Report of the Georgetown Symposium on
What’s So Special About Religious Freedom?
November 17, 2011
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 interreligious 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.

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

About the Religious Freedom Project
On November 17, 2011, the Religious Freedom Project conducted its first public symposium. In keeping with our objective of exploring the meaning and value of religious freedom, the RFP’s first symposium began at the beginning. Its theme was “What’s So Special About Religious Freedom?”

What follows is an edited transcript of three profoundly fascinating and in some ways groundbreaking conversations.

The first is a discussion of the historical and contemporary sources of religious freedom in the West. Top scholars debate the contributions, respectively, of Protestantism, Catholicism, Judaism, and Enlightenment secularism.

The second is a debate over the conference’s core question—what, if anything, is special about religious freedom, this time in the American context. The combatants are two of America’s most eminent jurists: Stanford Law’s Michael McConnell and Harvard Law’s Noah Feldman.

The third turns to the question of the universality of religious freedom and its compatibility with non-Western cultures.

Sometimes the sparks fly, but the results are both illuminating and entertaining. Read on!
Program

Panel 1:
The Catholic, Protestant, Jewish, and Secular Sources of Religious Freedom in the West
Panelists: Brad Gregory, Dorothy G. Griffin Associate Professor of Early Modern European History, University of Notre Dame
          David Little, Research Fellow, Berkley Center for Religion, Peace & World Affairs
          David Novak, Shiff Chair in Jewish Studies, University of Toronto
          Dorinda Outram, Clark Professor of History, University of Rochester
Moderator: Thomas Farr, Director, Religious Freedom Project, Berkley Center for Religion, Peace & World Affairs

Keynote Debate:
What’s So Special About Religious Freedom?
Panelists: Noah Feldman, Professor of Law, Harvard Law School
          Michael McConnell, Richard and Frances Mallery Professor of Law, Stanford University Law School
Moderator: Tim Shah, Associate Director, Berkley Center for Religion, Peace & World Affairs

Panel 2:
The Universality of Religious Freedom and its Compatibility with Non-Western Cultures
Panelists: Peter Danchin, Director, International and Comparative Law Program, University of Maryland School of Law
          John Finnis, Bioethics Family Professor of Law, Notre Dame University
          Mona Siddiqui, Director, Centre for the Study of Islam, University of Glasgow
Moderator: Thomas Banchoff, Director, Berkley Center for Religion, Peace & World Affairs
THOMAS FARR: The vast majority of the world’s constitutions protect religious liberty. The international covenants that bind countries, such as the International Covenant on Civil and Political Rights, protect religious liberty. So if no one opposes religious freedom, and the law protects it, what is the problem?

First, there is a huge and growing gap between rhetoric and reality that raises vital questions about the meaning and importance of religious freedom. The nonpartisan Pew Research Center has recently published two reports, in 2009 and 2011. The headline from the first report is that 70 percent of the world’s population lives in countries where religious freedom is highly restricted. That is almost four out of five people on the planet. Many are subject to severe discrimination on the basis of their religious beliefs. But millions are subject to violent religious persecution: torture, rape, kidnapping, unjust imprisonment, and unjust execution. This is happening to Christians, Muslims, Buddhists, Hindus, Jews, and others all over the world. Think of the Coptic Christians in Egypt, the Ahmadiyya in Pakistan or Indonesia, or the Tibetan Buddhists in China. Nor are minorities the only victims. The victims include reformers among the majority religious communities.

Although the problem is very different qualitatively and quantitatively, several Western nations fare poorly in the Pew reports. In addition, there are emerging conflicts between traditional understandings of religious freedom and new rights claims, such as the right to abortion and the right to same-sex marriage.

We do not claim to have all the answers to these questions and challenges. But we do claim that they are important questions. Most of us in this room presumably would endorse religious freedom. But the hard question is: What does religious freedom mean? Freedom to do what? What are the limits? Is it a private right? Is it a public right? Does it mean religious freedom in politics? Or just religious freedom in the mosque or the temple? Is religious freedom connected to other social, economic, and political goods? Is religious freedom good for women? If you are a highly religious society seeking to have stable democracy, such as Egypt and the other countries affected by the Arab Spring, do you need religious freedom? Can you counter religion-related violence with religious freedom? Or is religious freedom a destabilizing element? As I said, we do not have all the answers. But we know these are important questions.

Second, we also know that too little attention is being paid to these vital questions by presidential candidates, policy makers, scholars, or the media. One primary purpose of the Religious Freedom Project is to rekindle a long overdue conversation about religious freedom among government officials,
scholars, and opinion shapers. We may disagree about religious freedom, but we need to agree on what we are disagreeing about. Clarity is better than confusion.

Today we look at the question of what, if anything, is so special about religious freedom, as well as the closely related question of its historical roots and development. In particular, what were the most consequential historical sources for religious freedom in the West: Judaism, Protestantism, Catholicism, or secularism? Which of these sources, operating singly or with others, proved so crucial that religious freedom would not otherwise and perhaps could not otherwise have emerged in the West in the form in which it did? And does an understanding of the origins of religious freedom clarify the nature and distinctive value of religious freedom? To address this vital set of questions, we have assembled four outstanding scholars: Brad Gregory of Notre Dame; David Little, professor emeritus at Harvard Divinity School and now research fellow with the Berkley Center at Georgetown; David Novak of the University of Toronto and also a scholar with the Religious Freedom Project; and Dorinda Outram of the University of Rochester.

BRAD GREGORY: In my advance remarks I tried to indicate how all of the respective traditions represented here contributed in their own ways to the emergence of a contemporary notion of religious freedom. Here, though, I draw from my expertise as a scholar of the very dead—somebody who studies the late Middle Ages and the Reformation era. In particular, I want to emphasize how the understanding of religion underlying modern discussions of religious freedom is very different from what came before it. The differences I will emphasize are institutional, anthropological, and conceptual.

Institutionally, the elimination of the most important expression of religious freedom in the Middle Ages, the freedom of the church or the *libertas ecclesiae*, constitutes the major difference between medieval Christendom and modern conceptions of religion. In place of a jurisdictional sharing of public authority between church and state in the Middle Ages, we have the modern sovereign state, which accords only as much liberty, either to other institutions or to individuals, as it sees fit. This has the consequence of eliminating any independent, institutionally-protected space for the exercise of religion outside of the stipulations of the state. That does not look like a big problem until we start to consider totalitarian, fascist, or Communist regimes in the 20th century, or some of the situations around the world that Tom Farr mentioned. The key period in this transformation is the Reformation era. Only those forms of Protestantism that received sustained political protection could survive with any widespread influence. But Catholic leaders also increasingly controlled the church within their respective territories in the early modern period.

Anthropologically, a conception of human beings as embodied souls gives way to a functionally dualistic conception of human beings. With this fundamental shift, religion becomes understood first and foremost as a matter of interior beliefs, convictions, experiences of faith, intelligible in terms of a Madisonian liberty of conscience. Religion is less and less understood as an integral combination of beliefs and practices, including practices that are expressed publicly and that seek to inform the public sphere of politics and economics. This means that in our modern world, individuals can privately believe as they like but that the state dictates how they can publicly behave. Individuals can act and religion can inform public life only insofar as a given behavior is permitted by the state. Again, the key period of transition is the Reformation era. This is true not only directly, insofar as we see in Luther a distinction between the inner and the outer man, mapped onto his notion of the “two kingdoms,” in which the domain of faith and the domain of secular authority are entirely distinct from one another. But it is even more significantly true indirectly, insofar as the religio-political conflicts between the 1520s and the 1640s invited rulers and theorists alike to seek means of securing public stability while satisfying the willingness of at least some Christians to exchange a traditional desire for religion to inform public life for a politically protected private zone of freedom of worship and devotion.

Conceptually, in place of Christianity, understood as something that was meant to inform all of life in medieval and Reformation-era Europe, “religion,” as we understand it today, is essentially invented and in the 17th and 18th centuries as something that is separable from the rest of life. This parallels the institutional and anthropological shifts favoring functional dualism that I already noted. Religion is
one thing; politics is another. Religious traditions that rely on scriptural and other sorts of authority are one thing; the exercise of autonomous reason in modern philosophy is another. This means that the political protection of individual religious freedom is also in principle, and has turned out to be in fact, a critical avenue for the secularization of the public sphere in the Western world. So even though hundreds of millions of people in the United States consider themselves religious believers, their heterogeneous commitments simply mirror secular political divisions. This religiosity has almost no discernible impact on the dominance of post-Fordist capitalism. Again, the Reformation era is the critical watershed. From the very outset of the Reformation, those who rejected the Roman church disagreed among themselves as individuals about what scripture meant, which means that it is the freedom of individual belief that needs to be cordonned off and defined as protected space. And the religio-political conflict between Catholics and Protestants means that any kind of supra-confessional solution to concrete social and political instability is met by inventing “religion” as conceptually distinct and by restricting its scope.

In short, the conception of religion that is embedded in contemporary discussions of religious freedom does not mean what religion meant in the past. It is a contingent, historical product of the conflicts of the Reformation era, and, furthermore, it is defined and controlled by the state.

DAVID LITTLE: Let me start by defining religious freedom. A good candidate for a definition occurs in Article 18 of the International Covenant on civil and political rights: “Everyone shall have the right to freedom of thought, conscience and religion or belief of one’s choice. No one shall be subject to coercion which would impair that right. That right may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health and morals and the basic freedoms and rights of others.”

Three comments are in order. First, the language is surely a product of the West, even though it is believed to apply universally. That is important in the whole discussion of human rights, including religious freedom. Second, the phrase “belief” as in “religion or belief” is meant to apply to non-belief very explicitly. Third, the idea of “conscience,” whether religious or otherwise, is accorded special priority in the human rights literature.

The indispensable sources for this understanding of religious freedom are a combination of all four traditions represented here. However, I believe that the Protestant tradition makes a particularly important contribution, though by no means an exclusively important one. Debates over the meaning of freedom of conscience and over religious freedom were central to the Protestant Reformation, both the magisterial Reformation of Luther and Calvin and the so-called left wing of the Reformation. These debates profoundly influenced the movements in 17th-century Europe and colonial America toward protecting conscience against coercion. John Calvin, for example, was deeply ambivalent over how free conscience should be. As an “internal forum,” as he called it, it was naturally recognized to be “higher than all human judgments” and consequently deserved special protection on the part of the “external forum” or the civil authority. He also declared that the state has responsibility for enforcing only moral and civil rights and not religious practices or beliefs; here his claim rested upon a commitment to natural law or natural rights, which became enormously important as a commitment to religious freedom developed after Calvin’s time. At other times, Calvin blatantly contradicted this commitment to a natural right of free conscience—particularly after 1553 when he participated in the public execution of Michael Servetus. It is possible that the Radical Reformation helped to influence Calvin’s more liberal teachings. The Radical Reformers never deviated from their commitment to equal freedom for all consciences, despite the high price many of them paid for that conviction.

Other radical Christians such as Sebastian Castellio, who was a colleague of John Calvin but later became a severe critic of the public execution of Michael Servetus, also had an important impact on subsequent Protestant views of freedom of conscience. In keeping with the Reformers’ loyalty to scripture, they elaborated on the numerous New Testament references to conscience, especially Paul’s treatment in the First Epistle to the Corinthians and his ringing claim, “Why should my freedom be determined by someone else’s

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*Thomas Farr*
conscience?” (10:29). They were also influenced by reflections on the freedom of conscience among the church fathers and scholastic theologians, who kept Paul’s challenge alive, though, I would say, in restricted forms. The Reformation legacy was particularly important in 17th-century Holland, England and colonial America. In these settings the modern idea of a legal right to freedom of conscience was first codified. The constitutional proposals of the Levelers in England, though never adopted, reflected that idea. It was the Rhode Island Charter of 1663, inspired by the very unconventional Calvinist Roger Williams, that, in my opinion, laid the foundations for religious freedom as it came to be expressed in the American experience in the views of Jefferson and Madison and eventually in modern human rights language.

DAVID NOVAK: At the end of the 18th century, the test case for religious liberty, as we know it now, was the Jewish people. The Jews were an excluded minority. The Jews were not citizens of the state. They had, in Christian Europe, special, contractual relationships with Christian monarchs, which often meant that they lived at the whim of these monarchs—the most famous case being Spain in 1492 and the expulsion of the Jews and Muslims. Therefore, Jews were most anxious to be citizens of the new emerging nation-states, which even though they often had an official church endorsement, nonetheless seemed far more secular than the regimes of the receding Middle Ages, which had created the ghetto. So the argument of Jews was basically that the practice of religion is a private right. And there should be no penalties whatsoever for any religion, and by implication, non-religion. Now that in many ways is the good news. The Jews were the test case. In fact, the leading Jewish philosopher of the 18th century, Moses Mendelssohn argued vociferously for the civil emancipation of the Jews. But in doing so he asked Jews a demanding question: How can the Jews become equal citizens of the state when they fail to recognize the equality of people who practice other religions? After all, they practiced communal discipline, where the community basically ostracized those members who were not living according to its accepted practices. (The most famous example of this is the formal expulsion of the philosopher Baruch Spinoza from his Jewish synagogue in Amsterdam in the 17th century.) So Mendelssohn argued to the Jews that they must give up this communal right of ostracism—what I would call a public right—as their price of admission to the new secular states. And most of the histories of modern Judaism emphasize this *quid pro quo*.

What is not emphasized is that there was a rear guard reaction, led primarily by conservative members of the rabbinate, and with good reason. They believed that the price of admission and civil emancipation, in which religion becomes a private right, was an unacceptable loss of their communal autonomy and power. There was a famous statement of a member of the French National Assembly: “To the Jews as a community, nothing; to the Jews as individuals, everything.” As a matter of secular, civil obligation, religion becomes a private right and a private matter. Though there was opposition from the conservative rabbinate, Jews in Western Europe overwhelmingly absorbed this notion that religion is a matter of private right. However, an inner contradiction arises: to be a practicing Jew means to be part of a community. This morning, even when I said my morning prayers outside of a congregation—you are supposed to pray with a congregation but I could not, because I was in the airport—every prayer I said (with the exception of one) was in the first person plural: “We, we, we, we.” Giving up that communal right to be a Jew, therefore, is something that is in contradiction to virtually all of traditional Judaism.

So what happened in the United States is that the greatest advocate of religion as a private right, which really became freedom from religion, rather than freedom for religion, was perhaps the late Leo Pfeffer. Pfeffer was General Counsel for the American Jewish Congress, who argued some of the most famous cases before the United States Supreme Court. He basically argued for this notion of a private right or a strict wall of separation. But what we are seeing now, however, is a small number of Jewish thinkers, especially in the U.S., who are more secure in their traditional Jewish identity and practice, and who are convinced that this ultra-individualism has gone too far. They are convinced, too, that the whole notion of religious liberty in a democratic society has to be rethought in a way that is better for the society and more consistent with the overall thrust of the Jewish tradition.

DORINDA OUTRAM: I am going to describe late 18th-century America and how we got to the First Amendment to the Constitution. In his 1794 *Age of Reason* Thomas Paine wrote, “My mind is my own church.” A lot of people must have been fascinated by this idea, even if not entirely agreeing with it, because the *Age of Reason* went into 17 editions
between 1794 and 1796. I am going to argue today that religious freedom in America was the child not of any church but of the state and of the Enlightenment—an Enlightenment that privileged the autonomous human mind, which could be its own church. As Jefferson wrote to his nephew in 1787, “Your own reason is the only oracle given to you by heaven.” Not many years later in 1791, the First Amendment to the Constitution ratified religious freedom. Its opening clause reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” But the way there was not easy.

The founders themselves were not united in their understanding of religious freedom. Furthermore, the First Amendment applied only to the federal government, not to the states. Religious conservatives like the Episcopalian Patrick Henry battled with Deists, who, like Paine, scorned institutional Christianity and denied most of its key doctrines, such as the divinity of Christ. Henry worried in a 1796 letter to his daughter that “the rising greatness of our country...is greatly tarnished by the general prevalence of deism, which, with me, is but another name for vice and depravity.” The separation of church and state worried many who thought it would harm religion, give rise to widespread lack of virtue, and call down God’s judgment on the New Republic. Benjamin Franklin, on the other hand, admitted he found the divinity of Christ hard to accept. John Adams, who once declared that the Christian religion would last as long as the world, had also exclaimed defensively, “Ask me not whether I am a Catholic or Protestant, Calvinist or Arminian.” It is as if the religious controversy of the previous 150 years—from the first Protestant to the settlers on Plymouth Rock, right up to the Great Awakening of the 1730s and 1740s with its attacks on established religious authorities—had produced distaste among many of the founders for theology and institutionalized religion. Yet the new country they were creating, while full of readers of Tom Paine, was also still full of competing religious groups: Episcopalians, Baptists, Congregationalists, Moravians, Lutherans, Jews, Catholics, Mennonites, Methodists, and Quakers, to name only a few. And hardly anyone during the Founding era doubted that religion and virtue were important to the life of the new American republic. The founders thus struggled to find a balance between ensuring religious freedom and honoring the important place of religion in American society.

But the balance was increasingly towards religious freedom understood as a natural right. Even before 1791, Jefferson and Madison, with the support of Baptists fearful of persecution by established churches, successfully introduced “an Act for establishing Religious Freedom” in Virginia, foreshadowing the First Amendment. Washington endorsed freedom of religion for minorities in well-known letters to Baptists, Catholics, and Jews, saying that the new government of the

From left: David Little, David Novak
United States “gives to bigotry no sanction, to persecution no assistance.” By 1802, Thomas Jefferson had called the First Amendment a “wall of separation” between church and state in the famous letter to the Baptists of Danbury, Connecticut. In fact, religious freedom became the hallmark of what was new about the U.S. As James Madison wrote in his “Memorial and Remonstrance” of 1785, “Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease.” What happened was that religious minorities, who were sometimes accorded privileges in Europe as a matter of state indulgence, were accorded religious liberty as a matter of right in the United States. Jefferson described religious freedom as a universal natural right in his preamble to the 1786 Virginia “Act for Establishing Religious Freedom,” implying that religious freedom went beyond specific prerogatives such as not having to pay dues to an established church. Religious freedom was an inherent human right.

What is clear from this account is that however much Baptists might aid Jefferson’s “Act for Establishing Religious Freedom,” it was not from the churches that the First Amendment sprang or was maintained. Indeed, the First Amendment was contrary to the interests of the established churches. Rather, it sprang from the state and from the Enlightenment idea of the autonomous individual possessed inherently of rights and partaking in historical progress. I will leave you with a question. In the America of the founders there is still little or no tolerance for atheism. All manner of opinions on religious freedom, Deist or Christian alike, assume that individuals would have some religion or another. For those without religion, there is no toleration. In the absence of such toleration, could revolutionary America really qualify as a state with religious freedom?

THOMAS FARR: Common among all four presentations is that the modern understanding of religious freedom that has emerged from Catholic, Protestant, Jewish, and secular sources tends toward individualism and an emphasis on religious freedom as a private right. I would like to explore this beginning with you, Brad. You suggest that the medieval Catholic Church generated a more corporate and institutional understanding of religious freedom by laying the basis for a jurisdictional limitation on government through a notion of libertas ecclesiae, as in (though you did not mention it) the Gelasian Doctrine of the two swords. But if the Protestant Reformation swept away the associational dimensions of religious freedom, how do you account for the fact that today’s Catholic Church formally emphasizes the corporate and public as well as individual and private nature of religious freedom, as it does in Dignitatis Humanae of 1965?

BRAD GREGORY: First, I would not say that the Protestant Reformation entirely did away with the corporate attempt to enable Christian truth to inform the wider society. With respect to your main question, I may be a bit of a cultural pessimist in thinking that Dignitatis Humanae and the other documents of Vatican II have little impact in the contemporary world, even among Catholics. And the reason is the wider cultural and social context in which modern Westerners live. It is extremely difficult to imagine the widespread transformative impact of these documents in a world that is pervaded by an acquisitive ethos of wanting to live as affluent as possible. When Professor Novak was talking about the communal aspects of religious practice in Judaism, I was struck that there are many similarities with Catholicism. But since the Second World War, with suburbanization and the construction of communities around the automobile, Catholicism to a large extent has been congregationalized in terms of parish preference. And that is a radically different experience of what it is to live as a Catholic compared to the ethnic parish enclaves that characterized immigrant communities in the later 19th and through the first several decades of the 20th century.

DAVID LITTLE: I am not convinced that the Protestant contribution is as individualistic or atomistic as seems to be implied. Not only were the magisterial reformers, Calvin and Luther, interested in restructuring the institution of the church as critical to the expression of religious belief, but the Anabaptists were also emphatic about working out their own forms of church life and religious practice as an expression...
of their beliefs. And my understanding of Roger Williams’ contribution is that, in establishing religious liberty in Rhode Island, he welcomed groups as well as individuals and entitled these groups to express their forms of belief in religious practice. There is still a synagogue in Newport, Rhode Island where Jews were entitled to practice their religion. Of course, there were limits in terms of public interest and public safety, and there is a bit of a mixed record in respect to Williams’ contribution. But protecting corporate expression as fundamental to religious belief is an important part of the approach to liberty of conscience in this liberal Calvinist and Anabaptist tradition that I have been describing.

THOMAS FARR: David Novak, you said you are seeing some American Jewish thinkers beginning to rebel against the notion of a separationist faith. How do you account for this? George Washington understood religion as crucial to public welfare and to public virtue, though he always took care to describe religion’s public contribution in a way that was not specifically Christian or denominational. In other words, is there something in the American tradition that is not entirely privatizing with respect to religion?

DAVID NOVAK: That is undoubtedly the case. The American Jewish establishment’s strict separationism is very much a 20th-century phenomenon. In the 19th century, there was a more pluralistic notion. The Jews had their public presence, as Christians did. If you have yours, then we have ours. This came to the fore in 1962, when New York proposed a non-sectarian prayer for public schools, which referred only to a deity. The American Jewish establishment spoke out against this with the greatest possible vehemence. They claimed that this was a slippery slope and before long everyone would be forced to attend church services. Meanwhile, two of the leaders of conservative orthodoxy at the time—Rabbi Moshe Feinstein, the leading Jewish legal authority in America, and the Lubavitcher Rebbe, Rabbi Menachem Mendel Schneerson—argued on the contrary that Jewish tradition teaches that everyone should pray to God and we should therefore encourage gentiles to fulfill their obligations. (Ironically, both Rabbis were leaders of communities who sent only a tiny fraction of their children to public schools.)

Furthermore, the followers of Rabbi Schneerson also broke ranks with the American Jewish community on the issue of erecting Chanukah menorahs on public space. They supported this public practice, while the American Jewish establishment was arguing against having a crèche or any religious display in front of city hall. And Rabbi Schneerson’s argument was that this is the American way. We are not for a naked public square, but for a truly pluralistic public square.

We come here as a community, and we practice our communal practices in public. So these people who used to look un-American with beards and big black hats consider themselves much more part of a pre-separationist American ethos. And this has influenced younger people who are both better educated Jewishly and who are already third, fourth, and fifth generation Americans and therefore more comfortable in the United States, whereas the strict separationists were basically the children of immigrants. So most of those still advocating strict separation are way over 50, and many of those arguing in a self-confident way that the Jeffersonian model is not the only model that one can look to in the history of the United States are much younger.

THOMAS FARR: Whether other minority religious groups in the United States, such as American Muslims, will divide along these lines either now or in the future is a fascinating question.

DAVID NOVAK: A previous conservative government in Ontario, where I live, was defeated in a previous election, and a big issue was public funding for religious schools. For historical reasons, Catholic schools are publicly funded. Before this election, people were arguing that public funding should be for everybody or that it should be for nobody. As the debate unfolded, there was a possibility of public funding for Muslim schools. At the same time, some members of the Muslim community were arguing for Sharia law for domestic relations. On these issues, Jews and Muslims would have been natural allies. But the political situation in the world, particularly vis-à-vis Israel and the Palestinian question, made that a political impossibility. That is unfortunate because Muslims could learn a great deal from lessons that Jews in North America have learned about claiming what Charles Taylor calls “group rights.”

THOMAS FARR: Dorinda, one final question. David Little talked about the notion of freedom of conscience. Clearly today, when we talk about conscience, we mean something broader than religious conscience. Those of us who remember the Cold War talked about “prisoners of conscience,” some of whom were in the Gulag for religious reasons but many simply for their opposition to the Soviet regime. But when Luther says “I cannot in conscience do what I am being asked to do” at the Diet of Worms, he is making a religious claim. So I have a two-part question. First: Was this broadening the cause of the new notion of autonomy that you see as an achievement of the secular Enlightenment? And second: Can you ground religious freedom in non-belief? Certainly religious freedom does not exist where non-belief is unprotected. But can non-belief supply a solid and defensible foundation for religious freedom?
DAVID LITTLE: If you go back to Roger Williams, he mentions that atheists and non-religious people are covered by the 1663 charter. So in the mid-17th century, the idea that non-belief should be protected is already present. Second, Williams’ move is precisely to say that the foundations of government are not religious or Christian but natural, humane and civil. So he is very explicit about advocating a premise for citizenship that is non-religious. Could he have made that argument if he did not have a belief in God or a theistic premise? He is making the argument that he does not need a belief in God. Much as Grotius argued in regard to the foundations of international law, the idea is that these principles would obtain whether there is a God or not.

DAVID NOVAK: But Grotius and Aquinas before him (who argued in a similar vein) were not arguing that you could even have natural law without a belief in God. They argued that one did not need a specific revelation. But I think that even Grotius would argue that if you press the matter, a divine foundation provides a better grounding for natural rights, if not immediately then ultimately.

DORINDA OUTRAM: When Luther said at the Diet of Worms that he could not in conscience obey the emperor, he was not making a non-political statement, because the emperor was a religious authority as much as a secular one. His power was legitimated by the Catholic church. So Luther’s was a religious statement, of course, but also one with immediate political consequences. You cannot separate conscience from politics because of the way in which most rulers, up to the 18th century, were supported in their rule by religious institutions. I am not sure when this stops, but I think it starts to stop in the middle of the 18th century when rulers start to grant religious toleration to minorities who are not of their own faith. This starts to happen in Prussia in the 1740s and in Austria in the 1760s. It starts to happen in England when you get sects of minorities such as the Moravians. And it starts to happen here with Thomas Jefferson’s Act for Establishing Religious Freedom in Virginia in 1786. As far as grounding religious freedom on the right not to believe, it is very difficult to grant anything on a negative. A theistic premise still means that you believe in something that created the world, and is interested in the world. If you do not believe that, then that is a belief, but not a religious belief. So can you have a sustainable system of religious freedom that is not grounded in the sense of a theistic source of rights? I think you could argue it both ways — that you have to have both “X” and “not X” in the system in order to support it. But if you reject the theistic grounding, you could have a situation where nonbelievers can be persecuted within the law, and this seems to be an absurd outcome.

BRAD GREGORY: If the law is to protect everyone, regardless of the content of his or her beliefs, but the presuppositions acknowledge the longstanding tradition of human beings created in the image of God, from Judaism and Christianity, and this is transmuted into the notion of natural rights and of “Nature’s God” as Jefferson called it, there would be protection for people who may not have the “right” theoretical underpinnings. But the basis of this approach remains theistic.

THOMAS FARR: There is an immunity from coercion in matters of religion that would extend to non-believers as well as believers.

DAVID LITTLE: First, if you go back to Roger Williams, he mentions that atheists and non-religious people are covered by the 1663 charter. So in the mid-17th century, the idea that non-belief should be protected is already present. Second, Williams’ move is precisely to say that the foundations of government are not religious or Christian but natural, humane and civil. So he is very explicit about advocating a premise for citizenship that is non-religious. Could he have made that argument if he did not have a belief in God or a theistic premise? He is making the argument that he does not need a belief in God. Much as Grotius argued in regard to the foundations of international law, the idea is that these principles would obtain whether there is a God or not.

DORINDA OUTRAM: It is true that many toleration acts in the 17th and 18th centuries, such as the English Toleration Act of 1689, excluded atheists. In large part this is because it was thought that atheists could not take oaths.

DAVID LITTLE: But interestingly, Roger Williams did not believe in oath-taking. He felt that atheists should not be required to take oaths because it forced them to be hypocritical.

THOMAS FARR: Let us now go to the audience.
terms the state is a completely oppressive reality. Rather, the freedoms that are granted are enacted entirely on the sufferance and with the agency of the sovereign state. So in the 19th century, when Mormons say that it is a part of their faith to practice plural marriage, the U.S. government at a certain point steps in and says that this is beyond the bounds of what is permissible. Other examples can readily be found. So the point is not that the state is oppressively controlling of all aspects of religious expression, but that whatever the laws are, they are the laws of the sovereign state, and there are no countervailing institutions in a jurisdictional sense as there were in the Middle Ages.

CHRISTY GREEN (Center for the Study of Law and Religion, Emory University): I have a question about religious choice and how it relates to religious freedom. Some see the profusion of choice in religion as a key characteristic of modernity. The Pew Forum had a report on faith and flux in America, and John Micklethwait and Adrian Wooldridge, the editors of The Economist and authors of God is Back, argue that American-style religious choice is being replicated around the world. But in the Muslim world, individual religious choice can lead to charges of apostasy. And Charles Taylor seems to refer lamentingly to the fact that in modernity, choosing a religion becomes more and more like choosing a lifestyle. So does the possibility of choosing religion strengthen religious freedom? Or does it detract from more organic forms of religious community based on ethnicity, nationality, and tradition?

DAVID LITTLE: I distinguish religious choice into two levels. Belief in God is regularly perceived by the religious believer as if it is not a choice. It is something that is imposed on one. There is freedom because in order to accept that belief, one must consent to it. But it is not regarded as some-thing one picks out as from a smorgasbord. The second level, though, is the one relevant to religious freedom: choice with respect to governmental or other forms of human authority. That is where choice is crucial and that is, I think, the reference in Article 18 to religious freedom and freedom of choice. As regards the authoritative instructions of earthly leaders, one has freedom of choice. One may pick as one will. But it is true that this does not capture what some religious people mean when they say, “This is not my choice but God’s.”

DAVID NOVAK: Consider that last phrase: “Not my choice, but God’s.” The whole topic of choice in the Judeo/Christian tradition is crucial. In fact, one thing that distinguishes Judaism and Christianity from Islam, as I understand it, is the notion of election. Your “choice” is your choice to either respond positively or negatively to God’s prior choice to choose your community. And therefore it is subsequent. The notion that choice lies primarily with the individual, or even with human beings, is the great inversion I mentioned before. Before it was clear that God elected his people, now it becomes common to think that people elect God. So the Covenant, which is God’s election of the community, becomes a contract basically initiated by human beings, who elect God as their sovereign and by implication can un-elect God as their sovereign. So the emphasis on religion as a matter of individual choice leaves out the whole understanding that in classical Judaism and Christianity it is God’s election first, and the individual has freedom of choice only in response to God’s prior choice. And in this traditional understanding, freedom is not autonomy, which basically means to pause before the options and then choose one. Today, therefore, we tend to have a truncated view of individual preference. The problem with such a view is that most of the things we leave to individual preference are considered too trivial for society or the state to be bothered with.

BRAD GREGORY: And we see both of those in the sociological reality of religious practice and belief in the United States today. We can find examples of what David Little was talking about a moment ago. There are people who absolutely believe that this is my response to what God has called me to. But there are other people who reduce religion to an individual preference. I did not like the music here so I will try the music there.

THOMAS FARR: Right. And God may put better music in some churches than he does in others.

DAVID LITTLE: If he works a miracle. If he works a miracle....

ROGER TRIGG (Oxford University): On the theme of whether we need a theistic basis for religious freedom, I no-
noticed that the panel tended to distinguish “religion” from the “Enlightenment,” and that goes with a hard distinction between “faith” and “reason.” But the roots of the early Enlightenment, and the early English Enlightenment in particular, were firmly theological, which the Cambridge Platonists emphasized with their slogan that “reason is the candle of the Lord.” That is important because they influenced John Locke, who uses the same phrase, and who of course, was a major influence on Jefferson. And I noticed, too, Professor Outram’s distinction between the Enlightenment and groups such as Methodists. But John Wesley was greatly influenced by John Locke, and he himself uses the phrase “reason is the candle of the Lord,” and in some ways he could be regarded as an Enlightenment thinker who believes that reason, tradition, and scripture are all important. Religious experience is important for Wesley, of course, but he did not think it overrules reason, tradition, and scripture. And with the strong presence of reason in religion, there is the notion that God had given us free will to exercise our reason.

DORINDA OUTRAM: That is a very interesting viewpoint, but I think rationalism was something Wesley had to argue for. He is the head of an “inner light” religion in which people come to God not because they choose him rationally but because he chooses them. Often there is a prototypical process of getting to the point of religious faith, and then an experience of mental and physical disturbance, which is ended by a process of revelation of God and a sense of being chosen by God. The challenge for the inner light churches, including the Quakers and the Moravians, was to ensure that these experiences were genuine and long-lasting. Each church therefore had to have a kind of religious quiz to assess the authenticity of these experiences, and this is one way rationalist elements were introduced.

DAVID LITTLE: One comment on Locke is that he is a good example of the consequences of presupposing a theistic grounding for a natural right to religious freedom. He excludes atheists because they cannot be accepted as people who could ground their moralities since they have rejected the foundations of morality. And he had problems with Catholics and Muslims, though less from theological concerns than from concerns that their political loyalty was unreliable. But Locke’s view is only one option on these matters.

“Hardly anyone during the Founding era doubted that religion and virtue were important to the life of the new American republic. The founders thus struggled to find a balance between ensuring religious freedom and honoring the important place of religion in American society.”

Dorinda Outram

GREGORY TREE: (Jubilee Campaign USA). Is secularism now being perceived as a threat to pluralism itself? And how would you distinguish between a secularism that supports religious freedom and pluralism, and a secularism that is a threat to religious freedom and to pluralism?

THOMAS FARR: There are some anti-religious aspects of modern American and European secularism, and threats to religious liberty. Dorinda, would you agree with that or would you say that this is just part of the pluralistic project?

DORINDA OUTRAM: Yes, I would.

THOMAS FARR: The latter.

DORINDA OUTRAM: The latter.

BRAD GREGORY: A lot of religious believers in France would beg to differ. You cannot wear a hijab or a prominent cross publicly. By American standards, that is a blatant infringement on free exercise. The French tradition of laïcité is very much more state interventionist than for example free exercise as understood in the United States.

THOMAS FARR: Religious freedom in France and in the United States are very different things, are they not? There is no such thing as a “Western concept of religious freedom.” There are at least two concepts.

DAVID NOVAK: Several years ago I gave a lecture before a largely Jewish audience in Paris. I was sensing tremendous opposition to what I was saying and I attributed it initially to my awful French pronunciation. But the fact was that I was uttering heresy. Because I was presenting this notion of a kind of a strong pluralistic presence. And at the end, the chairman, who happens to be a personal friend of mine, in the most condescending way possible attributed this to my rather narrow North American perspective.

THOMAS FARR: All right. Let us end with that distinction between the French and American models of religious freedom.
TIMOTHY SHAH: “What is so special about religious freedom?” Religious freedom has often been referred to as the “first freedom” in America’s constitutional order, not just because of the placement of the religion clauses as the first words of the First Amendment to the U.S. Constitution, but also because the principles underlying religious freedom have been taken to be a cornerstone of human rights. Yet, others have argued that liberalism requires that religious freedom not be treated as special or unique in the pantheon of human rights. Some have argued that religious freedom is part of a more general and secular liberty of conscience. We are delighted to have two of America’s foremost legal minds, Michael McConnell and Noah Feldman, to take us into the heart of this debate and explore these questions: Is there anything special about religious freedom? Do historical investigations and theoretical reflections suggest that religious freedom is special and distinctive as the “first freedom?” Or is it better understood in terms of a broader freedom of conscience of belief?

MICHAEL MCCONNELL: In the debates in the first Congress over our First Amendment, there were proposals that would have protected liberty of conscience, or free exercise of religion, or sometimes both. James Madison’s original draft would have separately protected free exercise of religion and liberty of conscience. That both versions were considered tells us that they were not regarded as synonymous. Ultimately, they adopted the language of free exercise of religion, and not the somewhat different language of liberty of conscience. That both versions were considered tells us that they were not regarded as synonymous. Ultimately, they adopted the language of free exercise of religion, and not the somewhat different language of liberty of conscience. Now some regard that as a mistake, perhaps because our circumstances are not those of the founders, or perhaps because theirs was a philosophically flawed choice from the beginning.

Noah Feldman has written, “Today the liberal state cannot embrace a theory of liberty that privileges religion over other comprehensive and world-making doctrines that are sincerely held by believers.” Although we certainly can and do extend protection for all kinds of non-religious exercises of conscience, it is not clear to me what it is about these “comprehensive and world-making doctrines” that would require a free exercise of conscience provision or a prohibition on state establishment of such doctrines. What is it about religion that made the Framers think that they should be treating it as a different phenomenon? I think the key point was in James Madison’s Memorial and Remonstrance Against Religious Assessments of 1785 where he says that it is an “arrogant pretension” to consider “the civil magistrate a competent judge of religious truth.” It is outside of the government’s jurisdiction to evaluate truth claims with respect to religion.

Let us try to apply Madison’s line, “the civil magistrate is not a competent judge of…” to environmentalism, as an example of a comprehensive and world-making doctrine. If the civil magistrate were not a competent judge of the truth of environmental claims, I do not think we could have an Environmental Protection Agency, debates in Congress about environmental legislation, or even have public schools encouraging an environmental ethic for our children. It seems to me inconceivable, at least in this particular example, that a world-changing, sincerely held view could be treated as religion is treated in the First Amendment. It is not that our First Amendment privileges religion exactly. Rather, our Constitution fences off religion as none of the government’s business. It is very hard to apply that to other doctrines and ideologies.
It may be even more important today to have this distinction than it was at the time of the framing. The coming to our shores of people of religions, many of which have very strong demands that are contrary to standard American practices, makes free exercise of religion even more important than it was.

I believe that even atheists and agnostics believe that religion is special because even they recognize that it is not appropriate for the state to advance ideas about religious truth, even though it may advance various other kinds of controversial truths and propositions that we disagree about. So it seems to me that it may be even more important today to have this distinction.

NOAH FELDMAN: I did not think I would start by trying to outflank Professor McConnell to the right. But I will start by doing that. I believe, and I thought that he believed, that if a professor at a public university espoused religious beliefs that he held to be true, that that would be perfectly constitutionally permissible. Not only if he began by saying “these are my personal beliefs.” But even if he said, “I believe these things to be true.” And let us say I am teaching a course in philosophy: “I intend to teach true things in this class.”

On the historical question, I am in total agreement with Professor McConnell: There is no doubt that James Madison, taking him as the most important representative figure in framing the religion clauses, thought that religion was special. But I do not think that we can order our constitutional affairs today in just the way that James Madison wanted us to. I am not going to be speaking in the terms of what the original meaning of the Constitution was, but rather in terms of what ought to be the most attractive justification for what our constitutional institutions should do today.

It is not some obscure or new or ill-defined set of views that I have in mind when I say that comprehensive world views, in principle, ought to be entitled to the same protection as religiously held comprehensive world views. It is a set of views that could be identified, broadly speaking, as philosophy. I mean “philosophy” not in any narrow sense, but in the way that the Athenians thought of it—that is to say, a way of seeing and encountering the world, and indeed, an intellectual tradition, which has made tremendous contributions to religious thought over the years, and has, of course, itself been influenced by religious thought.

Just as the state cannot suppress a religious belief or the expression or practice of a religious belief, it cannot suppress philosophical belief or the expression of philosophical belief. If that were all that the Establishment Clause or the Free Exercise Clause required, my guess is that Professor McConnell would agree with me. In fact, as they have evolved, the Constitution’s free speech guarantees would provide a lot of the same protections today. In Professor McConnell’s view, however, the Free Exercise Clause ought to do more than that. Professor McConnell is one of the most important critics of the Supreme Court’s version of the Free Exercise Clause, which, in its present form, does not provide special protection for religiously motivated beliefs and practices when they are incidentally burdened by a neutral and generally applicable law. He has argued, as a matter of history and constitutional theory, that this is wrong, instead holding that the Constitution should be read to say that, if religious practice is incidentally burdened by a general law, one ought to be entitled to a special exemption from that law, except in the case of compelling state interest.

Now should this sort of protection be extended to philosophical beliefs, as it is to religious belief? If one buys Professor McConnell’s view, the answer is yes. And I do not think that should be especially troubling to us. A person who, as a matter of conscience, deeply wishes to engage in a ritual practice associated with his environmental beliefs, wants to commune with nature, should surely be subject to the same protections, whatever they may be, as a person who wants to go into the field and pray to his god. In my view there are no good principled reasons for distinguishing between the two.

To Professor McConnell’s argument regarding the Establishment Clause, I would offer Justice Jackson’s view from West Virginia State Board of Education v. Barnette, a case that overturned an earlier Supreme Court decision denying to Jehovah’s Witnesses the right to exempt themselves from saluting the flag. Jackson wrote, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” I think that captures pretty closely what an
Establishment Clause extended to non-religious beliefs ought to look like. It is not that government officials cannot say what they believe or think to be true; it is rather that they cannot prescribe what shall be orthodox.

Even though the framers saw religion as distinctive and unique, this was grounded in a fundamentally theistic view of the world, which is not, in my view, ultimately consistent with most of the commitments that we take to be those of the liberal state. Religion should not get any less protection than the framers gave it, but those same protections should similarly be given to sincerely and conscientiously-held philosophical beliefs.

MICHAEL MCCONNELL: It is important to note that the American tradition started out distinguishing between religion and other worldviews, and it has continued that way. Those who say that a liberal state cannot draw this distinction are either proposing quite a significant change in our practices, or perhaps they are suggesting that we do not have a liberal state at all because we have maintained that distinction.

To Noah's example of philosophy as a world-changing, sincerely held belief that should be held on a par with religion, I cannot think of a single instance in which anyone has ever brought a claim in any court of the United States saying, “My belief system is philosophy and somehow the state is either interfering with my free exercise of philosophy, or is establishing philosophy.” One of the principal differences between philosophy and religion is that philosophy is based upon inferences from the observable facts about the universe and human nature, and is always subject to skepticism and review on the basis of additional knowledge. When Madison said that the civil magistrate is not a competent judge of religious truth, I think what he means is that religious truth is not based upon the same kind of inference from observable facts, but is rather based upon something that is not susceptible to the scientific, or even the philosophical method. Now I do think that philosophy deserves and receives a great deal of protection in the American constitutional system. We protect belief and we protect speech about belief almost absolutely.

But then we come to West Virginia Board of Education v. Barnett and Justice Jackson's absolutely beautiful statement about the government not prescribing what is orthodox in all these matters, and I always ask my students, “Is it true? Does this actually describe our practice in the United States?” Now it all depends upon what you mean by “prescribe as orthodox.” If by that we mean that we do not throw people in jail or punish them for deviating from the truth, then it is true. That is the Free Speech Clause basically. But one of the big differences between religion and everything else in our practice concerns a wide variety of government practices that are educative — that is, not where the government punishes the unbeliever, but where the government uses its control over culturally significant institutions in order to propagate and hold up a particular set of beliefs. We do “prescribe as orthodox” in the sense of using culturally important governmental institutions such as public schools to inculcate a variety of philosophical beliefs such as patriotism, environmental ethics, racial and gender equality norms, etc. We do not do this with respect to religion, and it would be quite a change if we abandoned this distinction.

NOAH FELDMAN: By what justification could the state treat religion differently from philosophically committed views, other than the historically contingent fact of religion's presence in the Constitution? One argument may be that the state should treat religion differently from other things when it comes to both granting religion special rights and also subjecting religion to certain disabilities on the basis that religion is in some sense true. This would assume that there is one thing that religion teaches, but many different religions teach many different things, some of which substantively contradict each other. If we are not meant to choose which among those things is true, it seems implausible that our basis for protecting religion is its truth.

If, on the other hand, we did believe that religion had a specific content and if we could identify it as true, then I do not think that the liberal state should commit itself to protecting that thing on the grounds of its truth because that commits the liberal state to a theistic belief. In turn, that would, in my view, violate the obligation that the liberal state has to make its beliefs and values available to all of its citizens, including those citizens who do not possess any religious belief.

An alternative argument is to say that the state should provide special protection to religion and also deny it certain privileges because it is better for the state to do things that way. This is
Erastianism, classically the view that the state should aid religion because it will serve the state’s interest. Similarly, one could say that religion should be specially protected because it uniquely provides special benefits to the human person. This too is a form of Erastianism because it imagines that the state should promote these special benefits. The state should promote human fulfillment, and religion is especially good for human fulfillment. In that sense religion serves the interest of the state. My view is that this is implausible as an empirical matter, at least when compared to other comprehensive views. We do not have any real evidence that religious belief makes us better off as human beings than philosophical belief does. Other than theism and Erastianism, why should the state specially support religion or grant it certain exemptions?

MICHAEL MCCONNELL: I at least partly agree with Noah that the basis cannot be that religion is true; that would be a self-contradiction. Of course it is also important that the state not presume that religion is false. We want the state to be agnostic, which is to say either the state cannot tell whether religion is true or false or that it is none of the state’s business to try. I would think even an atheist citizen looking around can see that some of his fellow citizens believe religion to be true and believe it to be the most important thing, a source of authority, which is superior even to the state. That is what makes religion both valuable and dangerous. That is why Hobbes said that the sovereign must have control over what is being taught in the name of religion—that is, precisely because it represents the highest form of authority. If it is possible that religion is true, then there are citizens who have demands upon them that we may not have. Just as a childless person might well recognize the importance of legal protections for parents, I think a religion-less person is perfectly capable of understanding the importance of a protection for religious people. The twin authorities of religion and the state present believers with a kind of conscientious conflict that is not seen elsewhere.

NOAH FELDMAN: When you spoke of the protections coming from the Free Speech Clause, I could not agree with you more. The Free Speech Clause did not afford these particular kinds of protections in the 18th century. It came to do so in part because of our growing recognition that people can feel deeply committed to certain things that matter to them tremendously, even if those things are not religious. That is a direction in which our thought and our law have moved, and I think it is a reasonable and defensible direction at that. I believe that to some extent law must gradually struggle against given principles and rules, like the written text of the Constitution or the meaning it held in the 18th century. Now I concede that there might be some practical challenges, and that historically we have not proceeded in this way. Yet I am suggesting that if we were setting a course for the future, there is no strong theoretical reason not to do so.

MICHAEL MCCONNELL: As we expand the category of the types of things that are protected, it is going to be necessary to provide less protection. Furthermore, on the establishment side, I do not see how our government can operate without making judgments about the truths of many of these other comprehensive worldviews. When legislators contemplate leg-
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"The twin authorities of religion and the state present believers with a kind of conscientious conflict that is not seen elsewhere."

Michael McConnell

islation, I do not want them to consider whether it comports with a religious doctrine. Yet I do want our legislators to make wise judgments based upon the philosophical knowledge that we can have about the world.

NOAH FELDMAN: I actually think it is fine for a religious legislator to ask himself what the teachings of his faith tell him about what the right thing to do is. I think it is fine for someone to ask himself the same question in philosophical terms. I do not think that the state will have to deny the truth or the value of philosophy writ large, any more than the state has to deny or affirm the truth of any religion writ large. The state is focused on many practical problems, to which both philosophy and religion have contributions to make.

MONICA TOFT (JFK School, Harvard): Professor McConnell, I would like for you to discuss the theoretical basis for thinking that there is something distinct about religious duty or obligation.

MICHAEL MCCONNELL: I do not believe that religion is narrowly theistic, nor do I think that our framers necessarily thought so. The founders spoke in the broadest language they could about a "providence" and the "author of the universe" and the "governor of the universe." The underlying idea here is not theistic in the narrow sense, but rather there is some conception of transcendence or sacredness, which is what distinguishes religion from philosophy.

RICHARD FOLTIN (American Jewish Committee): I want to throw out another way of thinking about why religion might be different—that is, the notion of religion as something commanded. Such "commandedness" is not a conclusion one comes to but, from the point of view of one's own existential situation, it is imposed on one by the other. That is different from a philosophical conclusion. Such imposition puts that individual or that community in the situation of being subject to a conflict of laws. There are different authorities coming to bear, and in Professor McConnell's constitutional doctrine, we are allowing those individuals and communities a way of dealing with that conflict that is not going to perpetually subject them to the demands of the state in a way that is contrary to their religious commands.

NOAH FELDMAN: As Professor David Novak has discussed extensively in his writing, even the commandment with a divine obligation arises in part as a result of a human's free choice to perform that commandment. Even in the Rabbinic Jewish tradition, there is a commitment to the idea of free choice in performing a commandment, and that act of choice is crucial to the successful performance of the commandment. In many other religious traditions, the idea of the individual as making an autonomous choice to believe or to act is also in play. That active choice is the same active autonomy—making the rules for oneself—that the philosophical tradition so centrally protects and seeks to explicate. Even if one were to accept that a religious belief is heteronomous and thus a matter of law given by the other, it is not obvious to me that the believer's position would be any more worthy of respect than that of a person who believed that he had chosen something and was therefore obligated by it by virtue of his choice. From the standpoint of whether the state should infringe on my ability to perform my action, it does not matter where the sense of obligation comes from.

DAVID NOVAK (University of Toronto): If I understood Professor Feldman correctly, it would seem that he posits a kind of genus called "ultimate commitments," or "comprehensive worldviews," in a Rawlsian sense, and then there are species thereof. There is one species that is religion; one species that is philosophy and therefore we should not privilege one rather than the other. However, I think the fundamental difference between religion and philosophy is not just specific, but generic. The generic factor is not at least immediately the theistic factor, because that is always problematic—for example, whether Buddhism is a religion or a philosophy. The generic difference is the difference of what one could conceive to be culture, that is, religions are communal practices that are not considered to be the invention of the members of that community. Furthermore, it is a question of practice. Philosophy does not entail practices. Another question is whether one can invent a religion, or does one inevitably inherit a religion from earlier sources? Environmentalism seems to me to be basically an invented religion. I think that there is more of a generic difference at play, and therefore all traditional cultures are, at the core, religious. One should certainly have the choice to be part of it or not. But I think this generic difference points to why we privilege certain communal practices over certain individual preferences.

MICHAEL MCCONNELL: That does accord very much with the development of the ideas of religious freedom in Protestant Europe in particular, where a distinction was drawn between the various aspects of religious freedom. Conscience was the ability to come to one's own conclusions with respect to religion—to adopt a religion or to convert. Free exercise of re-
religion meant the manifestation of religion principally through
the preaching of the word and the administration of the sacraments. What Professor Novak is talking about is this kind of
practice. The third category of religious freedom was what they
called freedom of the church, which meant the ability of the
community to be able to adopt its own structure, doctrine, and leadership. When you bring the three of those together,
you have an understanding of freedom of religion that is richer
than a sort of individualistic model.

NOAH FELDMAN: One can have a religion without rituals.
Similarly, one can have a comprehensive culture with no re-
ligious content that is deeply meaningful and inherited from
the past. I do not think that the association of culture and re-
ligion is other than something that sometimes happens. Fur-
thermore, there can be religions that are best conceptualized
as civilizations.

TIMOTHY SHAH: In a case now before the Supreme Court, 
_hosanna-Tabor Evangelical Lutheran Church v. the Equal Emplo-
yme nt Opportunity Commission_, the Obama Justice Department has
argued before the Court that the church in question should be treated
essentially the same as any other entity, religious or non-religious, as
far as its hiring practices are concerned. Would you both care to
comment on that case?

MICHAEL MCCONNELL: The case involves a woman at a small
Lutheran school who, in addition to being a teacher there, is also a
commissioned minister. She takes a medical leave of absence and then
unexpectedly comes back in the middle of the school year after the school has hired a replace-
ment teacher for the year. The school refuses to reinstate her
and she threatens to sue under disability laws. The school and
the church respond by noting that as a minister, she did not
follow the internal, biblically specified means of dealing with
these problems.

Every one of the 12 courts of appeal that has jurisdiction over
discrimination cases has held in the past that there is a “min-
isterial exception.” This is not in the statute, but rather it is a
constitutionally-grounded exception for ministers. The govern-
ment simply cannot decide who a church’s ministers will be.
The various courts have different definitions of how to figure
out whether a position is ministerial. In this particular case, the
plaintiff comes close to the line because she does some religious
things; she is commissioned and ordained, for example. But on
the other hand, she teaches ordinary secular classes a lot of the
time. When the case gets to the Supreme Court, the Depart-
ment of Justice files a brief claiming that there is no such thing
as a ministerial exception. So this has become a very big case as
to whether churches, synagogues, mosques, and other religious
organizations have the right to hire and fire their clergy with-
out second-guessing from the state.

If one were to treat the church just like any other organization,
one might consider the church to be like the Boy Scouts—that
is, they have the right to make sure that their leaders do not
contradict their doctrine. When that happens, a lot of churches
will win cases like that, but that means that the courts are the
ones deciding whether a particular minister’s attitudes, beliefs, and
conduct, are inconsistent with the church’s teaching. It puts the
government in the position of being the judge of the church’s teaching
about religious truth. It seems to me that the fundamental idea of
separation between church and state points to a protection for
churches in this matter.

NOAH FELDMAN: The view that the Obama administration put forward in their brief is the
following: If it were the case that the teacher were fired on the basis
of her religious beliefs, there is no question that the First Amendment
would protect the church under free association just as it did in the
Boy Scouts case. The administration holds that it does not matter
whether she is a minister or not. You can fire your minister be-
cause you do not like what she believes, or for any other reason
connected to your religion. However, you cannot fire her for
something that has nothing to do with her religious functions.
The court would only have to judge whether the church was
telling the truth when it said that it was a religious reason for
the firing and, frankly, that is what courts do every day. I do
not think the truth of the religion would have to come into
question in future cases.

MICHAEL MCCONNELL: Therein lies the problem—
namely, how do courts decide whether employers’ reasons
are pretextual? They have to look to see how consistent the

“The vision that religious lib-
erty is at the heart of it all, an
idea which I find very appeal-
ing, is only viable if the idea of
religious liberty that we have is
a universalizing idea that goes
way beyond particular theistic
religion, or even transcen-
dent religion, and extends to
the most fundamental deci-
sions that a human being can
make.”

Noah Feldman
employer has been. When you apply that to a church and its religious teachings, you are asking: “Is the church consistent about its religion? Are its tenets to be found in scripture or creed somewhere? Is the church correct about its view that this person is not the best person in order to carry out the religious mission of the church?”

NOAH FELDMAN: I am open to that view. All that is entailed by my position today is that if you do it for the church, fair enough. Do it also for the deeply committed comprehensive secular organization. If you respond by saying, “That is not practical,” then that already suggests that there is something wrong with the rule in the first place.

MICHAEL MCCONNELL: The question is not one of practicality but rather that it is wrong for the government to be treading through the church’s statements about its beliefs and setting itself up as the highest tribunal within the church.

LAUREN HOMER (Homer International Law): The issue that we run into in the international community is whether religion is more important than other conventionally held human rights in terms of what one might call a priority of rights. The argument, on one hand, is that religion is the foundation for all other human rights; the opposite argument is that it is just one among many rights.

NOAH FELDMAN: When I was working with Iraqis who were drafting the Iraqi constitution, the Americans involved insisted that religious liberty be included because it is a universal human right, regardless of what a democratic majority may have wanted. It trumps democracy. I do not think we promote a vision of religious liberty as a democratic right, in the sense that it derives from the people, but rather as a right that serves some greater good. Now the view that religious liberty is the first freedom, or most basic of all rights, is only comprehensible if you believe that such a first freedom is the right to make crucial and important life decisions about the nature of the world and your existence in it, in the most general sense. In that case, religious freedom is absolutely the first right. But if you think that religious freedom is a much narrower right, a right simply to worship as you wish, or to believe certain religious propositions as you wish, or for religious institutions to be free of state interference—which I grant are very important rights—then this is by no means the basis for the rest of our liberal rights. It is just an important right in the pantheon.

So for me, the vision that religious liberty is at the heart of it all, an idea which I find very appealing, is only viable if the idea of religious liberty that we have is a universalizing idea that goes way beyond particular theistic religion, or even transcendent religion, and extends to the most fundamental decisions that a human being can make.

MICHAEL MCCONNELL: Perhaps “first” refers to first in time. I think a pretty powerful argument can be made that the history of civil liberties in the West begins with the conflict between church and state. At a time when governments asserted a sort of omnicompetence with respect to society, there was the uncomfortable fact that one institution was not completely under government control. So all through Europe, there were conflicts between, on one hand, emperors and kings, and, on the other, popes who asserted the ability to name their bishops within those countries, which meant the ability of the pope in Rome to be able to control the most important cultural influence in the state. Basically, religion was the battering ram that destroyed the fortress of authoritarian government and, in the resulting breaches, civil liberties for everyone eventually emerged. So it is not just, for example, that religious publications can be printed freely, but everyone is able to print freely. It is not just religious institutions that have a certain degree of autonomy, but now there can be a robust civil society. Thus, I would say that there was something about religion that was really distinctive that is behind the fact that religious freedom was the first freedom historically. I think it has something to do with the anthropology of the human being. Not everyone is religious, of course, but there is a sense in which people respond to religious authority, and it makes them willing to sacrifice and fight and demand freedom.

NOAH FELDMAN: On the idea of religious freedom being first in time, you are talking about 300 years after the Magna Carta, which is the birth of rights, even in the Anglo-American tradition, to say nothing about the broader philosophical tradition. The Magna Carta comes long before these religious liberty rights begin to be introduced. The notion of due process, to be free from arbitrary government action, is definitely prior in time, as it exists in the Magna Carta. So when we say “first freedom”, I think we have to mean something more profound than sequential priority.
Panel 2: The Universality of Religious Freedom and its Compatibility with Non-Western Cultures

Thomas Banchoff: Having discussed various dimensions of religious freedom, we move to address how issues of religious freedom are playing out on a global stage. A critical issue in discussions of the international dimension of religious freedom is the challenge to keep distinct the empirical and normative dimensions of the question. Empirically, is religious freedom endorsed and applied universally around the world? Normatively, should it be endorsed and applied around the world? Is religious freedom universal? How universally or culturally portable is religious freedom? What core principles of religious freedom, if any, are universally applicable around the world and in the West? What do we mean by religious freedom in a globalizing world?

John Finnis: There is a natural or human right to religious freedom that is inherently universal, that is, it ought to be acknowledged by any society, even those societies whose cultural development does not yet enable members of the society to recognize such a category of human relationships as a natural human right. This right ought to be acknowledged even by those societies whose culture denies the truth of such categories or the inclusion of religious freedom within the category of human rights. Secondly it is inherently portable but the radical partial opposition to it in certain cultures—for example, Marxist culture, Islamic culture, Medieval Catholic culture, classical Puritan culture, and Lockean culture (with respect to Catholics and atheists)—is such that it is culturally portable only on the condition that such cultures undergo reform and conversion in at least this respect.

To the question of what core principles of religious freedom, if any, are universally applicable: Not only are such principles applicable across the diversity of the world’s cultures and religions but they are applicable even across the diverse societies and experiences of the West. I venture to say the core principle is that everyone has the natural or human right not to be coerced in seeking the truth about religious matters, that is, about matters concerned with the question of whether there is a transcendent source of the cosmos. These religious matters include not only the asking of the question and the answering of the question, but also putting results of that search into practice, for example by proclamation and worship including public proclamation and worship. This is a right whose entailed correlative is the duty of other persons and groups, including the government, not to engage in such coercion either with intent to restrict such seeking or without sufficient reason to prohibit activities which have a public impact. There is sufficient reason for coercion only when the intent is to prohibit or restrict activities to the extent necessary to preserve public order, that is, the rights of others including their right to religious freedom, public peace and public morality including just constitutional order within the category of public morality.

Secondly, there is sufficient reason for coercion only when such steps are indeed no more restrictive or coercive of religious practice than is needed for that purpose of protecting public order in the rather rich sense of the term that I just specified. The right is not that public authorities should be neutral as between religions; such neutrality may well be incompatible with public order. Government favor for a religion may easily take forms which amount to coercion in a
relevant sense. Nor does the right entail separation of church and state, but a sharp distinction between the sacred and the secular is part of the matrix in which the right to religious freedom becomes at least historically acknowledged.

A principal moral and political basis for affirming the right to religious freedom is the inherent human dignity of being capable of seeking and finding truth about cosmic and human origins and ends. Dignity is always a term that connotes that one is above something else. So we have human dignity because unlike other animals we can search for the truth about ultimate questions. This capacity entails the duty of participating in that activity as an activity oriented towards the good and particularly the good of truth about these great questions – answerable to nothing but the truth as one responsibly judges that it emerges from the grounds, reasons, evidences, and arguments for affirming it. Truth, the intrinsic goodness of truth, the duty of seeking that good and that truth, and the duty of being responsible in one’s enquiries into it, and the radical human capacity not shared with sub-human creatures for seeking and finding it—these are universally recognizable in principle, even in cultures where such a recognition would require abandonment of certain culturally entrenched beliefs, which block such recognition.

The articulation I gave of the content of this right to religious freedom does track very closely with Article 18 of the Universal Declaration of Human Rights, Article 9 of the European Convention on Human Rights, and closely with the Second Vatican Council’s declaration on religious liberty, Dignitatis Humanae. It tracks less closely with the International Covenant on Civil and Political Rights. Article 18 says everyone has the right to freedom of thought, conscience and religion. The 1952 European Convention on Human Rights Article 9 includes the same phrase. This freedom of thought, conscience and religion includes freedom to change one’s religion. The International Covenant on Civil and Political Rights dropped that reference to changing one’s religion and said everyone shall have the right to adopt a religion or belief of his choice. Of course you could read into this the choice to opt out of a religion but the reason why what was in the Universal Declaration and the European Convention was not included in the International Covenant on Civil and Political Rights I think historically is clear. The Islamic countries were unwilling to see an explicit reference to changing one’s religion. One can understand that in the light of the Cairo Declaration on Human Rights in Islam, signed by the 57 Islamic states. Article 10 of the Cairo Declaration says Islam is the religion of true unspoiled nature, that is, the innate religion of every human being. Taken in context, including the historic context of being a declaration on human rights issued after all these other international covenants, it is pretty clear that the sense of Article 10 is that there is no freedom to change from the religion that everyone innately belongs to. That introduces an aspect of religious freedom that I think is worth dwelling on and which has become of particular importance in European discussions of and rulings on religious liberty.

PETER DANCHIN: I see the right to religious freedom not as a singular stable principle, which we can think of in some sense as existing outside of culture or spatial geographies or power. Rather, if we look at it both normatively and in practice, we see that it is not a single concept, but a highly contested polyvalent concept, which is unfolding within the histories of concrete political orders. To really gain an appreciation of the right to religious freedom we need to think of it as both historically relative and normatively plural. Here, international law is actually very interesting because international law—all the documents that Professor Finnis cited—reflects some genuine contestation at the normative level by what we mean by the right to religious freedom. The genius and the power of the discourse of religious freedom is that it defines political authority in terms of some notion of secular neutrality and it defines the right itself in terms of individual freedom. What this means is that the public sphere, whether domestically or internationally, is dynamically related to the scope of the right to religious freedom. The discourse is able to maintain its simultaneous claims to uniqueness because, supposedly, it is neutral towards religion and it is universal because it is securing the right to religious freedom by constantly defining each of these terms in terms of the other. Both logos and nomos, in philosophical terms, are inilluminably contextual and evolving within different sites of contestation. Nomian

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neutrality in any particular decision-making context quickly devolves into hyperstasis or reification of an historically specific political order. The European Convention on Human Rights is perhaps the clearest illustration of this. We get a very clear sense of what religion and belief mean within that jurisprudence and within very particular demarcations of spheres. Conversely, if we view any accounts of or claims to natural reason or universal reason, we see considerable shifts across time in interpretation and indeed warring intellectual traditions, as well as internal struggle over the concept of the right itself. In other words, there are normative conflicts and rival intellectual conceptions of the right existing at any moment in time.

The early modern period in Europe led to a conception of religious freedom in terms of social peace and led to the very complex religious settlements that we see in Europe today. This derived from a civil philosophy that sought to desacralize the state and led over time to the spiritualization of religion. However, if you look later, into the 18th and 19th centuries, you see quite a different liberal tradition emerging which advances a moral theory of justice and which grounds religious liberty in a complex and highly unstable notion of freedom of conscience. Today we have quite a unique situation where freedom of conscience in effect is defined as autonomy by the law. We think of conscience in terms of autonomy and it is this dialectic that shapes much of the legal decision-making we see. What is fascinating about this later tradition, which I associate most strongly with the Kantian tradition, is that it is a metaphysical philosophical tradition that simultaneously sacralizes reason and rationalizes religion. It redefines what we mean by religion and a proper religious subjectivity such that I think that is the legacy of much of the way liberal human rights views are advanced today. So what is the universality of any of these traditions once we get outside of a broadly North Atlantic Western Christian context?

In the 2009 Lautsi case, the Second Chamber of the European Court of Human Rights held that the compulsory display of crucifixes in public schools in Italy violated the right of children to religious freedom under Article 9. The Court said that this restricted the right of school children to believe or not to believe. The decision of course was met with outrage in Italy and in many orthodox states, and an appeal was launched to the Grand Chamber of the European Court of Human Rights. The appeal argued that we need to think about neutrality in more complex terms—in terms of both individual and collective rights—and in terms of the rich European tradition of diversity of religious values which I mentioned earlier. In other words, there was not a single religious liberty claim at issue in the Lautsi case, there was also the collective liberty claim of a state and a people to define its own way of life and society in terms of religion and religious symbols even to the extent of having an established or official religion, as still is the case today in the United Kingdom, Greece, and Denmark, all of which are members of the Council of Europe.

On the question of neutrality the Grand Chamber said that the presence of the crucifix did not impinge or infringe upon the principle of neutrality because the crucifix is an essentially passive symbol that cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities. Now of course you can see here immediately a particular notion of what religion is—a notion of conscience or inner belief. This type of interpretation almost invisibly naturalizes a particular religious tradition. For some, this tradition, Christianity, is now part of Italy’s civil religion or part of Italian culture. For the Italian government itself, the crucifix was a symbol of tolerance, pluralism and even religious freedom itself. Because there is no European consensus on the presence of religious symbols, the Court said that there is a sphere of freedom for Italy and for other European states to work this issue out as amongst themselves. The Court is moving from a discourse of right which is not to be interpreted in terms of coercion or universal reason, toward this collective notion of right to be worked out inter-subjectively, contextually between the member states of the Council of Europe. You see how the dialectic between neutrality and freedom allows the Court to reach some kind of political accommodation of these claims.

“I see the right to religious freedom not as a singular stable principle, which we can think of in some sense as existing outside of culture or spatial geographies or power. Rather, if we look at it both normatively and in practice, we see that it is not a single concept, but a highly contested polyvalent concept, which is unfolding within the histories of concrete political orders.”

Peter Danchin
MONA SIDDQUI: I am not sure where I put religious freedom in the hierarchy of individual freedoms but we value religious freedom because we argue that democracy is good and we argue that our rights-based language is good. However, not all countries and cultures value a rights-based language. We all have the right to believe or not believe in God but how we express our vision and that belief in God through practices is what becomes controversial in the public sphere. I am not sure that when we talk about religious expression there is such a clear-cut division between the private and public. I think the biggest dilemma is how we define religion. Can the state protect religious freedom when there are different ways of defining religion, different ways of practicing the same faith, and can lived religion in all its manifestations really always be protected by the law? The state is not allowed to decide what counts as religion and what does not, but courts of law are always having to make that decision when actually there is no national or coherent definition of what religion means. The paradox is that, of all the freedoms we talk about today, religious freedom as a given in society may be something quite unique to Western democracies alone. That is not to say that other religions do not have a developed sense of what freedom of conscience means. But when it comes to the practice of that, there is a sense of apology, there is a sense of defensiveness because the ability or the freedom to convert from one faith to another is a very emotive and a very powerful issue.

In a largely post-Christian, secular West, the very idea of religion continuing to exert a meaningful hold in public life, at least in the European context, is quite resisted. I think the intellectual discussions and the practice of religious freedom become easy because of the general context of other intellectual freedoms. However, in societies where you do not have those kind of freedoms, religious freedom is an anomaly to many people. Why should it be given a priority? Why should it be seen as part of a human dignity? There are so many other things that are an affront to human dignity that religious freedom takes a back seat. I am not saying this is right or wrong, rather I am trying to consider why religious freedom has not caught on in these places.

JOHN FINNIS: In the United Kingdom today there is restiveness about the visibility of one religious minority: Islam. And similarly in the European Court of Human Rights’ jurisprudence the status of that one religion, the one talked about in Sahin and Refa Partisi is treated, I think correctly, as quite distinct from that of other religions. It has its own character, its own dynamism. If I am not mistaken and if those cases are not mistaken it is a religion not interested in religious freedom. Its own affirmations of religious freedom either negate—or articulate something that does not match up to—our conception of, or my conception of, or the court’s conception of religious freedom.

The Court judges that that is a permanent part of the dogma of Islam. That is part of the phrasing in the cases. Now you might say that they are making a mistake about Islamic theology. They were being instructed in the case by Muslims, namely by the Muslims representing Turkey which is a 98 percent Muslim country. The government of Turkey, a country which is 98 percent Muslim, proposed this argument that Sharia must not be introduced because it is contrary to the European Convention on Human Rights. Therefore, I do not think we can talk about all religions or all minority religions in the same way.

So the question of fact about whether the crucifix represents something that is a threat, is of a coercive character or a threat to religious liberty, is a question of fact. I have no brief for putting up crucifixes in public schools. I do not have any special desire to defend it. Historically the crucifix was put in Italian classrooms because of the concordat between the Italian state and the Roman Catholic Church in the late 1920s. By the time the case came to court in 2005 the Catholic Church had unambiguously adopted a clear conception of religious liberty. And so it was possible to argue, as Weiler and the Italians argued in 2009-10 what would have been impossible in 1928—namely that the crucifix now represents a religion that teaches religious freedom as part of its own dogma. And that gives you a sort of striking, as it were, factual historical context and it is necessary to keep the distinctions within religion, the category of religion very much in mind.

Regarding conscience, it is not an Enlightenment concept. It is a Christian concept, found in St. Paul, later taken over from left: John Finnis, Peter Danchin
into the Enlightenment. It was dramatized by Aquinas’ saying that you will certainly be mortally in sin if you defy your conscience, however vicious your conscience is, provided it is authentically yours because your judgment of conscience is nothing other than your judgment about what you consider to be true. The value of truth is such that if you defect from that you are bound to be in serious moral error, whatever the other errors that your judgment about the truth may have involved.

That prestige of conscience is what is carried forward into the Enlightenment and shapes much of the Enlightenment, both its good features and its bad. Neutrality came into the European jurisprudence about religious freedom in a way that is rather hard to put one’s finger on. It corresponds, broadly speaking, to the no establishment doctrine in the United States and I think it has come into the European jurisprudence by a kind of inertial adoption of American ways of thinking. Whereas if you look at the European Convention or the international conventions there is nothing about establishment or neutrality. The focus is on coercion and freedom from coercion.

THOMAS BANCHEFF: What about the fundamental question of the universality of religious freedom and Peter’s argument that you cannot look at it in the abstract because it is always embedded in different cultural and political contexts?

JOHN FINNIS: All of us can effortlessly transcend the historical by simply asking the question and answering it for ourselves. We are not mired in history. It is a little bit of hard work to subject your own concepts to some sort of immanent and external critique in order that they be judgments that you want to commit yourself to. That this can be done is the nature of philosophy, sincere religious thought, science, and history.

We jolly well better be able to transcend historical context. Otherwise it is not worth thinking.

PETER DANCHIN: I agree in part—as any pluralist would have to—that we can try. And in fact the best thing about the liberal tradition is the effort. In my view, however, it is impossible to transcend one’s own situationality. Despite whatever efforts are made from the particular to grasp the universal, one always falls back into some form of what I would call “objective particularism,” namely that there is always an effort made to define a universal position but such effort is always contingent. In a sense we have to presuppose the possibility of grasping the universal but the tragedy of the human condition is the impossibility of doing so.

But if I could just return to the Refah case because I think this is where Professor Finnis and I most strongly disagree. In my view this was the worst decision of the European Court of Human Rights has ever made in its history and I think scholars are starting to wake up to this. They got almost everything wrong in that case. And of course subsequent events in Turkey bear out what I am going to say.

The important thing to realize about the Justice and Development Party, that was banned in this case, was that it was a political party which had a democratic platform—it wanted, through the democratic process, to make changes to the legal system in Turkey. My limited understanding of the history of the Kemalist project is that from Ataturk on a lot of that project was staunchly secularist in the French model and was backed up by the military. It was seen increasingly by many Turks as undemocratic.

And so what we were seeing was a different form of contestation democratically in Turkey over the nature of the public sphere of the state itself, what we mean by the limits of democracy. What is striking about the case is how both the Turkish Constitutional Court and the Human Rights Court in Strasbourg used the idea of religious freedom to limit the democratic aspirations that were being expressed by this political party.

The one thing that seemed most at issue was this idea of a plurality of legal systems. The dissenting judge says that the court seems to suggest that the very idea of legal pluralism, the idea of religiously based law—the very idea that the Archbishop of Canterbury had just proposed in England and that we see existing in many democracies around the world like India or South Africa with all their vibrant pluralism and
I am not sure that when we talk about religious expression there is such a clear-cut division between the private and public. I think the biggest dilemma is how we define religion.”

Mona Siddiqui

I would like to present some clarifications on Sharia because it is such a contested word in Islamic jurisprudence and amongst Muslim scholars. The problem is the West talks about Sharia as if it were a monolithic Islamic legal system. Sharia was never an Islamic legal system. Aspects of Sharia could have been applied but most of Sharia was an elaboration of Islamic jurisprudence. Today it has become an important part of the legal vocabulary and the human rights discourse because Muslim and non-Muslim scholars are trying to debate what is it about Islamic law or Islamic legal jurisprudence that has glimmers of human rights, human dignity, etc. We need a more nuanced and more sophisticated understanding of what Islamic jurisprudence is before we think about Sharia.

I am the first person to say that the major community that is problematic in Europe and in the UK in recent years is the Muslim community. There are also other religious communities, such as Sikhs and Hindus, that feel marginalized and ignored at the expense of the Muslim community. We also have to understand that there is a dislike for religion in the public space in Europe and the UK. There is a sense that religion harks back to a medieval era whereas secularism, which is not anti-religious but anti-theocratic, is forward looking. Secularism allows for pluralism. For me, a secular concept to a pluralist society is a good thing. Many Muslims and Jews already have certain practices that are legal in their religious tradition which are not contested by the state.

I think we are collapsing too many extremes under the rubric of religious freedom. This is not about the Islamic world with its oppressive and rather medieval-looking ethical frameworks, which are to some extent justified as a criticism against a very liberal post-Christian West. This is really about considering how different cultures and religions live meaningfully, not just in silence, in a pluralist society. I do not think we have reached that situation yet.

ROGER TRIGG (Oxford): On the subject of religious freedom being normatively plural and not universal, I assume that means that we cannot rationally criticize other people for not living up to the norm of religious freedom except that it is just an expression of our own particular culture. For example if Americans criticize Pakistanis for lapses from
the ideal of religious freedom they are doing no more than saying “I wish they would play baseball not cricket.” Is that what you are really saying Professor Danchin?

PETER DANCHIN: People who claim a universal position often charge that pluralism is really relativism. I want to insist that there is a normative difference between a relativist and a pluralist position. One can indeed have a rational conversation with people from cultures or normative traditions that are different from one’s own. The point of disagreement is whether there is a position superior to the position of the two discussants by which their criticism can be legitimated as correct. Pluralism suggests that that position is simply unavailable and one has to advance one’s rational arguments on the basis of one’s own tradition. The possibility for rational dialogue comes when one tries to take the internal position of one’s interlocutor. Where one sees one’s interlocutor as having some incoherence or conflicts within his own normative tradition, the space opens up for recognizing that as such and engaging in a dialogue as to how one might reconcile that conflict within the other tradition. That then relates back to one’s own position.

THOMAS BANCHOFF: Might not the Universal Declaration of Human Rights represent such an external, superior authority, a set of universal truths to which one might appeal in order to frame these kinds of normative debates on religious freedom?

PETER DANCHIN: Professor Finnis pointed out the normative dissonance between the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Article 18 of the International Covenant on Civil and Political Rights is normatively different from Article 18 of the Universal Declaration of Human Rights and both of those are different from the Cairo Declaration on Human Rights in Islam. So who has the universal position?

JOHN FINNIS: Do you think they are all equally good?

PETER DANCHIN: No I do not.

JOHN FINNIS: Which one is superior?

PETER DANCHIN: I think we would have to argue about that.

JOHN FINNIS: I am going to propose that Article 18 of the Universal Declaration of Human Rights is superior because it articulates the right to change one’s religion and the other two are inferior, with the Cairo Declaration being radically inferior because it implicitly denies such a right. The intermediate one, the International Covenant on Civil and Political Rights, under pressure from the Muslim states, leaves in shadow that question of whether you can change your religion.

PETER DANCHIN: In making that judgment I think you are assuming a position that is particular to a tradition that you are particularly attached to, which of course is your right. What is really interesting about this disagreement is that in 1948 when Article 18 of the Universal Declaration of Human Rights was drafted, there was no attempt to ask Muslim states what they thought about it. When they were consulted in the intervening years leading to the International Covenant on Civil and Political Rights, their disagreement was voiced.

JOHN FINNIS: In voicing that disagreement they said there was no right to change one’s religion and that is a very serious defect. Are you saying it is defensible to say no one can change his or her religion? Perhaps the position actually being asserted is that no one can change from Islam but anyone has a right and even a duty to change from atheism or other religions to Islam. Do you think that is universally defensible? No, it is not. Let us go back to your basic position which is that there are no universally defensible positions. I just do not see any rationality to the claim that there is one position that is exempt, namely the one that tells you all positions are tradition-based and you cannot get outside your tradition.

PETER DANCHIN: There must be better or worse positions. The difficulty we face on the Cairo Declaration is that the 50-odd states that are parties to that declaration disagree at a normative level with Article 18 of the Universal Declaration of Human Rights. I think that in those societies there is a different understanding of religion and religious subjectivity. Once one thinks about religion in a more communal
sense, as being claimed by a moral community, as opposed to thinking of religion on an Enlightenment or autonomy or conscience basis, it may be that the freedom to change religion is a more difficult question. I do not want to say that the Christian/Enlightenment position is inferior to the Islamic one but I also do not want to rule out the possibility that the Islamic position has its merits as well.

JOHN FINNIS: It should be emphasized that the propositions of the Universal Declaration and the proposition that I defended were not defended as Christian or as emerging from any other religious tradition but as being natural or human rights available to any reasoning person willing to inform themselves about the basic facts of the human and cosmic situation. These are truths for each person to discover and it is deeply important that everyone should discover them for himself free from the coercion which entails inauthenticity. Now in the Cairo Declaration you have it prominently stated twice that all these declarations of human rights are subject to Sharia. In the Refah case, the European Court of Human Rights and the Turkish Constitutional Court did not have the luxury of waiting for advanced scholars to emerge with some concept of Sharia that would be compatible with democracy or with human rights. They had to act knowing that an Islamic political party could take over Turkey and repeal the 60 or 70 years of Kemalist secularist government—a government of Muslims, by Muslims. There is a historic given Sharia, and modern discussions amongst advanced scholars do not yet represent anything like the substance of Sharia that political people, voters, and courts have to meditate and deliberate about and make decisions about. The Refah case reminds us about militant democracy, a concept familiar to Europeans and one that Americans ought to consider more carefully. Democracy is not a sort of self-validating concept of having elections and so forth.

PETER DANCHIN: There is no monolithic answer to the question of Sharia within different Islamic schools of interpretation. It is truly fascinating how a jurisprudence based on a revelation unfolds historically and politically. Consider, for example, the jurisprudence of the Egyptian Court of Human Rights. Based on interpretations of relevant Islamic legal sources, that court has been recognized within Egypt as broadly progressive over the last 20 years.

The question of militant democracy raises the issue of the need to defend the commitments we have to the secular and to the individual as the source of our normative order through military force if necessary.

Finally, this critique of Sharia rests on a previous assertion that there is some alternative notion of freedom. In a sense, the Enlightenment is an escape from this dilemma. The genius of Kant was his positing that a self-critical reason, premised on the individual, has to commit to what reason dictates as duty. Integral to the Kantian scheme is a very strongly binding morality, which requires us to take the rights of every individual into account so that individual freedom itself imposes duties on us. The moral right to religious freedom or individual freedom imposes duties on us from which we cannot exempt ourselves. We have no choice but to accept the moral right to equal freedom. If that is the case, what is the freedom that is being advanced by military means if necessary? Is it not possible for a political party in a country like Turkey, through democratic elections to vote to change the nature of the country’s legal system? Is that something that we are saying is not a valid choice? I cannot reconcile these two positions.

MONA SIDDIQUI: The critical question could be that in much of the Islamic world, aside from the scholars, especially those working in the West trying to reformulate these kind of debates within the context of human rights, there is still a commitment to an old order of Sharia. When communities and societies do get a chance to reform, why is it that so many are still wanting some kind of Sharia legislation when they have the freedom to vote for a secular or a non-Sharia based government? I have not been able to resolve that myself. Why is it that Muslims forsake the values of the West—pluralism, equal rights for all, and the freedom to live your life morally as you wish—sometimes very violently, for an alternative social and legal order even when they are not coerced? However much we have a moral imperative to keep this debate going and to criticize those Islamic regimes and communities that do oppress, we should not be oblivious to the fact that we are not making equal comparisons. Saudi Arabia and Pakistan are not the UK or the USA. We have to be very careful to keep in mind that the political, economic, and social order of these communities dictates to a large extent how people think.

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*From left: Timothy Shah, Michael McConnell, Noah Feldman*