About the Religious Freedom Project

The Religious Freedom Project (RFP) at Georgetown University’s Berkley Center for Religion, Peace, and World Affairs began in January 2011 with the generous support of the John Templeton Foundation. The RFP is the nation’s only university-based program devoted exclusively to the analysis of religious freedom, a basic human right restricted in many parts of the world. Our team of interdisciplinary scholars examines different understandings of religious liberty as it relates to other fundamental freedoms; its importance for democracy; and its role in social and economic development, international diplomacy, and the struggle against violent religious extremism. Our target audiences are the academy, the media, policymakers, and the general public, both here and abroad. For more information about the RFP’s research, teaching, publications, conferences, and workshops, visit http://berkleycenter.georgetown.edu/rfp.

About the Berkley Center for Religion, Peace & World Affairs

The Berkley Center for Religion, Peace, and World Affairs at Georgetown University, created within the Office of the President in 2006, is dedicated to the interdisciplinary study of religion, ethics, and public life. Through research, teaching, and service, the center explores global challenges of democracy and human rights; economic and social development; international diplomacy; and inter-religious understanding. Two premises guide the center’s work: that a deep examination of faith and values is critical to address these challenges, and that the open engagement of religious and cultural traditions with one another can promote peace.
Scholars as diverse as Alfred Stepan and the Berkley Center’s own José Casanova have recognized that religious freedom includes the right of religious groups to organize and contend for their views in public and political life. According to this view, religious freedom is necessarily public, not just private. However, many questions arise. What are the foundations of such a robust right to public religious freedom? Is it rooted in no more than practice and convention? Or is it rooted in the very nature and capacities of human beings? Furthermore, what are the limits to religious freedom? In a liberal democracy, do religious citizens have the right to introduce religious views and arguments into political debate? Or should they do so only when they can support their views with non-religious arguments? Today, these questions are more vital and controversial than ever, not only in established Western democracies but also in non-Western contexts in which religious groups are influential political actors, such as India, Tunisia, and Indonesia.

To discuss these crucial questions, the Religious Freedom Project brought two of America’s most distinguished political and ethical thinkers together for an extensive—and often intense—discussion. This discussion kicked off the RFP’s two-day capstone conference, Freedom to Flourish: Is Religious Freedom for Peace, Prosperity, and Democracy? Nicholas Wolterstorff, the Noah Porter Professor of Philosophy Emeritus at Yale University, began the conversation with a wide-ranging lecture arguing that religious freedom—including its public dimensions—is a “natural right” rooted in our natural human capacities. He also argued that liberalism permits religious citizens to make religious arguments for their political positions, even when they lack a non-religious rationale for these positions. Stephen Macedo, the Laurance S. Rockefeller Professor of Politics at Princeton University, responded by arguing that liberal democracy is a shared political project that requires citizens to find common ground. It therefore requires that religious citizens offer reasons for their positions that non-religious citizens can understand and endorse. Following their remarks, RFP associate director Timothy Shah moderated a vigorous conversation between Wolterstorff and Macedo that also involved a large audience of students, scholars, and policy thinkers assembled in Georgetown’s historic Copley Hall.
NICHOLAS WOLTERSTORFF: In his initial email to me about this colloquium, Tim Shah, associate director of the Religious Freedom Project at the Berkley Center for Religion, Peace & World Affairs, invited me to compose an essay on “the foundations and character of religious freedom as a normative principle, and the integral importance of religious liberty for liberal democracy.” This is a daunting invitation: to discuss the nature of religious freedom, the foundations of religious freedom, and the importance of religious freedom for liberal democracy. I can treat only a few aspects of the topic. I hope that the aspects I have selected—and what I have to say about them—will prove interesting and worthwhile for us to discuss.

The historical origin of the religion clauses in the US Bill of Rights

In a letter of 494 to Emperor Anastasius, Pope Gelasius I declared: “Two there are, august emperor, by which this world is ruled: the consecrated authority of priests and the royal power.” The idea that Gelasius here expresses is that pope and emperor, church and state, are distinct authority structures whose essential difference is that they have jurisdiction over two distinct domains of human activity.1

In his tract of two years later, On the Bond of Anathema, Gelasius elaborated his idea. Church and empire each have a distinct “sphere of competence,” a distinct “jurisdiction.” Christ himself, says Gelasius, “made a distinction between the two rules, assigning each its sphere of operation and its due respect.” The emperor has governance over human or secular affairs. The Pope, along with his
bishops and priests, has governance over divine affairs and spiritual activity.

The doctrine that Gelasius articulated in these passages came to be known as the “two-rules” doctrine. From the time he wrote his letter until a century or so after the Protestant Reformation, this doctrine was almost always the framework employed in the West for discussing the relation of the state to religion and the Church. The doctrine assumed that the Church in a given area was unified and that its membership was very nearly identical with the body of those who were subjects of whatever was the government in that area. What differentiated church and state was not a difference in those they govern but a difference in the activities that fall under their governance.

The traditional separation of church and state was a crucial part of the context within which freedom of religion emerged in the West. There can be a certain degree of freedom of religion in a society that has a single unified governance structure with authority over the lives of the subjects as a whole, including their religion. But it will take a significantly different form from the form it has taken in the West. It may take the form, for example, of the Ottoman millet system for non-Muslims.

Though the separation of church and state presupposed by the two-rules doctrine was an important part of the context within which freedom of religion emerged in the West, those who thought in terms of the doctrine seldom affirmed freedom of religion. Rather, they almost always assumed a perfectionist view of the state, as they did of the Church: state and church together aim at perfecting the people in virtue and piety. This assumption remained implicit in Gelasius’ letter and tract; in numerous later writings it was stated explicitly. From the many passages that could be quoted on the matter, let me select one from John Calvin. Calvin is emphatic in his insistence on the importance of distinguishing the two rules. “These two, as we have divided them, must always be examined separately; and while one is being considered, we must call away and turn aside the mind from thinking about the other. There are in man, so to speak, two worlds, over which different kings and different laws have authority” (Institutes III. xix. 15).

As to the task of government, this is what Calvin says: “[Government] does not merely see to it…that men breathe, eat, drink, and are kept warm, even though it surely embraces all these activities when it provides for their living together. It does not, I repeat, look to this only, but also prevents idolatry, sacrilege against God’s name, blasphemies against his truth, and other public offenses against religion from arising and spreading among the people; it prevents the public peace from being disturbed, it provides that each man may keep his property safe and sound, that men may carry on blameless intercourse among themselves, that honesty and modesty may be preserved among men. (Institutes IV. xx. 3)”

In 1579, twenty years after the fourth and final edition of Calvin’s Institutes,
there appeared a tract with the title, in English translation, A Discourse upon the Permission of Freedom of Religion, called Religions-Vrede in the Netherlands. Though the author presents himself as Catholic, the predominant scholarly opinion nowadays is that he was the prominent Huguenot Philip du Plessis Mornay. Here is what the author says in one place:

“I ask those who do not want to admit the two religions in this country how they now intend to abolish one of them… It goes without saying that you cannot abolish any religious practice without using force and taking up arms, and going to war against each other instead of taking up arms in unison against Don John and his adherents and delivering us from the insupportable tyranny of the foreigners. If we intend to ruin the Protestants we will ruin ourselves, as the French did. The conclusion to be drawn from this is that it would be better to live in peace with them, rather than ruin ourselves by internal discord and carry on a hazardous, disastrous, long and difficult war or rather a perpetual and impossible one. Taking everything into consideration, we can choose between two things: we can either allow them to live in peace with us or we can all die together; we can either let them be or, desiring to destroy them, be ourselves destroyed by their ruin…As we cannot forbid these people to practice their religion without starting a war and cannot destroy them by that war without being destroyed ourselves let us conclude that we must let them live in peace and grant them liberty…”

The argument is eloquent and poignant. The situation in the Lowlands is that the religious unity that once prevailed is gone. Many have left the Catholic Church and become Protestant. Any attempt to recover the hegemony of the Catholic Church by force of arms would require appalling bloodshed, devastating the Catholic population as well as the Protestant and leaving both at the mercy of the Spaniards. The only option is for the state to give up its perfectionist attempt to enforce religious conformity. Protestants as well as Catholics should have a civil right to practice their religion. Catholics should tolerate and live at peace with the Protestants so that together they can fight Don Juan.

Du Plessis Mornay’s argument was prescient. The impossibility of undoing the religious fission caused by the emergence of Protestantism forced Europeans to consider an alternative to the two-rules doctrine and the perfectionist view of the state. Initially they played with the idea of mini-Christendoms, each political unit enforcing its own preferred religion, be it Catholic or some version of Protestantism: *cuius regio, eius religio*. But within a relatively short time even that proved impossible. What then slowly took place among western European political thinkers and actors was a fundamental rethinking of the task of the state and of the relation of the state to its citizens—not just to the religions of its citizens but to its citizens more generally.

The idea of natural rights had been current ever since the twelfth century among canon lawyers and, to a lesser extent, among philosophers, theologians, and other theorists. That idea was now employed to replace the perfectionist idea of the state with what might be called the “protectionist idea.” The state is to pro-
tect citizens against violations of their natural rights by their fellow citizens, and citizens are in turn to be protected against violation of their natural rights by the state.

The idea of the state as a rights-protecting institution received canonical formulation in the US Declaration of Independence: “We hold these truths to be self-evident, that all men are...endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men.”

The idea of the state as a rights-honoring institution received elaborate, binding expression in the first ten amendments to the US Constitution, known as the Bill of Rights, the aim of which was declared to be to “prevent misconstruction or abuse of [the federal government’s] powers.” The first amendment famously paired religious freedom with non-establishment by declaring, in its opening clause, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This represents a stunning rejection of the perfectionism that went hand-in-hand with the two-rules doctrine: Instead of the state being enjoined, in conjunction with the church, to seek the perfection of the citizens with respect to religion, this first article protects the people against the state with respect to the exercise of their religion. The first amendment does not explicitly declare that freedom of religious exercise and freedom from establishment are to be civil rights because they are natural rights; but as we shall see later, there is considerable evidence for the conclusion that is how many, if not all, of its authors were thinking.

The reference to non-establishment can seem baffling in this connection: Why would it be thought that there is a natural right to freedom from establishment, if indeed that is how the authors were thinking? It helps, then, to remind ourselves of how people at the time thought of this right; subsequent jurisprudence has led us to think of it quite differently. Here is how the Pennsylvania Constitution of

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“"The traditional separation of church and state was a crucial part of the context within which freedom of religion emerged in the West. There can be a certain degree of freedom of religion in a society that has a single unified governance structure with authority over the lives of the subjects as a whole, including their religion; but it will take a significantly different form from the form it has taken in the West."
1776 put it: “No man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to or against, his own free will and consent.”

Let me summarize what I have said thus far. The religion clause of the Bill of Rights declares that citizens are to have the civil right to freedom of religious exercise and to freedom from establishment. The emergence of that conviction was the result of the confluence of three factors: (1) the traditional understanding of church and state as two distinct institutions with different jurisdictions; (2) the breakup of the religious unity of Europe and the subsequent abandonment of the perfectionist view of the state; and (3) the employment of the idea of natural rights, long common among canon lawyers, to think of the state as a rights-protecting and rights-honoring institution, with religious freedom and non-establishment prominent among the natural rights to be honored.

The nature of religious freedom

Let me now turn to the assignment Tim Shah gave me, beginning with the nature of religious freedom. Let me approach the topic from a somewhat oblique angle.

In modern liberal democracies Protestants and Catholics are not killing each other, as they were when the author of A Discourse upon the Permission of Freedom of Religion wrote his tract. But the relation of the state to the religions of its citizens remains the site of controversy in our liberal democracy as it does in all others.

These controversies take different forms than in the past. In former days, the controversies were almost always jurisdictional controversies between church and state; now and then, controversies of that sort still erupt in the US in the form of legal cases involving the so-called “ministerial exception.” For the most part, however, our controversies are not jurisdictional disputes between church and state. Nonetheless, religion remains a problem for the liberal democratic state. One sometimes hears someone from the West talking to the rest of the world as if religion no longer poses problems for the state in Western liberal democracies. The truth is quite otherwise.

What is it about religion and the liberal democratic state that results in religion continuing to pose quandaries to the state? And how do those quandaries, and the state’s handling of them, cause controversies in the public? To get at the issues, I will use the US as my example. The outcome of our discussion will be an understanding of why the civil right to religious freedom has taken the particular form it has in the US. Once we understand that, we will also realize that we must expect it to take different forms in other countries. Considerations of space require me to focus exclusively on free exercise and to say next to nothing about non-establishment; that is unfortunate, since the form that the civil right to religious freedom has taken in the US is due, in good measure, to its intertwinement with the proscription of establishment.

Some of the quandaries presented by religion to the liberal democratic state are definitional controversies. Is this act on
the part of these citizens an exercise of their religion or not? If it is, does this law or policy on the part of government constitute an infringement on their free exercise of their religion?9 Sometimes these definitional questions have no clear answer, with the result that reasonable people disagree on the answer or prefer to give no answer.

In her contribution to an online forum on the politics of religious freedom, sponsored in 2012 by the blog The Immanent Frame, Winifred Fallers Sullivan wrote:

“\textit{It is a commonplace in the academic study of religion to observe that the word religion is manifestly conditioned by the history of its use and that it is deeply problematic, epistemologically and politically, to generalize across the very wide range of human cultural goings-on that are now included in this capacious term...It is also common to note the very specific difficulty of definition that faces interpreters and enforcers of legal instruments purporting to protect and regulate the freedom of religion.}’’

I understand Sullivan to be suggesting, though not quite saying, that the term “religion” is too vague for “freedom of religion” to pick out anything definite. We should cease and desist from talking about freedom of religion.10

It is true, of course, that the term “religion” is not a natural kind term; it is more like the term “game” that Wittgenstein discussed at length in Philosophical Investigations. Games, he argued, are united not by some shared essence but by family resemblances. The term \textit{religio} was used by the ancient Romans to group together certain activities whose similarities they found important to take note of for the purposes at hand. The same is true for our term “religion.” Though a much-used item in our English vocabulary, Sullivan holds that the term is, nonetheless, “deeply problematic” because it is “manifestly conditioned by the history of its use” and because it generalizes across a “very wide range of human cultural goings-on.” Others argue that it is problematic because there are borderline cases in which we are not sure whether to call some activity religious or not.

I do not find these arguments compelling. In particular, I am not persuaded by the argument that we should give up talking about freedom of religion because the concept of religion is too problematic. All terms are conditioned by the history of their use. And many terms generalize across a wide range of phenomena. The term “heavenly body” generalizes across a wide range of phenomena; that does not make its use particularly problematic. And as to the fact that there are borderline cases in which we are not sure whether to apply the term “religion” or not, many if not most terms are like that—the term “raining,” for example. That does not make such terms too problematic to be of any use. The term “raining” is very useful.

As to jurisprudence concerning the free exercise clause, the issue to consider here is whether there are so many cases in which it is not clear whether or not something is a religion that the term has become useless for the purposes of the law. I judge that that is definitely not the
case. In a great many cases it is perfectly obvious that something is a religion and perfectly obvious that it is being exercised. Such cases do not find their way into the courts, for the reason that they are obvious. It is the borderline cases that turn up on the dockets of courts and that catch our attention. In such cases, judges have to make a judgment call that reasonable people can disagree about. Unlike judges, you and I can say, “In a way it is a religion and in a way it is not,” and let it go at that. And unlike judges, we can say, “In a way it is an exercise of religion and in a way it is not.”

By no means are all the quandaries and controversies surrounding the civil right of Americans to freedom of religion definitional, however. There may be little doubt that some law or policy on the part of government is an example of infringing on someone’s exercise of his or her religion; nonetheless, it may be a point of controversy as to whether or not it is permissible. Let’s see why this is.

Most of the religions present in western liberal democracies are exercised by adherents of the religion participating in communal rituals and engaging in acts of private devotion. One would think that such forms of exercise would pose few quandaries to the liberal democratic state. It is easy to see that these activities count as an exercise of one’s religion than there is a natural right to the free exercise of one’s religion than there is a natural right, say, to the practice of quack medicine. Yet others hold that it is a mistake to single out religion for special treatment. The right to religious belief should be treated as a species of the right to liberty of conscience, and the right to religious exercise should be treated as a species, say, of the right to freedom of speech and assembly.”

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“Many of our fellow citizens hold that there are no natural rights, only rights bestowed by laws, social practices, and speech actions. Of those who agree that there are natural rights, many hold that there is no god, almighty or otherwise, and so, of course, there is no natural right to worship almighty God. Some of those who hold that there is no god regard religion as a menacing relic of irrational primitive ways of thinking and see no more reason to think that there is a natural right to the free exercise of one’s religion than there is a natural right, say, to the practice of quack medicine. Yet others hold that it is a mistake to single out religion for special treatment. The right to religious belief should be treated as a species of the right to liberty of conscience, and the right to religious exercise should be treated as a species, say, of the right to freedom of speech and assembly.”
Here’s why. The religion clauses in the first article of the US Bill of Rights have the rhetorical flavor of articulating absolutes: Congress shall make no law respecting an establishment of religion and no law prohibiting the free exercise thereof. But that is not how the courts have interpreted these clauses. They have interpreted them as articulating prima facie rather than ultima facie, or absolute, prohibitions on governmental action—or to view it from the other end, as articulating prima facie rights of citizens vis-à-vis the government rather than absolute, ultima facie, rights. One’s prima facie right to the free exercise of one’s religion can be outweighed by other weightier rights. The currently operative formula, as I understand it, is that the government may substantially burden a person’s exercise of his or her religion only if it can demonstrate a compelling interest in doing so and only if it uses the least restrictive means available.

Whether or not a person’s prima facie right to free exercise is in fact outweighed in a given instance by other rights is very much a judgment call on the part of the courts. These judgment calls are invariably controversial; and liberal democracies differ considerably in how they make them. To know what the American government is actually prohibited from doing by the two religion clauses, and hence to know what our civil right to religious freedom actually comes to, one cannot just exegete the language of the clauses. One has to look at the long and complex series of often convoluted court decisions as to which infringements on free exercise and which violations of no-establishment are permissible and which are not.

Suppose that the members of some religion have come to the conviction that they are called by God to offer the occasional child sacrifice in their communal rituals. Should they be permitted to do so? It is obvious that they should not be permitted; no liberal democracy would permit them to do so. But suppose that it is the long established practice of some group to use certain mind-altering drugs when performing their rituals; and suppose that the government, in the interest of public health, passes a law that has the effect of making this illegal. Would this infringement on free exercise be permissible? The answer in this case is not obvious. In a famous case, the US Supreme Court declared that such an infringement is permissible. Again, suppose that the government passes a general law forbidding alcohol in prisons whose effect is to make it impossible for prisoners to receive wine in the Eucharist. Would this infringement on free exercise be permissible? The answer is not obvious.

The quandaries posed to the government by the communal rituals and private devotions of the religions present in society pale before the quandaries posed by the fact that seldom is the exercise of a religion limited to such activities. Almost always the exercise of a religion spreads into everyday life, sometimes in surprising ways. In order to exercise their religion as they believe it should be exercised, groups establish faith-based hospitals, adoption agencies, educational institutions, relief agencies, development agencies, housing agencies, social justice organizations, and so forth. To exercise their religion as they believe it should be exercised they do such things as pray and
wear religious garb in public and post the Ten Commandments in public places. To exercise their religion as they believe it should be exercised they resist doing such things as serving in the military, getting vaccinated, educating their children beyond elementary school, working on Saturdays or Sundays, or employing members of other religions or of same-sex couples in their businesses and organizations.

It is easy to see that such forms of religious exercise will regularly pose quandaries to the government. Suppose the government decides that recitation by school children of the Pledge of Allegiance enhances national unity and that such unity is important. Is it then permitted to require recitation of the pledge by all school children even though reciting the pledge would violate the religious convictions of Jehovah’s Witnesses? When the US Supreme Court was faced with this question, it determined that this was not permissible.

We do not have to dredge the past for cases of this sort. The current debate over the restrictions on free exercise of religion implicit in the Affordable Care Act in its present form is another example of the point. We do not yet know what the courts will say on this matter.

It is worth noting that the civil right to free exercise of one’s religion is not unique in being a prima facie rather than an absolute right. The same is true, for example, of the civil right of Americans to free speech and their right to bear arms. Those opposed to one and another form of gun control sometimes talk as if any restriction on the right to bear arms is a violation of the Bill of Rights. “They’re trying to take our guns away,” they say. In this case, the US Supreme Court has explicitly stated that the right is not absolute. The issue to be debated concerning any proposed restriction is always whether the restriction is wise and is justified, all things considered.

One of the lessons I want to draw from these observations is that the precise contour of the civil right of Americans to freedom of religion depends on how the courts resolve disputes over borderline applications of the terms “religion” and “free exercise” and on how they resolve disputes over when the prima facie right to free exercise is outweighed by other weightier rights. Each decision on these matters slightly alters the contour from what it was before, so that the contour is constantly changing. A second lesson I wish to draw is that we must expect that the precise contour of the civil right to freedom of religion will differ from one liberal democracy to another, as indeed it does. The contour of the civil right to freedom of religion in the United States is significantly different from the contour of the civil right to freedom of religion in France, for example.

What follows? Does it follow that there is the present-day American civil right to freedom of religion, the present-day French civil right to freedom of religion, and so forth, and that that is the end of the matter? Does it follow that there is no such thing as the natural right to free exercise of one’s religion? When the US Congress passed the International Religious Freedom Act in 1998, requiring the State Department to report annually on the state of religious freedom around the world and, in various ways,
to promote religious freedom, was it, at bottom, just engaging in an attempt at cultural domination? Was the passage of the act nothing but power masquerading as high principle?

I understand it to be the view of some of those who posted contributions to The Immanent Frame on the politics of religious freedom that these things do follow. In the draft of a book he is working on, Dan Philpott calls these “the new critics of religious freedom.” He summarizes their position as follows: “Far from being a universally valid principle…religious freedom is the product—and the agenda—of one culture in one historical period: the modern West. And in the West it should stay—and be kept under strict surveillance.”

Let's assume that Philpott’s interpretation is correct: There are “new critics of religion,” and they affirm the position Philpott attributes to them. I hold that their position does not follow from the fact that the particular contour of the civil right to religious freedom differs from society to society and from time to time within a given society. In denying that religious freedom is “a universally valid principle,” the new critics presumably mean to deny that there is a natural right to religious freedom. But from the fact that certain persons have a civil right to so-and-so, nothing follows, one way or the other, as to whether or not they also have a natural right to so-and-so. Some civil rights are grounded in natural rights; some are grounded in consequentialist considerations. So too, from the fact that certain persons do not have a civil right to so-and-so nothing follows, one way or the other, as to whether or not they also lack a natural right to so-and-so.

A natural response to this observation is that, though formally correct, it is irrel-
relevant to the topic at hand. If there is no such thing as the civil right to freedom of religion, but only the civil right in 2013 of Americans to freedom of religion, the civil right in 1913 of Americans to freedom of religion, the civil right in 2013 of the French to freedom of religion, and so forth, then how can these diverse civil rights all be grounded in something referred to as “the natural right to freedom of religion”?

Assume, for the moment, that there is a natural right to freedom of religion. My answer to the question posed is that the various contours of the civil right to freedom of religion are all to be understood as “positivizings”—to use a term that seems to have fallen out of the vocabulary of political theorists—of the natural right to freedom of religion. Each particular contour of the civil right to freedom of religion is the articulated inscription into law, the positivizing, of the natural right to freedom of religion.

There is nothing peculiar here about religion. The points made about freedom of religion also apply to freedom of speech. The contour of the civil right of Americans to free speech is slightly different in 2013 from what it was in 1913, and significantly different from that of the right of the English to free speech in 2013. Assuming that there is a natural right to free speech, these distinct contours of the civil right to free speech are all to be seen as positivizings of the natural right.

I have emphasized that the civil right of Americans to religious freedom arose out of a unique confluence of historical factors; from this it does not follow that the civil right to religious freedom cannot emerge from a very different set of historical factors—witness the Ottoman millet system.14 I have likewise emphasized that the civil right of Americans to religious freedom has its own unique contours; from this it does not follow that when I, an American, urge some other government to grant religious freedom to its citizens, I am implicitly urging them to imitate the American contour. I may be doing that; if so, I am rightly to be charged with an attempt at cultural imperialism.
But rather than urging them to imitate the American contour, I may simply be urging them to positivize the natural right to religious freedom in whatever way they judge best for their society.

The foundation of religious liberty

Now we get to a second part of the assignment that Tim Shah gave me—the “foundations of religious freedom as a normative principle.” I think it will be helpful if, before I present my own proposal, we take note of those that were in the air at the time of the American founding.

Talal Asad has argued that an important part of what happened in sixteenth- and seventeenth-century Europe, as a result of the emergence and spread of Protestantism, was that religion came to be identified with belief, and that it was widely held that what one believes is in one’s own hands; it cannot be coerced by laws and sanctions or any other outside forces. It is my own reading of the intellectual history of the time that a good many philosophers and other intellectuals not only held that belief cannot be determined by outside forces, but also that it is not a product of the believer’s will; it was commonly said to be determined by “evidence.” That was the view of John Locke, Thomas Jefferson, and James Madison. But if religion is a matter of belief, and if what one believes cannot be determined by laws and sanctions, then it is futile to pass laws aimed at prohibiting one and another form of religion. Rather than securing true religion, such laws will only encourage hypocrisy.

Speaking now as a Protestant who knows something about the relevant history, I myself doubt that very many Protestants thought that their religion consisted only of beliefs; it involved religious practices as well: participation in the public liturgy, reading of Scripture, and private devotions. What is true is that Protestantism gave considerably more salience to beliefs than did traditional Catholicism; what they believed was, for Protestants, an important component of their religion, though never more than a component. The fact that it was an important component of their religion was enough, however, for them to argue for religious freedom on the ground of the futility of trying to control religion by law.

In his Bill for Establishing Religious Freedom of June 12, 1779, Thomas Jefferson wrote:

“Well aware that the opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free and manifested his Supreme will that free it shall remain, by making it altogether insusceptible of restraint: That all attempts to influence it by temporal punishments or burthens or by civil incapacitations, tend only to beget habits of hypocrisy and meanness [my emphasis].”

And James Madison, in his *Memorial and Remonstrance against Religious Assessments* of June 20, 1785, begins his argument for religious freedom by quoting from the Virginia Declaration of 1776: “Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” He then continues as follows: “The Religion then of
every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”

It is worth noting that Jefferson and Madison were here repeating, in their own way, a line of argument that goes far back in the Christian tradition (whether they were aware of doing so, I do not know). The Latin Church father Lactantius (ca. 240-320), taking for granted that true devotion cannot be legislated, echoed the Hebrew prophets in arguing that God has no interest in ritual behavior that is not the expression of true devotion:

“[N]othing is so much a matter of free will as religion. The worship of God… requires full commitment [maximum devotionem] and faith. For how will God love the worshipper if He Himself is not loved by him, or grant to the petitioner whatever he asks when he draws near and offers his prayer without sincerity [ex animo] or reverence. But they [the pagans], when they come to offer sacrifice, offer to their gods nothing from within, nothing of themselves, no innocence of mind, no reverence, no awe.

And in characteristically vivid language, Luther insisted to his fellow Christians that though it would be a good thing if heresy were restrained, laws and sanctions are useless for the purpose:

“You say: “The temporal power is not forcing men to believe; it is simply seeing to it externally that no one deceives the people by false doctrine; but how could heretics otherwise be restrained?” Answer: This the bishops should do; it is a function entrusted to them and not to the princes. Heresy can never be restrained by force. One will have to tackle the problem in some other way, for heresy must be opposed and dealt with otherwise than with the sword. Here God’s word must do the fighting. If it does not succeed, certainly the temporal power will not succeed either, even if it were to drench the world in blood. Heresy is a spiritual matter which you cannot hack to pieces with iron, consume with fire, or drown in water.

Let’s move on now to the authors of the US Bill of Rights. Why did they hold that in the newly formed United States of America there should be a civil right to the free exercise of religion? In the bill itself they do not say. Evidently they thought it wasn’t necessary to say. Perhaps some of them were thinking along the same lines as Luther, Jefferson, and Madison. I think it almost certain, however, that most of them, if not all of them, had another argument in mind as well: namely, a natural rights argument. Notice that the Luther-Jefferson-Madison argument for the civil right to religious freedom was not a natural rights argument, nor was du Plessis Mornay’s argument a natural rights argument. I think it almost certain that, whatever other arguments the authors of the religion clauses in the Bill of Rights may have had in mind, most, if not all of them, believed that there should be a civil right to free exercise of religion because there is a natural right to free exercise of religion. I base my inference that this is how they were thinking on the fact that this line of thought was very much in the air at the time.

After the issuing of the Declaration of Independence from England in 1776,
all of the newly formed states composed constitutions in which citizens were declared to have a civil right to free exercise of their religion. With the exception of the New York Constitution, all of these constitutions base that declaration more or less explicitly on the claim or assumption that there is a natural right to free exercise. The most explicit and elaborate of these declarations is that of the Pennsylvania Constitution of 1776. I have already quoted part of it; let me now quote it in its entirety:

“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding. And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.20”

In our day and age, we who believe that the civil right to religious freedom is of fundamental importance can obviously not just recite these words from the Pennsylvania Constitution in defense of our conviction. Many of our fellow citizens hold that there are no natural rights, only rights bestowed by laws, social practices, and speech actions. Of those who agree that there are natural rights, many hold that there is no god, almighty or otherwise, and so, of course, there is no natural right to worship almighty God. Some of those who hold that there is no god regard religion as a menacing relic of irrational primitive ways of thinking and see no more reason to think that there is a natural right to the free exercise of one’s religion than there is a natural right, say, to the practice of quack medicine. Yet others hold that it is a mistake to single out religion for special treatment. The right to religious belief should be treated as a species of the right to liberty of conscience, and the right to religious exercise should be treated as a species, say, of the right to freedom of speech and assembly.

In defense of the claim that there is a natural right to free exercise of one’s religion

I come now to the hard part: namely, my own attempt to defend the claim that there is a natural right to free exercise of one’s religion. Looking back over previous writings of mine, I notice, to my surprise, that this is something I have never hitherto attempted.21 So almost certainly my formulation of the argument will be flawed; perhaps the argument as such is flawed.

Let me say at the outset that to establish that there is a natural right to religious freedom, it will not be sufficient to argue, as does John Finnis in *Natural Law and Natural Rights*, that religion is a great good in our lives. For one thing, if religion is just a great good in our lives, then it is possible that situations would arise in which a society would judge that the form religious exercise has taken in that
society is so destructive of the common good that it should be severely restricted. More important for our purposes here, however, is the fact that one cannot pull the rabbit of rights out of a hat that contains only life-goods. It would be a great good in my life if the Rijksmuseum in Amsterdam gave me Rembrandt’s *The Jewish Bride* to hang on my living room wall, along with a round-the-clock security force to stand guard. But I do not have a right to their doing that; the Rijksmuseum is not wronging me by not doing that. On the other hand, the brusque reply to my inquiry by the receptionist in the health service is but a small harm in my life. Nonetheless, I have a right to her not answering me in that way. There are some great life-goods to which one has no right and some small life-goods to which one does have a right.

To account for why it is that we have a right to certain life-goods and not to others, we have to introduce into the picture something other than life-goods.²² I hold that that something is the worth or dignity of the rights-holder. You have a right to the life-good of my treating you a certain way just in case, were I not to treat you that way, I would not treat you as befits your worth or dignity.

On this occasion, let me assume, without argument, that rights are indeed grounded in the worth or dignity of the rights-holder. Let me also assume, without argument, that there are natural rights—that is, rights not conferred on rights-holders by laws, social practices, or speech actions. I know, of course, that both of these assumptions are highly controversial. I have defended them at length elsewhere.²³ If I did so here, we would never get to the topic at hand.

I invite those of you who are dubious about these two assumptions to adopt
a hypothetical attitude toward the argument that follows. Suppose that there are natural rights, and suppose that they are grounded in the worth or dignity of the rights-bearer: What reason might there be for holding that among our natural rights there is a natural right to free exercise of one’s religion?

For my purposes here, I need some account of religion. Rather than devising and offering my own account, let me employ the account Thomas Nagel offers of what he calls the “religious temperament” in his book, Secular Philosophy and the Religious Temperament.24

The religious temperament, says Nagel, is the belief “that there is some kind of all-encompassing mind or spiritual principle in addition to the minds of individual human beings and other creatures—and that this mind or spirit is the foundation of the existence of the universe, of the natural order, of value, and of our existence, nature, and purpose.” The religious temperament is the “belief in such a conception of the universe, and the incorporation of that belief into one’s conception of oneself and one’s life.” The religious temperament addresses “the question of how a human individual can live in harmony with the universe.”25

In Nagel’s explanation of the religious temperament, belief is prominent. We can debate whether it should have the prominence that Nagel gives it. More important for my purposes here, however, is that a person’s religion should not be identified with her religious temperament; her religion is her religious temperament along with her way of giving expression to that temperament in her way of living, including her religious practices. A person’s religion is her particular way of living “in harmony with the universe.” The beliefs comprised within her religious temperament will often be implicit within her way of living and within her religious practices, rather than consciously entertained.

I judge that everything covered by this account would naturally be called a religion; whether it is also the case that everything that would naturally be called a religion is covered by this account is perhaps less clear. But whatever one concludes on that matter will not make a difference to my argument. Opponents of religion often speak as if it were some quirky add-on to what science and common sense tell us, a relic of the childhood of the human race. On Nagel’s description, it is anything but that. Our question now is whether, and in what way, depriving a person of the freedom to practice her religion constitutes treating her in a way that does not befit her worth.

Most present-day thinkers who hold both that there are natural rights and that these are grounded in the worth or dignity of those who possess the rights are of the view that what imparts to the rights-holder the relevant dignity is the capacity for rational agency—that is, the capacity to act for reasons and not just from causes. Some hold the more specific view that the dignity in question is grounded in the capacity for normative agency—that is, in the capacity to perform an action for the reason that one judges it to be a good or obligatory thing for one to do. This is the view defended, for example, by James
Griffin in his book *On Human Rights*. He urges his readers to “see human rights as protections of our normative agency.”

I have argued in a number of places that this account of the dignity that grounds natural rights is inadequate. Obviously it does not account for the dignity of those human beings who are not capable of functioning as persons and who, accordingly, lack the capacity for normative agency—infants, for example, and those in a permanent coma or suffering from the final stages of Alzheimer’s disease. More relevant to our purposes here, it also fails to account for a good many of the rights possessed by those who are capable of functioning as persons. It does not account for the right not to have one’s privacy invaded. Even if the person who invades one’s privacy does nothing with what he learns other than enjoy it at home, thus in no way impairing one’s agency, one has nonetheless been wronged. Neither does it account, in my judgment, for the right not to be raped or castrated. Rape and castration do indeed constitute an impairment of one’s normative agency, but I find it grotesque to suggest that this is what is fundamentally wrong with rape and castration. Rape and castration are gross violations of a person’s bodily integrity.

Rational and normative agency do indeed give to those creatures who possess such agency great worth and dignity. But what is indicated by the examples I have given, along with a good many others, is that what gives to human beings the worth and dignity on which human rights supervene has to be more than just the capacity for rational and normative agency.

To account for natural rights we need a richer account of what it is to be a human person.

Here is not the place to present an account of the human person rich enough to account for the dignity that grounds the full panoply of natural rights. Let me confine myself to singling out those aspects of the human person, in addition to the capacities for rational and normative agency, that seem to me directly relevant to the natural right to free exercise of one’s religion.

1. To be a human person is to have the capacity to interpret reality and one’s place therein. Some of these interpretations happen naturally, as in perception and introspection; I just naturally interpret what is presented to me as the sun rising above the horizon. In our capacity for such interpretations, we are similar to some of the animals. But to be a human person is also to have the capacity for interpretations that are optional, not given with our nature, and that go far beyond perceptual and introspective interpretation. We interpret what is happening as the gods being angry, as the far-flung effects of the Big Bang, as the dire effects of libertarianism spreading among the populace, and so forth. Interpretations such as these go vastly beyond perceptual and introspective interpretation and are optional, in the sense that some human beings interpret reality in this way and some do not.

As for myself, I cannot imagine what it would be like not to have the capacity for such interpretations of reality and of my place therein; it is a pervasive and fundamental part of my life, so pervasive and
fundamental that I hardly ever take note of it. I take it for granted. But when I do stand back and take note of it, I find it remarkable, amazing. If any of the non-human animals have this capacity, or something like it, they have it only to a minimal degree.

2. To be a full-fledged human person is to have the capacity to form what I shall call a “valorized identity.” What I mean by the “valorized identity” of a person is the relative importance that the person assigns to the states and events in her own life: to her various beliefs, her various commitments, her plans for action, her memories, her attachments to persons, animals, and objects, and so forth. We say such things as, “This commitment is more important to me than any other; I cannot imagine giving it up. It is fundamental to who I am.” Thereby one is verbalizing one aspect of one’s valorized identity. One’s valorized identity consists not of the importance one assigns to things outside oneself but, to repeat, to the various states and events in one’s own life.

As for myself, I cannot imagine what it would be like not to have the capacity to form my own valorized identity; it, too, is a pervasive and fundamental part of my life, so much so that I hardly ever take note of it. I take it for granted. But when I do stand back and take note of it, I find it remarkable, amazing. If any of the non-human animals have this capacity, or something like it, they have it only to a minimal degree.

I have stressed that these capacities are amazing. On account of possessing these capacities, in addition to those of rational and normative agency, and yet others that I have not mentioned, human persons are remarkable, amazing. So far as we know, no other creatures that dwell on earth possess these capacities to anywhere near the same degree, if, indeed, they possess them at all. Not only are human persons remarkable on account of possessing these capacities; they also have great worth on account of possessing these capacities. On account of possessing these capacities human persons are precious. They have multifaceted dignity. They are to be prized. Something of great worth is lost when these capacities are destroyed or lost.

Religions represent a remarkable exercise of these two capacities, along, of course, with the capacities for rational and normative agency. To see this, recall Nagel’s description of the religious temperament. The religious temperament is the belief “that there is some kind of all-encompassing mind or spiritual principle in addition to the minds of individual human beings and other creatures—and that this mind or spirit is the foundation of the existence of the universe, of the natural order, of value, and of our existence, nature, and purpose.” The religious temperament is the “belief in such a conception of the universe and the incorporation of that belief into one’s conception of oneself and one’s life.” The religious temperament addresses “the question of how a human individual can live in harmony with the universe.” I suggested that we think of a person’s religion as her religious temperament along with her way of giving expression to that temperament in her life and practices, especially her religious practices.
It is obvious that religion, so understood, is a manifestation of the two capacities I identified, along with those of rational and moral agency. A person’s religion includes the belief that there is some kind of all-encompassing mind or spirit that is the foundation of the existence of the universe, of value, and of our own existence, nature, and purpose. Such a belief is obviously a manifestation of the remarkable and precious capacity for interpretation that I took note of above. A person’s religion is not just that belief, however, but includes, along with the belief, her way of giving expression to that belief in life and practice. That will perforce be an exercise of the person’s capacity for forming a valorized identity.

If one holds, as I do, that these two remarkable capacities give to those creatures who possess them great worth, as do the capacities for rational and normative agency, then one will have a prima facie reason to refrain from stifling or restraining the exercise of these capacities and for resisting the attempt of others to do so.

Now consider Richard Dawkins, Daniel Dennett, and others of their sort, people who embrace a secular alternative to religion that is a manifestation of the same capacities of which religion is a manifestation and to which they are as ardently attached as is any religious adherent to his or her religion. The argument I have given leads to the conclusion that their embrace and exercise of that alternative should receive the same protection in law as does the free exercise of religion. I dare say that some will regard this implication as a reductio ad absurdum of my argument. I regard it as an implication that should be embraced. Making it illegal for Dennett to express and practice his secular alternative to religion would be a violation of his personhood in the same way that making it illegal for me to express and practice my religion would be a violation of my personhood.

Additional shaping up?

Rather often one hears it said that a fundamental principle of liberal democracy is that the state is to be neutral between one religion and another and between religion and non-religion. We can discuss whether this is true, strictly speaking, even for the religions embraced by the citizenry of some liberal democracy. But certainly it is not true for religions in general. Earlier I noted that the religious fracturing of Europe and the subsequent wars of religion forced the emergence in Europe of a new form of state, liberal democracy; the old familiar perfectionist form of state was no longer possible. But not only did the fracturing of religion require a new kind of state; the new kind of state required a certain kind of religion. There had to be mutual accommodation—accommodation of the state to religion and accommodation of religion to the state.

Richard Rorty remarks in one place that the “happy, Jeffersonian compromise that the Enlightenment reached with the religious…consists in privatizing religion—keeping it out” of the public square. That is clearly not correct; religion in liberal democracies has not, in general, been privatized. But the larger point, that certain forms of religion are
incompatible with the liberal democratic state, is undeniable. Were I to develop this point, I would look at the version of Islam that Sayyid Qutb propounded in the commentary that he wrote on the Koran titled *In the Shade of the Koran.*

In good measure, Qutb shaped his view of Islam in conscious opposition to the “hideous schizophrenia” between religion and life that he saw as characteristic of Western liberal democracies.

But rather than develop that point, let me bring this essay to a close by calling attention to the presence in liberal democracies of voices that find the structural accommodations of religion to liberal democracy inadequate. These voices hold that religions endanger peace, justice, and the stability of liberal democracy even if they have accommodated themselves to the structural principles of liberal democracy and even if religious people do accept those infringements on the free exercise of religion that the courts judge permissible. These voices call for a further shaping up on the part of religion. They do not propose that laws be enacted to bring about this further shaping up; they hope that moral suasion and intellectual argumentation will do the work.

Let me order these voices, starting with those that call for the most limited form of shaping up and concluding with those that call for the most radical form.

John Rawls and his followers hold that it is acceptable for citizens to employ reasons drawn from their own particular religion when debating significant political issues in public and when making decisions on those issues; but if they do, they
must “stand ready” to offer reasons for the positions they favor that are drawn from what Rawls calls “public reason.” What exactly Rawls means by “public reason” is the subject of a literature that is by now vast; for our purposes here it will be sufficient to say that public reason, as Rawls understands it, consists of principles that are drawn from the governing idea of liberal democracy for the just distribution by the state and other public institutions of benefits and burdens and civil rights and duties. Rawls holds that those who affirm liberal democracy, rather than merely putting up with it, implicitly embrace such principles, whatever be their religious disagreements. Accordingly, appealing to such principles when debating and deciding significant political issues enhances the stability of a liberal democratic society; resting content with employing our diverse religious reasons endangers that stability.

In all liberal democratic societies there are religious people who affirm liberal democracy but are not in the habit of debating and deciding political issues on the basis of reasons drawn from public reason. It is their habit to debate and decide political issues on the basis of reasons drawn from their own particular religion. For some, this is not just a habit; they believe that this is what they ought to do. Many of those who are in the habit of debating and deciding political issues on the basis of reasons drawn from their own particular religion are not familiar with any other way of debating and deciding such issues; this is the way they learned in their families and in their religious institutions. They do not know how to appeal to public reason. Satisfying the Rawlsian injunction requires of them that they shape up by acquiring the ability and the willingness to debate and decide significant political issues on the basis of

“So I think what the public reason liberal should say to the Barthian is that, since he regards himself as having an overriding duty to God to employ only the resources of his religion in thinking about political issues (plus whatever non-normative factual knowledge is relevant), and since he is entitled to that conviction, that is what he should do. He should not follow the public reason imperative. Perhaps others should. But he should not. Given his comprehensive doctrine, it is his ultima facie duty not to conform to the public reason imperative—unless his comprehensive doctrine has nothing to say on the matter at hand.”

Nicholas Wolterstorff
reasons drawn from public reason.

Richard Rorty urges a more stringent form of shaping up. In an unpublished essay consisting of remarks he made upon receiving the Eckhart Prize and titled “Religion after Onto-Theology: Reflections on Vattimo’s Belief,” he asserts that ecclesiastical institutions, “despite all the good they do—despite all the comfort they provide to those in need or in despair—are dangerous to the health of democratic societies, so that it would be best for them eventually to wither away.” The dangers posed to democracy by institutionalized religion are “particularly evident,” he says, in the present-day United States, where “Christian fundamentalists whose support has become indispensable to right-wing American politicians are undermining the secularist, Jeffersonian, tradition in American culture.” The danger fundamentalists pose to our liberal democracy is not that they are threatening to overthrow the US government; the danger they pose is their support of legislation restricting behavior that other groups in society regard as completely accept-able—abortion and homosexual activity, for example.

The danger can only be averted by religion shaping up so that it becomes entirely personal and private. The religion of one’s inner life can be of whatever form and intensity one wishes; no harm there. It is when religion leaves the sanctuary of the inner life and tries to shape the state and other social institutions in accord with its convictions that it endangers liberal democracy. To repeat a passage quoted earlier: The “happy Jeffersonian compromise that the Enlightenment reached with the religious...consists in privatizing religion—keeping it out” of the public square.

In John Hick’s and his allies’ discussions on religious pluralism one finds a yet more radical proposal for the shaping up of religion. Both Rawls and Rorty propose setting bounds to religion as we find it: Religion must shape up so that it no longer appeals exclusively to its own resources when debating and deciding significant political issues, or so that it no longer speaks on institutional matters in general. Within those bounds, religion is free to take whatever form it wishes. In his well-known book Interpretation of Religion,32 John Hick urges that particularist religions, rather than learning to live within bounds, should reinterpret their particularisms so that they are no longer exclusivist.

Hick holds that any “axial” or “post axial” religion that does not accord equal religious significance to all other such religions perforce harbors within itself the threat of coercion and violence, thereby being a menace to peace.33 To cite just one example: As long as Christianity harbors a supersessionist attitude toward Judaism, there can be no enduring peace between the two religions. The solution is for each axial and post-axial religion to regard all such religions as alternative ways of engaging “The Real,” with none of them giving us the literal truth of the matter, and for each to concede that all are equally successful in achieving salvation for their adherents.

A fourth, and yet more radical, version of the line of thought that I am delineating
says that a particular religion, whatever its form, content, or self-understanding, poses a danger to the liberal democratic society. It must wither away. Rather than shaping up by living within the bounds of public reason, by living within the bounds of the inner life, or by interpreting its particularism in non-exclusivist fashion, particularist religions must shape up by transmuting themselves into non-particularist religion.

This is what Jacques Derrida proposed in some of his late writings. In his reflections on “the return of religion” that he sensed to be occurring at the time, Derrida undertook “a program of analysis for the forms of evil perpetrated in the four corners of the world ‘in the name of religion.’” His analysis led him to the conclusion that violence is the inevitable consequence of what he calls “determinate” religion. The violence may or may not be what those of us would call “violence” who are less given to hyperbole than was Derrida; it might just be what we would call “coercion.”

The solution is for determinate religion to be transmuted into “religion without religion.” Take an example. A structural feature typical of the religions that interested Derrida is the messianic structure: Adherents of the religion look forward to a day when justice and peace shall reign. “Religion without religion” would be religion in which all determinate content has been abstracted from such messianic anticipation, leaving only the pure structure. Such religion would be “structural messianism,” “messianism without content,” or simply, “the messianic.” A condition of the elimination of political violence is the transmutation of present-day religions into a religion in which messianism is purely structural; determinate messianisms necessarily harbor the threat of war.

The great grey eminence behind this way of thinking is Immanuel Kant, though it must at once be added that the religion Kant proposed was by no means a religion of pure structure and no content. It was a determinate religion without being a particular religion. Kant explicitly shared with the other thinkers we have canvassed here the conviction that particular religion is a danger to peace, justice, and the stability of liberal democracy. If “eternal peace” is to arrive, particularist religion must wither away. Kant did not consider whether reining it in would be sufficient, nor did he consider the possibility of religions reinterpreting their particularisms so that they were no longer exclusivist. Since what Kant says about the menace of particularist religion is as vivid as Kant’s writing ever gets, let me quote him at some length: The so-called religious wars which have so often shaken the world and bespattered it with blood, have never been anything but wrangles over ecclesiastical faith; and the oppressed have complained not that they were hindered from adhering to their religion (for no external power can do this) but that they were not permitted publicly to observe their ecclesiastical faith.

Now when, as usually happens, a church proclaims itself to be the one Church universal (even though it is based upon faith in a special revelation, which, being historical, can never be required of everyone), he who refuses to acknowledge its (peculiar) ecclesiastical faith is called by
it an unbeliever and is hated wholeheartedly; he who diverges therefrom only in part (in non-essentials) is called heterodox and is at least shunned as a source of infection. But he who avows [allegiance to] this church and yet diverges from it on essentials of its faith (namely, regarding the practices connected with it), is called, especially if he spreads abroad his false belief, a heretic, and, as a rebel, such a man is held more culpable than a foreign foe, is expelled from the Church with an anathema. . . and is given over to all the gods of hell. The exclusive correctness of belief in matters of ecclesiastical faith claimed by the Church's teachers or heads is called orthodoxy.35

The solution to these evils of religion is the withering away of “positive” religions and their replacement with a purely rational religion—that is, a religion whose content is grounded in reason alone and not in the particularities of revelation, mania, or tradition. As humankind progresses toward full rationality, this is the religion that it will increasingly embrace. Such religion, though determinate in content, will nonetheless not be a particular religion, since it will enjoy universal acceptance; it will therefore not be a danger to peace and justice. The coming of such religion, shared by all on account of their common rationality, will finally bring about “the world of an eternal peace.”36

Response

The line of thought that I have just now been highlighting runs deep in the mentality of modernity. Religions pose a danger to peace, justice, and the stability of the liberal democratic polity. They must, accordingly, shape up in ways that go beyond what is required for living within the structure of liberal democracy and beyond acceptance of those infringements on free exercise that the courts judge permissible.

My response is that I see no prospect whatsoever of religion in general disappearing, nor of all determinate religions disappearing to be replaced by some religion of pure structure, nor of all particular religions disappearing to be replaced by a single determinate religion, nor of all particular and determinate religions reinterpreting themselves so that they are no longer exclusivist, nor of all particular and determinate religions becoming privatized. That religion is often a danger to peace, justice, and the stability of our liberal democratic society is beyond doubt. I think we have no choice but to deal with those dangers in ad hoc fashion when and where they arise. There is no prospect of averting them all in advance.

In the above list of what I saw no prospect of happening, I did not mention that I saw no prospect of all adherents of particular and determinate religions appealing to Rawlsian public reason in debating and deciding political issues, not even if it be in addition to appealing to the resources of their own particular religion. One of the best statements of the present state of the public reason debate is a recent essay by my commentator, Stephen Macedo, titled “Why Public Reason? Citizens’ Reasons and the Constitution of the Public Sphere.” In his opening paragraph, Macedo observes that among the objections to the public reason position launched by critics is this: “In a
deeply religious and pluralistic society the proposed norm seems unlikely to be accepted.” As Macedo well knows, I am one of the critics of the public reason proposal, and I do indeed see no chance of citizens in general conforming to the Rawlsian norm.

But rather than pressing that point further, I want to close this essay by posing an objection to the public reason proposal that flows directly from my defense of there being a natural right to religious freedom. It is an objection that I have raised in previous writings; in the literature on these matters, it has come to be called “the integralist objection.”

Consider a religious person of the following sort. He favors liberal democracy. He endorses, to quote Rawls, the “ideas of citizens as free and equal persons and of society as a fair system of cooperation over time.” He has different views than Rawls does as to the implications of those ideas; but he affirms the ideas as stated. He is willing to offer reasons for the policies he favors, and he is willing to listen with open mind to criticisms of those reasons coming from others.

As to the reasons he offers, he regards himself as obligated to ground his political reflections and arguments on the resources of his religion (plus relevant non-normative factual knowledge) and on those resources alone—when these speak to the matter at hand. The conviction that he is so obligated belongs to his religion; he sees fidelity to God as requiring this of him. To use Rawls’ language, a component in his comprehensive religious doctrine is the conviction that he should use the resources of his comprehensive doctrine and only those resources in deliberating, debating, and voting on some political issue (plus the relevant non-normative factual knowledge). Acting in accord with that conviction is an important part of exercising his particular form of religion

Given the understanding of religion that I adopted from Nagel, an understanding according to which religion is a comprehensive interpretation of reality rather than some sort of add-on, we should not be surprised that there would be religious people of this sort.

If the person in question is a Christian, he believes that his thinking about political issues should be shaped by the Old Testament prophets and by the teachings of Jesus—not by some political conception of justice, be it that which Rawls favors or some other. He recognizes that he and the Rawlsian are likely to agree on a fairly large number of policies. He is happy about that convergence whenever it occurs. He is even willing to inhabit the mind of the other person sufficiently to point out to him or her unnoticed implications of their way of thinking, especially when those implications coincide with his own convictions. But he himself is not going to think about political issues in Rawlsian terms. For him, thinking that way is unfaithful to God; and fidelity to God overrides all other considerations.

He knows that lots of people in his society, including a good many of his co-religionists, regard him as deeply misguided. They call him a “fundamentalist.” Whenever people go beyond referring to him with this pejorative language and give him a reason for thinking that he is deeply
misguided, he listens carefully and with an open mind to what they say. So far, he has not been convinced. Having listened carefully and openly to their objections without being convinced, he is now entitled to his convictions; there’s nothing more that can be asked of him. It cannot be asked of him that he decide to change his views. Nobody can do that.

Let’s give this sort of religious person a name. Let’s call him a “Barthian.” The attitude of the Barthian toward employing public reason in thinking and talking about political issues is very much like the attitude of the Kantian toward thinking about moral and political issues along utilitarian lines: The Kantian regards that way of thinking as deeply misguided. He refuses to think in those terms about moral and political issues.

I think the Barthian should feel free to think and argue as he believes he should. In doing so, he is exercising his natural right to religious freedom. Of course, nobody proposes that there be a law forbidding him from acting thus; everybody agrees that he should have the civil right to act thus. But beyond that, I fail to see that he is in any way violating the spirit, the ethos, or the governing idea of liberal democracy.

That is my view. But what does public reason liberalism of the Rawlsian variety say about the Barthian? The answer to that question proves to be less obvious than one would have thought; in fact, the answer that I think the Rawlsian should give has an air of paradox about it.

Nowhere that I know of does Rawls consider the sort of religious citizen that I have invited the reader to imagine. So far as I can tell, he just assumes that no reasonable comprehensive doctrine—in his sense of “reasonable”—would include the conviction that one should reason about political issues only in terms of one’s comprehensive doctrine. But suppose a Rawlsian were asked the question: What should a religious citizen of this sort do? What would the Rawlsian say? Would he say that if the Barthian is unable or unwilling to renounce that troublesome component in his comprehensive doctrine, he should refrain from advocating in public for political positions and refrain from voting? Possibly some Rawlsians would say this. But given the Rawlsian position as a whole, I do not think that is what they should say.

The “should” in the imperative proposed by public reason liberals is a *prima facie* “should;” public reason liberals recognize that citizens may find themselves in situations in which they see themselves as having, and do in fact have, other *prima facie* obligations that conflict with and outweigh their obligation to conform to the public reason imperative. So I think what the public reason liberal should say to the Barthian is that, since he regards himself as having an overriding duty to God to employ only the resources of his religion in thinking about political issues (plus whatever non-normative factual knowledge is relevant), and since he is entitled to that conviction, that is what he should do. He should not follow the public reason imperative. Perhaps others should. But he should not. Given his comprehensive doctrine, it is his *ultima facie* duty not to conform to the public reason imperative—unless his compre-
hensive doctrine has nothing to say on the matter at hand. Public reason liberalism leaves the Barthian free to use religious reasons and only religious reasons in public debate on political issues and in deciding how to vote.

1 My quotations from Gelasius are all from the translations to be found in Oliver O’Donovan & Joan Lockwood O’Donovan, From Irenaeus to Gro-  
2 I realize that speaking of the governmental structures of the time as states is anachronistic.
3 Jews were an exception; they were subjects of the government but not members of the Church, and their anomalous position put them at risk.
6 On this see especially Brian Tierney, The Idea of Natural Rights (Atlanta: Scholars Press, 1997).
7 Until roughly twenty five years ago, the US Supreme Court quite consistently interpreted the no-establishment clause as meaning no governmental support for any religion. It appears to me that in recent years it has been moving in the direction of interpreting it as equal treatment: the state is not to favor anyone, or discriminate against anyone, on account of his or her religion.
8 The most recent example is the U.S. Supreme Court case, Hosanna-Tabor v. EEOC.
9 The term that the Bill of Rights uses is not “infringing on” but “prohibiting.”
11 It is not always easy; it may be clear that a law places a burden on the free exercise by some people of their religion but not clear whether that burden rises to the level of infringement.
12 It also depends on how courts resolve disputes over the sorts of entities that are deemed to bear the right; cf. the Citizens United case.
13 I hereby thank Dan for allowing me to see the introduction and first two chapters of his draft manuscript.
14 It appears to me that the substantial difference between the Ottoman millet system for religious freedom and the American system is due to the fact that freedom of religion is paired in the US with the proscription on establishment, this now being interpreted by the courts, roughly speaking, as no preference and no discrimination by the government among citizens on the basis of their religion (or lack thereof).
15 For my knowledge of Asad’s position I am indebted to the contribution on The Immanent Frame discussion by Elizabeth Shakman Hurd.
16 The references for these passages can be found in my Understanding Liberal Democracy, pp. 343-4.
17 Lactantius, Divine Institutes, v.20. I thank Robert Wilken for the translation.
18 From Luther’s tract, Temporal Authority: To What Extent It Should Be Obeyed. The passage is to be found on pp. 502-03 in O’Donovan and O’Donovan, eds. and trans., From Irenaeus to Gro-  
tius. The tract comes from early in Luther’s career. In later writings he affirmed the traditional two-rules doctrine.
19 I exclude Lactantius at this point, since what he says can only be a matter of “free will” is not belief but full devotion and faith; I judge that by “full devotion and faith” Lactantius did not have in mind just belief.
20 I discuss the religion clauses in these various state constitutions in some detail in my Understanding Liberal Democracy (Oxford: Oxford University Press, 2012), pp. 333-341.
22 Finnis and others introduce the idea of basicness, and hold that what differentiates between those goods to which one has a right and those to which one does not is that the former are basic. Those who think along these lines typically say that aesthetic delight is a basic good. I hold that no matter how much aesthetic delight my having a Rembrandt hanging on my living room wall would give me, I do not have a right to the Rijksmuseum offering me one of their Rembrandts.
25 These passages are to be found on p. 5 of Nagel’s *Secular Philosophy and the Religious Temperament*.
27 See, in particular, *Justice: Rights and Wrongs*.
28 I have attempted that in chapter 8 of *Understanding Liberal Democracy*.
29 The thought comes to mind that perhaps these two capacities should be incorporated into a more comprehensive understanding of rational and normative agency. I think not. Neither one is, strictly speaking, a capacity for agency.
31 Qutb was an Egyptian intellectual who spent some time as a student in the United States (Colorado) and then returned to Egypt; after being imprisoned for more than ten years by the Egyptian government, he was executed in 1966.
33 The period extending from 800 to 200 BCE has been called “the axial age” in world religious history. Axial religions are those that emerged during that period, for example, Judaism, Buddhism, and Confucianism. Christianity, and Islam are post-axial religions. Hick regards pre-axial religions as inferior to axial and post-axial religions.
36 Ibid.; the last words of Division One of Book Three.
37 Apparently, Nancy L. Rosenblum and Philip L. Quinn were the first to use the term “integralist” for this objection, and they did so independently of each other. See Quinn’s article, “Can Good Christians Be Good Liberals?” in Andrew Dole and Andrew Chignell, *God and the Ethics of Belief* (Cambridge: Cambridge University Press, 2005), 274, nt. 12.
38 In his book *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), Christopher Eberle poses the integralist objection with a somewhat different type of religious believer in mind.
39 Of course, fundamentalist religious doctrines and autocratic and dictatorial rulers will reject the idea of public reason and deliberative democracy. They will say that democracy leads to a culture contrary to their religion, or denies the values that only autocratic or dictatorial rule can secure. They assert that the religiously true, or the philosophically true, overrides the politically reasonable.” The sort of person I have in mind is not Rawls’ fundamentalist. He is in favor of liberal democracy; he is opposed to autocracy and dictatorship. He realizes that liberal democracy may lead to a culture contrary to his religion. He is willing to live with that fact.
40 I call him a “Barthian” on the ground that it is likely the great twentieth-century theologian Karl Barth would have held such a position.
STEPHEN MACEDO: I’m delighted to have this opportunity. I’m a great admirer of this center and Tom and Tim, and I’ve used Nicholas’ work in class many times. I admire Nicholas’s work deeply while disagreeing with it in part. It remains to be seen how significant our disagreement is for practical questions in the US and abroad involving the boundary between religious freedom and legitimate public policy. But I imagine we’ll get to some of those questions later on.

Nicholas argues that there is a natural right to religious freedom, also a human right to religious freedom. I endorse those broad assertions. I think his account of human capacities that underlie the religious temperament and religious liberty are insightful and useful. I sometimes worry that in practice, invocations of natural rights and natural law can lead to a kind of false confidence, but nevertheless, I have no problems with the way Nicholas describes the foundations of religious liberty.

Nicholas also correctly notes—and I like the way he puts this very much—that the precise shape of our civil or constitutional rights varies quite a lot from one country to another, whether these rights are rights to religious freedom, or speech, or what have you. The Europeans call this a margin of discretion. I will quote Nicholas’s formulation: “the various contours of the civil right to freedom of religion are all to be understood as positivisings of the natural right to freedom of religion. Each particular contour of the civil right to freedom of religion is the articulated inscription into law—the positivising—of the natural right to freedom of religion.”

That’s fine. All natural rights that we have prior to government are bound to be vague, and their contours are open to disputation, requiring balancing with
other values in practice. And the unclarity of natural rights is among the things that make government necessary. The capacity of shared legitimate political institutions to authoritatively specify the contours of our fundamental rights at least to some degree—obviously subject to ongoing disputation—and to give our equal basic rights shape and definiteness is one of the great achievements of government and one of the great achievements of liberal democratic government in particular. Debating and deliberating on the shape of our basic rights is a project that all citizens properly participate in, in a democracy.

I like the fact that Nicholas says—and Tom said it in his introduction as well—that if we understand the religious temperament properly, then we should also understand that religious freedom extends equally to those whose worldviews do not include a God or a supreme being. Ronald Dworkin has just published a book posthumously, Religion Without God. It mentions Richard Dawkins and Daniel Dennett, and we might add John Dewey, as among those who have regarded the religious temperament as extending to those who do not embrace the idea of a supreme being.

So, let me just say a word about it. Rawls’ idea—and I don’t think it’s just Rawls’ idea, he just happens to have elaborated it—articulates a norm that is easily discernible in our political and constitutional practice, and it is stated by Supreme Court justices and others quite independently of Rawls. The idea is that citizens in a diverse democracy have an obligation to one another when deciding important political questions—including the shape and contours of our basic rights—to cite reasons and evidence for the positions they support that are public, that can be shared in public. They should cite reasons and evidence whose force doesn’t depend on accepting one particular religious worldview or even a particular philosophical worldview. They should draw on the shared ideals of our common political and constitutional tradition. In other words, when seeking to help define our basic rights in one way or another, they should look for ground that we can share. And note one further concession to religious believers: Rawls says that citizens are free to cite reasons that come from their religious perspectives but they ought, as well, to cite reasons that can be shared by those who don’t share their religious perspective. Now, when I explain this to ordinary people, to non-academics, the typical response has been, “Well, that’s a completely anodyne idea. Who could disagree with that?” Indeed.

But we do have some disagreement with that here. Nicholas’ disagreement is not particularly radical. Nicholas is concerned that there are people in our political community that don’t share these principles, and he’s concerned that Raw-
lsians and others require that they “shape up” in a way that’s inappropriate. In his remarks he has referred specifically to religious people who affirm liberal democracy, so he’s suggesting that these are people with reasonable public views, but they’re not in the habit of debating and deciding political issues on the basis of public reasons. They believe that they should debate and decide on the basis of reasons drawn from their own particular religious tradition, period. They don’t know how to appeal to public reason, Nicholas says. Satisfying the Rawlsian injunction requires that they shape up, and Nicholas disagrees with that. He did add that they will cite non-normative factual knowledge, so he and Rawls agree, at least, that religious people ought to look for factual knowledge that is public in the right sort of way. But their normative beliefs, their ethical beliefs, I suppose, that shape their political convictions are drawn entirely from their religious beliefs, and they do not wish to go beyond that.

Now one thing about these citizens is that they may quite excellently exemplify many political virtues. However, it seems to me that they don’t exemplify one such virtue, which is being concerned whether those outside their church also have good reasons to support or even accept, the positions they advance on the shape and content of our basic rights, and other important political questions. Now if these citizens are engaged in a liberal democratic agenda, as Nicholas hypothesizes, such as fighting for civil rights, fighting for the rights of the poor, well, my gosh, they’re doing excellent work in all sorts of ways. And if their political positions, in fact, can be justified by public reasons, and it just turns out that they’re not interested in talking about those reasons, then I don’t think anyone is going to have a very
great objection. The problem tends to develop when people operate from purely religious premises, and their conclusions and positions are ones that we can’t come up with good public reasons for. I think that’s when the problem arises.

So I think that such citizens in general are violating one important norm of citizenship, which is important in a diverse community: that we should look for a common ground. At the same time, if we can see that particular religious citizens, motivated wholly by their religious beliefs, are advancing the cause of justice and equal rights, then they are violating the norm of public reasons only quite mildly. So, my view is that it’s not enough to say, “The Bible says such and such, and that’s the end of it.” It’s uncivil. It violates an important norm of citizenship in a diverse democracy. Happily there are, it seems to me, very few people that argue in that way in our politics, especially in our national politics. For one thing, it would be quite ineffective because we disagree about religion, we disagree in our interpretations of the Bible, if that’s our holy book. And that’s the important thing: It’s not that there are many irreligious people out there, but rather that there’s religious diversity, so we look for grounds that people with diverse religious views can share.

I’ll come back to that point in a minute. I think Nicholas and I partly just disagree about whether this so-called Rawlsian norm is one that’s widely shared: I believe that indeed it is.

Nicholas mentioned the views of several other people who think that religion should shape up, and I agree with him in rejecting those. Rorty’s view that religion is dangerous unless it’s fully privatized seems to be quite an eccentric view that few people espouse, and I think it’s an unreasonable view. The view of John Hick is interesting. I interpret it to be that religion itself should be non-exclusive; that from a religious point of view, we should regard various religions as different paths to a single ultimate truth. This seems to be the view that all religions are the same in the eyes of God, not just in the eyes of the state—

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that’s a view that others have advocated too. Hinduism in some ways sort of incorporates various religious perspectives into one common perspective. But the point is that’s not the liberal idea. The liberal idea sticks to insisting that citizens’ differing religious views are equal in the eyes of the state or the law, and in the public realm, we ought to practice these public virtues of reasonableness, and it is up to people to work out how they bring that into alignment with their own religious views in their own way. Finally, there is the idea that Nicholas associates with Derrida and Kant that religion should be emptied of determinate content. Now, these are all religious claims about religion. None of them is an appropriate basis for political action. The values and virtues of liberal democracy pertain to the public realm and liberal political principles do not prescribe to religious people how they should go about reconstructing their religion in the face of religious diversity.

But there are a couple of things worth noting, and I think Nicholas and I agree here. In the remarks in his paper, I worried that he was against the sort of general project of religious “shaping up” in general, but in fact, he believes that religion needs to shape up for the sake of liberal democracy in a variety of ways, and I also agree with that. Religions that themselves are intolerant, that refuse to accord equal rights to people with different religious beliefs, that refuse to treat citizens of other faiths equally, that would use the state to disadvantage, harass, or persecute people who dissent from the official religious view—those religions do need to shape up, and they need to shape up precisely because we believe in equal religious freedom for all citizens, and we think it’s a basic right. So I think we agree that religions need to “shape up” if they have not endorsed basic rights to equal liberty for all citizens.

So, Nicholas and I agree, I think, that in order for religious freedom to be recognized, there are religions in the past that needed to shape up, and there are religions now that need to shape up. So, we agree on the need for a lot of shaping up for the sake of liberal democracy. When John Locke wrote his Letter Concerning Toleration anonymously, arguing that the first duty of Christians was to practice meekness and toleration with those they disagree with, he was not expressing the general view. There were many who thought it was both a religious duty and politically prudent to impose religious conformity. So, shaping up was necessary.

I hardly need mention here at Georgetown the sort of shaping up that came with Vatican II and its declaration of religious freedom. John Courtney Murray has already been mentioned. Samuel Huntington’s important book The Third Wave argues that the third wave of democratization was a Catholic wave. Catholic countries shaped up and became more democratic, less authoritarian in the wake of Vatican II. Catholicism went from being associated with anti-democratic authoritarian regimes to being associated, empirically, with democratic regimes. So, a shaping up in terms of conformity with basic rights to equal freedom is a very important part of our political and religious agendas. From a political standpoint the norms that we can reasonably expect all of us to comply with are norms of equal
freedom. And we leave it to religious people to work out in their own ways how they go about integrating those views with their religious perspectives. But there are many religions that still need to do some work and to revise some of their convictions in order to conform to human rights norms and equal basic rights.

But Nicholas’s objection and the point on which we disagree is a little different. As he said in his remarks, it represents the point of view of the person who has an integralist view—it’s his integralist objection, concerning the “integralist” or “Barthian” citizen who believes that he or she should comport themselves in the public realm on the basis of their religious convictions and when deciding important questions, including the shape and contours of basic rights. Now obviously such people, as he says, are free in a liberal democratic society to exercise their political rights however they wish: the right to free speech protects religious advocacy for laws, and the right to vote may similarly be exercised on a purely religious basis. But I adhere to the view that these ways of exercising our rights fail in a basic duty of citizenship in a diverse democracy: the duty to exercise power over one another on grounds that we can all share.

Now, one thing that Nicholas says is that he sees no chance of citizens in general conforming to the Rawlsian norm, which I have described, and I just want to suggest against Nicholas that we do in fact largely do so, and it’s a good thing. And I’ll cite one set of examples. I’m working on a book on the future of marriage, which is to say marriage after gay marriage, and why a two-person status relation in the law of marriage should be favored, and why we need not and should not move from same-sex marriage to polygamy, polyamory, or plural marriage. I am responding to various slippery-slope arguments that have been brought forth by conservatives: “If we have same-sex marriage, we’re going to have polygamy, we’re going to have this, that, and the other thing—probably have marriage privatization.” It seems to me monogamy makes a huge amount of sense—indeed, it makes just as much sense post-gay marriage as it makes pre-gay marriage. In fact, I want to argue that monogamy is properly regarded as part of the basic structure of a liberal democratic society because it promotes an equal opportunity to enjoy the great good of family life. Polygamy and its various historical forms—apart from the fantasies of academics—have involved vast inequalities and greater social conflict and other personal and social ills.

So, if we look at the discussion in this country—the conflict around gay rights, privacy rights, rights to sexual freedom in the first instance, and the current debate about marriage—it’s deeply, systematically, and consistently informed by norms of public reasoning. The reason is that everyone knows that claims about sin are in the background, that religious teachings have shaped people’s attitudes towards sex and marriage, and, thus, conservatives themselves have been embarrassed by some of the arguments that had been put forward in some authoritative institutions to deny equal rights to gays.
This was strongly exhibited in the case of *Bowers vs. Hardwick* twenty-seven years ago when the Supreme Court upheld Georgia’s criminal sodomy statute as applied to gays. You look at the opinions of the slim majority in the Court at that time, and they’re not strong arguments. There’s practically no argument at all; there’s bald assertion. Justice White writing in 1986 simply declared that homosexual sodomy bears no resemblance to the Court’s previous privacy cases. Gay sex has no connection—he didn’t say “gay sex,” of course—with family, marriage, or procreation. To claim otherwise is at best facetious. In effect, the argument was that the people of Georgia believed that this is wrong. Decent people have always thought it was wrong, and that’s enough. We don’t need any further reasons. Justice Warren Burger wrote separately to emphasize a long tradition of condemnation of homosexual sodomy, “firmly rooted,” he said, “in Judeo-Christian ethics, capital crime in Roman law, an infamous crime against nature, not fit to be named,” so on and so forth. I mean, the tone suggests, “How dare anyone actually question this?” And in his dissent, Justice Blackmun was equally pointed and said, quoting Justice Holmes, “‘[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.’ … [B]efore Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an ‘abominable crime not fit to be named among Christians.’”

So many conservatives may have found the result in *Bowers* acceptable, but many were embarrassed by the Court’s reasoning or lack of reasoning. John Finnis recognized that “embarrassment…renders most people more than usually inarticulate” with respect to homosexuality. And he insisted that “public policies must be based on reasons, not mere emotions, prejudices, and biases.” Good for him. And he’s participated in the ongoing debate and discussion, and I’ve been very delighted and honored to participate with him. And he would have added some variations on the Rawlsian claim that the reasons ought to be not religious and doctrinal reasons but reasons that could be presented as a matter of public philosophy, in his case the new natural law, and premises that can be appreciated by people with different religious faiths. So, John Finnis, my colleague, Robert George, and others in the natural law tradition have advanced public arguments, including in a recent book by Sherif Girgis, Ryan Anderson, and Robert George entitled *What is Marriage?*, which contains very philosophically sophisticated argument. Not strong arguments, but arguments whose force may be assessed without reference to matters of faith or theology. And that’s good.

So, it seems to me that this norm of public reasoning is common, it is widely accepted, and, indeed, it is accepted oftentimes on both sides of very difficult political controversies. Some disagreement about exactly how it applies and about the de-
pendence of the natural law argument on certain metaphysical premises may be an issue. But the need to cite evidence has been widely asserted, not just in the courts, of course, but in legislatures, and even on television talk shows. I can remember hearing an episode of The Factor with Bill O’Reilly—not someone we would think of as a Rawlsian—in which he was having a discussion about same-sex marriage with a conservative. And Bill O’Reilly is asking, “Sir, what’s the harm in same-sex marriage?,” followed by a bit of inarticulateness on the part of his interlocutor, and then, “Sir, what’s the harm? You’re going to have to do better than that.” So trying to find reasons and evidence that are common in order to address these matters is critical.

Not surprisingly, when Bowers was overturned in 2003, Justice Kennedy observed that many people condemned same-sex relations based on religious and ethical ideals to which they aspire and which thus determine the course of their lives. But the issue is whether the majority may use the power of the state to enforce these views on the whole society. I think that Justice Kennedy was correct. And if there are religious people who don’t recognize the essentially public nature of that question, and don’t recognize that they must do more than cite their particular religious convictions when shaping the rights of all, then my assertion is simply that they are violating a fundamental norm of citizenship. They may be very good citizens in other respects, but not in this one.

So with respect to marriage, the debate has returned over and over to certain matters of obvious public interest, with the well-being of children being central to the debate. Everyone acknowledges that the well-being of children is a reasonable

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public concern central to the reservations and past opposition of people like David Blankenhorn and others, and that argument has been advanced and responded to. Other public arguments, such as slippery-slope arguments of the sort that I already mentioned (i.e., same-sex marriage will lead to polygamy, incest, and bestiality), have been expressed and responded to. The slippery slope arguments about gay marriage do hold that we would slide toward practices that involve real public harm. So those sorts of arguments, though unconvincing, are at least on the right track.

And then, of course, the arguments of the new natural law are based on philosophical and ethical claims, not religious premises. They are part of a wider sexual morality that I don’t need to explain here at Georgetown, in which marriage is necessarily the relationship of one man and woman because, in order to be the kind of comprehensive union that marriage is, it must involve and it must be consummated by sexual acts that have procreative significance. The new natural law position is not that hard to explain. I believe what’s hard to convey is its persuasiveness to those who don’t share the wider perfectionist sexual ethic. It’s not a crazy sexual ethic, and I don’t despise it or scorn it at all. It just seems to me that there are many reasonable grounds for rejecting it, and in fact the vast majority of Americans have rejected it (including all of those who use contraceptives).

Interestingly, when the natural law argument was sidled up to by the attorney defending Proposition 8 in California, defending marriage as one man and one woman, and then again in the Supreme Court, that attorney, Charles Cooper was asked: What is the harm of gay marriage?
And Cooper’s frank response was, “Your Honor, I don’t know.” In the Supreme Court, he did attempt to advance the marriage as procreation argument, and it led to an exchange with Justice Kagan that Scalia joined in—you may have heard this on the radio. Justice Kagan asked Charles Cooper: If the state’s interest is in keeping marriage focused on procreation, would it be okay if the state said that people over the age of fifty-five can’t marry? Well, Cooper said, both parties to the marriage may not be infertile. Laughter in the courtroom. Justice Kagan: “I can assure you, if both the man and the woman are over fifty-five, there are not a lot of children coming out of that marriage.” More laughter. Scalia joins in, “Well, I suppose you could have a questionnaire at the marriage desk when people come in, are you fertile or are you not fertile?” More laughter. Cooper comes back, “Well, one of the parties may be fertile,” and Scalia can’t resist and says for some reason, “Strom Thurmond was.”

“He honestly said that. But, in any case, this was an attempt to try to articulate the view that marriage must involve procreation and gender complementarity and so on—not very successfully.

But let me just say this in closing. I recently came across an excellent piece reflecting on the problems faced by the new natural law arguments considered as public arguments. The piece was written by Paul Griffiths, who is a Catholic theologian at Duke. I’ve never met him, and he never mentions Rawls, but it seems to me that he makes a very sensible point about the natural law orthodoxy. He says, “I think the orthodoxy is true. I think the arguments are valid and it would be better if everyone thought so. But there are not, as a matter of fact, arguments available that do or should convince those who do not hold that orthodox view, whether Catholic or non-Catholic, that they should. The lack

“One of the common grounds that should shape our public conversation is a mutual acknowledgement that the shape of our free exercise rights is part of a general scheme of equal rights for people of different religious faiths. And in a way, that’s why people need to step out of their particular religious frameworks to see that there are people with other religious faiths, in part, who have equal rights, and that it’s reasonable for them to expect that the grounds that are offered by the state or by their fellow citizens to shape their equal rights, our equal rights, are grounds that they and we can share.”

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of such arguments, I’ll call them public arguments, is empirically obvious. The premises are rationally disputable. The truth about none of these things is obvious or self-evident, which is among the reasons that thoughtful, well-meaning people differ so profoundly about them.” That seems to me a very sensible remark by someone who accepts the Catholic natural law argument.

On the other hand, the fairness of arguments for including gays in marriage is very straightforward, and they’ve been articulated by philosophers like Alec Baldwin. I’ll quote a brief part: “There are people who are married in the eyes of the state, enjoying all of the legal benefits who have no intention of having children. They seek only companionship and all of the entitlements that come with marriage: sex, joy, partnering, caring, and so on, all of that is theirs, even though they’ll never bear children and willfully so. If the state says they are free to, why aren’t gay couples as well?”

So, in any case, at every step along the way, there’s been an articulate and self-conscious concern in the debate over gay rights, including now same-sex marriage, about the kinds of reasons that are being cited. If you look back at the debates in Congress in the mid-1990s over the Defense of Marriage Act—exchanges between Henry Hyde and Barney Frank and so on—you find discussion along the lines of: “What’s the harm, how is it going to harm children?” So, it seems to me that we do have a general norm of public reasoning, and that is a good thing.

Let me just quote one other thing on these debates, by David Moats who won a Pulitzer Prize. He was and may still be the editor of The Rutland Herald in Vermont, and he was there for the long debates around civil unions in Vermont. And looking back, he reports this: “I had not read John Rawls at the time. But the editorials I wrote on the question of private morality and public justice reflected a Rawlsian conception of democracy.” And the way he put it is this—it’s a bit homespun, but I kind of like it—“The village green of a typical Vermont town was emblematic of my view. The green might be surrounded by a Congregational church, an Episcopal church, a Unitarian church, a Catholic church, a public library, and a tavern. Citizens would enter each place for their own personal reasons and they would be free to fashion their own moral codes from what they learned inside. But when it came time to develop public policy, the citizens would have to emerge onto the village green and meet together to pass laws that a majority could support. No individual sect would have the authority to force its moral views on the others. Somehow the separate groups would have to find common ground on which to act. What Rawls calls a comprehensive view of morality as embodied in religion, philosophy, or some other moral teaching is not the business of government.” And I agree.

Let me just mention one other quote on democracy and public reason. This is much briefer. It’s a book called The Democratic Virtues of the Christian Right by Jon Shields. It is an empirical study of Christian-right activists, and actually a student of mine at Princeton did some-
“Not surprisingly, when Bowers was overturned in 2003, Justice Kennedy observed that many people condemned same-sex relations based on religious and ethical ideals to which they aspire and which thus determine the course of their lives. But the issue is whether the majority may use the power of the state to enforce these views on the whole society. I think that Justice Kennedy was correct. And if there are religious people who don’t recognize the essentially public nature of that question, and don’t recognize that they must do more than cite their particular religious convictions when shaping the rights of all, then my assertion is simply that they are violating a fundamental norm of citizenship.”

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thing very similar, looking at Focus on the Family in Colorado. Let me quote how Shields characterizes the main point of his book: “I argue that the vast majority of Christian right leaders have long labored to inculcate deliberative norms in their rank-and-file activists, and especially the practice of civility and respect, the cultivation of real dialogue by listening and asking questions, the rejection of appeals to theology and the practice of careful moral reasoning.” And he goes on later in the paragraph, page two, to say, “Christian apologetic organizations teach thousands of citizens every year to make philosophical arguments rather than scriptural ones because Paul instructs Christians to give reasons for their beliefs. From this perspective then, Jesus Christ was not a belligerent moralist, thus, ignoring deliberative norms is not merely impolitic, it is also considered to be unfaithful.” And that’s true. That’s also what my student Nate Klemp found looking at Focus on the Family in Colorado. They recognized that, in speaking to the wider polity about public policy issues, it’s prudentially important and also respectful of others to cite widely accessible reasons and evidence—you’re trying to build a political coalition after all. And they also believe that there are religious norms that support these norms of public reason.

So all of this, it seems to me, represents a good way for citizens to participate—citizens with diverse religious and philosophical perspectives in a process of common deliberation, which is seeking common ground on the basis of which to shape the contours of our fundamental rights, good reasons that we can share, to transform, in effect, different accounts of what people believe our natural rights are into shared authoritative, civil, or constitutional rights. It ought to be a common conversation, seeking common ground on which to shape our basic common rights.
I have a hard time seeing why Nicholas thinks this endeavor is unimportant. He thinks there are people who opt out of it in a way that’s entirely excusable. I don’t know what I want to say about excuses, but he made a remark towards the end, to the effect: “Wouldn’t a Rawlsian say that these people are entirely justified in what they’re doing if they consciously believe that what they’re doing is required by their religion?” Well, I would say that they’re subjectively justified, as it were, but objectively wrong. I don’t believe that religion properly understood requires that sort of comportment in politics. I tend to agree more with Jon Shields. So, you can be subjectively justified but objectively wrong, and those citizens are objectively wrong about the virtues of democratic citizenship.

None of this, I think, is going to help us much with difficult issues that face us nowadays as we think about particular issues involving religious freedom and conflicts involving public policy, such as whether it’s legitimate or not for the Health and Human Services to mandate health coverage to employees that includes contraceptive services. Should the mandate be applied to for-profit businesses—religious institutions and faith-based not-for-profits having been exempted—or would that be an infringement on the free exercise rights of the owners of companies who disapprove of certain forms of contraception? I don’t see how notions of natural rights can help us with that. These sorts of questions are too bound up with complicated institutional context. I think Nicholas and I will probably agree with that. And I would certainly prefer that when we have these conversations, we, as I suggested and as John Rawls has suggested, do it on the basis of common grounds.

And let me just say this in concluding: One of the common grounds that should shape our public conversation is a mutual acknowledgement that the shape of our free exercise rights is part of a general scheme of equal rights for people of different religious faiths. And in a way, that’s why people need to step out of their particular religious frameworks to see that there are people with other religious faiths, in part, who have equal rights, and that it’s reasonable for them to expect that the grounds that are offered by the state or by their fellow citizens to shape their equal rights, our equal rights, are grounds that they and we can share.
TIMOTHY SHAH: Everybody take a seat so we can start the discussion between our two featured speakers this morning, a discussion into which I’m eager to welcome all of you.

My colleague, director of the Religious Freedom Project, Tom Farr, quoted John Courtney Murray earlier, who said that it’s actually an ideal and an achievement for creeds to contend intelligibly with each other. Sometimes our disagreements are not very intelligible or clear, so I hope that we will not only achieve, as we were saying earlier, some clear disagreement and clarify the lines of disagreement that were defined earlier today, but also map out and perhaps understand better some of the very interesting and important lines of agreement that were discussed earlier today between Professor Wolterstorff and Professor Macedo.

First, let me thank both of you for your wide-ranging presentations, again, conducted with great clarity as well as civility. So, thanks very much to both of you.

I want us to begin by talking about some of the areas where there was the most disagreement between the two of you, namely public reason, its demand, and its relationship to the demands of religious freedom. I don’t want this consideration to absorb all of our time because there are other issues as well, but I suppose it’s the elephant in the room, given that it was the point that you focused on, Steve, in your remarks.

Let me just ask you, Nick, to comment, however you’d like, on what Steve had to say in saying, “Look, really, people mostly actually do appeal to public reason.” One of your arguments was that you really couldn’t see any prospect of many people accepting the Rawlsian deliberative norms. Steve says, “Look, even very religious people, people that we tend to think of as
making Biblicist sorts of arguments, actually are engaging in democratic deliberative norms.” So, what’s the problem, why is it so important to make the case that you were making about the “Barthian,” as you called him.

NICHOLAS WOLTERSTORFF: No, I don’t see that most people appeal to public reason. I don’t see that most present-day Congressmen are appealing to reason.

Steve, I’ve never understood why common ground is important. I do think what we should do in the liberal polity is aim at agreement on policy, but on that point I’m inclined to agree with the Gausians. Who cares, in principle, provided they’re responsible views, why people converge on a common policy? What’s important is that we try to get convergence on a policy. When we don’t—and usually on significant issues, we don’t in a liberal democracy, of course—we vote, and that seems to me at least to be a crucial part of it.

So, take the natural law people. I don’t see how they fit into your scheme, because as you yourself have observed and as Paul Griffiths, who is a good philosopher theologian, observed, in fact there’s not agreement on natural law. Even though it doesn’t appeal too explicitly on religious premises, nonetheless—goodness knows—there’s not an agreement on it. But I think they should be free to use natural law arguments and inhabit the mind of other people insofar as possible to try to get them from their own standpoint to agree with natural law conclusions, but let them do their own natural law thinking. So, I don’t see the need for common ground.

STEPHEN MACEDO: Right. I think one thing that’s important is that once we pass a law, in a way, that’s only the beginning, then we have to interpret the law and we have to administer the law, we have to revise the law. There’ll be a lot of rule-defining and, in effect, lawmaking that follows from administration and application of the law, and adjudication as well. And as a practical point—not as deeply principled a point as others, but I think it does make practical sense—if we don’t have any common sense of what the law was for, if we don’t have any sort of common understanding, we’re very unlikely to interpret it with anything like common purposes, to be able to make sense of it, administer it, and so on.

The fundamental principled point is a legitimacy point. I think it’s very important that political power be exercised on the basis of reasons that we’re presenting and that we can all see that there are reasons for the law. It helps to reassure one another that our fellow citizens are not just committed to particular policy outcomes with which we agree but to ongoing deliberation on the basis of reasonableness. That seems to me a fundamental norm of democratic legitimacy.

TIMOTHY SHAH: If I could interrupt you.

STEPHEN MACEDO: Yes.

TIMOTHY SHAH: Doesn’t the Barthian, as described by Nick, conform to reasonableness? This is a person who engages in an effort to understand other points of view. As you described the Barthian, he listens to criticisms of his point of view,
but he’s just not persuaded. In a way, like the critics of the new natural law you were talking about who just don’t find that position persuasive, the Barthian doesn’t find the secular critics of his position persuasive, and, therefore, what canon of deliberative democracy is he violating?

STEPHEN MACEDO: Well, we live in a religiously diverse community. On this particular issue, the Barthian may be arriving at a reasonable standpoint because Nick describes him or her having a liberal democratic agenda of some sort. But there’s something, in general, worrisome about somebody who believes the law ought to be used simply to enforce their own religious worldview given that there are many people that disagree with that religious worldview and given that there many people that reject it or don’t share it. Now, it happens to be the case that they’re supporting things that are in fact supported by good common reasons—this seems to be the case that Nick has in mind. In that case, it doesn’t make that much of a difference. But it becomes worrisome when people support things that only have justifications within sectarian worldviews. To think about this practically, we’d have to think about cases where it really matters, and those will tend to be cases where some people think there’s a religious justification—that some practice is sinful say—and there is no good public reason for regarding the practice as wrong or harmful.

TIMOTHY SHAH: But isn’t the kind of scrutiny you described characteristic of all disagreement? I mean, what you described is not special with respect to religious disagreement. I mean, libertarians and welfare-state types have very, very deep disagreements about the nature of the individual and so forth.
STEPHEN MACEDEO: Well, they have different disagreements about how to think about liberty and how to think about equality and the role of the state in securing liberty and equality, and they have different predictions about the consequences of government actions. In fact, those are disagreements that are tractable and about which we can argue in common. This isn’t about all of us agreeing, and it isn’t all about us coming to the same conclusion, but it’s very important, I think, that we try to focus our disagreements on grounds that we can talk about—like with marriage: the interest of children, the harm that such-and-such notion of marriage might do, etc.

These are common interests and common concerns, simply because we’re talking about making law for the whole community, applying the law to the whole community, coercing people in the name of this law that they will disagree with. It’s a sign of respect to other people to give them reasons, not just insist on sectarian dogmas that one thinks are true, but to offer them reasons and evidence that one thinks they may be capable of regarding as true. It just seems to be a moral requirement of respect in a democratic society to try.

Now, if one has the view that the truth is something that simply can’t be grasped by people with whom one disagrees and that truth is hugely important and that the only conscientious course is to insist upon the truth as you see it, you’re liable to believe that those others are corrupt in some way, that there’s some failure on their part that makes it impossible for them to see the truth. Then indeed one has conscientious reasons to proceed on that basis.

There may have been people that couldn’t see that slavery was wrong—though I think that people probably could see that it was wrong—but if something really is important, of course one will feel personally warranted in insisting upon some particular truth that corrupt others can’t see. But that’s not generally the case in our democracy, and I think we’d do far better to proceed in the way that we have been proceeding, which is by trying to deliberate together on the basis of reasons and evidence appropriate to public forums.

I do disagree with Nick about the extent to which people tend to conform with the norm of public reasoning: I think ordinary citizens and legislators do tend to conform and that it’s good for our democracy. Let me put it this way. I think government is a very important instrument for the common good. One of the things that contributes to its functioning as an instrument for the common good is that we’re capable of deliberating collectively when we can—not at the moment in Washington, obviously our politics is broken—but deliberating collectively on the basis of common purposes that we can appreciate, continue to work out, pursue, and perfect over the course of time. And it seems to me norms of shared reasoning are an important part of making this process work.

TIMOTHY SHAH: Now, you don’t disagree, Nick, that there may be a *prima facie* case, as you were saying, for the kinds of shared norms and civility that Steve was describing, but this may have to give way to an *ultima facie*, a more ultimate claim or rights claim of religious individuals?

NICHOLAS WOLTERSTORFF: Well,
suppose we distinguish between the reasons we have for some policy and the policy itself. I certainly think that when we engage in a liberal democracy and political discussion, we should aim at arriving at an agreement on the policy. I suppose in some ideal universe, we would also agree on the reasons for our agreement on the policy, but it seems to me the really important thing is to aim at agreement on the policy.

As a matter of fact, what we find in our society is natural law theorists like John Finnis and Robert George, and Ayn Rand libertarians, and utilitarians, and Kantians, and here and there, my Barthian, and so forth. So, my view is to let them start from what premises seem right to them. Aim at consensus. Give your own reasons and inhabit the mind of the other person sufficiently to be able to show, if at all possible, that the convictions of that person lead to the same conclusion. So, aim at agreement on policy.

But in democracy, as a matter of fact, on big issues, we almost always fail to reach agreement on policy. So, for me, voting has a greater importance than I think it does for Steve and for the Rawlsian tradition in general. Aim on agreement on policy. I’ve never seen the point of insisting on agreement on grounds or reasons.

STEPHEN MACEDO: I certainly agree that it’s more important in most instances to get people to agree to the right policy than to get them to agree for the right reasons. And if the only way to argue someone over to the side of civil rights is to invoke Christian beliefs that they ought to share and then argue that denying civil rights is inconsistent with their religious conviction, it’s—

NICHOLAS WOLTERSTORFF: Fine. Then, I’m going to do that.

STEPHEN MACEDO: Yes, fine, absolutely. It isn’t a question of whether the reasons are more important than the conclusions. But I just don’t understand how politics would work if large numbers of people had the attitude that Nick has, and it seems to me they manifestly don’t. It isn’t just a matter of deliberating and voting. It’s a matter of parties. The Republican and Democratic Parties advance differing visions of the common good which they themselves have to arrive at within those huge, multifaceted, and diverse organizations on the basis of hammering out some differences and advancing some sort of agenda for governance, and so on. That itself requires common deliberations, so people can see that they support a common policy and see something of the common principles that lead them to support it. But in the deep background, of course, Nicholas and I agree that people will have different ultimate convictions about how to think about our place in the universe, religious truths, and various other philosophical questions. But a common set of political principles and some sort of common rationale for them seems to me of practical importance and it seems to me very much to be how things work.

TIMOTHY SHAH: I just want to push you a bit, Steve. Doesn’t that point of view give greater weight to concerns like political stability and consensus than to freedom? And don’t we, for example, think it admirable when people, on the basis of conviction, say, “No, I’m not going to go along with that position of the state.” We think this is the classic conflict in Anti-
gone. Creon issues a decree that’s not unreasonable. Traitors to the state shouldn’t receive proper burial. That’s not unreasonable. She says, “No. I’m going to do that anyway,” and in fact, invokes a kind of transcendent duty and, therefore, a right to perform what is in fact an act of very grave disobedience to the state.

Looked at it that way, aren’t there many cases where individuals are under those kinds of circumstances and we respect, as a matter of religious freedom, their right and their duty to say, as a Barthian might say, “Well, no. I actually feel deeply obligated to invoke my religious convictions as not just the primary but the ultimate basis for my views on public policy.” Isn’t that admirable? Just for the sake of freedom, don’t we have to make space for that sort of view?

STEPHEN MACEDO: Well, let me say, there are two different perspectives on this. One is the perspective of someone being asked to comply with the law or perhaps even to take part in being an instrument of the law, such as military service or being required to comply with the HHS mandate or something of that sort. Then, I think, it’s very important that we appreciate the burdens that the person feels that they suffer or have to bear on account of their conscientious beliefs. Those will be questions about accommodations or exceptions and so on: “On account of my beliefs, I bear a much greater burden than others who don’t have these particular beliefs if you require me to do X, Y, or Z.” In those contexts, it’s extremely important for us to sympathetically understand people’s religious point of view or philosophical point of view to assess whether an unfair burden is being imposed as a consequence of someone’s beliefs.

But when the question is different and in a way prior to that, if it’s rather, what should the law be that’s going to be imposed on everyone in the community, then, I think, the common point of view is one that we have an obligation to take, because we’re making law for other people. And the question is whether I care about whether you have reasons for the law I’m suggesting should be imposed on you? It’s a mat-
ter of other regard. I care not only that the law is justified to me. I care about whether it's justified to others. That's why I look at common considerations and do not just think about a law from my perspective but think about it from our perspective. It's a "we" regarding standpoint. It just seems to me to go without saying that when it comes to lawmaking, we want to think about what the common interest is, what the common good is. Again, I just think this is kind of anodyne.

TIMOTHY SHAH: What do you think, Nick?

NICHOLAS WOLTERSTORFF: I agree very much with what Steve said just now. It's a question not only of whether I have good reasons for accepting the law but of whether you have good reasons for accepting the law. I just don't see that those have to be the same reasons.

STEPHEN MACEDO: To some they don't have to be the same reasons. To some degree they can be somewhat different reasons.

NICHOLAS WOLTERSTORFF: I mean, it'd be nice if they were the same reasons.

TIMOTHY SHAH: But what do you say to the charge that the Barthian is not as other regarding—

NICHOLAS WOLTERSTORFF: Oh, sure. The Barthian—I mean, my fictional Barthian.

TIMOTHY SHAH: Yes, your fictional Barthian is what I'm talking about, yes.

NICHOLAS WOLTERSTORFF: The Barthian has his or her own way of thinking. But the Barthian also cares very much about convergence, consensus, and so tries to inhabit the mind of the other person and tries to find arguments that start from the premises of the other person which lead to the same policy conclusion.

STEPHEN MACEDO: So, as far as I can figure, this is a kind of a consociationalist model of politics—I think that is what it would be called. We operate within different faith communities and other sorts of communities, and we seek a consensus at the top, as it were, on the law, but not on the deliberation going down.

NICHOLAS WOLTERSTORFF: Exactly.

STEPHEN MACEDO: And consociationalism is associated with a variety of problems, not just problems of stability but problems of negotiation. There's no common negotiation. I mean, you could run a department this way, you could run an institute this way. We could always think about a legislature as being more like the United Nations where representatives come from very different points of view. This wouldn't be a Burkean model in which we come and deliberate together about our common good. It's rather that we have our own perspectives. I just think it's a strange way of proceeding, in which one bases one's politics on deep suspicion and disagreement. One is operating from a deeply sectarian point of view, in which one insists on the entire truth as one sees it within one's faith community, and one is not willing to go along with common deliberative institutions with people who
have different faiths. Rather one is only willing to negotiate with them. That approach would create, it seems to me, an extremely unfortunate political situation that would make collective governance for important political questions impossible and very much at odds with the way the Constitution has been conceived from the beginning.

NICHOLAS WOLTERSTORFF: So, an aspect we agree on. It’s by no means just religious people or even primarily religious people who subscribe to this view. Nowadays it seems to me it’s convinced libertarians who are most convinced.

STEPHEN MACEDO: Right. Nozickians, right, who have some deep sense of inviolability, that taxing them to support common purposes uses them as a means to other people’s ends.

TIMOTHY SHAH: Right. Right.

STEPHEN MACEDO: That seems to me to greatly exaggerate the incursion on individual liberty as a result of taxation. But in any case, it’s an undemocratic or anti-democratic point of view. If one regards the democratic community itself as an important community of shared purposes then it seems to me natural and appropriate for participants to jointly expect their fellows to join with them in taking seriously the common point of view and to be willing to engage in common forms of reasoning about common aims. And again, the Catholic tradition in general has gone along with this idea that the political community has its own important sphere and its own important agenda and that the deliberations there should operate on the basis of accessible reasons. But if one regards political views as unimportant, or as deeply corrupt, and as a fount of falsehood, and one regards the whole truth as simply within one’s faith community, one’s sect, and wants to separate as much as possible from this other model of public deliberation—we’re not going to call it public deliberation, but politics of negotiation—I could see how it would have some appeal. I just don’t think that’s the world that the vast majority of Americans live in, and I don’t think we’d be a better place for it.

TIMOTHY SHAH: I’m sure we’ll get more into this when I get the audience involved. But for a few minutes I want to turn to some of the bigger claims that you make, Nick, in your paper concerning natural rights and religious freedom as a natural right. This whole notion that there are natural rights and that religious freedom is among the natural rights is actually pretty controversial. Jeremy Bentham is famous for saying natural rights are “nonsense built on stilts,” but then we have more recent critics of the whole notion of natural universal rights—you mentioned some of them, Nick, in your paper.

What would we lose if we stopped talking about religious freedom as a universal inherent natural right? In this context let me just quote George Washington in his very famous letter to the Hebrew Congregation at Newport, Rhode Island in August 1790. He says, “The citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation.” To that extent, he thinks the policy is universalizable, if not universal at that time. “All possess
alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it were the indulgence of one class of people, that another enjoy the exercise of their inherent natural rights.” He is, of course talking about rights of conscience and religious liberty rights as inherent natural rights. What do we lose if we stop talking like that, Nick?

NICHOLAS WOLTERSTORFF: So, it seems to me that the very idea of a right, in particular that of a natural right, is that if I have a right to some good, that has a certain peremptory quality in my assessment of various goods. If it’s a good to which I don’t have a right, then in deciding to pursue it or in somebody else’s deciding whether or not to dispense it to me, we weigh up a variety of goods. If the status of religion was simply a good, then it seems to me that religious people like myself have to say that often it’s not a good.

In many cases, the form which religion takes is pretty horrible. And even if it is a good, one who is a Stalin or a Hitler or a Pol Pot weighs religion against some supposed greater good, some classless society off in the future that we will achieve if we sacrifice this good of religious freedom. So the important thing is that rights have this peremptory quality. If it’s a prima facie right, it can be outweighed by other prima facie rights, but it’s not outweighed by mere goods.

It may help if I mention autobiographically how the importance of rights first became clear to me. In 1975 I was sent by the college at which I was teaching, Calvin College to a meeting in Potchefstroom, South Africa. The meeting was not about apartheid. There were Afrikaners there, some English-speaking people, some so-called “colored,” some blacks from South Africa, plus a contingent of South Africans
and some of us from North America.

The Dutch were very well informed about what was going on in South Africa and were very angry about it. Furthermore, the Dutch understand Afrikaans and the Afrikaners understand Dutch, so the Afrikaners could not say, as in those days as they said to almost everybody, “Well, you don’t understand.” They couldn’t say to the Dutch, “You don’t understand.” At most, they can say to the Dutch, “But you’re so judgmental. Why are you so judgmental?” So, after some heated exchanges between the Afrikaners and the Dutch, the so-called “blacks” and “coloreds” began to speak up, began to speak of the indignities that were daily heaped upon them, both en masse and separately. They issued a cry for justice.

I shall never forget the response of the Afrikaners. The Afrikaners responded by saying, “Justice is not the issue. Benevolence is the issue.” They talked about their private acts of benevolence and they described apartheid as itself inspired by a visionary benevolence. There are 11 or 12 different nationalities in South Africa. Wouldn’t it be wonderful if they each found their own cultural identity? But they can’t find their cultural identity if they’re all mingled with each other, hence they’ve got to be pulled apart in apartheid.

I saw benevolence being used as an instrument of oppression. The Afrikaners recognized no brakes on their paternalistic benevolence. So, one way of putting it is that rights are a brake on paternalistic benevolence. They say, “Count up all those goods. That doesn’t make any difference.” That is, I think, why the notion of rights is important.

“Now, I just don’t think the language of natural rights or the idea of natural rights is sufficiently clear in its contours to solve or even to provide much traction on the issues that we face in a liberal democracy, where we’ve agreed that individuals have important equal basic liberties. We need to think about the interests that inform those rights, their weight, and how they interact with other interests on the part of the political community and the interest of other people.”

Stephen Macedo

TIMOTHY SHAH: What do you say about that, Steve? You commented to me you’re not sure how much work this natural rights language really does. You did say you don’t disagree with it, but is it not important in the ways that Nick describes?

STEPHEN MACEDO: Well, I think Nick is absolutely right, that rights have this peremptory quality, that they establish a social world in which we can make certain demands on one another, not, as he
said, on the basis of benevolence or request or submission, but rather we can demand certain things, demand forms of equal status and equal treatment and so on.

TIMOTHY SHAH: I take it that’s what Washington was saying in distinguishing between toleration as an indulgence that’s granted to the minority by the majority versus an inherent natural right of mankind.

STEPHEN MACEDO: Right. It’s important to clarify what the rights are and to interpret them neither too narrowly nor too broadly. In public life now, often the questions are of various complicated interests that implicate rights in certain ways and contour how those rights are going to be defined given various kinds of rights of others. These are questions about a regime of equal rights and of public purposes of one sort or another that are also quite weighty and quite important and may actually be partly about securing the rights of children or the rights of third parties.

Now, I just don’t think the language of natural rights or the idea of natural rights is sufficiently clear in its contours to solve or even to provide much traction on the issues that we face in a liberal democracy, where we’ve agreed that individuals have important equal basic liberties. We need to think about the interests that inform those rights, their weight, and how they interact with other interests on the part of the political community and the interest of other people.

Rights are ways of making good on those interests that we have, but generally, conflicts about rights need to refer and weigh those interests that inform the rights. Saying “I have a natural right to X” is just a way of saying that the government would be illegitimate if it infringed upon it, but what we want to know is: Is that really so, and does it outweigh other rights and interests? It’s more of a conclusion, I guess, and I just don’t think the language of natural rights is all that helpful. The language of rights is helpful. The extra endowment of “natural” doesn’t really help. Even Locke said we enter society with a contract on the basis of unanimous consent—we ask what the legitimate conditions that should apply to government power in order to make that consent legitimate are. And again, we need to really justify these rights to one another. We need to think about them in ways that we’re all prepared to acknowledge, and that comes with a process of public deliberation and public argument and then probably some decisions through public authority.

TIMOTHY SHAH: But there are some recent moves by a number of fairly prominent legal theorists, Brian Leiter, for example, who has written a book called Why Tolereate Religion, in which he says, in effect, “Look, there really shouldn’t be any well-established, respected right to religious freedom as such.” The rights that we think of as being protected by religious freedom can better be protected by protecting freedom of speech and freedom of association. Religious people can be protected under those freedoms. Do we lose anything if we don’t have an especially carved out right to religious freedom? Noah Feldman has said something along these lines. What do you think about that Steve?

STEPHEN MACEDO: Well, I would have to work through Leiter’s book in
detail, which I have not done. It may be the case and often seems to be the case that religious convictions have a special kind of non-negotiable quality for people in the context of their lives. They can be a source of conflict with other kinds of rights claims and interests. My colleague, now president of Princeton, Chris Eisgruber, has a very good book on religious liberty with his former colleague, Larry Sager, in which one of the things they observe at the beginning is that nobody really has any serious problem with the National Endowment for the Arts or the National Endowment for the Humanities and so on. But if there were a “National Endowment for Religion,” that could be a source of greater conflict as to exactly what kind of government support is acceptable. Now we do give tax exempt status to religious groups, and we do argue things out. But it may be the case that religious convictions are an especially fertile source of conflict, and historically that’s often been the case. But I think it’s very important that we take a broad view of religion, and that in effect the regime of equal rights that we build up around religious claims are ones that secular analogues can also claim, secular convictions that are equally deep in the life of a person, whether it’s exemptions from military draft or participation in other kinds of programs. That seems to be sort of common ground. We have to define these deep and serious convictions that have this place in people’s lives, and religious beliefs are also included within this. Then I think most people wouldn’t have a problem.

TIMOTHY SHAH: Do you have anything to say on that, Nick?

NICHOLAS WOLTERSTORFF: Well, suppose that religion is roughly what Nagel suggests it is. Then, it seems to me that to say the only relevant right is the right
to free speech is a very reductionist and almost weird take on it. I mean when you look at what Nagel says, it isn’t speech that he is talking about. It includes speech but it’s not speech. It’s a certain way or style of interpreting the universe and one’s place in it, in which evaluation is a deep component. So thinking of it in terms of speech just strikes me as off target.

TIMOTHY SHAH: Yes, not robust enough.

NICHOLAS WOLTERSTORFF: You know that I think speech in its own right is very important, but I want to think of it along different lines.

STEPHEN MACEDO: Well, you’d have to include associated freedoms. The question would be whether special exemptions, privileges, or burdens in particular cases make sense. I think that we shouldn’t be singling out religious communities as opposed to other kinds of expressive community. Generally, equal liberty interests apply quite broadly.

NICHOLAS WOLTERSTORFF: That I certainly agree with.

STEPHEN MACEDO: We shouldn’t be singling out religious groups, either for special privileges as compared with other conscientious communities, value communities of some sort, or special burdens.

NICHOLAS WOLTERSTORFF: On the way here, I walked past a building that looked like a rehabbed old church building. The sign said, “Community of Divine Science.” Now, I have no idea what the Community of Divine Science is, but it seems to me they’ve got the same rights as the Catholic Church does.

TIMOTHY SHAH: Let’s invite those in the audience who are eager to jump in. Yes, please?

TIMOTHY SHAH: I’ll just ask you to just quickly identity yourself and then ask your question or offer your comment.

ADELAIDE MENA: My name is Adelaide Mena. I’m with Catholic News Agency and EWTN News and a former student of Professor Macedo’s. My question is: Who gets to decide what the common good is within society? Who gets to set the language with which we talk about the good and determine what exactly is owed to persons within society within the bounds of justice and what rights truly are?

STEPHEN MACEDO: The short answer is that we all do. This is a democracy. I think the interesting questions are the limits of the public good. Is there a legitimate public interest in supporting certain kinds of policies and programs that some people regard as controversial? I’m working on marriage now, and there are those who say that the entire institution of marriage is too judgmental, that it violates some norm of ethical neutrality with which the state ought to be required to comply. Therefore, the liberal state ought not to have marriage; it ought to have some sort of contractual regime instead. I think when we walk through those arguments, they’re wrong. There are public interests in marriage, and marriage has a recognized public status. There are perfectly reasonable public interests in two-person monogamous marriage. There are arguments around the edges. I
think the important arguments are: What are our common interests? What are the limits of our common interests? And how do we go about justifying them? But in a democracy we all participate—we participate as members of civil society as well as citizens exercising our political power. Did you have something more specific in mind, or a controversy?

ADELAIDE MENA: When there are competing definitions of what the common good is, and when we have completely different language for discussing what that good is, how as a society is it even possible to get on common ground and use the same language and therefore be able to determine the limits that you were talking about?

STEPHEN MACEDO: It depends on the case. With respect to the current marriage debate, there are those who want to say that the core interest is the interests of children and that marriage ought to be child-centered. Maggie Gallagher argues that very strongly. David Blankenhorn also argues it, though he’s shifted his position on same-sex marriage. Others want to put more emphasis on the interest of adults. That’s not exactly different languages, but they’re focusing on different sources of value.

The question is: How do we actually work this out in practice? It seems to me that they’re both right. Children’s interest may well come first. And if same-sex marriage was going to be bad for children as a general matter, then I think David Blankenhorn would have a strong argument. I don’t believe it’s really the case. But it’s also the case—and he acknowledges this—that adults have an interest in marriage. People get married intending not to have children. They get married after they’re no longer capable of having children. Marriage is obviously hugely, deeply significant to adults as well.

One thing that worries me about this conversation a little bit is that we can only get so far talking about these things in the abstract before we need to get into particulars. How do we work this out? Well, we should just look to see how we do work it out or how we don’t work it out. I don’t think the current conflicts we have in Washington are really at that high level of abstraction. There are much more particular debates, I think, about the limits of our collective

“We engage in discussion about that issue of the common good and public justice. But in a liberal democracy, we always do that within the framework of the constitution. That’s a crucial part of it. It’s not just that we talk together and vote. We do the talking and the voting within the framework of a constitution and with the procedures outlined in the constitution.”

Nicholas Wolterstorff
TIMOTHY SHAH: Thank you, Tom.

NICHOLAS WOLTERSTORFF: So, Tom, my view is that in a liberal democracy, if we’re behaving responsibly and an issue comes up pertaining to the common good or justice—public justice—we don’t just give speeches to each other. Maybe sometimes my position sounds as if we just give speeches to each other and then take a vote, but I don’t mean that. We engage on whatever basis we find compelling, be it natural law or libertarianism or my Barthian. We engage in discussion about that issue of the common good and public justice. But in a liberal democracy, we always do that within the framework of the constitution. That’s a crucial part of it. It’s not just that we talk together and vote. We do the talking and the voting within the framework of a constitution and with the procedures outlined in the constitution. So, in that case, the court decided to strike down the proposition. And whether they were right or wrong about that, that was faithful to the basic structure and procedure of a liberal democracy, it seems to me. Similar things are going to happen eventually with religion and the Affordable Care Act.

I think whenever I’ve talked about this I’ve said or implied that I mean within the framework of the constitution, but about five years ago, I had a discussion with Jürgen Habermas, and he had not heard that qualification, “within the framework of the constitution.” And then, for autobiographical reasons, he was very alarmed. He remembers growing up in Nazi Germany when there were in effect no constitutional prohibitions whatsoever. Especially since my discussion with him, I’ve been more emphatic in saying that lawmaking is always within the framework of a constitution.

THOMAS F. FARR: That’s why I like you, Nick. But I want to ask you a question that has to do with law. I think it plays into what you’re talking about, and Steve wants to be specific, so let’s talk about gay marriage and the Prop 8 decision. Here we had 54 percent of the people of California—I don’t know whether they were Barthians or not, if there are that many Barthians in California—who voted in a referendum to make marriage in California law between one man and one woman. This was overturned on a number of grounds at the first level, including the ground that it was sort of a Rawlsian argument that there were moral and religious grounds for overturning it, and then it went on up through the courts as you know. But again, this goes back to the first question: Who decides what the common good is? What is the basis on which any reasoning and much less the constitution overturns the democratic decision on that basis? I’d like to ask both of the panelists to address that.

TIMOTHY SHAH: Other questions, comments? Tom Farr.

THOMAS F. FARR: Well, I don’t believe either one of you are lawyers, right, which is why you’re here.

NICHOLAS WOLTERSTORFF: No, I’ve never been tempted by that.

THOMAS F. FARR: Other questions, comments?...
STEPHEN MACEDO: Right. As long as your constitution is legitimate—

NICHOLAS WOLTERSTORFF: A legitimate constitution. I’m assuming ours to be legitimate. So, certain things are off the table, and it’s up to the courts then to decide what’s on the table and what’s off the table.

THOMAS FARR: But I’m surprised at your answer, Nick, if I could just jump in—

NICHOLAS WOLTERSTORFF: Really?

THOMAS FARR: Yes. I said you weren’t a lawyer, but you punted to the Supreme Court. What about the democratic activity of the people of California and what about the First Amendment, which guarantees the free exercise of religion?

STEPHEN MACEDO: But what if those 54 percent of the people in California mandated Christian prayers in the public schools? Do you think that all rights questions ought to be settled by—

THOMAS FARR: No, but perhaps the question of marriage should be.

STEPHEN MACEDO: Okay. Well, that’s sort of specific to the merits of that particular issue, and I tend to agree with you for the moment. But some people will think that there are principled questions there having to do with equality, and that’s what I believe as well; that discrimination against gays with respect to marriage equality is invidious and, in the fullness of time I believe this should be regarded as a constitutional principle. But for now, I’m happy to see it work through legislation. At the state level, courts and legislators of-
ten interact more, and part of what's going on will be state constitutional issues as well as federal ones. So one can argue about the details of these cases. I like the federal court ruling that limited the effect of the California litigation to California. One thing we need to keep in mind is that the electoral process is itself flawed, and we have never, in this country, placed our complete confidence in elections or legislatures. I agree with Nicholas in thinking courts play a legitimate role in our democracy. This doesn't mean we're always going to agree with the role that they play or their decisions. And with respect to marriage, there has been some real backlash: The Hawaii decision in '93 drew a huge backlash with the Federal Defense of Marriage Act, and so the wisdom of a Hawaii decision on marriage equality may be questioned even if you agree with it in principle. But if one sees the merits as requiring that ultimately marriage equality is a matter of justice and equal rights, then obviously one is likely to be more sympathetic to judicial outcomes that nudge us in that direction. It's very important that these things come about democratically and with collective approval over the course of time. It sounds like you agree with the role of the courts, it's just that you disagree on the merits of this particular issue.

THOMAS FARR: Well, I do disagree with the role of the courts, especially Justice Kennedy's finding on the Defense of Marriage Act, a law that was passed just a decade before the finding. Those who supported it—who were virtually everybody in both parties including the president of the United States, Bill Clinton—are now people guilty of hatred, of animus.

STEPHEN MACEDO: I'm not crazy about Kennedy's opinion, that's for sure, but it was a political decision in part, with two important cases and a desire to take an incremental but important step in the direction of marriage equality as a matter of federal law. I basically agree with the outcome. Kennedy was threading various needles, but I don't think anybody thinks it's a particularly satisfying opinion.

THOMAS FARR: Okay. Fair enough.

NICHOLAS WOLTERSTORFF: But Tom, you're not saying that the result of a referendum should always stand, are you? I mean, some referenda might be absolutely horrible.

THOMAS FARR: Sure.

TIMOTHY SHAH: I guess the question is whether Judge Walker's reasons—and let's just say that one—

NICHOLAS WOLTERSTORFF: But that's getting into the details of the case.

TIMOTHY SHAH: Yes, that's right.

THOMAS FARR: Well, that's what I'd like to do. We need to get into the details of the case, and if the finding is that people who judge marriage to be between one man and a woman are wrong because they are religious—

STEPHEN MACEDO: No, that's not—

THOMAS FARR: That was precisely part of the reasoning.

STEPHEN MACEDO: Well, the main argument of the case was based on evidence concerning harm to children, which
was very poorly presented by those defending Prop 8. David Blankenhorn, who's actually quite good on these issues, was not very good as an expert witness.

THOMAS F. FARR: Right, I agree. But I'm speaking of the ruling of the judge, and that wasn't the only basis of the ruling. The ruling of the judge proposed that because those who supported traditional marriage did so for religious reasons, this finding was unconstitutional.

NICHOLAS WOLTERSTORFF: That just seems to me preposterous. I mean, just gross error on the part of the court.

TIMOTHY SHAH: Any other questions, comments? Yes, sir?

AL MILLIKAN: I'm Al Millikan with AM Media. You brought up the arts and common good. I'm wondering if you had a conflict in the past, for example with the art of Piss Christ, where you saw conflicts between artist freedom and religious freedom. Also is our government's claiming a film challenging Islam reason for tremendous violent outbreak? We can go back to the Reformation times when Martin Luther was challenging indulgences, supposedly getting people time off in purgatory. I remember *Sister Mary Ignatius Explains It All For You*. It seems like there's always going to be people offended, particularly when you're dealing with truth, eternal truth, and artists have a right and responsibility to do that. I mean, people in religion do that. But if it is offensive, why can't those offended challenge it peacefully? Why does the right of someone to speak the truth or even attempting to speak truth in error, why shouldn't that be protected?

TIMOTHY SHAH: I don't think there's any disagreement on that.

NICHOLAS WOLTERSTORFF: Unless this form of expression threatens public order, safety, and security, it should be protected. Religious people and anti-religious people should have the right to annoy each other.

STEPHEN MACEDO: Here, here.

TIMOTHY SHAH: I think there was a question in front. Professor Alon?

ILAN ALON: Ilan Alon from Rollins College. I think I've heard the term “liberal democracy” used, at least 20 times during the speeches, and it seems to me that a great number of people in the world are actually not living in liberal democracy. This debate centered around, on the one hand, a common good and, on the other hand, individual rights, inalienable rights for the individual to practice religion. How does this debate apply to places where common goods are not determined by the common on the one hand, and, on the other hand, where collective rights or the rights of the collective are more important than the rights of the individual?

TIMOTHY SHAH: Thank you.

NICHOLAS WOLTERSTORFF: Well, religious freedom comes in degrees and different configurations. So, you can have religious freedom of a sort in non-democratic situations. As I understand, in the ancient Ottoman millet system, Christians and Jews had freedom to practice their religion and to conduct family affairs and so forth on their own. To my mind, what
structurally made this system profoundly different is that there was establishment of Islam. It’s the blend of a guarantee of religious freedom and no establishment of religion that gives a special character to religious freedom in the modern West. But you don’t need democracy for a millet system, for example. And as I say, the Christians and the Jews and certainly the Muslims enjoyed a substantial amount of freedom there. But there were positions they could not hold in government if they were Jews or Christians, and they had to pay extra taxes, as I recall. So, it was establishment combined with some degree of free exercise.

TIMOTHY SHAH: But probably not equal free exercise at some level?

NICHOLAS WOLTERSTORFF: No, but substantial free exercise on the parts of Christians and Jews. And they were, by and large, as I understand, not terribly restless under that arrangement, but historians know that better than I do.

TIMOTHY SHAH: Steve, how would you tackle the question?

“So, each society has to carve out its own particular contour of the civil right to religion. It seems to me that religion for religious people and a-religion for people like Dawkins and Dennett is such a deep part of who they are as human persons that one violates them very deeply if one says, “You may not practice it, we’re going to put you under pressure to renounce it.” That’s a deep violation of the human person, deeper than not letting them assemble”

Nicholas Wolterstorff

STEPHEN MACEDO: Well, I mean, the extension of this tradition of rights that Nick was talking about is human rights. And so, what do we want to say in criticism of regimes that rate certain collective interests higher than individual human rights? Well, one could argue that there hopefully isn’t any conflict between the two. I mean, in certain very difficult circumstances, it can be hard to apply rights in the same way that we do, but the human rights tradition stands for the idea that legitimate governments ought to respect certain basic rights that individuals have, and it’s a criterion of legitimacy. And if they don’t, the international community should be concerned. Exactly what you do depends on the particulars of the case. Sanctions? Criticism? Dealing with countries like China is very tricky. I wouldn’t necessarily want to equate human rights with natural rights because they also have to get refracted through international organizations and what we think of the role and capacities of international organizations, but human rights are a hugely important devel-
opment and extension of the rights tradition that Nicholas was talking about.

TIMOTHY SHAH: It leads me to ask about the challenge of trying to promote religious freedom abroad. I mean, to the extent that religious freedom is a universal human right, whether we call it natural or universal, it actually is part of U.S. policy to promote religious freedom, as you mentioned, Nick. In fact, today is the fifteenth anniversary of the passage of the International Religious Freedom Act passed unanimously by Congress. How much of a priority should this be for the United States, its standard of legitimacy? Steve, you’ve written a bit about universal jurisdiction and these kinds of issues; how important should it be and what are the challenges of promoting this right abroad?

STEPHEN MACEDO: Well, I think it should be very important. But I won’t hazard to give any kind of clear answer about what the challenges are, and I haven’t studied this particular rights question enough to do so. But I’m in favor of the human rights dimension to our foreign policy insofar as we can do things to actually advance it.

TIMOTHY SHAH: And what do you say? I mean, there are a lot of fashionable critics of this policy, some that Nick mentioned, people who say that imposing religious freedom really is a kind of instrument of domination. There’s a sort of Foucauldian critique of these Western notions of freedom. How do we respond to these kinds of concerns and criticisms? Steve and Nick?

NICHOLAS WOLTERSTORFF: Well, my response would be to try to distinguish between the natural right as such and what I call the particular contour. I made it clear in my talk that the civil right to religious freedom has a certain contour in the West by virtue of many factors, by virtue of the character of the religions that we’ve had to deal with in the West, in particular in their plurality, and so forth. So, each society has to carve out its own particular contour of the civil right to religion. It seems to me that religion for religious people and non-religion for people like Dawkins and Dennett is such a deep part of who they are as human persons that one violates them very deeply if one says, “You may not practice it, we’re going to put you under pressure to renounce it.” That’s a deep violation of the human person, deeper than not letting them assemble. I mean the right to practice religion and the right to assemble are, of course, very closely connected to each other. So, I think it’s hugely important. When the Copts are put under severe pressure in Egypt, that’s a violation.

STEPHEN MACEDO: I’m not familiar with the Foucauldians you’re talking about, but there are people that always worry that certain standards emanating across national lines or other group lines stand for some sort of homogenization. Well, I’m personally in favor of homogenization when it comes to respecting basic human rights, the ones that are well thought through via representative institutions and legitimate government. If we all become more alike with respect to our support for basic human rights, that’s certainly no loss.

TIMOTHY SHAH: Yes.

DAVID HOLLENBACH: I’m David Hollenbach. One of the interesting ques-
tions for both of you, I think, is how do you conceive limits to the right to religious freedom and on what ground? I mean, Nick Wolterstorff has got his Barthian. At what point, if ever, does that person’s right to religious freedom get limited? Because I don’t think the right to religious freedom is an absolute unlimited right. There are restrictions at some point. A case in point: A Barthian South African who thinks apartheid is demanded by the interpretation of the Bible. It’s clear that you don’t agree with that, and you think that person’s right to religious freedom should be limited. Why?

NICHOLAS WOLTERSTORFF: I’m going to do my best to prove him wrong.

DAVID HOLLENBACH: Okay. But, I mean, apart from persuading him, what if he isn’t persuaded, then what do you do?

NICHOLAS WOLTERSTORFF: I’ll do my best to get my fellow citizens to vote against him.

DAVID HOLLENBACH: But I thought you said he should be able to exercise his right in public?

NICHOLAS WOLTERSTORFF: Equal rights.

DAVID HOLLENBACH: All right. But all I’m trying to see is where and how the limits—

NICHOLAS WOLTERSTORFF: Under the limits of a legitimate constitution.

DAVID HOLLENBACH: He had a constitution in South Africa that said that apartheid was legitimate.

STEPHEN MACEDO: That was one of the problems: a constitution that mandates or permits apartheid cannot be legitimate. Remind him of what Lincoln said not just about slavery, but it would apply to apartheid too. Certain fundamental principles make a constitution legitimate, including the basic equality and dignity of all persons. Lincoln would have said that the US constitution was legitimate because it stood for the wrongness and ultimate extinction of slavery, a great moral evil. The general question of the limits of religious liberty is a large and tough one. The first thing to be said about basic rights is that they should be understood as ways of securing the equal freedom and dignity of all, and so an advocate of apartheid can never complain of his rights being violated when we prevent him from practicing apartheid, because we oppose apartheid in the name of equal rights. When we move to the American context, we need to address particular cases as they arise. The HHS mandate thing for contraceptive services is a current controversy: It seems to me a considerable stretch for for-profit businesses to claim a serious free exercise infringement for being required along with other for-profit businesses to provide these contraceptive services. Exemptions for religious non-profits and religious organizations have been provided for in the healthcare law and that seems more or less permissible. But I do not think that the owners of large for-profit businesses can claim that their free exercise rights are being seriously burdened by the requirement to subsidize their employees health insurance: no one is requiring the owners to endorse contraceptives or even to supply them directly.
Nicholas Wolterstorff: So, David, I would say that when we’ve got a constitution, which we didn’t have in South Africa at that point, but within the framework of a constitution, then indeed the right to religious freedom, free speech, and assembly is not an absolute but what I called a *prima facie* right. And from there on, I guess we’ve just got to argue the cases.

David Hollenbach: Right. I guess what I’m really pushing for here is that reaching the agreement about the constitution is going to require a kind of common ground among the people to get that constitution going, so that in order to do that, the limits on this Barthian that you’ve been referring to, he or she already has to have agreed to some kind of common ground in order to maintain your position, as I understand you to be putting it forward. It’s a both/and rather than an either/or purely religious argument or a public reason argument, I think is the way I’m interpreting what you’re saying. Is that correct?

Nicholas Wolterstorff: Right. So, I think it’s providential that the kind of constitution that we do in have in fact emerged in the 1780s. I’m not sure that it would emerge today.

Stephen Macedo: You could say that again!

Nicholas Wolterstorff: But if some private employer is opposed on religious grounds to all surgery, to all cutting into the sacred body of a human being, would we say that he can exempt, in his healthcare policy, all surgery? I doubt it.

Timothy Shah: Let’s take one more question. Karen Rupprecht.

Nicholas Wolterstorff: I know that Tim wanted to find points of disagreement.

Karen Rupprecht: Thank you. I’m Karen Rupprecht. I’m a graduate student here. I actually had a question related to the gentleman’s question here about liberal democracy, and don’t misunderstand me, I wouldn’t argue against it. Nevertheless, it does seem a bit parallel to natural law in the sense that, as you said, Professor Macedo, it’s internally persuasive or something akin to that, but it’s not clear why you must accept that particular system.

Stephen Macedo: Accept what? Liberal democracy?

Karen Rupprecht: Yes, speaking about natural law, and I’m arguing it seems a bit parallel—liberal democracy does—if you live in a country that has no experience with liberal democracy nor necessarily desires it, but is perhaps very religiously convicted. Religious freedom is a very different thing.

Stephen Macedo: Because we were arguing about, I think, the United States and within the American constitutional framework, I was referring to liberal democracy because that’s how I would characterize that, and I think Nicholas would agree. But it’s a separate question of what are the requirements of legitimacy on the global stage for a regime to be a perfectly respectable regime in the family of nations. There I would refer to another book.
of John Rawls, which is quite vague and schematic, called The Law of Peoples. I think it’s actually a pretty good book. He says it’s possible to have a perfectly legitimate state with an established church. And he uses the example of an idealized—it’s quite idealized, but it’s still recognizable—Islamic Republic.

TIMOTHY SHAH: Kazanistan.

STEPHEN MACEDO: Kazanistan. He makes it up. Michael Doyle thinks that some of the Gulf states qualify. But, you know, you could favor the established faith in certain institutions, certain offices, but you’d respect minority rights and have representative institutions so that the law that’s made reflects everyone’s interest and so on, so that religious minorities are treated very fairly. In fact, you have to bend over backwards to be fair to religious minorities so they feel included in the regime. But if you did that, you could have a legitimate constitution that favored or established one particular religion. So I don’t think societies have to be liberal democracies to be legitimate and respectable. It’s a separate question in a way. How we think our politics should be within our constitution will reflect our own traditions and our own best judgments. But other people within other traditions have some discretion to be different, but within the bounds of legitimacy, which need to be defined; they would include respect for basic human rights and some reliable system of representative government. And China, hopefully, someday, will be a legitimate regime, but it will be somewhere hopefully within that margin of discretion, perhaps reflecting some Confucian traditions. There’ll be some differences. Think about Japan; there are quite a lot of differences between Japanese political and constitutional traditions and those of other countries, but many of those differences are legitimate and respectable.

KAREN RUPPRECHT: So, then in those contexts, will public reason actually in a sense be a form of religious reason, given that that’s the majority?

STEPHEN MACEDO: It could very well be religiously inflected. And I think in a sense societies have their own public reason when it comes to having their own conversations in light of their own traditions about their own standards of justice, their own constitutional traditions. There are certain commonalities, and the human rights agenda and standards of global legitimacy are supposed to be those common global standards. They don’t coincide with the standards of good governance and democratic justice that we would, or should, endorse domestically. I think it’s a very important point that there is a margin of discretion, but it’s not an unlimited margin of discretion, and the human rights agenda is meant to mark that. So, we need a global public reason, which is going to be distinct from the particular public reasons of particular societies.

TIMOTHY SHAH: Well, thanks to both of you very much. This is just the beginning of a conversation. We’re just getting started here. You’ve done a marvelous job, both of you, in helping us launch our conversation today about religious freedom.
Religious Freedom Project

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