

RELIGIOUS FREEDOM IN A WORLDWIDE SETTING: COMPARATIVE REFLECTIONS

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I. Introduction

In this paper, my aim is not so much to describe unfolding legal events visible across a range of legal systems, but to reflect from a comparative perspective on what I see as a looming crisis in defending religious freedom. I first reflect on the nature of that crisis (Section II) and the social setting in which it is unfolding (Section III). We live at a time when every level of society – global, national, and local – is more pluralistic than ever before. The differences seem deeper and more intractable and the potentially resulting conflicts pose greater risks of devastation. Freedom of religion holds a time-tested key for addressing these challenges. Yet at precisely the time we are coming to understand its effectiveness better than ever before, we are forgetting its significance and permitting its erosion.

Against this background, I sketch a general comparative framework for analyzing the institutional structures that have been developed in varying cultural and political settings for dealing with the complex interrelationships of religion, state, and society (Section IV). The analysis suggests that there are a range of possible religion-state configurations that can be reconciled with high levels of religious freedom protections. But such freedom is likely to be jeopardized by excessive positive or negative identification of the state with religious institutions – i.e., with excessive privileging of some religion or religions or with excessive privileging of secularist or anti-religious positions (ranging from inadvertent insensitivity to outright persecution). New conceptions of equality are beginning to collide with instead of to reinforce religious freedom rights.

Recognizing that contemporary challenges to religious freedom tend to take the form not of overt challenge to the ideal of religious freedom but of erosion by exception or by emptying of protections, the remainder of the paper looks at four major types of erosion: (1) replacing the idea of secularism, which in its best form guarantees a neutral governmental framework

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for accommodating and protecting different belief systems, with ideological secularism, which makes secularism an end in itself (Section V); (2) the erosion of the standards of review applied by the judiciary in assessing religious freedom claims (Section VI); (3) the loss of the appreciation of the priority of religious liberty, both in its relative priority vis-à-vis other human rights and in light of emerging arguments concerning the ‘redundance’ of the religious freedom right (Section VII); and (4) the deeper loss associated with forgetting the virtue of reverence – reverence that can take many forms, but is critical to cultivating openness to the transcendent and respect for rival interpretations of the transcendent – both of which are vital to democratic society (Section VIII).

II. The nature of the religious freedom crisis

In some ways, the crisis – at least as experienced in strong constitutional democracies – is an odd one. It is not a crisis that takes the form of a frontal attack on religious freedom norms or their status as fundamental human rights. No one is suggesting repeal of Article 18 of the International Covenant on Civil and Political Rights, or that the guarantees of religious freedom in most constitutions on earth should be withdrawn. Rather, there is a tipping point phenomenon and a pattern of erosion by exception – exceptions in the name of other rights and other state interests, exceptions in the name of transformed equality norms, and exceptions deriving in the end from lost perspective on the importance of freedom of religion.

A striking feature of the crisis is its incremental character. In the regions where most of us live, it is a crisis of apathy more than passion, of gradual erosion and cultural drift more than dramatic political and social transformation. It is a crisis of lost moorings. It is a crisis whose long-term costs are overlooked because in many ways religious freedom is better protected today than at most times during human history. Think how much better the situation is today than it was a quarter century ago. The collapse of Soviet communism and its ripple effects in many other parts of the world have resulted in major improvements in the global protection of freedom of religion or belief. But this success and the longer history of religious freedom elsewhere carry with them a hidden peril: long-enjoyed blessings of religious freedom can act as a social anesthetic, leading to a gradual forgetting of how truly foundational religious freedom is and to a skewing of the weight accorded this right in comparison with other rights and social interests. This drift is made all the more difficult to combat because it often proceeds in small steps, no one of which can easily galvanize strong public opinion and political pressure. The great irony, as Allen Hertzke has pointed

out¹ and as the path-breaking work of Brian Grim and Roger Finke has documented,² is that popular understanding of the preeminence of religious freedom in the pantheon of human rights is slipping away at precisely the time when we have better empirical evidence for its significance than ever before.

Of course, for those suffering violations of their right to freedom of religion or belief, there is nothing remote or gradual about the injustice they face. Those of us who live in countries blessed with strong protection of this right tend to forget the plight of Christians fleeing persecution in the Middle East; of Christian Montagnards in Vietnam faced with jail terms, forcible de-conversion, and death; of Christians, Ahmadiyyah, and other religious minorities being persecuted in Pakistan; of religious groups who have suffered loss of homes, places of worship, and lives as a result of inter-communal violence in India; of Buddhists, Muslims, and house-church Christians facing persecution in China; of Muslims and non-Muslims facing the steady state of religious oppression in Saudi Arabia; and of countless other victims of persecution.³ The daily flood of reports that those of us tracking religious freedom violations receive is a grim reminder of the reality highlighted by the *Global Restrictions on Religion* study published in December 2009 by the Pew Forum on Religion and Public Life,⁴ which found that 32% of the countries on earth, comprising 70% of the world's population, have high or very high restrictions on religious freedom.

In comparison with the harsh realities of cases of acute persecution, battles about religious symbols in public buildings or many other religious controversies arising in stable constitutional democracies seem quite tame. Many countries would feel blessed if problems of the latter variety were their most severe religious freedom controversies. Nonetheless, it is vital to pay attention to the less acute challenges to religious freedom in the major democracies. As James Madison wrote in his famed *Memorial and Remonstrance Against Religious Assessments*, one of the key documents shaping thought on religious freedom in the United States, 'it is proper to take alarm

¹ Allen D. Hertzke, 17th Plenary Session paper, pp. 108-133 of this book.

² Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press, 2011).

³ For a collection of cases drawn from news reports in recent days, see www.religlaw.org/index.php?blurb_id=1057.

⁴ Pew Forum on Religion and Public Life, *Global Restrictions on Religion* (December 2009), available at pewforum.org/uploadedFiles/Topics/Issues/Government/restrictions-fullreport.pdf.

at the first experiment on our liberties'.⁵ Moreover, if sound and effective implementation of religious freedom norms is not maintained among leading democracies, there is little hope that it will be protected more effectively elsewhere. One of the perennial problems for religious liberty everywhere is that while it ranks high as a fundamental right, it often ranks low in the priorities of practical implementation. But if left on the back burner too long, simmering religious freedom issues are all too likely to explode.

III. Essential features of the global social setting for religious freedom

A few basic points about the global setting necessarily shape thinking about religious freedom.⁶ The first point is that religion is here to stay. Even staunch advocates of the secularization thesis have conceded in light of the data that religion is not withering away. To the contrary, we are witnessing the desecularization of the world⁷ and the resurgence of religion, especially in the public sector.⁸ There is a major reawakening of religion in Latin American⁹ and in Africa¹⁰ and throughout the Muslim world.¹¹ To the extent that the secularization thesis has any residual explanatory power, it

⁵ James Madison, Memorial and Remonstrance Against Religious Assessments (1785), para. 3, available at <http://original.religlaw.org/interdocs/docs/jmadagainstreli-gassessments1785.htm>.

⁶ This section draws from the General Report written by Javier Martínez-Torrón and myself in Javier Martínez-Torrón and W. Cole Durham, Jr., *Religion and the Secular State / La Religion et l'État laïque*, Interim National Reports Issued for the Occasion of the XVIII International Congress of Comparative Law (Provo: International Center for Law and Religion Studies, 2010), 3-5, available at <http://jrcb-lar.byu.edu/common/files/General%20Report.pdf>.

⁷ Peter Berger, ed., *The Desecularization of the World. Resurgent Religion and World Politics* (Washington, D.C.: Ethics and Public Policy Center, 1999).

⁸ José Casanova, *Public Religions in the Modern World* (Chicago: Univ. of Chicago Press, 1994).

⁹ David Martin, *Tongues of Fire: The Explosion of Protestantism in Latin America* (Oxford: Blackwell, 1990). '[M]ost writers place the number of Protestants in Latin America at between 12 and 15 percent of the population – dramatic increase from an estimated 1 percent in 1930 and 4 percent in 1960. The largest percentages are in Guatemala, Brazil, Chile, El Salvador, and Nicaragua, but the expansion is continent-wide'. Paul E. Sigmund, ed., 'Introduction', in *Religious Freedom and Evangelization in Latin America: The Challenge of Religious Pluralism* (Maryknoll, New York: Orbis Books, 1999), 1, 2.

¹⁰ See, e.g., M. Christian Green and John D. van der Vyver, *Law, Religion and Human Rights in Africa: Introduction*, *Afr. Hum. Rts. L.J.* 8: 337-356 (2008).

¹¹ See, e.g., Paul Marshall, ed., *Radical Islam's Rules: The Worldwide Spread of Extreme Shari'a Law* (Lanham, Boulder, New York, Toronto and Oxford: Rowman & Littlefield Publishers, Inc., 2005).

seems to apply primarily with respect to ‘European exceptionalism’.¹² Even in China, which has particularly strong governmental constraints on religion, religiosity appears to be on the rise among many sectors of the population, and Chinese leaders are rethinking how religion fits into and contributes to the building of a ‘harmonious society’.¹³

Second, the trend is toward greater religious pluralization virtually everywhere. At the global level, no religion has a majority position; all are minorities. Even in countries that at one point had relative religious homogeneity, the percentage of adherents to the dominant religion is declining. In part this reflects purely secular trends: the realities of labor force movement, refugee flight, trade, education, and countless other factors. The result is that the number of religious minorities is proliferating in every country. Muslim populations are becoming substantial throughout Europe, the United States, Canada, and elsewhere. The growth of other groups is less visible, but is also significant. In addition to demographic shifts associated with migration, significant shifts are occurring because of conversion (e.g., the growth of Protestantism in Latin American) and deconversion (growing numbers of non-believers in many societies). Moreover, while ethnicity and religion are often linked, the correlation is becoming less automatic. Many minority religions are not ethnically based. At a minimum, these trends mean that the realities of religious difference need to be taken into account in addressing countless legal issues.

Third, while pluralization is increasing, traditional religions continue to hold a very significant place in many societies. They typically have deep roots, and have generally played a significant role in molding a country’s history and shaping and preserving national identity. Because of their centrality in culture, traditional religions can easily become a significant factor in nation building. More generally, politicians often cater to religious groups to garner support. Despite their dominant position, however, prevailing religions often feel threatened by the combination of forces of secularization and the growth of other religious populations in what has traditionally been ‘their’ space. Not surprisingly, they are motivated to find ways to strengthen their position in society. As a result, reactions to issues of religious rights are often colored by identity politics, fear of immigrants, and security concerns. Depending on the circumstances, playing to majority sensitivities can

¹² Peter Berger, Grace Davie, and Effie Fokas, *Religious America, Secular Europe?: A Theme and Variations* (Aldershot, UK and Burlington, VT: Ashgate, 2008).

¹³ See, e.g., Zhuo Xinping, *Religion and Rule of Law in China Today*, 2009 *BYU L. Rev.* 519.

exacerbate tensions with other religious groups. Moreover, concern for minority rights sometimes generates a backlash among those in majority positions, who may feel that their position is at risk or under-appreciated. In some ways, prevailing religions exhibit behaviors analogous to monopolies or oligopolies in economic settings in seeking to exclude competition.¹⁴

Fourth, while most countries on earth have constitutional protections of freedom of religion, implementation of these protections is uneven, and, as already mentioned, a high percentage of people on earth live in countries with high or very high restrictions on religious freedom. The latest work by Grim and Finke documents a strong correlation between government and social restrictions on religion and incidents of religious violence in society.¹⁵ Their work identifies societal mechanisms that strongly suggest that governmental restrictions on religion are a significant factor in causing religious violence.¹⁶

Taken together, these considerations underscore the urgency of assuring better global protection of the right to freedom of religion or belief. The challenge in our increasingly pluralistic world is to find ways for persons holding competing, inconsistent, and often deeply irreconcilable views to live together peacefully in society. The problem is not merely how adherents of differing religious views can live together, but how those with different comprehensive views, including anti-religious comprehensive views, can live together. Since at least the Peace of Westphalia, progressively stronger versions of the right to freedom of religion have been recognized as holding the key to a solution. The core theory was articulated by John Locke: if a certain measure of social stability can be assured by favoring the dominant religion, an even greater level of social peace can be achieved by tolerating and respecting an even broader range of beliefs.¹⁷ The theory has been validated by extensive historical experience over the intervening centuries, and has found persuasive empirical validation in the work of scholars such as Grim and Finke.¹⁸ The key here is not achieving some type of overlapping

¹⁴ Shima Baradaran-Robison, Brett G. Scharffs, and Elizabeth A. Sewell, *Religious Monopolies and the Commodification of Religion*, 32 *Pepperdine L. Rev.* 885 (2005).

¹⁵ Grim and Finke, *supra* note 2, at 68-87, 215-222.

¹⁶ *Id.*

¹⁷ See John Locke, *A Letter Concerning Toleration* (first published in 1689; cited edition: Buffalo, NY: Bobbs-Merrill, 1990), 68-69. For a fuller discussion of the Lockean insight, see W. Cole Durham, Jr., in Johan D. van der Vyver, and John Witte, Jr., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague, Boston and London: Martinus Nijhoff Publishers, 1996), 1, 7-12.

¹⁸ See Grim and Finke, *supra* note 2, at 68-87, 215-222.

consensus. Rather, what is critical to peace in a pluralistic world is assuring the members of society that everyone is committed to respecting (and not harassing or persecuting) others, or at a minimum, that the risks of rights violations will be held to a tolerable minimum. If the tools that religious freedom norms provide for resolving such conflicts do not work, it is difficult to see what will.

A corollary is remembering the principle enunciated by the European Court in *Serif v. Greece*.¹⁹ In that case, an individual selected as a mufti by the relevant Muslim community was convicted for ‘impersonating a mufti’ because he was not the mufti officially appointed by the Greek government. This case has important general implications for dialogue between religious communities and the state. The state doesn’t necessarily get to define its dialogue partner. Rather, the state needs to respect the governance structures of religious communities. In the process of reaching that decision, however, the Court enunciated another principle that has broader validity for protecting religious freedom:

Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other ...²⁰

In general, protecting the framework of pluralism involves protecting the right of individuals and groups to maintain their differences. The aim is not to repress difference but to allow differences to be authentically expressed, albeit in peaceful ways.

IV. A comparative framework for analyzing religion-state configurations

Religious freedom issues typically arise in the context of the religion-state configurations that exist in particular states. Indeed, the degree of religious freedom in a particular state is an aspect of the general relationship of religion, state, and society in a particular country. In analyzing the full range of religion-state configurations on a comparative basis, it is helpful to think of them being spread out along a continuum stretching from positive identification of the state with religion (e.g., theocracies, established churches, confessional states) through various types of state neutrality and

¹⁹ *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

²⁰ *Id.*, at § 53.

extending to negative identification). It turns out that if this continuum is curved, with the two endpoints at one end and the middle at the other, as in the accompanying diagram,²¹ there is a rough correlation between the position on the identification continuum and the degree of religious freedom experienced in the relevant country. The various positions along this 'loop' need to be understood as Weberian ideal types; no state structure corresponds exactly with any of the described positions. Indeed, it is probably best to think of the various positions along the loop as contested equilibrium points reached in different societies at different times. In this sense, the loop structure can be used to map not only the current positions of various states but also the range of discourse arguing for alternative positions at a given time in a particular country. For example, the major constitutional debates in the United States are focused in the range between separation and accommodation. In other countries, the range of debate is often much wider. Because the various types of religion-state relations have been explored in detail elsewhere, I will not go into greater detail here, except to make a few basic points.

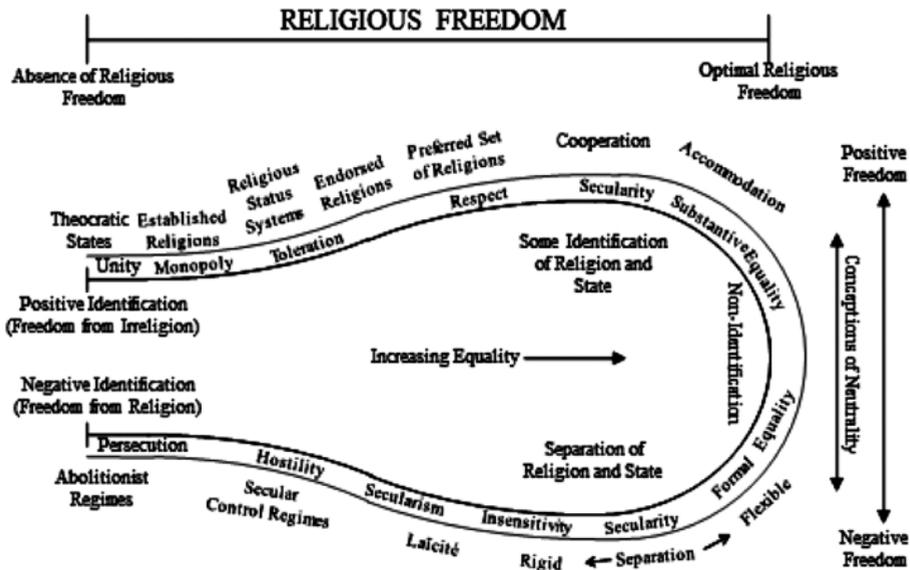
First, the diagram can be used to help model various types of religion-state relations not only as viewed from the perspective of the state but also as viewed from the perspective of religious communities. In this regard, I am grateful for the essay of Professor Hittinger, who has adapted an earlier version of this diagram to help chart a range of 'plural, legitimate religion-state regimes' as envisioned by *Dignitatis Humanae*.²²

Second, a range of possible religion-state configurations can correlate with high degrees of religious freedom.

Third, the level of religious freedom in a particular country can decline either through excessive positive or excessive negative identification of the state with religion. Dangers exist as a regime moves toward either end of the identification continuum.

²¹ I have published various versions of the diagram over the years. The version included here is the most recent iteration, prepared for an article entitled 'Patterns of Religion-State Relations', to be published in a volume edited by John Witte, Jr. and M. Christian Green, *Religion and Human Rights Anthology* (Oxford University Press, forthcoming 2011). The significance of various positions along the identification continuum is elaborated in more detail in W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Austin, Boston, Chicago, New York: Aspen, Wolters Kluwer Law & Business, 2010), 114-22.

²² F. Russell Hittinger, 'Political Pluralism and Religious Liberty: The Teaching of *Dignitatis Humanae*', presented at the Pontifical Academy of Social Sciences, 17th Plenary Session, pp. 39-55 of this book.



Fourth, the mapping of equality notions has become problematic. Instead of providing increased protection to religious groups and individuals, newly minted equality notions are beginning to have the opposite effect when religious beliefs collide with shifting sexual mores and other ethically sensitive practices. More generally, we are witnessing a paradigm shift from freedom to equality norms as the deep structure of human rights, and key dimensions of freedom of religion or belief disappear or suffer de-emphasis as a result of this shift.²³ This problem becomes more troubling as equality norms are twisted to justify discrimination *against* religion.²⁴ This phenomenon lies at the heart of the crisis we face, but since others have addressed this issue in more detail, I focus in this essay on other questions.

²³ See W. Cole Durham, Jr. and Brett G. Scharffs, State and Religious Communities in the United States: The Tension between Freedom and Equality, in *Church and State Towards Protection for Freedom of Religion* 362 (Japanese Association of Comparative Constitutional Law, Proceedings of the International Conference on Comparative Constitutional Law, 2–4 September 2005).

²⁴ For an excellent treatment of these issues, see Marta Cartabia, 'The Challenges of "New Rights" and Militant Secularism', presented at the Pontifical Academy of Social Sciences, 17th Plenary Session (pp. 428–455 of this book), especially sections 4–7.

Fifth, freedom is likely to be optimized across a range of systems characterized by ‘secularity’, as opposed to ‘secularism’ or strong versions of *laïcité* (on the negative identification half of the loop) or excessive privileging of religion (on the positive identification half of the loop). Because one of the major incremental hazards to religious freedom, in my view, involves drifting away from secularity, it is worth saying more about what is intended by this concept.

V. Secularity vs. secularism

Secularity is most easily explained by contrasting it with secularism. Briefly, the contrast is between secularism as an ideological position and secularity as a framework within which different comprehensive views – both religious and secular – can be held. Both ideas are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications. By ‘secularism’, I mean an ideological position that is committed to promoting a secular order as an end in itself. At a minimum, this view is committed to confining religion to the private sector, and more militant versions are more aggressively anti-religious altogether. By ‘secularity’, in contrast, I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that provides a neutral framework capable of accommodating or cooperating with a broad range of religions and beliefs.

In most modern legal systems there are exponents of both types of views. Constitutional and other legal texts addressing religion-state issues can often be interpreted as supporting one or the other of these views, and in fact, some of the key debates turn on the difference between the two approaches. Historically, French *laïcité* is closer to secularism; American separationism is closer to secularity. But there are debates in both societies about how strictly secular the state (and the public realm) should be. This tension between two conceptions of the secular runs through much of religion-state theory in contemporary settings. My contention is that human rights should constitute a framework that embodies secularity, not secularism.

This basic contrast is familiar in Catholic circles.²⁵ Pope Pius XII spoke already in 1958 of the ‘healthy secularity of the state’ (*sana laicità dello*

²⁵ See Evaldo Xavier Gomes, Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy’s New Concept of *Laïcité* Positive, *J. Cath. Legal Stud.* 48:201 (2009), 209–11, 213–5.

stato'),²⁶ thereby legitimating secularity as one of the attributes of the state from a church vantage point.²⁷ Such 'healthy secularity' is contrasted with secularism, which involves 'a negative conception of separation between Church and state, in which the Church is persecuted or denied its basic rights'.²⁸ Secularity in contrast is 'understood as a healthy cooperation between Church and state. ... [T]he Church and state are not opposed to each other; both are in the service of human beings, so between them there must be dialogue, cooperation, and solidarity'.²⁹ Pope Paul VI also distinguished between secularism and secularity, equating the former with 'militant atheism' that aims at 'suffocating faith – combatting it and extirpating it from society'.³⁰ A similar notion is implicit in President Nicolas Sarkozy's conception of *laïcité positive*, introduced at his speech at St. John Lateran in Rome in December 2007. As he used this expression, it connoted 'an open secularism, an invitation to dialog, tolerance, and respect'.³¹ Pope Benedict XVI responded warmly to this new idea, viewing it as a historical step forward in church-state relations.³²

From a comparative law perspective, the contrast between secularity and secularism is evident in the approaches states take to a variety of concrete issues affecting religious freedom. Reflecting on Canadian developments, José Woehrling and Rosalie Jukier have commented that as a general matter, there are four key principles in modern secular states: 'the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State'.³³ But much depends in their view on the relative weights and interpretations given to these ideas. They contrast what they call 'rigid secularism', which corresponds with secularism as used here, and 'open secularism', which corresponds with secularity. In their view, 'strict' or 'rigid' secularism

²⁶ '[T]he legitimate healthy laicity of the State is one of the principles of Catholic doctrine'. *Alla vostra filiale*, 23 March 1958, *AAS* 50 (1958), 220.

²⁷ Gomes, *supra* note 22, at 210.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 211, citing Paul VI, Apostolic Exhortation *Evangelii Nuntiandi* §55 (1975).

³¹ President Nicolas Sarkozy, *Allocution de M. le Président de la République dans la salle de la signature du Palais de Latran* (20 December 2007), www.elysee.fr/documents/index.php?mode=cvview&cat_id=7&press_id=819.

³² Pope Benedict XVI, Address of His Holiness Benedict XVI: Meeting with French Episcopal Conference (14 September 2008); Gomes, *supra* note 22, at 214–5.

³³ José Woehrling and Rosalie Jukier, Religion and the Secular State in Canada, in Martínez-Torrón and Durham, *supra* note 6, at 185.

would accord more importance to the principle of neutrality than to freedom of conscience and religion, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free of any expression of religion. Also termed ‘a-religiousness’, this concept of secularism is obviously less compatible with religious accommodation, as well as antithetical to the recognition of the place of pluralism in the modern state.³⁴

A more ‘flexible’ or ‘open secularism’, in contrast,

is based on the protection of freedom of religion, even if this requires a relaxation of the principle of neutrality. In this model, state neutrality towards religion and the separation of Church and State are not seen as ends in themselves, but rather as the means to achieving the fundamental objectives of respect for religious and moral equality and freedom of conscience and religion. In open secularism, any tension or contradiction between the various constituent facets of secularism should be resolved in favour of religious freedom and equality.³⁵

The ‘flexible’ and ‘open’ (secularity) approach is the one recommended in Canada by the highly publicized Bouchard–Taylor Commission constituted in Quebec in 2007, and it appears to be the approach followed by Canadian Courts.³⁶ As stated in a landmark Canadian case, ‘[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct’.³⁷

The contrast is evident not only in the general approach to thinking about religious freedom issues but also in a host of more practical settings. Secularity favors substantive over formal conceptions of equality and neutrality, taking claims of conscience seriously as grounds for accommodating religiously-motivated difference. Secularity is likely to give more favorable treatment to a wide range of conscientious objection claims. Secularity would be more accommodating of distinctive types of religious clothing, at a minimum allowing female Muslim students to wear traditional head coverings, and likely allowing teachers to do so as well.³⁸

³⁴ Id.

³⁵ Id.

³⁶ Id., at 185–86.

³⁷ R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 321 (Dickson, C.J.).

³⁸ That is, the European Court’s decisions in *Dahlab v. Switzerland* (ECtHR, App. No. 42393/98, 15 February 2001) and *Şahin v. Turkey* (Grand Chamber) (ECtHR, App. No. 44774/98, 10 November 2005) appear to be manifestations of secularism, rather than secularity.

Of course, the line between secularity and secularism does not resolve all disputes. Even among advocates of secularity, differences of opinion might arise about the extent to which representatives of the state as opposed to private individuals should have their religious beliefs accommodated. Similarly, with respect to religious symbols in public buildings, there can be differences of opinion about whether allowing or disallowing such displays is more effective in accommodating religious difference. The answer to this question may well depend on the local cultural setting.³⁹

Because of the conceptual and rhetorical similarity of secularism and secularity claims, it is all too easy to slip from the optimal and open practices of secularity to the more hostile and restrictive approach of secularism. The cost is measured in increased restrictions on religious life, a greater tendency to rule religion off limits in the public square, an expanded range of potential conflicts between the state and religious believers and organizations, and in general, a greater tendency to violate religious freedom norms. Sharpening public awareness of this contrast can help prevent erosion of religious freedom in many spheres.

VI. Standards of judicial review

The landscape of religious freedom is strewn with concrete legal battles. The most dramatic involve litigation on same-sex marriage issues, questions of conscientious objection to participation in ethically sensitive medical procedures, and controversies regarding religious symbols. Others include issues relating to the autonomy of religious institutions and broader problems associated with giving offense to religious sensitivities, and in particular, the problem of religious defamation. Less visible but arguably more significant than these outcome-oriented ‘culture war’ controversies are the key constitutional decisions that decide the standards of review that will be applied in reviewing religious freedom claims. This is because the standards of review become a critical leverage point in addressing virtually all of the other issues. Erosion occurs in this area both through reformulation of the applicable standards themselves and through less obvious changes in the starting calibrations of the balancing mechanisms used by judges (the baseline assumptions of what constitutes neutrality) and through changing weights assigned to other values thrown into the balance against religious freedom.

The struggle concerning the standard of review has been the central drama regarding religious freedom for the past two decades in the United

³⁹ See, e.g., *Lautsi and Others v. Italy*. (Grand Chamber) (ECtHR, App. No. 30814/06, 18 March 2011).

States, and is also vital in other legal systems where such claims wend their way into courts. Prior to 1990, Supreme Court decisions in the United States held that burdens on religious liberty could only be justified by narrowly tailored compelling state interests. That is, they had to withstand ‘strict scrutiny’ – a difficult though not insurmountable challenge. In 1990, in *Employment Division v. Smith*,⁴⁰ the Supreme Court jettisoned that test, and held that subject to certain exceptions, any general and neutral law would override religious freedom claims. This unleashed a series of efforts in Congress and state legislatures to reinstate strict or at least heightened scrutiny, thereby providing stronger protection of religious freedom than had been established by the Supreme Court as the minimum constitutional standard.

In retrospect, one of the most striking features of this controversy has been the resilience of free exercise values. While the Congressional effort to reimpose a strict scrutiny standard on the states via the Religious Freedom Restoration Act (RFRA)⁴¹ was struck down in *City of Boerne v. Flores*,⁴² RFRA remains in effect with respect to federal legislation. Moreover, a number of additional federal statutes have been passed requiring strict scrutiny of religious claims for specified but significant federal laws are involved.⁴³

Even more interesting is the response at the state level, which is summarized on the chart on the following page. At this point, there are majority of states (26 jurisdictions) that have decided to retain heightened scrutiny, either by passing state legislation to that effect, or as a result of a decision by the highest courts of the respective states construing the state constitution to impose a higher constitutional standard than the federal constitution. Perhaps the biggest surprise is that only three states have explicitly followed the *Smith* approach as a matter of state constitutional law. Six have reached a similar result, albeit in decisions that don’t make it clear whether it is state or federal constitutional law that is being followed. Four states have had cases raising religious freedom issues, but not ones that required the courts to decide whether strict scrutiny was required under the applicable state

⁴⁰ 494 U.S. 872 (1990).

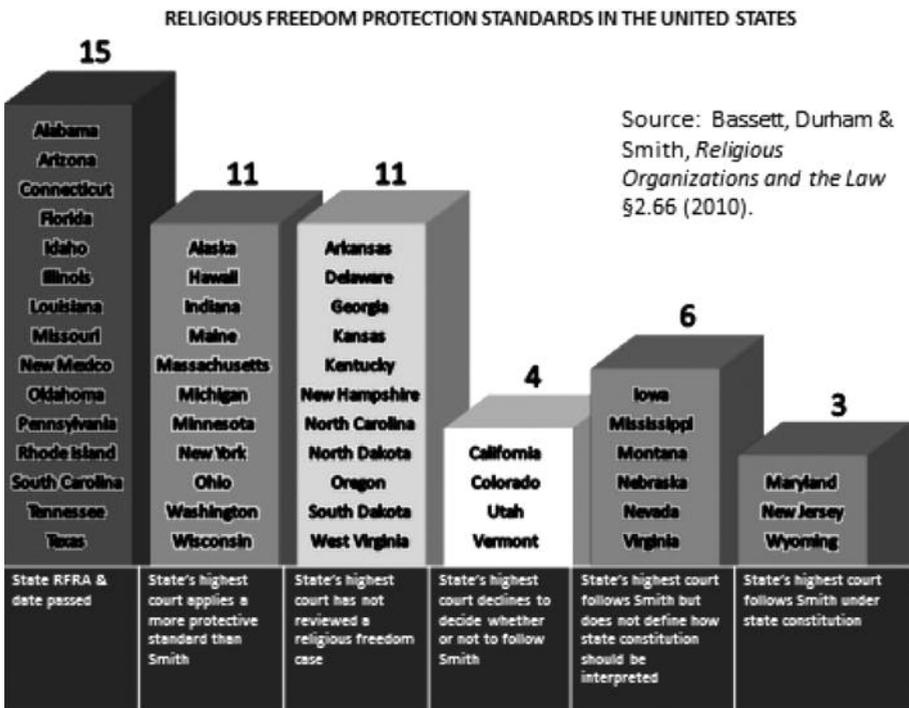
⁴¹ The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. (2007).

⁴² 521 U.S. 507 (1997).

⁴³ Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. 544, 546, 548, 707, 1325 (1994)); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq.; American Indian Religious Freedom Act Amendment of 1994, 42 U.S.C. § 2000bb-2(4) (which incorporates a somewhat broadened definition of religious exercise from RLUIPA into RFRA, making it clear that the term ‘religious exercise’ includes the ‘use, building, or conversion of real property for the purpose of religious exercise’).

constitutions. Eleven states have not yet had cases posing the question, although several of these have pre-*Smith* precedents which suggest that they would follow a strict scrutiny approach. In short, the general pattern suggests significant resistance to the idea of lowering religious freedom protections.

The standards used in applying the International Covenant on Civil and Political Rights (ICCPR) by the U.N. Human Rights Committee and those applied under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are virtually identical. This is not surprising, since the relevant treaty provisions contain largely parallel language. Only ‘manifestations’ of religion may be subjected to limitations; internal forum matters lie beyond state purview, though as a practical matter, relatively few cases are dealt with in this category. Limitations on manifestations must pass three tests. First, they must be prescribed by law. This requirement has a formal element (requiring that the interference in question is legally authorized) and a qualitative element (requiring that fundamental rule of law constraints such as non-retroactivity, clarity of the legal provisions, absence of arbitrary enforcement and the like be observed). Note



that as a practical matter this is the minimum floor established by the *Smith* decision in the U.S., which implicitly assumes that rule of law constraints alone provide a sufficient protection of religious freedom.

International standards go further and prescribe a restricted set of permissible or legitimating grounds for limitations. As enunciated in the ECHR, these legitimating grounds are restricted to those which are necessary ‘in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’.⁴⁴ While the legitimating grounds are quite broad and in most cases at least one is available to support the particular limitations being challenged, it is quite clear that only the enumerated legitimating grounds may be invoked to justify a limitation.⁴⁵ Note the U.S. ‘compelling state interest’ test is arguably broader, in the sense that anything a court thinks is ‘compelling’ may meet the standard.

The real core of the ICCPR/ECHR test lies in assessing whether the particular limitation is ‘necessary’ or ‘necessary in a democratic society’, and the European Court has construed this to require a ‘pressing social need’ that is ‘proportionate to the legitimate aim pursued’.⁴⁶ Clearly, when analyzed in these terms, the issue of necessity must be assessed on a case-by-case basis. However, certain general conclusions have emerged. First, in assessing which limitations are ‘proportionate’, it is vital to remember that ‘freedom of thought, conscience and religion’ is one of the foundations of a ‘democratic society’.⁴⁷ State interests must be weighty indeed to justify abrogating a right that is this significant. Second, limitations cannot pass the necessity test if they reflect state conduct that is not neutral and impartial,⁴⁸

⁴⁴ ECHR, art. 9(2).

⁴⁵ See U.N. Human Rights Committee, General Comment 22 (48), adopted by the U.N. Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994); Nolan and K v. Russia (ECtHR, App. No. 2512/04, 12 February 2009), § 73.

⁴⁶ See, e.g., Kokkinakis v. Greece, 17 EHRR 397 (A/26-A) (1994) (A/26-A) (ECtHR, App. No. 14307/88, 25 May 1993), § 49; Wingrove v. United Kingdom, 24 EHRR 1 (1997) (ECtHR, App. No. 17419/90 25 November 1996), § 53; Manoussakis and Others v. Greece, 23 EHRR 387 (1997) (ECtHR, App. No. 18748/91, 26 September 1996), §§ 43–53; Serif v. Greece, 31 EHRR 20 (2001) (ECtHR, App. No. 38178/97, 14 December 1999), § 49; Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 119.

⁴⁷ Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 114.

⁴⁸ *Id.*, § 116.

or that imposes arbitrary constraints on the right to manifest religion.⁴⁹ Discriminatory and arbitrary government conduct is not ‘necessary’ – especially not in a democratic society. In particular, state regulations that impose excessive and arbitrary burdens on the right to associate and worship in community with others are impermissible.⁵⁰ In general, where laws are not narrowly tailored to further one of the permissible legitimating grounds for limitation, or where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state’s objective, it is difficult to claim that the more burdensome alternative is genuinely necessary. Further, counterproductive measures are obviously not necessary. Finally, the U.N. Human Rights Committee has noted that limitations ‘must not be applied in a manner that would vitiate the rights guaranteed in article 18’,⁵¹ and the European Court would no doubt take a similar position. Finally, restrictions on religious freedom ‘must not impair the very essence of the right in question’.⁵²

In addition to the foregoing, both the United States strict scrutiny and the ICCPR/ECHR approaches impose threshold requirements below which religious liberty claims are not cognizable. In the United States there must be a ‘substantial burden’ on free exercise before the burden shifts to the state to establish that there is a compelling state interest that cannot be accomplished in some less restrictive manner. In Europe, there must be an ‘interference’ with a manifestation of religion. Unfortunately, as cases proliferate, it is becoming evident that some courts will find ways to set this threshold unreasonably high, so that they can dismiss a case without further balancing of the rights and interests at stake. These cases are fact-sensitive, and time does not allow exploring them in depth here, but in the future, efforts are needed to prevent setting the burden/interference threshold too high. Some of the cases seem to suggest that even massive monetary burdens are not sufficient to cross

⁴⁹ *Ibid.*, § 118; *Manoussakis and Others v. Greece*, 23 EHRR 387 (1997) (ECtHR, App. No. 18748/91, 29 August 1996), §§ 43–53.

⁵⁰ *Metropolitan Church of Bessarabia v. Moldova*, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 118.

⁵¹ United Nations Human Rights Committee General Comment No. 22 (48) (Article 18) Adopted by the U.N. Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994), § 8.

⁵² Decision, Republic of Korea [2007] UNHRC 5; CCPR/C/88/D/1321-1322/2004 (23 January 2007) (U.N. HRC).

the threshold because they are ‘merely financial’. In some cases, this has allowed imposition of significant burdens on individual claimants.

The proportionality analysis that lies at the core of ICCPR and ECHR limitations analysis has become

an overarching principle of constitutional adjudication. ... From German origins, [it] has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems – Canada, South Africa, New Zealand, and via European law, the U.K. – and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [proportionality analysis]. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered ‘constitutional’ in some meaningful sense: the European Union (EU), the European Convention on Human Rights (ECHR), and the World Trade Organization.⁵³

Proportionality analysis has thus become the dominant approach in many parts of the world for addressing religious liberty claims.

Paying attention to these judicial tests is extremely important. While courts authorized to engage in judicial review of legislation are clearly obliged to follow constitutional laws, they have an obligation to review legislation with sufficient rigor to assure that the right to freedom of religion or belief is given effective protection. Strict scrutiny and careful application of proportionality tests has the effect of promoting secularity, because it assures that neither intentional nor inadvertent encroachments on religious freedom rights are permitted. Relaxing the standard makes it easier for systems to drift either toward privileging of majority religious or majority secularist communities, depending on which groups have democratic dominance in a country.

There are a variety of ways that religious freedom rights can be eroded under the various tests examined here. Relying solely on rule of law constraints (as opposed to insisting on proportionality tests in addition) places religious groups at the mercy of legislative majorities. More significantly, it drastically shifts the likelihood of success for religious claimants at the grass roots level. When a religious claimant meets with an official requesting an accommodation with respect to a religious claim, the official is more likely to seek a solution if his solution will be subjected to strict

⁵³ Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, *Colum. J. Transnat'l L.* 73-74 (2008).

scrutiny.⁵⁴ In contrast, if the laws authorizing the official's activity are reviewed under a deferential standard of review according to which any neutral or general law can trump religious freedom, the official has virtually no legal incentive to cooperate and an accommodation depends on his or her good graces. This is particularly problematic for unpopular or less known groups.

As already noted, the interpretation of what constitutes an 'interference' with or a 'substantial burden' on religious freedom can be manipulated in ways that significantly reduce the viability of religious freedom claims.

More significantly, both American compelling state interest and proportionality analysis confer significant discretion on judges in weighing religious freedom claims. A primary issue here is that cultural shifts associated with the process of secularization lead many judges to assign greater weight to secular state interests and less to religious concerns. This can occur because religion is no longer seen to deserve special protection, because there is a sense that religious activities and religious views should be consigned exclusively to the private sector, because religion has become more suspect as a locus of social danger, or for any of a variety of other reasons.

Even if judicial biases are not skewed in this way, there is a risk that the characterization of the values being balanced can be manipulated so that they system wide interests of the state are balanced against the individualized concerns of the religious freedom claimant. A more reasonable approach balances the marginal burden faced by the state in the particular interest against the actual burden of the claimant.

Another factor that can be particularly significant as a practical matter is whether the governmental interest in question can be sufficiently achieved in a way that is narrowly tailored to assure that it does not intrude unduly on the religious right in question. It is important to insist on fair characterizations of the state's interest in this regard, since characterizing a state interest in one way will rule out consideration of all possible alternatives, where a more reasonable description of the state's interest might allow more room for negotiation. There are a number of formulations of this basic narrow tailoring requirement, including among others insisting that the state employ the 'least restrictive alternative',⁵⁵ or applying the Canadian notion of 'minimal impairment' of the right or freedom.⁵⁶

⁵⁴ See Douglas Laycock, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 244 (1994).

⁵⁵ See, e.g., Religious Freedom Restoration Act.

⁵⁶ See, e.g., *Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec*, Supreme Court of Canada, 1 S.C.R. 256, 2006 SCC 6 (2006).

Depending on the particular country, the history of judicial appointments, the current composition of the judiciary, and traditions of deference or activism, religious communities may be more or less wary of judges and the power they have in interpreting religious freedom norms. It is important to remember, however, that while the rule of law is not necessarily sufficient in itself to provide full protection for religious liberty, the rule of law poses a vital minimum set of protections for religious communities, and great care needs to be taken to respect the importance of an independent judiciary in maintaining the rule of law. Moreover, in countless situations, legislation cannot fully specify the full range of protections for religious freedom that reasonable interpretation of legislation will afford. In general, however, a competent and unbiased judiciary plays an important role in implementing the ideal of secularism, and this role is enhanced where heightened standards calling for rigorous scrutiny of state action infringing religious freedom are applied.

VII. Resisting the erosion of religious freedom's primacy

A. *The priority of religious freedom*

In the United States, we often refer to religious freedom as a first freedom, or even as *the* first freedom. This is not merely because it appears in the First Amendment of the U.S. Constitution. That, after all, is somewhat of an accident of history. In some early drafts, the religion clause was in the third amendment. But freedom of religion is in fact a first freedom, or *the* first freedom, because of its profound links to the core of human dignity, to the very center of our normative consciousness, to conscience, and to all that calls us to what is highest in human affairs.

Dignitatis Humanae takes essentially the same position, proclaiming that the 'demand for freedom in human society ... regards, in the first place, the free exercise of religion in society'.⁵⁷ Moreover, 'the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself'.⁵⁸

Rooted in dignity and protective of conscience, religious freedom is foundational for other human rights in at least three respects. It is *historically foundational* because so many other rights emerged as additional supports for or expansions of legal protections originally provided in the name of religious freedom. It is *philosophically foundational* because it protects the comprehensive

⁵⁷ Pope Paul VI, Declaration on Religious Freedom *Dignitatis Humanae* (1965) § 1.

⁵⁸ *Id.*, at § 2.

belief systems and world views in which our other ideas are rooted and from which they derive their meaning. It is *institutionally foundational* because it protects and fosters the institutions that engender the vision, the motivation, and the moral support that translate religious and moral ideals into personal and communal practice. Religious freedom often overlaps with other rights, such as freedom of expression, freedom of association, rights to non-discrimination, rights to protection of an intimate or private sphere, and so forth, but the sum of religious freedom is greater than any of these individual parts.

Part of the impending crisis we face is that both religion and freedom of religion are losing their priority status in social consciousness. This is a global pattern. In part this reflects what Scott Appleby has described as ‘the ambivalence of the sacred’⁵⁹ – the fact that while the sacred can elicit the highest in human nature, it has all too often elicited just the opposite – the darkest manifestations of man’s inhumanity to man, and to woman. The dark side of religion is trumpeted in the media, undermining confidence in religious institutions, while the massive day-to-day service rendered by believers and the tremendous social capital generated by religion are too easily forgotten. The challenge is how to respond to the claims so alluring to secular equalitarians that neither religion nor religious freedom deserves any special protection.

B. Redundancy arguments

Here I will focus primarily on an aspect of such argumentation that is attracting increasing attention: claims that the right to freedom religion or belief is essentially redundant in a constitutional world with robust protections for freedom of expression (including symbolic conduct), association, and strong anti-discrimination norms.⁶⁰ In the United States, this move takes the form of arguing that ‘free exercise of religion’ has become largely redundant in light of other constitutional developments. As early as 1983, Professor William Marshall argued that if freedom of speech is interpreted with sufficient breadth, using a broad notion of symbolic speech to cover religious conduct, the free speech clause could be used to cover everything that is protected by free exercise clause.⁶¹

⁵⁹ R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Lanham/Boulder/New York/Oxford: Rowman & Littlefield Publishers, Inc., 2000).

⁶⁰ See, e.g., Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 72 (2001); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983).

⁶¹ Marshall, 67 Minn. L. Rev. 545.

This argument has been given added force by subsequent developments. After the Supreme Court downgraded free exercise protections in 1990 in the *Smith* case so that virtually any neutral and general law could trump religious liberty claims,⁶² one could make the argument that free speech provided even stronger protection than free exercise. That is, after *Smith*, free speech claims still triggered compelling state interest/least restrictive alternative analysis (i.e., ‘strict scrutiny analysis’), whereas free exercise claims no longer did so, unless there was explicit or implicit targeting of religion (i.e., non-neutral state conduct), or unless the free exercise claim was buttressed by a stronger constitutional right (so-called hybrid rights cases),⁶³ or involved institutional religious autonomy claims.⁶⁴

The better view is that freedom of religion claims should receive protection at least as strong as that provided by freedom of speech, freedom of association, and equal protection norms,⁶⁵ but so long as those norms are available, the argument runs, why is an additional right to freedom of religion necessary?

A more recent version of this argument has been advanced by Professor Mark Tushnet.⁶⁶ He asks, ‘Suppose the Free Exercise Clause were simply ripped out of the Constitution. What would change in contemporary constitutional law?’⁶⁷ His response: not much. After noting that the scope of the Free Exercise Clause is quite narrow after *Smith*,⁶⁸ he goes on to document how ‘other constitutional doctrines protect a wide range of actions in which religious believers engage’.⁶⁹ These actions include direct protec-

⁶² *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶³ The idea was that strict scrutiny analysis might apply if free exercise were buttressed by another constitutional right such as freedom of speech or family rights. But of course, where that is the case, the other right alone is sufficient to prevail, so the religious right becomes not only redundant but irrelevant.

⁶⁴ In the *Smith* case, the Supreme Court explicitly noted that it was not overruling a long line of cases that affirmed the right of religious communities to autonomy in their own affairs (e.g., with respect to church property disputes and internal issues such as ecclesiastical appointments). For an overview of these issues, see James A. Serritella, Thomas C. Berg, W. Cole Durham, Jr., Edward McGlynn Gaffney, Jr., Craig B. Mousin, eds., *Religions Organizations in the United States: A Study of Identity, Liberty, and the Law* (Durham, NC: Carolina Academic Press, 2006).

⁶⁵ See, e.g., Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 *Geo. Wash. L. Rev.* 925 (2000).

⁶⁶ Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 *Loy. U. Chi. L.J.* 71 (2001).

⁶⁷ *Id.*, at 71.

⁶⁸ *Id.*

⁶⁹ *Id.*, at 72.

tion of speech,⁷⁰ bans on coerced speech,⁷¹ symbolic speech (i.e., expressive conduct that is intended to communicate and is so understood by others),⁷² free speech doctrines that proscribe viewpoint discrimination, require equal access to public resources, or proscribe disparate regulatory impacts.⁷³ Also significant are rights of expressive association,⁷⁴ which can help explain legal doctrines such as the ministerial exception to legislation forbidding employment discrimination (religious groups can engage in preferential hiring of their own members)⁷⁵ and more generally, the right of religious communities to autonomy in their own affairs.⁷⁶

Tushnet acknowledges a few areas where coverage may be inadequate. For example, symbolic speech may not be sufficient to cover certain activities motivated by religious belief, because while they are ‘intended to communicate ... belief, [they] are not generally understood to be communications’.⁷⁷ This may be the counterpoint of decisions in the European Court of Human Rights that that refuse to find a ‘manifestation of religion’ in conduct that is motivated by religion but does not symbolically express the religious beliefs.⁷⁸ Similarly, expressive association cases may not provide full protection to church-related employment cases, because American law respects the autonomy of religion with respect to all employment decisions of religious employers, not merely those in which direct religious expression activities are involved.⁷⁹ But in general, Tushnet concludes that ‘[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant’.⁸⁰

⁷⁰ *Id.*, at 73–80.

⁷¹ *Id.*, at 74.

⁷² *Id.*, at 75.

⁷³ *Id.*, at 75–76, 80–83.

⁷⁴ *Id.*, at 84–90.

⁷⁵ *Id.*, at 84–86. For a recent case summarizing developments with regard to the ministerial exception, see *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007). See also *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The Supreme Court has recently granted review in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 2011 WL 1103380 (2011).

⁷⁶ See Tushnet, *supra* note 47, at 85.

⁷⁷ *Id.* at 76–77.

⁷⁸ *Arrowsmith v. United Kingdom* (ECmHR, App. No. 7050/75, 12 October 1978) ((1981) 3 EHRR 218).

⁷⁹ See Tushnet, *supra* note 21, at 86, citing Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 20 (2000).

⁸⁰ Tushnet, *supra* note 47, at 73.

Note that this is not a parochial problem of American constitutional law. The redundancy problem is likely to arise in most modern constitutions because, by and large, these also include rights covering freedom of expression, freedom of association, and protecting against non-discrimination.⁸¹

This is also true at the level of international human rights law.⁸² Thus, Professor James Nickel has argued that freedom of religion is adequately covered by a constellation of nine basic liberties that are widely recognized in international law: (1) freedom of belief, thought and inquiry; (2) freedom of communication and expression; (3) freedom of association; (4) freedom of peaceful assembly; (5) freedom of political participation; (6) freedom of movement; (7) economic liberties; (8) privacy and autonomy in the areas of home, family, sexuality, and reproduction; and (9) freedom to follow an ethic, plan of life, lifestyle, or traditional way of living.⁸³ In Nickel's view, once this full set of basic liberties is in place, no separate mention of freedom of religion is necessary to protect the interests traditionally covered by freedom of religion.⁸⁴

For Nickel, this approach has at least four advantages. First, it clarifies that no special religious reasons need to be given for grounding religious freedom, which has the same general grounding as other basic liberties.⁸⁵ Second, it provides a 'broad and ecumenical scope for freedom of religion that extends into areas such as association, movement, politics, and business',⁸⁶ further underscoring the multifaceted character of religious freedom. Third, this approach transcends a clause-bound approach to religious freedom that sees its contours as defined by the happenstance of the wording of constitutional and international documents.⁸⁷ And fourth, it resists 'exaggerating the priority of religious freedom',⁸⁸ setting it on a more equal footing with other rights.

C. Responses to redundancy claims

The redundancy arguments have considerable force in our equalitarian environment, but in the end the arguments are flawed for a variety of rea-

⁸¹ See, e.g., German Basic Law, Grundrechte.

⁸² ICCPR, arts. 2, 18-21, 26; ECHR, arts. 9-11, 14.

⁸³ James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. Colo. L. Rev. 941, 943 (2005).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*, at 944.

⁸⁷ *Id.*

⁸⁸ *Id.*

sons. Defenders of religious freedom need to be vigilant against these arguments, which are being made with increasing frequency around the world. The redundancy arguments are virtually always made in support of a secularist agenda, and they typically do not have concern for secularism, as opposed to secularism, at heart. In what follows, I list counterarguments I have identified thus far. Additional counterarguments are welcome.

1. General anti-redundancy claims

Redundancy arguments are an unusual species of human rights argument. In most areas, redundant coverage is welcomed as a source of increased strength and legitimacy for threatened rights. The move in the opposite direction is unusual. No one seems exercised about redundant non-discrimination provisions.

In most areas, the tendency is toward generating greater specificity in human rights norms. Excessive abstraction leaves too much room for discretion. This helps to explain why most constitutions around the world are much more detailed today than similar documents were in the 18th century. Some see this as a loss of elegance, but in large part it is a result of increased experience and a desire to clearly resolve known issues.

Whatever attitude one has toward originalism in constitutional interpretation, this is surely an area where it should not be ignored. Non-originalists sometimes argue for expanded interpretation or shifts in meaning over time to adapt to new circumstances, but arguing that a provision should simply be ignored would seem particularly brazen.

Rights grow in legitimacy with age, particularly when they protect core values such as human dignity and the right to freedom of religion or belief. Rights have historical associations and help entrench clear meanings regarding key protections. Different rights, although no doubt providing some overlapping coverage, do not necessarily have the same range of coverage and gravitational influence with regard to subsequent cases. Sometimes they cover similar cases, but without lending the same degree of weight to the protection. In general, freedom of speech and association, and non-discrimination norms, capture many of the values of the secular enlightenment, but relying on these ‘younger’ rights risks leaving deeper strata of values unrecognized and unprotected.

2. Coverage shortfalls

Marshall, Tushnet, and Nickel all recognize that the freedom of religion right – the legitimacy of which none of them questions – can only be covered by other rights if some stretching of the other rights is allowed. For example,

the conduct dimension of religious freedom is covered only with some stretching of alternative doctrines such as the protections available for symbolic speech. Rights that have different centers of gravity may not allow the same flexibility for doctrinal growth that the original freedom of religion doctrine has. Redundancy is an important safeguard against such shortfalls in coverage. The following paragraphs identify several potential shortfalls that are easily imaginable if a separate religious freedom right is not maintained.

Reconceptualizing protections in terms of secular rights may result in reduced coverage. Although the headscarf cases in the European Court of Human Rights have been dealt with under the European Convention's religion provision, the freedom was for all practical purposes analyzed in terms of secular priorities, and religious concerns were given relatively little weight. Removing explicit reference to religious freedom would weaken the protections even further. Indeed, whether intended or not, treating religious freedom as redundant would send a powerful message that religious values have dropped in legal importance.

With respect to the core freedom of 'thought, conscience and belief', should secular thought be the core, and religion the penumbra, or vice versa, or should both be regarded as equally important? Religion has more premises than the secular mind has thought of. While philosophical elegance is attractive, breadth and depth of coverage are even more important. If a particular mental filter is applied, it is too easy to filter out as 'noise' the substance of what others are claiming. Alternatively, other premises often resonate across value systems, earning respect and promoting understanding. We cannot afford to arbitrarily exclude some using a criterion of sufficient secularity.

In the freedom of association area, one thinks of the '*Bahá'í Case*'⁸⁹ – one of the key German precedents in the domain of religious autonomy and the law of registration of religious associations. Under German association law applied as normally interpreted, the distinctive *Bahá'í* religious structure could not have been approved. One can easily imagine the right to freedom of religion being given a similar interpretation, inconsistent with the religious community's right to autonomy in organizing its own affairs. Earlier, in a number of communist countries, association laws required 'democratic' governance, so Catholic or other hierarchical organizations might not pass muster. Democratic association laws can have similar effect if they are not construed to take religious autonomy rights into account. More generally, freedom of expression and freedom of association values do not necessarily cover neatly

⁸⁹ *Bahá'í Case*, German Constitutional Court, 5 February 1991.

the sensitive domain of communal belief and practice typically covered by religious autonomy and self-determination doctrines.⁹⁰

Freedom of movement is important to religious communities for a variety of reasons. But freedom of movement can easily be trumped by national security or other considerations. In this regard, *Nolan and K v. Russia*⁹¹ is important in recognizing that while nations have a strong interest in policing their borders, they cannot use border prerogatives.⁹² Indeed, national security concerns alone, in the absence of demonstrated concrete risks to public health, safety and order, are not sufficient to override right to travel claims where religious freedom claims are involved.⁹³ The right to travel alone would not be so robust.

Freedom of political participation is also cited at least by Nickle as an area that may provide some overlapping protection. The difficulty in this area is that there is too much pressure in the opposite direction. Governments are as likely to restrict religions on the grounds that they are dangerous as to protect their rights to political participation. When religious groups become a source of tension, the temptation is to resolve the tensions by eliminating pluralism. The reminder in the European Court's *Serif* case, mentioned earlier,⁹⁴ that the obligation of the state is to protect religious pluralism rather than repress it, is an important non-redundant reminder of what should be done.

3. *Grounding of claims for distinctive treatment*

Leaving problems of inadequate coverage aside, religious freedom is vital because it represents a crucial constraint on the social contract. It operates in effect as a reservation clause to use the language of international treaty law. In Madisonian language, it protects the duty that believers owe to the Creator, and as such, it is 'precedent both in order of time and degree of obligation, to the claims of Civil Society'.⁹⁵ *Dignitatis Humanae* is even more explicit. 'Religious freedom ... which men demand as necessary to fulfill their duty to worship God, has to do with immunity from coercion in civil society'.⁹⁶ The

⁹⁰ See Tushnet, *supra* note 47, at 86.

⁹¹ ECtHR, App. No. 2512/04, 12 February 2009.

⁹² *Id.*, at §§ 62-65.

⁹³ *Id.*, at § 73.

⁹⁴ See text accompanying notes 19-20, *supra*.

⁹⁵ Memorial and Remonstrance, *supra* note 5, at § 1.

⁹⁶ *Dignitatis Humanae*, *supra* note 57, at § 1.

right to religious freedom ‘is known through the revealed word of God and by reason itself’.⁹⁷ Man should not be ‘restrained from acting in accordance with his conscience, especially in matters religious’, because ‘the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind’.⁹⁸ Religious freedom relates to an order of obligation that transcends normal civil arrangements, and accordingly deserves distinct protection.

Religious freedom is thus about more than protecting the values of secular enlightenment. Religious values have distinctive dignity, centrality, and importance not adequately captured by enlightenment notions of freedom of speech, association, and equality.

Second, expanding on the first point, freedom of religion is not merely about protecting particular ideas and particularized communications. It is about protecting comprehensive world-views – the frameworks within which individual ideas and norms are born, nurtured, and given meaning. It is about protecting the norm-generating, nurturing, and transmitting process. It protects the seedbeds of pluralism, generating the ideas and social arrangements that give the other rights their content and their significance.

VIII. Virtue ethics, reverence, and the distinctive role of religious freedom

A final area of erosion and loss is drawn from the domain of virtue ethics, and in particular, from what Paul Woodruff has referred to as the forgotten virtue of reverence.⁹⁹ Woodruff’s argument for renewing this forgotten virtue

⁹⁷ *Id.*, at § 2.

⁹⁸ *Id.*, at § 3.

⁹⁹ Paul Woodruff, *Reverence: Renewing a Forgotten Virtue* (Oxford: Oxford University Press, 2001). Woodruff uses the English word ‘reverence’ to translate three Greek terms with overlapping meanings: *hosion*, *eusebeia*, and *aidos*. He notes that in the *Euthyphro*, *hosion* is often (but he thinks wrongly) translated as ‘piety’, but this has a meaning closer to religiosity, which is not the kind of ethical virtue intended by the term. Correspondence from Paul Woodruff in possession of author, July 5, 2011. Woodruff considers reverence to be one of the cardinal Greek virtues. See Ursula Goodenough and Paul Woodruff, ‘Mindful Virtue, Mindful Reverence’, *Zygon: Journal of Religion and Science* 36 (2001) 585–95, 590. In his introduction to his translation of the *Bacchae*, he states, ‘Reverence itself, a cardinal virtue in the period [of Greek antiquity], is most deeply the sense of holiness that comes over an individual during initiation’. Euripides, *Bacchae* (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), xiv.

can be expanded to provide a powerful additional ground for explaining why religion in general and religious freedom in particular deserve special protection. This provides one additional ground for affirming that religious freedom is not redundant, but for more importantly, it underscores society's deep need to provide protection to freedom of religion and belief.

As an expert in classical Greek philosophy, Professor Woodruff began to recognize some time ago that the great thinkers of Greece attached a significance to reverence that we moderns seem to have forgotten. At the outset of his book, he states, 'Reverence is an ancient virtue that survives among us in half-forgotten patterns of civility, in moments of inarticulate awe, and in nostalgia for the lost ways of traditional cultures'.¹⁰⁰ Reverence is not merely about being quiet in church or, more generally, about attitudes of religious believers. In Woodruff's view, reverence is a universal human capacity or virtue. It is evident in the lives of both believers and non-believers, and sometimes, paradoxically, even in the lives of individuals who pride themselves on being irreverent. As Woodruff portrays it, '[r]everence begins in a deep understanding of human limitations; from this grows the capacity to be in awe of whatever we believe lies outside our control – God, truth, justice, nature, even death. The capacity for awe, as it grows, brings with it the capacity for respecting fellow human beings, flaws and all'.¹⁰¹ Thus, '[t]he Greeks ... saw reverence as one of the bulwarks of society ...'¹⁰² 'To forget that you are only human, to think you can act like a god – this is the opposite of reverence'.¹⁰³ 'Ancient Greeks thought that tyranny was the height of irreverence, and they gave the famous name of *hubris* to the crimes of tyrants'.¹⁰⁴ Woodruff points out that much of Greek tragedy is really about *hubris*, the core of irreverence. It is no surprise, then, that the chorus in Greek drama has so much to say about reverence.¹⁰⁵

For these reasons, Woodruff maintains that '[r]everence has more to do with politics than with religion. ... [P]ower without reverence – that is a catastrophe'.¹⁰⁶ Power that seeks to manipulate religion for mere political

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 4.

¹⁰⁴ Id.

¹⁰⁵ See, e.g., Euripides, *Bacchae* (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), ll. 370–72 (Chorus: 'O Reverence [*hosia*], queen of gods,/Reverence, who over earth/spread golden wing ...').

¹⁰⁶ Woodruff, *Reverence*, *supra* note 99, at 4.

gain, or religion that panders to power for the sake of economic or social gain, is an affront to true reverence.

Woodruff traces this theme through many settings relevant to modern society which cannot be explored in detail here. For my purposes, three connected points need to be emphasized. The first is that reverence is a virtue that is vital for any human society – particularly any democratic society – that hopes to flourish. Democracy provides rich political machinery for weaving together the diverse values of society into a harmonious community. But the output of that machinery can rise no higher than the vision, the dreams, and the aspirations of the people. That which is highest in this regard emanates from moments of reverence in individual lives. Reverence is crucial to moral striving and envisioning that is essential if democracy is to become more than a chaos of self-interest.

Second, reverence is the best reminder that human things, including states, need to be subjected to limits. The experience of authentic reverence, widely disseminated in the populace, is the best safeguard against the counterfeits of demagoguery. The ideal of the rule of law – that we should be ruled by law and not men – reflects the two sides of what we learn from reverence: that there are things that transcend the human domain, and that human institutions need limitations.

Third, reverence is particularly vital to the flourishing of modern pluralistic societies. Here reverence is vital in pointing the pathway to respect. We may not fully understand the beliefs that other people hold, but we can resonate with their sense of reverence, and when we do, we come to respect them in deep ways that make pluralistic democracy possible. A society filled with people and subcommunities showing each other such respect can take maximal advantage of the synergies of life in a pluralistic society. People with reverence for very different values can nonetheless respect each other, and find ways to work together in productive and peaceful ways. In contrast, efforts to use state power either to impose or to exploit religion can only breed resentment and patterns of distrust. Conscience coerced is conscience denied.

Religious freedom is vital, and can never be redundant, because it protects and cultivates the insights and the wellsprings of reverence. It is not just one among many human rights; it is foundational for all the others. By protecting the space in which very different individuals and communities experience reverence, freedom of belief opens the possibility for dignity to unfold and for other rights to take root and grow. It provides legal protection for the activities and institutional contexts in which the fragile virtue of reverence can flourish, and without which society is imperiled and impoverished. In so doing, it protects a dimension of human existence that

the more secular values of speech, association and equality never fully grasp. It has an ontological depth that corresponds to the magnitude of the human capacity to feel and respond to reverence – whether that reverence takes religious or secular forms, and whether it is experienced directly or sensed in the lives of others. It recognizes both the sanctity of conscience and the limits that conscience sets. In the end, freedom of belief is vital because it facilitates the ability of human beings to build social worlds open to the best that human beings can be and become.