup> Malise Ruthven, *Fundamentalist and Other Obstacles to Religious Toleration*, in *UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY*, *supra* note 1, at 456, 464 (internal quotation marks omitted).

<sup>55</sup> See Hertzke, *supra* note 6, at 114–17).

<sup>56</sup> Brian J. Grim, *Religious Freedom: Good for What Ails Us?*, *REV. FAITH & INT’L AFF.*, Summer 2008, at 3, 4.

by aggressive secular policies, and undermined by growing elite hostility or ignorance.”<sup>57</sup>

To this I would add a second paradox—that just when longstanding, elite attitudes toward religion are allegedly spreading through the population in general, several prominent secular thinkers have had second thoughts. Philosophers Jürgen Habermas<sup>58</sup> and Marcello Pera<sup>59</sup> have called attention to the importance of the Judeo-Christian heritage in sustaining liberal democracy, while Bernard-Henri Lévy has expressed concern about the spread of bias against Christianity.<sup>60</sup>

No serious thinker, of course, disputes that the preservation of a free society depends on citizens and statespersons with particular skills, knowledge, and qualities of mind and character. But many secular theorists have simply assumed that a free society can get along fine without religion and that the more closely religion is confined to the private sphere, the freer everyone will be. Some have maintained that the experience of living in a free society is sufficient in itself to foster the civic virtues of moderation and self-restraint, respect for others, and so on.<sup>61</sup>

That complacent opinion is becoming harder to sustain, however, with so many of the country’s families, schools, religious groups, and other seedbeds of civic virtue currently in distress.<sup>62</sup> It is hard to resist the conclusion that our

<sup>57</sup> Hertzke, *supra* note 6, at 108.

<sup>58</sup> See JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION 3 (Ciaran Cronin trans., 2008) [hereinafter HABERMAS, BETWEEN NATURALISM AND RELIGION]; JÜRGEN HABERMAS, TIME OF TRANSITIONS 151 (Ciaran Cronin & Max Pensky eds. & trans., 2006) [hereinafter HABERMAS, TIME OF TRANSITIONS].

<sup>59</sup> MARCELLO PERA, WHY WE SHOULD CALL OURSELVES CHRISTIANS: THE RELIGIOUS ROOTS OF FREE SOCIETIES 5–7 (L.B. Lappin trans., 2011).

<sup>60</sup> French philosopher and professed atheist Bernard-Henri Lévy expressed his concern in 2010 that anti-Christian “prejudice and especially major anti-clericalism . . . is taking on enormous proportions in Europe.” *Prominent Atheist Says Catholicism Is Least Tolerated Religion in Europe*, CATHOLIC NEWS AGENCY (Sept. 24, 2010, 3:27 AM), <http://www.catholicnewsagency.com/news/prominent-atheist-says-catholicism-is-least-tolerated-religion-in-europe/>.

<sup>61</sup> For overviews of the positions of leading political theorists on this issue, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991); PERA, *supra* note 59, at 26–33. Galston states his own position thus: “Liberalism contains *within itself* the resources it needs to declare and to defend a conception of the good and virtuous life that is in no way truncated or contemptible. This is not to deny that religion and classical philosophy can support a liberal polity in important ways. . . . But it is to deny that liberalism draws essential content and depth from these sources.” GALSTON, *supra*, at 304. Nevertheless, Galston favors an accommodationist approach to religion on the ground that religion can help to support liberal values. *Id.* at 279.

<sup>62</sup> See FRANCIS FUKUYAMA, THE GREAT DISRUPTION 4–6, 37, 47–48, 52 (1999); see also Mary Ann Glendon & Pierpaolo Donati, *Towards Achieving Solidarity with Children and Young People in Our*

liberal societies have been living for quite a while on inherited social capital—and that, like profligate heirs, we’ve been consuming our inheritance without bothering to replenish it.

That is why thinkers like Habermas and the Italian philosopher–statesman Marcello Pera have begun to speak out about the political costs of neglecting a cultural inheritance in which religion, liberty, and law are inextricably intertwined, and to question whether liberal states can afford to be indifferent or hostile to religion.<sup>63</sup> They have begun to ask questions like: Where will citizens learn to view others with respect and concern, rather than to regard them as objects, means, or obstacles? What will cause most men and women to keep their promises, to limit consumption, to answer their country’s call for service, and to lend a hand to the unfortunate? Where will a state based on the rule of law find citizens and statesmen capable of devising just laws and then abiding by them? What is the role of religion in supporting the commitment to common values—the minimal social cohesion—that every free society requires?

Habermas has gone so far as to concede that the good effects that some philosophers have attributed to life in free societies may well have had their source in the legacy of the “Judaic ethic of justice and the Christian ethic of love.”<sup>64</sup> In his case, it was concern about biological engineering and the instrumentalization of human life that led him to conclude that the West cannot abandon its religious heritage without endangering the great social and political advances that are grounded in that heritage. “The liberal state,” he has written, “depends in the long run on mentalities that it cannot produce from its own resources.”<sup>65</sup> A professed atheist and political leftist, he stunned many of his followers when he announced he had come to think that

[t]his legacy [of the Judaic ethic of justice and the Christian ethic of love], substantially unchanged, has been the object of continual critical appropriation and reinterpretation. To this day, there is no alternative to it. And in light of the current challenges of a

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*Globalized World*, in 12 PONTIFICAL ACAD. SOC. SCIS., VANISHING YOUTH? SOLIDARITY WITH CHILDREN AND YOUNG PEOPLE IN AN AGE OF TURBULENCE 543 (Mary Ann Glendon & Pierpaolo Donati eds., 2006).

<sup>63</sup> Pera has written two books, one a dialogue with Pope Benedict XVI (then Joseph Ratzinger), on the danger of forgetting Europe’s cultural debt to Christianity. See PERA, *supra* note 59; JOSEPH RATZINGER & MARCELLO PERA, *WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM* (Michael F. Moore trans., 2006).

<sup>64</sup> HABERMAS, *TIME OF TRANSITIONS*, *supra* note 58, at 151.

<sup>65</sup> HABERMAS, *BETWEEN NATURALISM AND RELIGION*, *supra* note 58, at 3.

postnational constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.<sup>66</sup>

In a similar vein, Pera writes, “Without the Christian vision of the human person, our political life is doomed to become the mere exercise of power and our science to divorce itself from moral wisdom; our technology to become indifferent to ethics and our material well-being blind to our exploitation of others and our environment.”<sup>67</sup>

And so, the wheel of elite opinion may—just possibly—be coming back full circle to the views of those who, like George Washington and Alexis de Tocqueville, held that the free society was profoundly dependent on a healthy moral culture nourished by religion (by which they understood Judeo-Christianity).<sup>68</sup> In *Democracy in America*, Tocqueville—himself a religious skeptic—urged his fellow intellectuals to lay aside their bias against religion. Lovers of liberty, he said, should “hasten to call religion to their aid, for they must know that the reign of freedom cannot be established without that of mores, nor mores founded without beliefs.”<sup>69</sup> Religion, he continued, is “the safeguard of mores; and mores as the guarantee of laws and the pledge” for the maintenance of freedom itself.<sup>70</sup>

But what if Allen Hertzke is right when he says that just when the social value of religious freedom is becoming ever more apparent, the longstanding “consensus behind it is weakening”?<sup>71</sup> Or, what if Charles Taylor is right when he speaks of the sense that the basic values that have fostered social cohesion in the United States are “less cherished and less widely recognized among its citizens than in the past”?<sup>72</sup>

In some respects, our current situation is reminiscent of the progression that Tocqueville described in *The Old Régime and the French Revolution*. In the

<sup>66</sup> HABERMAS, TIME OF TRANSITIONS, *supra* note 58, at 151.

<sup>67</sup> PERA, *supra* note 59, at 60.

<sup>68</sup> George Washington said in his Farewell Address to the People of the United States that no one should claim to be a patriot if he works “to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . And let us with caution indulge the supposition that morality can be maintained without religion.” George Washington, President, Farewell Address to the People of the United States (Sept. 19, 1796), in S. DOC. NO. 106-21, at 20 (2000).

<sup>69</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 11 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

<sup>70</sup> *Id.* at 44.

<sup>71</sup> See Hertzke, *supra* note 6, at 108.

<sup>72</sup> Charles Taylor, *Religion in a Free Society*, in ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 48, at 93, 113.



late seventeenth century, he tells us, religious irreverence became fashionable among French elites who, “not satisfied with cultivating it between themselves, . . . propagated their ideas among the lower classes.”<sup>73</sup> The effect, he says, was not to leave a void. Rather, the place of religion was promptly taken “by a host of new loyalties and secular ideals that not only filled the void but (to begin with) fired the popular imagination.”<sup>74</sup> Moreover, “Those who retained their belief in the doctrines of the Church became afraid of being alone in their allegiance and, dreading isolation more than the stigma of heresy, professed to share the sentiments of the majority.”<sup>75</sup> The way was thus prepared, in his view, for “[r]evolutionaries of a hitherto unknown breed . . . : men who carried audacity to the point of sheer insanity; who balked at no innovation and, unchecked by any scruples, acted with an unprecedented ruthlessness.”<sup>76</sup>

The United States seems far from such a point. But if religious freedom is on the road to becoming a lesser right—in law and culture alike—it behooves friends of religious liberty to think hard about what can be done to shift those trends in a more favorable direction. No serious person disputes that religious freedom has to be harmonized with other fundamental rights, or that it is subject to necessary limitations in the interests of public health and safety. But the devil, as they say, is in the details. On the one hand, the more broadly religious freedom is conceived, the more tensions arise among individual religious freedom, the autonomy of religious bodies, other fundamental rights, and the legitimate interests of the state. Yet, one of the principal ways in which religious liberty is violated is by construing it so narrowly as to confine it to the private sphere. There is no simple formula for striking the balance.

At the recent meeting of the Pontifical Academy, there was ready consensus among the diverse participants that there is no one-size-fits-all model for religious freedom. But there was much discussion of the thorny issue of its legitimate scope and limits.

The prevailing juridical approach to these problems of scope and limits in liberal democracies is for constitutional courts to use pragmatic legal

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<sup>73</sup> ALEXIS DE TOCQUEVILLE, *THE OLD RÉGIME AND THE FRENCH REVOLUTION* 155 (Stuart Gilbert trans., Doubleday Anchor Books 1955) (1856).

<sup>74</sup> *Id.* at 156.

<sup>75</sup> *Id.* at 155.

<sup>76</sup> *Id.* at 157.

techniques to achieve balance among the various freedoms.<sup>77</sup> Some at our meeting expressed doubts, however, about whether such balancing feats can be accomplished in a principled manner. Moreover, there are well-known costs to the practice of entrusting hotly contested social issues to the courts when there is no clear constitutional warrant for doing so. Because constitutional adjudication effectively closes the door on further resort to ordinary democratic processes of debate, education, and persuasion, Professor An-Na'im advocated a "'people-centered' approach"<sup>78</sup> that would "promote the ability of local communities to protect their own rights," rather than rely too heavily on the "ambiguities and contingencies" of official action.<sup>79</sup>

Not surprisingly, no agreement was reached on these dilemmas at the Rome meeting, but there was broad consensus that religious liberty ultimately depends on the habits and attitudes of citizens and statespersons—that is, on culture. On that point, one of our invited experts, Professor Joseph Weiler, offered some wise observations from a comparative perspective. Professor Weiler, an observant Jew who successfully argued in support of Italy in the recent crucifix case before the European Court of Human Rights, praised that court's decision for recognizing that there can be a number of valid modes of protecting religious freedom.<sup>80</sup> In a press release issued at the time of the decision, he said:

Europe is special in that it guarantees at the private level both freedom of religion and freedom from religion, but does not force its various Peoples to disown in its public spaces what for many is an important part of the history and identity of their States, a part recognized even by those who do not share the same religion or any religion at all. It is this special combination of private and public liberties, reflecting a particular spirit of tolerance, which explains how in countries such as, say, Britain or Denmark to give but two examples, where there is an Established State Church no less—Anglican and Lutheran respectively—Catholics, Jews, Muslims and,

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<sup>77</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–44 (2002) (balancing individuals' interests in educational freedom with the rights emanating from the nonestablishment language of the First Amendment).

<sup>78</sup> Abdullahi A. An-Na'im, *Experiences in Freedom of Religion in the African Context*, in UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY *supra* note 1, at 193, 195.

<sup>79</sup> *Id.* On the necessity and complexity of striking the balance, see Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL'Y 5 (2009).

<sup>80</sup> Joseph H.H. Weiler, *State and Nation; Church, Mosque and Synagogue—On Religious Freedom and Religious Symbols in Public Places*, in UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIVERSITY, *supra* note 1, at 578, 578–82, 587). The crucifix case can be found at *Case of Lautsi and Others v. Italy*, EUR. CT. HUM. RTS. (Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=883169&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

of course, the many citizens who profess no religious faith, can be entirely “at home,” play a full role in public life including the holding of the highest office, and feel it is “their country” no less than anyone else. It is an important model for the world of which Europe can be justly proud.<sup>81</sup>

Weiler warned, however, that legal measures based on the concept of legitimate pluralism will only work if they are supported by a culture of mutual respect and genuine tolerance.<sup>82</sup> This means, he explained, that in countries like Italy where an accommodationist model exists, special care has to be taken to assure respect for persons of all faiths and no faith. The practice of such countries, he said, can be

hugely important in the lesson of tolerance it forces on such states and its citizens towards those who do not share the [majority] religions and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously-inspired values and the imperative exigencies of liberal democracy.<sup>83</sup>

By the same token, he added, special care must be taken in countries like France where a secularist model prevails to avoid marginalizing religion and religious believers.<sup>84</sup>

As regards the classroom, he specified:

[I]t falls *in equal measure* on those States who forbid any religious symbol on their classroom walls, and those who require it, to ensure that the prohibition or requirement are not misunderstood by the young members of our society. The prohibition of religious symbols should not be understood as a denigration of religion or religious people and the requirement of a religious symbol such as the cross, should not be understood as denigrating other religions or those who do not profess a religious faith at all.<sup>85</sup>

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<sup>81</sup> Press Release, Straus Inst. for the Advanced Study of Law & Justice (Mar. 18, 2011) (on file with author).

<sup>82</sup> Weiler, *supra* note 80, at 581.

<sup>83</sup> *Id.*; cf. Pope Benedict XVI, Address to the Diplomatic Corps for the Traditional Exchange of New Year Greetings (Jan. 10, 2011), *available at* <http://www.zenit.org/article-31404?l=english> (“The particular influence of a given religion in a nation ought never to mean that citizens of another religion can be subject to discrimination in social life or, even worse, that violence against them can be tolerated.”).

<sup>84</sup> Weiler, *supra* note 80, at 587.

<sup>85</sup> Press Release, Straus Inst. for the Advanced Study of Law & Justice, *supra* note 81.

Because I agree with Professor Weiler's emphasis on the priority of culture, I would like to conclude with this thought: whether religious freedom will rise or decline in status as a fundamental right will depend to some extent on the legal and political efforts in which many supporters of religious liberty are engaged, but it will depend even more on the attitudes and actions of religious believers and leaders themselves. Theirs is the responsibility to educate and encourage their co-religionists to the responsible exercise of religious freedom. It is up to them to find ways to advance their religiously grounded moral viewpoints with reasoning that is intelligible to all men and women of good will. It is up to each religious group to reject ideologies that manipulate religion for political purposes or that use religion as a pretext for violence. It is up to each religious group to find resources within its own traditions for promoting respect and tolerance. And it is up to them to resist the divide-and-conquer strategies that, if successful, could install secularism as the established religion of the United States.

Those are weighty challenges. For what hangs in the balance is nothing less than whether religion will be a destabilizing force in our increasingly diverse societies or will help to hold together the two halves of the divided soul of American democracy—our love of individual freedom and our sense of a community for which we all bear a common responsibility.