Constitutionalism, Democracy and Religious Freedom

To Be Fully Human

Hans-Martien ten Napel

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In both Europe and North America it can be argued that the associational and institutional dimensions of the right to freedom of religion or belief are increasingly coming under pressure. This book demonstrates why a more classical understanding of the idea of a liberal democracy can allow for greater respect for the right to freedom of religion or belief.

The book examines the major direction in which liberal democracy has developed over the last fifty years and contends that this is not the most legitimate type of liberal democracy for religiously divided societies. Drawing on theoretical developments in the field of transnational constitutionalism, Hans-Martien ten Napel argues that redirecting the concept and practice of liberal democracy toward the more classical notion of limited, constitutional government, with a considerable degree of autonomy for civil society organizations, would allow greater religious pluralism. The book shows how, in a postsecular and multicultural context, modern sources of constitutionalism and democracy, supplemented by premodern, transcendental legitimation, continue to provide the best means of legitimating Western constitutional and political orders.

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Law and Religion

The practice of religion by individuals and groups, the rise of religious diversity, and the fear of religious extremism, raise profound questions for the interaction between law and religion in society. The regulatory systems involved, the religion laws of secular government (national and international) and the religious laws of faith communities, are valuable tools for our understanding of the dynamics of mutual accommodation and the analysis and resolution of issues in such areas as: religious freedom; discrimination; the autonomy of religious organisations; doctrine, worship and religious symbols; the property and finances of religion; religion, education and public institutions; and religion, marriage and children. In this series, scholars at the forefront of law and religion contribute to the debates in this area. The books in the series are analytical with a key target audience of scholars and practitioners, including lawyers, religious leaders, and others with an interest in this rapidly developing discipline.

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Constitutionalism, Democracy and Religious Freedom

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Preface

Throughout my professional career, my passion has been the question of how liberal democracies can be designed to meet the demands of religiously and otherwise divided societies. Thus, while teaching at a Department of Political Science, I chose to specialize in Religion and Politics, among other things. My Ph.D. thesis dealt with the origins of the Dutch Christian Democratic party, whose predecessors were major architects of the pluriform democracy which characterized the Netherlands throughout the greater part of the twentieth century. Since my transfer to Leiden Law School, in 2000, Law and Religion has become one of my fields of expertise. In 2007 I also participated for the first time at two inspiring international gatherings on this topic: the Atlantic Conversation on Religion and Public Life, organized by St George's House, Windsor Castle, in association with the Center of Theological Inquiry (CTI) in Princeton, New Jersey, and "From Silver to Gold: The Next 25 Years of Law and Religion," the Silver Jubilee Conference of Emory University's Center for the Study of Law and Religion.

My research interests in the field of Law and Religion acquired their current focus largely as a result of a stimulating conference on "Religion and Civil Society: The Changing Faces of 'Religion' and 'Secularity'" held at Harvard Law School in 2012. The paper on "State, Civil Society and Religious Freedom" that I presented on that occasion was published in the *Oxford Journal of Law and Religion* in October 2013. It also formed the basis of my own contribution to a research proposal, co-authored with Dutch-American historian James Kennedy as principal applicant, that was granted a major subsidy by the Dutch Association for Scientific Research (NWO) in the summer of 2013. With the subsidy for this project, entitled "Religion Renegotiated: Faith-Based Organizations and the State in the Netherlands Since the 1960s," Leonard van 't Hul and Mart Rutjes have been appointed as Ph.D. Fellow and Postdoctoral Researcher respectively at the University of Amsterdam. The current book serves as my own contribution to this project, to the extent that it aims at providing some of the international and legal context in which the developments in the Netherlands can be better interpreted.

Since finishing my doctoral dissertation, I have published some 20 edited volumes, 150 book chapters and journal articles as well as numerous book reviews,

case notes, etc. Increasingly, these publications were written in English. What was missing was a monograph in English. A research fellowship at CTI afforded me the opportunity to lay the foundations for such a monograph during the academic year 2014–2015 at Princeton. I am immensely grateful to CTI for this opportunity, and indeed to my home institution for allowing me to be on leave for such a considerable time. The subsidy from NWO helped to make it possible for me to finish the manuscript back at my regular desk at Leiden University, for which I am obviously equally thankful.

Nor do I wish to forget those who were present during presentations of the various chapters at academic conferences in the course of the past few years. A first draft of the first chapter, for example, was presented during the XXI Quinquennial World Congress of the International Association for the History of Religions (IAHR) held in Erfurt, Germany, August 23–29, 2015. At this conference my colleagues from the NWO project and I had organized a panel "Religion Renegotiated," where we all presented the progress of our work. A draft of the second chapter had been presented a year earlier, at the IXth World Congress of Constitutional Law held at the University of Oslo, Norway, June 16–20, 2014. The chapter on democracy was originally presented at the second annual conference of the International Society of Public Law held at New York University School of Law, July 1–3, 2015. Even while finishing the manuscript for the book, I took the opportunity to test parts of its argument during, for example, the Cardiff Festival of Law and Religion in Wales, May 5–6, 2016. An earlier version of the fourth chapter was presented at the conference "Christianity and the Future of our Societies," jointly organized by the Evangelische Theologische Faculteit, Leuven, and the Association for Reformational Philosophy in Leuven, Belgium, August 15–19, 2016. I am grateful to all my audiences on these occasions and for the feedback they graciously provided.

The same goes for my students, who over the years have attended various courses during which I have been able to develop ideas for parts of the book, notably my Bachelor of Laws Elective Course on Dutch Parliamentary Democracy and my Master Elective Course on Comparative Constitutional Law. They probably do not realize how important it is to be able to try out arguments and ideas in front of a motivated student audience, and how much there is to be learned from their responses both in writing and during class. It is my hope that this book will have an even larger audience than the (remarkably growing) group of direct colleagues and students in this field. For example, the book might also be helpful to practitioners working for either governments or non-governmental organizations in the field of religious freedom. To the extent that this goal is achieved, my students deserve due thanks for this because it is with them in mind that I have tried to write this narrative.

At least, I hope what follows will indeed be perceived to be a story, despite its primarily academic ambitions. If so, I will have succeeded in finding my voice, thanks also to my editor at Leiden University, Wendy Rodger. In that case I might

also want to continue the narrative now that this one is finished. As will have become clear from the above, although in at least one sense this book has been long in the making, it is also actually based on a couple of recent presentations. As such, it is not so much the end of a period in my academic life, but I hope it marks the beginning of a new, even more fruitful, one. New courses and presentations are already in the making.

Introduction

Negotiating Amish–State Relations

Tuesday September 2, 2014 marked the official start of my Research Fellowship in Legal Studies at the Center of Theological Inquiry (CTI) in Princeton, New Jersey. Part of the mission of CTI is to seek the dialogue between theology and other disciplines. During the academic year 2014–2015, thanks to a generous gift from the John Templeton Foundation, a group of 12 resident fellows could be appointed. Approximately half of these were theologians and ethicists, the other half legal scholars. The overarching theme of this particular inquiry was law and religious freedom.

Some of the work I would be carrying out during the fellowship, including the current book project, had, however, unexpectedly already taken shape in the weeks running up to the start of the fellowship. During part of August we had been enjoying a holiday in Lancaster County, Pennsylvania. Lancaster County is just a two-and-a-half-hour drive from Princeton University. Yet it feels as if you are in a different country.

One reason why Lancaster County feels so different is that it is one of the strongholds of the Amish. As soon as one takes the highway exit, it is noticeable because of the slow-moving vehicles on the road: Amish horse-drawn buggies. Nor does it require much effort to determine on which farms the Amish live, because of the numerous black and white garments hanging out to dry on the washing lines. It is actually possible to encounter the Amish, and also Mennonites who belong to the same "Plain People," in local shops, some of which are run by members of the group.

The Amish are a conservative Christian group. In the early eighteenth century they were forced to flee European countries such as Switzerland and Germany where they were persecuted because of their religious convictions. In the Province of Pennsylvania, William Penn, himself an English Quaker, offered them hospitality in exchange for their willingness to farm the fertile soil.

Ever since, the Amish have attempted to stick to their traditional lifestyle as far as possible, because of what they regard as their biblical task—that is, to be *in* the world but not *of* the world. For this reason they largely refrain from using electricity and cars, among other things. But it is not the electricity and cars as such that they are against, just the fact that these could connect them too closely

to the outside world. In a similar vein, the Amish are generally hesitant to use the judicial system or to engage in political activities. At the same time, they are widely considered to be about the best neighbors one could possibly wish for. They are also connected economically to the people around them, because of the fresh produce and other goods they trade.

Although it may seem counterintuitive, the Amish constantly interact with the outside world and adapt slowly but steadily to new developments occurring there. In turn, the Amish present a test case for the outside world, which has to frequently consider which concessions should be made in legislation and otherwise to accommodate the distinctive lifestyle of the Amish in areas such as military service and conscription, education and schooling, social security and taxes, health care, land use and zoning, and other First Amendment issues (Kraybill 2003a). Although this tolerance does not always come easily, the fact is that the Amish have been able to live in Lancaster County and elsewhere in the United States according to their religious convictions for centuries.

As historian of modern Christianity Martin E. Marty has put it, the Amish "negotiate, while appearing not to negotiate" (2003: x). As a result, Amish–state relations can be characterized as "a dynamic process of give and take, compromise and concession, a process that continually redraws the symbolic lines between church and state" (Kraybill 2003b: 20). The same holds true for other religious groups which find themselves in, what at least in the West appear to be, increasingly secular, majoritarian contexts (Lind, Lövheim, and Zackariasson 2016; González and D'Amato 2017; Guesnet, Laborde, and Lee 2017). Whether they are aware of it or not, these negotiations all take place against the backdrop of the right to freedom of religion or belief.

In addition to its clearly crucial individual aspects, this right also protects what have been called the associational and institutional dimensions of religious freedom. As Johan D. van der Vyver has explained, the associational dimension of the right to freedom of religion or belief concerns

> a collective group right (it vests in individuals as members of the religious community) and includes (i) the right to practice one's religion, in association with other members of the religious community, and (ii) the right to form, join and maintain religious associations.
>
> (Van der Vyver 2011: 1)

Institutional religious freedom, on the other hand, "is an institutional group right (the right vests in a religious institution as such) and . . . requires of the State not to interfere in the internal affairs of religious institutions" (ibid.; see also Langlaude-Doné 2016).

This book focuses on these associational and institutional dimensions of the right to freedom of religion or belief, and their significance for the proper functioning of our Western liberal democracies. More specifically, it asks the question to what extent in both Europe and North America communal religious freedom continues to be protected. According to at least one observer,

> There is no more important issue in law and religion today than institutional religious autonomy. . . . This area of law is the source of growing contestation and will likely prove a more important site of law and religion debate than traditional religious freedom and religion-state relations questions.
>
> > (Calo 2014: 15; see also Scolnicov 2011; Norton 2016; Schwartzman, Flanders, and Robinson 2016)

Another observer rightly noted that what is at issue in communal religious freedom is more than immediately meets the eye. It also involves a fundamental question regarding the role of religious and other associations, groups, and institutions in society:

> Does civil society consist of a set of institutions that help the government achieve its purposes as it defines them when their doing so might be more efficient or convenient than the state's doing so itself, or does civil society consist of an assortment of efforts by citizens to band together in pursuit of mutual aims and goods as they understand them? Is it an extension of the state or of the community?
>
> > (Levin 2012)

Levin regards the potential pressure on institutional religious autonomy as "perhaps the gravest threat to freedom in American life today" (2012; cf. Sherratt 2012). It is not without reason that Secretary-General Ban Ki-moon of the United Nations called civil society "the oxygen of democracy" (UN News Centre 2015; see also World Movement for Democracy 2012).

The "New Critics of Religious Freedom"

Before I left for Princeton I already had the sense that, as the United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt noted, religious freedom was globally becoming "a human right under pressure" (2012). Political scientist Allen D. Hertzke, the editor of a recent volume on the future of the right to freedom of religion or belief, speaks about "a profound paradox of our age," in the sense that "at the very time that the value of religious freedom is mounting, the international consensus behind it is weakening. . . . Indeed we see not only widespread violations around the world, but looming threats in the West that jeopardize previous gains" (2013: 3).

Still, the thing that without doubt has struck me most during my fellowship is how relatively fast and comprehensively the right to freedom of religion or belief has indeed already come under pressure across the West, at least in theory. It is true that in my home country, the Netherlands, a debate already arose a decade ago on whether to continue guaranteeing, or instead abolish, this right (Ooijen *et al.* 2008). Also more generally in Europe, respect for this fundamental right appears to have been eroding for quite some time, certainly in some of the courts (Trigg 2013). In the meantime, however, also in the United States, which can

globally still be considered to be one of the main advocates of religious freedom (Su 2016), the traditional consensus concerning the significance of this right has weakened if not disappeared altogether. As one author put it,

> [f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.
> (Laycock 2011: 407; see also Reno 2014; Smith 2014; Tushnet 2015)

It is difficult to give a single and clear-cut explanation for this. One important factor is without doubt the political polarization that has come to be associated with religious freedom. Thus, Democrats blame Republicans for claiming a near-monopoly with respect to the right to freedom of religion or belief, thereby interpreting it in a conservative manner when it comes to topics such as same-sex marriage. On their part, as they themselves would be the first to admit, the Obama administration has not always dealt in a sensitive manner with issues regarding the inclusion of abortion and anticonception in the healthcare legislation it has introduced.

In academic circles, the "new critics of religious freedom" is a term which refers to a group of legal and other scholars that criticizes the right to freedom of religion or belief as such (Philpott 2014: 4; 2016; Philpott and Shah 2016). Obviously, it is possible, and indeed common, for academics to be critical about specific interpretations and applications of the right in particular cases. In this sense, I also consider myself a critic of the right to freedom of religion or belief as, later on in the book, I will argue that the liberal individualist paradigm that one can sometimes see at work in the case law of, for example, the U.S. Supreme Court, can easily place pressure on communal religious freedom.

The criticisms by the new critics go much further, in that they question virtually all elements of the phrase "the right to freedom of religion or belief." Thus, a *first question* they ask is whether a right is a suitable way to protect religious freedom. The notion of rights is, of course, one of the pillars on which Western liberal constitutional orders are based. Globally, however, other types of constitutionalism can be discerned, which cannot necessarily accommodate the notion of rights so easily (Thio 2012). Also questioned is the idea that by attempting to guarantee religious freedom by means of a right, freedom is actually enhanced. To the extent that the protection of a liberal-style right is biased in a particular way, one's religious freedom can actually be limited rather than enlarged.

In fact, according to the new critics of religious freedom, there is reason to believe that the protection that the right to freedom of religion or belief provides is biased. This is because they regard the concept of religion itself as a Western invention. As a result, the concept is heavily influenced by, for example, Christian theology. Therefore, to the extent that the right aims at providing equal protection to believers, this is only possible within the terms of this framework. If Judaism, for example, is based on ethnicity, rather than a universalist religion such as

Christianity, legal protection of the religious rights of Jews is likely to be negatively influenced.

Finally, the idea of religion as a belief is perhaps what causes the bias in the first place. This is seen as a Christian, and more particularly a protestant, bias. Protestant is usually written with a small "p" in this context, so as to stress that the term is not used in a narrow denominational sense. Still, the reference to Protestantism is clear. In the process, Protestantism is depicted as a largely individual and private type of religion, which is focused on doctrine rather than practice. The same is said to apply to Christianity as a whole, when looked at from a comparative point of view. In this view, it is Christianity which is largely responsible for the distinction between a public and a private sphere, with "belief" being relegated to the latter (e.g. Sullivan 2005; Sullivan, Shakman Hurd, Mahmood, and Danchin 2015; Petty 2016).

The adjective "new" in "new critics of religious freedom" is a reference to the fact that there have been earlier critics of the right to freedom of religion or belief as such. These past critics of religious freedom were generally conservative in outlook. Thus, the Roman Catholic Church had not wholeheartedly embraced the idea of there being such a thing as religious freedom until the Second Vatican Council in the 1960s. Before then, the Church was critical of liberal democracy in general and the right to freedom of religion or belief in particular, because of the relativism that was believed to be at the heart of both. This was also the position of other, for example orthodox Protestant, churches. The new critics of religious freedom, on the contrary, appear to be mostly progressives who now might well believe religious freedom to have been an idea of conservative origins in the first place.

Of course, the new critics of religious freedom do not all contend exactly the same things, and in fact there are notable differences between them. As we have seen, however, what the critics do have in common is that they criticize the right to freedom of religion or belief as such. Their criticisms are therefore minimally of interest to human rights scholars in general and specialists in religious freedom in particular. Yet sometimes the implications of the criticisms, or of secularism more generally, for liberal democracy as a whole are also spelled out (see e.g. Rosenfeld and Mancini 2013; Cohen and Laborde 2015). Secularism, among other things, refers "to different normative-ideological state projects, as well as to different legal-constitutional frameworks of separation of state and religion and to different models of differentiation of religion, ethics, morality, and law" (Casanova 2011: 66). It is here that the topic takes on an even broader relevance and becomes also of interest to constitutional lawyers and political scientists more generally. Whereas the criticisms referred to above hold that the protection which the right to freedom of religion or belief provides is too limited, in the West religious freedom is arguably currently granted too much protection according to this latter line of thought.

Thus, one of the questions raised is whether recent case law in the United States has witnessed the resurgence of an almost medieval, "jurisdictional," approach to the right to freedom of religion or belief. Characteristic of this approach is that,

besides the obvious sovereignty claim of today's national states, other—more controversial—sovereignty claims by religious associations, groups, and institutions are increasingly being acknowledged. The latter sovereignty claims are regarded by their critics as being incompatible with the idea of state sovereignty being the only legitimate source of sovereignty in society. Thus, it is presented as though a clear choice will have to be made between the jurisdictional approach to religious freedom and the view that sees sovereignty within the liberal democratic state as essentially monistic in nature (Cohen 2015).

In a similar vein, it is sometimes considered "sectarian" to grant special protection to religion or comparable beliefs at all. One way the right to freedom of religion or belief could be made more inclusive is by transforming it into, for example, a general right to ethical integrity (Laborde 2015). Another option, as we saw already, is to abolish the right to freedom of religion or belief altogether and henceforth deal with religious rights in the context of, for example, the freedoms of expression and assembly and association.

The points made by the new critics of religious freedom raise a *second question* which has given rise to the current book, in addition to the question of to what extent in Europe and North America the communal dimension of religious freedom continues to be protected. This second question is whether the recognition that there are multiple sources of sovereignty in society can actually help to achieve legitimacy of the democratic constitutional order rather than putting its political legitimacy under pressure. Legitimacy is used here in the descriptive sense of "people's beliefs about political authority and, sometimes, political obligations" (Peter 2016). Whereas the first question is of an empirical nature, the second question is more normative. To the extent that the answer to the first question will, although provisionally, have to be in the affirmative, the second question obviously gains in weight.

Main Thesis and Synopsis of the Book

Although I rather fundamentally disagree with them, I am at the same time grateful to the new critics of religious freedom, some of whom I had the privilege of meeting personally during my year at Princeton. Perhaps unintentionally, they have provided at least some of the inspiration for this book and made it clear to me what its thesis would have to be: that no matter if one argues that the protection provided by the right to freedom of religion or belief is too wide or too limited, there is always more at stake than this right in itself—that is, constitutionalism and democracy (cf. Joustra 2016). Although it is obviously possible to disagree about concrete interpretations and applications of the right to freedom of religion or belief, to argue that the protection provided by this fundamental right is generally too limited suggests that religious freedom within the framework of a liberal democratic state has become an impossibility altogether. Similarly, to argue that the protection provided by the right to freedom of religion or belief is generally too wide because it puts the monopoly of the state on sovereignty under pressure, which is characteristic of a democratic constitutional order, is to question the

political legitimacy of the same order. There are likely to be many members of Western societies who, for religious reasons, are unable to subscribe to the idea that all sovereignty is concentrated within the state and the worldly authorities which public law constitutes.

More specifically, the main thesis of the book is that no legitimate liberal democracy is feasible without there being the type of protection of religious freedom offered by the right to freedom of religion or belief as it has historically developed. In turn, a more classical understanding of the idea of a democratic constitutional state than many of the new critics of religious freedom appear to adhere to leads to a generous interpretation of in particular the associational and institutional dimensions of the right to freedom of religion or belief, in addition to its clearly also crucial individual aspects. The reason for the principled interconnectedness of these principles is that it is possible to argue that the purpose of all three—constitutionalism, democracy, and religious freedom—is ultimately to allow citizens to become "fully human."

"To be fully human" is a quotation from Professor Emeritus in Christian Ethics at the North-West University (Potchefstroomcampus) Koos Vorster. The full quotation reads as follows:

> The attitude of the Christian towards other religions can be served best where room is created for all to be fully human in the public and private spheres. To be fully human means to cradle the spirituality of one's religion and to build one's life on the foundation that the religion offers.
>
> (2010: 179)

As is clear from this quotation, Vorster indeed takes for granted the arguably Christian idea of, for example, the separation of a public and a private sphere, yet believes that this still can be beneficial to "other religions" as well. Equally, although Vorster addresses primarily his fellow Christians in this instance, the notion that it is important with a view to human flourishing to make room for all to build their lives on the foundation of their religious—or other—worldviews is also one that can be adhered to more generally by many faiths.

The book is divided into four chapters and a conclusion. Chapter 1 analyses what three relatively recent actual court cases—one from Europe, one from the United States, and one from Canada—can teach us about how the right to freedom of religion or belief, and in particular its associational and institutional dimensions, is currently being interpreted and applied. Is the protection that religious freedom is granted indeed too broad, or is it perhaps the case that also in the case law the right to freedom of religion or belief is gradually coming under pressure? It will be concluded that, although at first sight the various high court rulings seem to suggest otherwise, the cup of religious freedom is indeed gradually becoming half empty rather than half full.

An obvious explanation that has remained unmentioned thus far is the change in religious convictions taking place among, for example, the American population. Changes in the religious maps of Europe and North America cannot simply be

equated with secularization. The concept of secularization "usually refers to actual or alleged empirical-historical patterns of transformation and differentiation of 'the religious' (ecclesiastical institutions and churches) and 'the secular' (state, economy, science, art, entertainment, health, welfare, etc.) institutional spheres from early-modern to contemporary societies" (Casanova 2011: 54). However, as sociologist of religion José Casanova has pointed out, secularization is also sometimes held to comprise "the progressive decline of religious beliefs and practices as a concomitant of levels of modernization" as well as the "privatization of religion as a precondition of modern secular and democratic politics" (2011: 60; see also Casanova 1994). According to the so-called theory of secularization, developed within the social sciences, all three processes have inevitably progressed during the past couple of centuries up to the point that, at least in the West, we have now entered a "secular age." Canadian philosopher Charles Taylor describes this change as "one which takes us from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others" (2007: 3).

On the contrary: what, according to at least some literature, seems to emerge is rather a postsecular constellation. As German philosopher Jürgen Habermas points out, it really only makes sense to apply this term to societies which since at least the Second World War have become relatively secularized also in the second and third meanings of the term as distinguished by Casanova, such as various Western European countries and Canada, not so much with respect to the United States. In the former countries, religion then arguably "maintains a public influence and relevance, while the secularistic certainty that religion will disappear worldwide in the course of modernization is losing ground" (2008: 21). In the context of this book the term postsecular is, in addition, used to indicate that there are not just more secular people in society, but that there is also more diversity among the equally significant part of the population that remains religious or spiritual (cf. Commission on Religion and Belief in British Public Life 2015: 6). Some authors even hold that it makes more sense to do away with the religion/secular divide altogether, as the question is not so much whether but *how* people are religious (Paul 2014).

The notion of a postsecular society is without doubt a valuable perspective, as it draws attention to the fact that historically religion has proved to be a lasting characteristic of the human condition. This does not exclude the possibility, however, that when looking specifically at developments in the West in recent decades, first of all a process of secularization can be discerned. This has recently also come to include the United States, although still maybe not to the extent that is the case in certain European countries such as the United Kingdom (Bagehot 2016). As a result, the renegotiations that are taking place between in particular Christian organizations and the state are rather of a defensive nature. A religion which in many countries used to enjoy a majority status now has to slowly but steadily become accustomed to being in the minority (Bottum 2014). For Islam the story is different, as in many instances it is for the first time negotiating a status for its followers, next to religions which in the West are more established.

One advantage of there being a right to freedom of religion or belief is, however, that it ought not to make much difference whether a religion enjoys a majority status or is in the minority. Of course, in practice both legislation and case law can become influenced themselves by the majority religion, as has in the past without doubt been the case with Christianity in the West. Similarly, a (developing) secular majority will be able to legitimately influence legislation and case law in its own way. Still, to the extent that religious freedom is a fundamental right and even, as some hold, a natural right preceding the state, the various renegotiations between Christian organizations and the state should not be as comprehensive as otherwise might have been the case. Also, a more recently established religion such as Islam should be able to enjoy basic protection of its associational and institutional religious rights under a secular majority as well.

Some of the criticisms voiced by the new critics of religious freedom without doubt contain a considerable amount of truth, such as that the concept of religion employed by courts in the West is not as "transhistorical and transcultural" as is sometimes tacitly assumed (Petty 2016: 15), but instead is heavily influenced by Christianity (Trigg 2010: 18). It would indeed be quite a sensation to somehow discover that the legal conception of religion in the West had not been influenced by Christianity. As will be argued in Chapter 2, a close relationship exists also more generally between classical liberal principles for the constitutional order and theological notions such as original sin, the separation of church and state, conscience protection, and the fundamental equality of all human beings before God.

Partly under the influence of the social and cultural revolution of the 1960s, however, liberalism has arguably developed from a means of managing diversity in the direction of an ideological agenda of its own. In a postsecular society a more limited type of government thus appears to be required once again, in order for it to remain legitimate. Such so-called social pluralist constitutionalism extends the idea of the separation of powers from the statal powers to non-state actors. The purpose of the doctrine of the separation of powers is to prevent tyranny. However, especially now that the state has grown so much bigger, a type of separation of powers between the state powers only may no longer suffice. It will be argued that certain (theoretical) developments taking place in the area of transnational constitutionalism can lead the way with respect to the—in this view—desired existence of multiple sources of sovereignty in society.

Contrary to what legal and political theorist Jean L. Cohen and others suggest, it will indeed be argued in Chapter 2 that the debate on where the ultimate source of sovereignty lies has historically never been answered by Western democracies. What is more, liberal democracy is not even able to legitimately settle this issue in an unequivocal manner given its own principles, such as the right to freedom of religion or belief. Thus, the individual dimension of this right actually creates a solid foundation for the associational and institutional dimension of the same right. Institutional religious autonomy is, in turn, foundational for the notion of limited government and as such for liberal democracy as a whole. Of course, it remains the case that "[n]o private group residing in a liberal democracy enjoys sovereign immunity from the actions of government, even for its internal affairs.

Given a sufficiently important reason, government can and does intervene in 'internal' religious group matters" (Gedicks 2013: 17).

Expanding upon the line of thought developed in Chapter 2, Chapter 3 argues how in our present time, in which Western societies, despite a clear degree of secularization, have at the same time become perhaps more divided than ever, according to social pluralist thought a democracy needs to be characterized by a generally accessible and as a result truly pluralistic public square. As Aristoteles once taught, the essence of politics consists in ethical debate about what constitutes "the good life." The Achilles heel of liberal democracy is that by itself it is not able to formulate an answer to this question, and because of the lack of substantial public and parliamentary debate on the matter has become largely dysfunctional. To the extent that there is still substantial public and parliamentary debate, this tends to focus on issues such as the economy and security. Also, paradoxically, there appears to be less tolerance of views that do not belong to the—new—mainstream than there used to be even some 20 years ago (Mansvelt Beck 2015).

A resurrection of democracy, to borrow the phrase from theological ethicist Luke Bretherton (2015), is not feasible without generous protection of (also) the more associational and institutional dimensions of the right to freedom of religion or belief, however (Van den Brink and Ten Napel 2013; Ten Napel and Van den Brink 2014). It is submitted that precisely within faith and other communities mature visions of the good life can develop, which simultaneously contribute to the notion of the common good. At first sight, there is a contradiction between the notion of a truly pluralistic public square and the desire that several minorities feel that they also contribute to the common good. This tension can be resolved to the extent that the said faith and indeed other communities also teach that good citizenship implies the idea of liberal democracy as a moral engagement. The more citizens look at the political decision-making process in this way, the more they will respect the vital interests of others. Moral engagement also makes it possible to translate differing visions of the good life into the pursuit of policies that are in the interest of all.

As will be set out in Chapter 3, several thinkers who believe in the need to translate the pluralism in society into a truly "equal political voice liberalism" (Wolterstorff 2012) accord much weight in particular to the freedoms of assembly and association. In order for different voices to be heard, there is a need for places where people can find their voice, even if this implies that some of these ideas will not be in conformity with the majority opinions in society. In such cases, it is furthermore required to be reluctant to interfere in the internal affairs of religious and other associations. At first sight this may seem to imply that the new critics of religious freedom are also right when they argue that the protection provided by more general political rights—such as those of speech, press and assembly—suffices. It is submitted, however, that in these cases the more general political rights and communal religious freedom can complement and strengthen one another (Inazu 2014).

Crucially, however, at the same time boundaries will need to be set in order to keep the public square indeed generally accessible and pluralistic and thus to

maintain the foundations of a pluriform democracy. As Chapter 3 will argue, however, these boundaries are markedly different from those advocated by adherents of the currently still dominant, yet arguably by and large worn-out, concept of a public reason. The difference is that, in the case of an equal political voice liberalism, the boundaries are confined to existing constitutional limits, notably those set by classical fundamental rights. In the case of public reason liberalism, additional limits are added on top of these, which according to the critics make it next to impossible for various minorities to join the conversation, with the result that they will opt out instead of joining in.

Chapter 4 goes on to outline the implications of a return to a more limited form of government and the development towards a truly pluriform democracy for the associational and institutional dimensions of the right to freedom of religion or belief in particular. In so far as both democratic constitutionalism in general and the right to freedom of religion or belief in particular aim at enabling citizens to become "fully human," as we have seen, it is clear that a generous interpretation of this right is advisable in order to achieve or maintain legitimacy. In their interpretation of the right to freedom of religion or belief, courts and legislatures sometimes tend to narrow it down to its individual dimension.

Still, there is not really the need for a radically new theory of this right. This is because the associational and institutional aspects of religious freedom have traditionally constituted an integral part of the right to freedom of religion or belief, and it is perfectly possible to build on this legacy in a manner that is both pragmatic and principled. It may be the case that, this way, both democratic constitutionalism in general and the right to freedom of religion or belief in particular retain a distinctly Western and even Christian character. It is submitted that this should be regarded as an asset rather than a weakness that needs to be done away with as thoroughly as possible for the sake of "true" religious freedom, however. The fact that an idea has originated in a particular cultural or religious context does not imply that it cannot serve the interests of people in different parts of the world or belonging to other faiths or no faith.

It may sound rather pragmatic not to begin the search for a radically new theory of the right to freedom of religion or belief for our present time. Paradoxically, however, in the light of some of the criticisms of the right to freedom of religion or belief currently voiced, it almost becomes as radical to suggest that a gradual further development—and indeed improvement—of existing practice with regard to the interpretation and application of this universal fundamental right is to be preferred over a new beginning. It remains difficult to see, moreover, how a political order could maintain its legitimacy for long by legally ignoring the deepest convictions of at least sections of the population.

The Conclusion will wrap up the argument of the book. Of course, the position of religious and other minorities in the increasingly secular, majoritarian contexts of Western liberal democracies cannot be safeguarded by the associational and institutional dimensions of the right to freedom of religion or belief alone. In addition, a particular type of constitutional design in the broadest sense of the term may be needed, which is suitable for the present-day perhaps predominantly

secular, but at the same time still religiously and otherwise divided, societies (Choudhry 2008). This book, however, focuses on the idea that, in such a post-secular context, modern sources of constitutionalism and democracy, supplemented by a touch of premodern, transcendental legitimation, might well continue to provide the best means of legitimating Western political orders. It may not sound very democratic, or even academic, to suggest that some form of transcendence might even in modern times remain of relevance to a political order. Still, the fact that to some the right to freedom of religion or belief can be regarded as a natural right preceding the state proves that there is already a transcendental dimension at work regarding human rights and its underlying notion of human dignity. After all, according to the United States Declaration of Independence, "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (Emon, Levering, and Novak 2014; Holzer 2015; Muňoz 2016).

Gratitude for what has historically grown is perhaps more generally the most effective answer to the skepticism that a postsecular age can also give rise to. A reorientation of liberal democracy towards the common good is one main contribution that world religions such as Christianity, Islam, and Judaism can help achieve in an otherwise religiously violent world (Volf 2016). The constitutional significance of in particular the associational and institutional dimensions of the right to freedom of religion or belief is that they facilitate this contribution. To put into question the possibility to realize this right is to doubt whether liberal democracy itself is possible. Or so it will be argued in what follows.

Approach

As will already have become clear from the above, the book applies an interdisciplinary method, by combining insights from (comparative) constitutional law and political science on the one hand with elements of other disciplines, notably ethics and theology, on the other hand. As has rightly been argued,

> [t]heologians have been trained in a deep history of thought about the nature of our life with and without God. It is possible to disagree with their perspectives on our society, and they certainly disagree with each other. But we dare not dismiss the depth of their thinking by assuming religion is no longer a significant player in our life together.
>
> (Barnes 2016; cf. Storrar 2007; Skeel 2008)

To do so is very much in line with, and indeed inspired by, the "fresh" approach to the issue of law and religious freedom which CTI has pursued during the academic year 2014–2015. It should be noted, however, that the current book will engage these other disciplines in an indirect manner only—that is, in so far as ethics and theology are necessary to develop and apply the social pluralist framework which the study uses and will be set out below. Each time I have been

involved in interdisciplinary endeavors, I have—after the initial excitement—also experienced how difficult it is to actually translate the original ambitions and intentions into convincing results. It is for this reason that, although some will perhaps not even think this is worth calling interdisciplinary research, I consider a combining of insights from different disciplines already quite useful. In any case, I have found that some of the most worthwhile books on liberal democracy that have been published in recent years have been authored, for example, by ethicists and philosophers.

Such an interdisciplinary method also fits in well with what leading scholars in the field of comparative constitutional law, such as Armin von Bogdandy (2012) and Ran Hirschl (2014), in recent years have been pleading for, although they have largely restricted themselves to pointing out the relevance to law of history and the (other) social sciences. These authors have argued that the discipline of constitutional law ought to become more comparative, more theoretical, and more interdisciplinary in character. It is certainly the case that, because of this, the field of constitutional law has become much more interesting and lively since the founding of the *International Journal of Constitutional Law* some 15 years ago, to mention just one milestone (cf. DeGirolami 2015). Apart from making an interdisciplinary effort, the book is also theoretical in that its aim is not to offer a comprehensive overview of the latest case law regarding the right to freedom of religion or belief, but rather to develop a theoretical framework with the help of which developments in this area can be meaningfully interpreted and evaluated.

Finally, an interdisciplinary effort like this is, according to at least one observer, really only the very minimum of what would be needed in order to restore at least something of the previously existing intellectual and societal consensus regarding the significance of the right to freedom of religion or belief for liberal democracy—that is:

> a broad-based, multidisciplinary effort, comprised of many scholars and policy experts, many universities, and many research centers, both in the United States and abroad. It must involve economists, sociologists, psychologists, and anthropologists alongside philosophers, theologians, political theorists, policy makers, and, ultimately, the general public.
>
> (Farr 2012: 49)

As the same observer has noted, "[t]he stakes are high. They implicate human dignity, social harmony, political stability, economic growth, and world peace" (ibid.). The idea that ultimately what is at stake in debates regarding religious freedom is peace, both societal and international peace, can also be found in the preambles of various human rights declarations and treaties. What is more, as Professor Emeritus of the Practice in Religion, Ethnicity, and International Conflict at Harvard Divinity School David Little has pointed out, "[t]here is strong empirical support for the proposition that human rights compliance in general, and religious freedom compliance in particular, increase the prospects for peace" (2015: 4). This is known as the idea of a "Liberal Peace."

In addition to its principally interdisciplinary nature, the approach of at least some scholars at CTI has in the past been characterized by making explicit the philosophical background of one's writings, not just as a matter of academic integrity (everyone who looks at the fundamental questions of our constitutional and democratic order will bring their own set of convictions to the table, even—or maybe in particular—when these are "secular") (cf. Sandel 2014) but also in the hope and trust that precisely by doing so the dialogue with researchers who start from different theoretical frameworks will be facilitated instead of complicated (Waldron 2011: 7–13). The ensuing discussion might well bring the solution of the problems involved a step further, more so than when the participants in this discussion were forced to keep their deepest convictions hidden from their conversation partners.

In this sense an interesting parallel can be discerned between academia and the democratic process. In both cases it is considered politically correct to stick to "neutral" and "reasonable" arguments and positions (e.g. Espinoza and Rayner 2015). Just as it will be argued in this book that the notion of public reason actually contributes to the dysfunction of our political system, the same might hold true for academic debate. It is only when students and their teachers are provided with the opportunity to make explicit the background suppositions behind their theoretical frameworks that a real understanding and a real debate can begin. If academics are required to limit themselves to "neutral" arguments, any debate that nevertheless will take place runs the risk of remaining superficial. Apart from this paradoxically being a matter of academic integrity more generally, although many will disagree, getting to know students and other fellow academics better in this sense is often a precondition to further knowledge and understanding.

In light of the above, the book is not just meant for readers who could be expected to sympathize with some or all of the theoretical starting points set out here, but also as a modest invitation precisely to dissenters to engage in a "respectful academic conversation" similar to what Founding Director of the Center for Christian Studies at Gordon College (now the Center for Faith and Inquiry) Harold Heie calls a "respectful political conversation" (2014). Should this not, or no longer, be possible, then it will also prove difficult to uphold the ideal of a pluralistic public square as part of one's democracy conception, as advocated in what follows. To the extent that I have had the opportunity to put this model into practice myself, it was in academic settings such as academic conferences. Although it admittedly sometimes turned out to be difficult there as well, I have nevertheless concluded that it is worthwhile to stick to the ideal even in the undoubtedly still more difficult circumstances of practical politics.

Thus, a central tenet of the book is that both the questions surrounding the right to freedom of religion or belief and those surrounding constitutionalism and democracy can generally best be addressed by seeking guidance from the theory of social pluralism. At least three views of social pluralism can be distinguished: what could be called an argument from history (Edmund Burke, Guillaume Groen van Prinsterer, Otto von Gierke, John Neville Figgis); the recent Catholic tradition (Pope Leo XIII, Pope Pius XI, Jacques Maritain, Bishops of the Second

Vatican Council); and progressive Calvinism (Abraham Kuyper, Herman Dooyeweerd, H. Evan Runner, Bernard J. Zylstra). So much has been written on each of these three strands of social pluralist theory that there is no need to elaborate on the theory more than is strictly necessary in view of the argument of this book. The reader who would like to learn more about the theory itself can refer to more specialist literature such as the volume by political scientists James W. Skillen and Rockne M. McCarthy from which the above categorization stems in the first place (1991).

May it suffice to note here that a major starting point for the latter view of social pluralism, better known as neo-Calvinism, is the doctrines of associational and directional pluralism, which will be set out in Chapter 3. It is these doctrines which lie at the basis of the conception of a pluriform democracy as referred to above. The doctrines of associational and directional pluralism are regarded by their adherents as relevant to all cultures and all times, because they are believed to correspond "with the way things really are in terms of God and the nature of human being" (Heslam 2002: 26). As Skillen (2000: 368) puts it:

> Kuyper's way of seeking to discover and honor the integrity of creation's diversity illuminates one of the central social challenges people will always face in all parts of the world. . . . If individualism, collectivism, and secularism are all misleading in one direction or another, then the need for a God-centered, pluralist social vision will remain strong throughout the world.

These may at first sight appear to be strong statements. However, it is quite possible to come across similar claims and statements in the case of, for example, liberal theory. It has increasingly come to surprise me how it is considered perfectly acceptable to prescribe literature on such liberal theory and its internal debates, whereas even referring to other strands of thought such as social pluralist theory may easily be regarded as sectarian or even not fully appropriate in an academic context. Yet, just as it is probably not wise to exclude religious arguments from the public and political debate, there is no apparent reason why, for example, religious forms of constitutionalism should be ignored in academia. In fact, "the larger conversation of contemporary constitutional theory can only be deepened and clarified by treating them as legitimately within its domain" (Dane 2015: 476).

Interestingly, Catholic social teaching's recently more positive attitude towards democratic constitutionalism remains slightly more conditional than that of neo-Calvinism and by no means can be taken as an all-out acceptance of its (Enlightenment) liberal presuppositions. Thus, the handbook of this second view of social pluralism identified earlier, the *Compendium of the Social Doctrine of the Church*, "values" democracy (Pontifical Council for Justice and Peace 2005: 406). It adds (407), however, that

> an authentic democracy is not merely the result of a formal observation of a set of rules but is the fruit of a convinced acceptance of the values that inspire

democratic procedures: the dignity of every human person, the respect of human rights, commitment to the common good as the purpose and guiding criterion for political life. If there is no general consensus on these values, the deepest meaning of democracy is lost and its stability is compromised.

As a result, this tradition can well serve to help formulate the boundaries that are needed to maintain the accessibility and the pluralistic nature of the public square.

Another contribution that the recent Catholic tradition can make to current debates on constitutionalism and democracy has to do with the notion of the common good which we came across earlier as well. Of the three strands of social pluralist theory, the notion of the common good is perhaps best developed within Catholic social teaching. It is certainly more developed here than within neo-Calvinism, which has a more individualist tendency, although generally the differences between neo-Calvinism and Catholic social teaching should no longer be exaggerated either. As has rightly been remarked in this connection:

> [U]nder contemporary sociological conditions, the Augustinian philosophical wellspring is likely to yield more than the Thomist one. . . . Augustine's late classical world was highly pluralistic: paganism, Donatism, Pelagianism, and Arianism all vied with Catholicism on the battlefield of ideas, and sometimes on the actual battlefield as well. In sharp contrast, Thomas' late medieval world was characterized by an ambient Catholic public culture that provided a common constellation of political languages, concepts, and frames.
>
> (Latham 2013)

Given the relative prominence of these first two traditions within social pluralist theory, one could of course wonder which consequences the apparent decay of at least organized Christianity in the West will have for the prospects of social pluralist constitutionalism and pluriform democracy. The current book project could easily be—and indeed has occasionally already been—almost written off as a pervasively sectarian undertaking, which will not succeed in reaching the audiences to which it is geared in the first place. This book will argue, however, that there is "a pessimistic case for hope" in this respect (Levin 2014). Among other things, this hope stems from the existing links between the neo-Calvinist and recent Catholic views on social pluralism and the first, more general strand of social pluralist theory identified above—that is, the argument from history or Conservatism. In the course of my year in the United States I became increasingly convinced of both the relevance and the vitality of the Conservative tradition. Obviously, it helped that in the United States the tradition appeared to be much more alive intellectually than back home in Europe, let alone in the Netherlands where it remains something of a taboo word. Of course, for example, Edmund Burke's natural law-based constitutionalism "is both consonant with, and indebted to, a series of Christian theological convictions" (Burgess 2016; cf. Kirk 2002; Regnery 2012).

It equally helped to find authors who specifically had attempted to apply Conservative thought to questions of religious freedom and the state. Thus, it has been argued that

> to be "conservative" is at least and among other things to join Burke in rejecting Rousseau's assertions that "a democratic society should be one in which absolutely nothing stands between man and the state" and that non-state authorities and associations should be proscribed. . . . [N]ear the heart of anything called "conservatism"—of any temperament, worldview, or set of ideas that stands opposite or reacts against the French Revolution—should be an appreciation for the place and role of non-state authorities in promoting the common good and the flourishing of persons and a commitment to religious freedom for individuals and institutions alike, secured in part through constitutional limits on the powers of political authorities.
>
> (Garnett 2016: 164)

When applied in a contemporary manner to problems such as those dealt with in this book, the tradition might well continue to be able to make an important contribution, in addition to other intellectual traditions. Moreover, there is no reason why it would not have the potential to appeal also to younger generations, including so-called "nones" who no longer consider themselves to be adherents of an organized religion, yet remain "spiritual" (Ingraham 2016). They might well feel attracted to a Culture War 2.0, which aims at reviving the culture in at least four ways:

> We need to be more communal in an age that's overly individualistic; we need to be more morally minded in an age that's overly utilitarian; we need to be more spiritually literate in an age that's overly materialistic; and we need to be more emotionally intelligent in an age that is overly cognitive.
>
> (Brooks 2016)

It is important to note, however, that, despite its clear affinity with Conservatism, social pluralism is not a theory for, say, rural Pennsylvania and populations such as the Amish only. Nor is it something of the past. Not long ago, for example, neo-Calvinism was listed by *Time* as one of "10 Ideas Changing the World Right Now" (Van Biema 2009). To the extent that I had a particular location in mind while writing this book, it was New York City. At just a one-hour train ride away from Princeton, the "greatest city on earth" occasionally formed a welcome and highly inspirational escape from the sometimes rather too peaceful and quiet Princeton campus during the year in which I worked there. Obviously, New York City has its own fair share of problems and there is no reason to idealize life in the city, or in the United States for that matter, whatsoever. Still, to my mind, there is no better test case for social pluralist theory than this diverse place. If it

can make it there, it can make it anywhere, so to say. And that it has at least the potential to make it in New York City is demonstrated, for example, by the approach of Mayor De Blasio, a progressive liberal (Grynbaum and Otterman 2015).

There is an increasing academic fascination with cities, both in theology and law and political science, and rightly so. The reason for this lies without doubt in part in the prognosis that, globally, during the twenty-first century ever more people will be living in cities. As a result, the urge is felt to develop a theology for the city, with the help of which urban populations can be reached. An example is provided by the ministry of Tim Keller in New York City. His Redeemer Presbyterian Church, which celebrated its 25th anniversary in 2014 and can already in many ways be regarded as a success story, recently adopted an even more ambitious plan to reach a still larger part of the population of Manhattan. Also more in general, New York City can, contrary to what many people would expect, best be characterized as a religiously vibrant place (Bradley 2015; Roberts 2016). In political science, attention is paid to the increasing importance of cities in terms of governance. It almost seems as though cities are taking over the role previously played by national states—for example, when it comes to foreign policy (Daalder 2015).

Academically speaking, the infusion of ethical and theological insights can contribute to the so-called neo-institutionalism gaining more ground within the legal discipline as well. Institutionalism is a well-known school of thought within political science which, in part as a reaction to behavioralism, emphasizes the importance of both traditional and newer institutions. The legal neo-institutionalism does not imply full-blown pluralism, and its accompanying incommensurability of authority, but rather a weaker form of pluralism called subsidiarity (Muniz-Fraticelli 2014: chapter 3). Still, the more "the institutional turn" would be taken, the more, for example, a tendency should also become discernible, as one author recently put it, to "treat . . . religious entities as largely sovereign institutions, immunizing them from the application of civil rights laws and other statutes" (Horwitz 2013: 10). Subsidiarity is, of course, a governing concept which has its roots in social pluralist theory, notably its Catholic strand of thought.

What this means is that although within social pluralist theory there is certainly room for opinions such as Cohen's which emphasize the monistic character of sovereignty in the liberal democratic state as well, it clearly considers the jurisdictional approach to religious freedom to be at least equally legitimate and even plausible. The approach is thus also pluralist in the sense that it does not agree with Cohen that a choice will necessarily have to be made between these two approaches, but rather leaves the question of where the ultimate sovereignty is to be located within the liberal democratic state principally open. This can be called conservative, to the extent that, as was already noted above, historically this question has also not been "settled" once and for all—for example, during the American Revolution. On the contrary, the Founding Fathers differed significantly among each other on this topic.

Once again, this approach is not something which only Conservatives might agree with, however. For example, it also resembles in a sense the so-called minimalist interpretation theory advocated by legal scholar Cass Sunstein (2001), a progressive liberal. This theory holds that judges ought to stick as much as possible to the facts of the case and if possible avoid ruling on the deeper questions involved. More generally, the book will point to liberal pluralism as a plausible model to manage diversity also in a postsecular society (Galston 2002, 2005). It will also raise the question, in this context, if and to what extent social pluralist theory differs from liberal pluralism in a practical sense, although differences remain at the theoretical level. Former policy advisor to President Clinton and presidential candidates William A. Galston's alternative of political pluralism, for example,

> understands human life as consisting in a multiplicity of spheres, some overlapping, with distinct natures and/or inner norms. Each sphere enjoys a limited but real autonomy. It rejects any account of political community that creates a unidimensional hierarchical ordering among these spheres of life; rather, different forms of association and activity are complexly interrelated.
>
> (2004: 46–7)

What is more, although grounded at least in part in Christian theology, the approach is in a sense also remarkably similar to constitutional lawyer Asifa Quraishi-Landes's account of Islamic constitutionalism inspired by classical, premodern, Islamic regimes (2015). As colleague Perry Dane summarizes her account in his foreword to a symposium on religious constitutionalism, Islamic constitutionalism "is rooted in the pluralistic nature of *fiqh*—the necessarily human, imperfect, and widely diverse interpretation of Shariah." This characteristic idea of legal pluralism then leads to what Quraishi-Landes calls "a fundamental constitutional bifurcation":

> On one side of that divide is a community of communities, a collection of thick normative jurisdictions, each adhering to one of the various schools of *fiqh* or—crucially—to one or another non-Muslim faith. These communities would govern most of the details of life, individual conduct, and terms of social co-existence comprehensively governed by a religion of law. But they would also be volunteeristic. On the other side of the bifurcation is a much thinner, democratically-governed, state apparatus devoted, not to religious hermeneutics, but to *siyasa*, the pragmatic pursuit of the public good. (The central government would also—an important detail—craft its own set of rich but secular rules as a default option for anyone unwilling to commit to one of the volunteeristic schools of interpretation.) That state apparatus, in turn, would be subject to a further constitutional check, grounded in the fundamental purposes of Shariah to guarantee the common good broadly understood.
>
> (Dane 2015: 471)

Whether one agrees with such proposals or not, it seems difficult to deny

> the importance of engaging in an ongoing and open conversation about how to organize constitutional theories and actual states—whether religious or secular or some combination of the two—that can try to promote our highest and best aspirations as social beings while also respecting the divergent communities that any state will contain and treating each individual person justly and humanely.

(477)

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