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MARY ANN GLENDON ON RELIGIOUS LIBERTY:
THE SOCIAL NATURE OF THE PERSON AND
THE PUBLIC NATURE OF RELIGION

Angela C. Carmella*

Mary Ann Glendon’s writings in the field of religious liberty have come relatively late in her long and distinguished career as a legal comparatist, philosophical communitarian, common law traditionalist, Catholic intellectual, lay Vatican representative, and teacher of family law and property law.1 But in a short time, she has made a significant contribution to our understanding of the First Amendment precisely because she brings to the inquiry deep insights acquired through her work in these other fields.2 Glendon brings a refreshingly organic or “ecological” perspective to a field dominated by a narrow focus on individualized religion disconnected from its larger social function and on the Religion Clauses disconnected from text, tradition, and history. She corrects these deficiencies, placing religious liberty questions in the larger context of the vital role played by religious (and other) communities in the de-

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velopment of the person. Glendon calls for interpretation of the Religion Clauses in relation to other parts of the Constitution so that democratic themes, including the vital role of communities, emerge. And her comparative work in American and European legal and political discourse reminds us that study of a variety of approaches to the relationship between religious communities and government can illuminate the strengths and weaknesses of our own.

Glendon's overall thesis is that "the nonestablishment and free exercise provisions [of the First Amendment] were meant to work together in support of a single value: religious freedom." She argues that the Supreme Court set jurisprudence concerning religion on the wrong course in the 1940s when, in its earliest cases, it elevated the "wall of separation" to a paramount constitutional value, independent of religious freedom. Pointing to the repeated failures of this approach to promote religious freedom in its institutional, associational, and individual dimensions, Glendon contends that religion can be protected in a pluralistic society like ours only "through considering the complex interplay among free exercise, free speech, and equal protection principles, rather than through rigid, mechanical separationism." Eschewing a mechanical deference to the political branches as well, Glendon's focus is always on the many overlapping communities, religious and cultural, that make up the rich texture of civil society, create the environment for human development, and sustain democracy. She recognizes that religious groups are widely engaged in these public tasks—far from the privatized, isolated, and sectarian religion of the Court's creation. Her work on the "Religion Clause"—for Glendon, not two clauses in tension but a single clause aimed at religious freedom—demonstrates how First Amendment interpretation according to dogmatic separation or inflexible deference fails to grasp the social nature of the person and the public nature of religion.

While separation remains the dominant paradigm for judicial understanding of the Religion Clause, a competing paradigm has emerged over the last fifteen years. A new emphasis on egalitarianism, or nondiscrimination, has led to an entirely different understanding of the relationship between religion and government. The egalitarian paradigm treats religious speech and association, religious education and charity, and religious property and institutions like their secular counterparts, so that the burdens of generally applicable laws and the benefits of generally applicable services and resources

3 Glendon, Symposium, supra note 1, at 31.
4 See Glendon & Yanes, Structural Free Exercise, supra note 1, at 549.
fall on religious as well as secular actors. This emphasis on equal
treatment and equal access runs directly counter to the separationist
paradigm, which is marked by special treatment of religious actors:
special benefits by way of exemptions from general laws and special
burdens by way of ineligibility for government services and resources
even when they are widely available to comparable nonreligious
actors.

This new paradigm of nondiscrimination and equality has the ca-
pacity to incorporate much of Glendon’s thinking on Religion Clause
jurisprudence. Most significantly, the new paradigm seems to contain
the seeds of a view of the person as fundamentally social and an un-
derstanding of religion as profoundly public. But because the new
paradigm emphasizes the value of equality over liberty, Glendon’s
“structural” reading of the First Amendment and her attention to
communities is needed to reconnect the emerging egalitarianism to
the central liberty concerns expressed in the text, history, and tradi-
tion of the Constitution.

Part I of this essay will discuss Glendon’s critique of the “rights
talk” that pervades American legal culture and contributes to our awk-
ward discourse on communities. Part II will summarize her analysis of
Religion Clause jurisprudence. Part III will discuss her interpretive
methodology and show how such an approach can move the Court
away from its rights-based paradigms of separation and equality to-
ward a new conception of religious liberty.

I. THE LONE RIGHTS-BEARER AND SECTARIAN RELIGION VS. THE
SOCIAL PERSON AND PUBLIC RELIGION

As a philosophical communitarian, Glendon focuses on the so-
cial environments “within which human character, competence, and

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5 Communitarianism is typically founded upon a critique of liberalism, in that it
rejects the atomistic “unencumbered” conception of the person, emphasizes the
importance of communities “in the constitutive sense,” and encourages political participa-
tion and the retrieval of the tradition of civic republicanism, or civic virtue. See
Michael J. Sandel, Freedom of Conscience or Freedom of Choice?, in Religous Liberty in
the Supreme Court: The Cases That Define the Debate Over Church and State
483, 485 (Terry Eastland ed., 1993). Glendon believes that liberalism is dependent
upon “certain cultural conditions . . . . [S]eedbeds of good habits and attitudes are
essential for the maintenance of’ democratic institutions. Mary Ann Glendon, Intro-
duction: Forgotten Questions, in Seedbeds of Virtue: Sources of Competence, Charac-
ter, and Citizenship in American Society 1, 11 (Mary Ann Glendon & David
Blankenhorn eds., 1995) [hereinafter Glendon, Forgotten Questions]. For a discussion
of the distinction between integrationist and participationist visions of community,
see Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in
capacity for citizenship are formed." These "communities of memory and mutual aid"—families, neighborhoods, schools, religious and civic communities, workplaces, and worker associations—build and sustain the fabric of civil society. These communities are not simply private domains or voluntary contractual arrangements. Rather, they serve critical public and political functions and often "encumber" those within their circle in profound ways. In Rights Talk, she writes:

Groups are important, not for their own sake, but for their roles in setting the conditions under which individuals can flourish and order their lives together. Because individuals are partly constituted in and through their relationships with others, a liberal politics dedicated to full and free human development cannot afford to ignore the settings that are most conducive to the fulfillment of that ideal.

Glendon therefore approves of measures that recognize, protect, accommodate, and assist these communities; they often need support and nurturing so that they can in turn act as locations "where the values and practices that sustain our republic are shaped, practiced, transformed, and transmitted from one generation to the next." We ignore them at our peril.

Glendon's notable critique of American political and legal discourse in Rights Talk exposes our tendency to use strident and absolutist "rights" language, to ignore communities in favor of an emphasis on the individual, state, and market, and to assume that the public and political functions such communities perform will continue despite our inattention. In Glendon's estimation, the image of the "lone rights-bearer," together with an emphasis on "the right to be left alone," a phrase coined at the start of the twentieth century by Louis Brandeis, has led to a regime of expansive rights in which little thought is given to the appropriateness of, or relationships among, those rights, or to the articulation of correlative duties. Most significantly, because this regime of rights ignores "the social structures where cultural value systems are transmitted, and where civic skills are
acquired," such rights talk erodes the very conditions that enable rights to flourish and threatens the very survival of democracy.

For Glendon, religious communities representing a multiplicity of religious traditions are among those groups that help to set the conditions for the functioning of a larger civil community, economy, and polity. A libertarian image of the person ignores or reduces the significance of communities of religious formation; by assuming that everyone chooses his or her faith, solely as a private matter, from a supermarket of religious groups, this understanding denies the common phenomenon of religion as "encumbrance." For Glendon, the libertarian image of the atomistic individual denies and degrades the vital associational and institutional dimensions to faith that inform and shape the individual's own faith convictions and make such "choices" possible in the first place.

My own thinking about religion has not been rooted in the condition-setting and context-creating roles of religious groups, but rather in the theological self-understanding these communities hold as they view the society around them. Some communities are "sectarian" in their understanding. Such "sects" stand apart from civil society, call people out of society to join them in an intensely private life, and focus their efforts on the small group of adherents. Others, indeed the vast majority, consider themselves "church" as opposed to "sect." "Churches" deem their role a public one: they are deeply engaged in service to and discourse with the civil society, and cooperate with and learn from the society's institutions. For instance, they educate children, provide social and medical services, operate institutions for a wide variety of purposes, and advocate positions on topics of moral and political importance. Engagement in the culture by "churches" renders religion a public phenomenon, socially relevant beyond the small communities of adherents. For Glendon, such public religion contributes to the larger civil society and polity by encouraging virtue in the citizenry and developing habits and attitudes that nurture self-government.

11 Id. at 179.
12 See supra note 8; Glendon, Communities, supra note 1, at 678–79.
13 While these categories of church and sect have been articulated within, and relate primarily to, the Christian tradition, they describe phenomena of engagement and withdrawal that occur in most, if not all, religious traditions. For a discussion of church and sect, see generally Angela C. Carmella, Religion as Public Resource, 27 Seton Hall L. Rev. 1225 (1997).
Courts typically operate under a sectarian understanding of religion which fits the privatized, individualized understanding of rights that Glendon describes. The Supreme Court concedes that religious groups are one of many communities that have "beneficial and stabilizing influences in community life," but legal discourse rarely engages any socio-political role or condition-setting function. In the jurisprudence concerning religion, courts treat religious groups as sects—radically separate from the world, occasionally requiring protection from burdensome laws, and generally owed only autonomy from government in the exercise of their missions. They have, in the words of Brandeis, the right to be left alone (unless, of course, they violate the law—and even then, they might still have the right to be left alone if found exempt from the law). For Glendon, such a privatization of the function of religious communities (and for me, the imposition of a sectarian definition on those communities) perpetuates a legal concept of privatized religion that fails to describe and protect the widespread reality of public religion.

In addition to her deep understanding of how communities function within society, Glendon draws upon multiple sources to build her case and to develop her vision of "a fuller concept of human personhood and a more ecological way of thinking about social policy." First, as a legal comparatist in the fields of family law, property law, and constitutional law, Glendon brings to her analysis a knowledge of the liberal democracies of Europe as well as American habits. She notes that, while "rights talk" is ubiquitous, American rights talk differs in "its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities." Glendon contrasts this "libertarian" rights language, founded on an image of the autonomous, disconnected person, with the "dignitarian" rights language of Europe, which is rooted in an image of the person as fundamentally social, embedded within multiple,


16 This has begun to change in the last decade. See infra notes 60–66 and accompanying text.

17 Glendon, Rights Talk, supra note 2, at 137.

18 Id. at x.
overlapping communities. The dignitarian tradition "resolves the tension between the individual and society in favor of coordination and interdependence with the community without touching the intrinsic value of the person." 19 In the dignitarian tradition, for instance, religious communities are understood to play a significant socio-political role, which gives rise to duties on the part of government "affirmatively [to] promote religious freedom and set conditions for its effective exercise." 20 Rights to non-interference are found in the context of church-state arrangements that recognize areas of common concern (on social issues like education, health, and welfare) and permit structured cooperation rather than a radical separateness. 21 In the sect-church dichotomy, it could be said that if we assume a sectarian definition of religion, these European polities assume one of "church," with a clear understanding of the public roles played by religious communities.

While the dignitarian approach recognizes the social nature of the person, Glendon notes that our libertarian legal and political language fails to address "the social dimensions of human personhood, and the social environments that individual men, women, and children require in order to flourish." 22 Not only do we focus almost exclusively on the individual-state-market framework without thought of social context, but our almost exclusive rights talk compounds the inattention to the many overlapping communities that undergird and, indeed, constitute our civil society. Because these communities play such an important civic role (for instance, in teaching human dignity and respect for others), letting them deteriorate endangers our ability to deliberate publicly as citizens. To ensure that "participation and deliberation . . . [transcend] narrow [individual and group] concerns," it is necessary to attend to "the effective conditions for deliberation." 23 And those "conditions for deliberation" are provided precisely by the social institutions that we routinely ignore.

Glendon’s critique also resonates with another body of thought—the Catholic social teachings of the last century. 24 Glendon’s work

19 Glendon, Sheep’s Clothing, supra note 1, at 22 (quoting a 1954 decision of the German Constitutional Court, Investment Aid Case I, 4 B VerfGE 7 (1954)).
20 Id.
21 See id. at 21–22.
22 Glendon, Communities, supra note 1, at 674.
23 GLENDON, RIGHTS TALK, supra note 2, at 179.
profoundly confirms two bedrock principles of those teachings: the social nature of the person and the positive role of government in setting the conditions for the development of the human person. In fact, the main elements of the social teachings are at the heart of Glendon’s thinking. Just as the communitarian critique of liberalism and the dignitarian tradition of European nations point to the individual in society, the Catholic social teachings offer an organic view of society and emphasize the dignity and social nature of the person by focusing on the communities central to human development—the family, the civil society of the nation, and the global human community. Additionally, the Church’s teachings hold that the family and other communities of memory and mutual aid figure prominently in civil society and are responsible for tasks they can competently perform (under the principle of subsidiarity); the state is affirmatively responsible for tasks that only it can adequately accomplish (under the principle of socialization). And as with communitarianism, the emphasis of the Catholic social teachings is not on rights alone but on correlative rights and duties, including duties of the government in pursuit of the common good (that is, those goods that enable each person to develop fully).

Glendon is concerned not only with developing legal-political language that attends to the social context for human development, but also with judicial methods that recognize the historical and other relevant contexts for doctrinal development. Here, she draws on the common law tradition. Her reading of the Constitution is a common law reading, in which constitutional interpretation is a process of dialectical reasoning that articulates rules that respect past decisions and are sensitive to future litigants. Her common law reading possesses an open-ended quality that always permits doctrinal development, gives attention to the facts on a case by case basis, and demands

summary of the social teachings set forth in this paragraph comes in large part from notes taken during lectures by Rev. J. Bryan Hehir, Professor at Harvard Divinity School (Spring 1995).

25 Contrast Glendon’s view with Justice Scalia’s opposing view: “[It is] [m]uch better...to have a clear, previously enunciated rule that one can point to in explanation of the decision. The common law, discretion-conferring approach is ill suited...to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.” Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 (1989).

clear justifications for departure from precedent and for the making of new law. The common law is

a living tradition, one that is "historically extended" and "socially embodied," whose development constantly points beyond itself. To be a traditionalist in such a tradition is not to be frozen in the past, or mired in the status quo, but rather to participate in an intense ongoing conversation about what it is that gives the tradition its point and purpose. That discussion, carried on across generations, enabled the tradition's participants not only to make useful contributions to society through changing times but to recognize and correct for many of their own shortcomings.

The common law tradition enables rather than stifles creativity, and permits "dialectical reasoning..." [the only form of reasoning that is of much use in 'the realm of human affairs,' where premises are uncertain, but where, though we can't be sure of being right, it is crucial to keep trying to reach better rather than worse outcomes."

II. GLENDON'S CRITIQUE OF RELIGION CLAUSE JURISPRUDENCE

Glendon's critique of the jurisprudence concerning religion surely echoes comparatist, communitarian, Catholic, and common law themes from her other works, but it integrates them in new ways as it connects those themes to the history, text, and tradition of the Constitution. She would be considered a "non-preferentialist" and an "accommodationist" in First Amendment parlance, which means she accepts legislative accommodations of religion and aid to religion granted in a nondiscriminatory manner. But she arrives at this position through a larger understanding of the importance of federalism, separation of powers, representative government, and checks and balances, and not simply by way of an isolated choice of one or another interpretation of the Religion Clause's language. Most significantly, Glendon supports her accommodationist reading by demonstrating that the framers themselves understood the important democratic functions of communities, including religious ones, and crafted the Constitution precisely to protect those functions.

The centrality of social environments and interpretive contexts in Glendon's thinking is the hallmark of her "ecological" approach. As a comparatist, she understands American practices in relation to those

27 See Glendon, Communities, supra note 1, at 675. For her, Justice O'Connor is a common law jurist, see id. at 683. See also, Glendon, Tradition, supra note 26, at 13-19. 28 Glendon, A Nation Under Lawyers, supra note 2, at 182-83 (footnote omitted). See generally id. at 179-98. 29 Glendon, Tradition, supra note 26, at 19 (italics omitted) (quoting Aristotle).
of other liberal democracies. As a philosophical communitarian, she locates the legal and political meaning of the individual, state, and market within the larger context of civil society. As a student of Catholic social teachings, she underscores the social nature of the person and the organic view of society. And as a common law traditionalist, Glendon is committed to the deliberate, open-ended, and reasoned development of doctrine in continuity with the past and as a bridge to the future. From these four interrelated dimensions of her thinking, her critique of the Supreme Court’s jurisprudence concerning religion emerges.

A. Countering the Separationist Reading

Glendon locates fundamental interpretive failures in the Supreme Court’s early religion decisions of the 1940s. First, the Court chose to read (and incorporate) the free exercise language and the establishment language as two separate “clauses,” when they should have been read together as one clause with complementary provisions that both promote religious freedom.30 Second, the Court understood the establishment provision “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion,”31 an emphasis that had “little or no support from text, history, or tradition.”32 Third, because the “separation” of the Establishment Clause was now distinct from the “freedom” concerns of the Free Exercise Clause, the clauses were placed in direct conflict, a conflict that could be avoided only by subordinating one of the values. Religious freedom was subordinated to separation of church and state, and recognized only narrowly as applied to individuals of minority religions. Thus, the irony of the Court’s “Religion Clause” interpretation was that it actually subverted the Clause’s real purpose and design: religious freedom.

For Glendon, much of establishment litigation and some of the free exercise cases are “example[s] of rights litigation run wild.”33 Such litigation is “driven by an attitude that is wreaking havoc with the American democratic experiment—the insistence that one’s favorite parts of the Bill of Rights, in their broadest possible interpretations,

30 “They bar Congress from abridging religious freedom in one specific way (by legislation ‘respecting an establishment of religion’), and in general (‘or prohibiting the free exercise thereof’).” Glendon, Structural Free Exercise, supra note 1, at 541.
32 Glendon & Yanes, Structural Free Exercise, supra note 1, at 485.
33 Glendon, Symposium, supra note 1, at 30.
should trump all competing rights and constitutional values such as federalism and separation of powers." But Glendon's critique does not dwell on extremist claims made for constitutional protection of bizarre religious conduct. She focuses instead on the paradox of a jurisprudence that protects individual conduct and simultaneously maintains a hostile no-aid position toward "organized" religion.

For Glendon, the subversion of religious freedom is seen most clearly in the context of education, where separationism has been given its fullest articulation. The Establishment Clause has been read to require completely secular public schools and to forbid tax money from flowing to the religious mission of religious schools, while the Free Exercise Clause has been employed narrowly for minority religionists seeking exemptions from general requirements. Secularizing the public schools and restricting public aid to religious schools has severely diminished religious freedom. She writes,

> In a judicial pincer movement, one line of decisions . . . requires the public schools to be rigorously secular, while another has struck down most forms of assistance to parents who fear for their children's welfare in educational systems that are often actively promoting values profoundly at odds with the family's religious convictions.

Because the Establishment Clause has been given such a rigid reading and the Free Exercise Clause such a limited one, these tendencies have precluded a fuller reading of the religious freedom guarantee built into the text of the First Amendment. Thus, the Court has no jurisprudential capacity to see that "a crucial aspect of religious freedom remains unavailable to those families that are not wealthy enough to afford private education after paying their local property taxes to support public schools."

The best evidence of this lack of jurisprudential capacity came in the 1985 decision in *Aguilar v. Felton*[^38]. In that case, the provision of remedial services for poor children in private religious schools, delivered by public school employees on the private schools' premises, was held unconstitutional. The concern was twofold: that the public school teacher might indoctrinate the students, thereby creating a symbolic union of church and state, and that the government would have to monitor the behavior of the public school employees in order

[^34]: Id. at 29.
[^35]: See id. at 30–31.
[^37]: Id.
to prevent such indoctrination in a way that would cause "excessive entanglement" of the state into church affairs. In the twelve years following the decision, New York City alone spent over $100 million on vans (neutral sites for public school teachers and parochial school students to meet), a massive drain on the amount of funds available for remedial services overall.

Separationists would argue that separation has advanced, not subverted, religious freedom. In fact, at the heart of Justice Brennan's opinion in *Aguilar* is a concern for the ability of the parochial schools to undertake their mission as they saw fit, unimpeded by the government monitoring that would necessarily accompany the government's aid. Such "pietistic separation" (as it has been called) purports to protect the religious group's identity and mission by preventing governmental involvement and, in turn, governmental taint; it treats religious groups as sects. I suspect that Glendon would reject the separationist's definition of freedom because it is rooted in the impoverished libertarian image of the person (and of the religious group): the lone rights-bearer who is radically autonomous and self-sufficient, who chooses to believe (or not) entirely free from any cultural exposure, social influence, or legal pressure, and whose freedom requires only non-interference. The person is reduced to a private religious consumer, and the religious community to a private organization that markets itself to like-minded individuals. For Glendon, this is "[h]ostility to religion . . . disguised as friendliness to . . . individual free exercise."^41^

In the education context, this impoverished notion of the private religious consumer has profound implications. The secular public school permits each child to choose his or her own religion or none at all. Religious schools, which cater to those who freely contract to place their children there, are unavailable to those who cannot afford them and who are therefore forced to send their children to secular schools. In this way, separationism fosters "a secularism that is toler-

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^40^ We can trace this analysis to Roger Williams in seventeenth century Rhode Island, who used the wall of separation metaphor long before Jefferson did. Williams thought the church was like a garden in the midst of the world's wilderness—a small, perfect community, intensely holy and sacred, focused on the purity of the lives of its own members. For him, the church had to be walled off from the state and the world in order to maintain that purity and holiness; a relationship with the state would desecrate it.

^41^ Glendon, *Sheep's Clothing*, supra note 1, at 25.
ant of individual religious freedom, but hostile to the associations and institutions that assist religious people in nurturing their own beliefs and transmitting them to the next generation."\(^{42}\)

Notice that Glendon's choice of the single most important religious liberty issue today primarily concerns not the state or religious institutions, but the family. One of the tasks of this constitutive community is to teach children and shape their orientations toward the world, including a religious worldview. The family, together with the religious community, gives continuity to faith over the generations. In that connection, the state, at a minimum, should not interfere or create obstacles. But it has an additional obligation—a positive one—to create conditions in which families and other communities flourish so that they can, in turn, weave the thick fabric of civil society that supports self-government.

The emphasis on communities and the role of the state in allowing them to perform their functions also echoes many themes from Catholic social teachings. In the context of education, it is well to point out that the Second Vatican Council's document on religious freedom, *Dignitatis Humanae*, specifically declares,

Parents . . . have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive.

Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly.\(^{43}\)

Given the program of expansive separationism and minimal freedoms that the Court embarked upon in the 1940s, Glendon concludes, in essence, that its limitations have made such a genuine free choice impossible.

The American Catholic Church's position on government aid to religious schools holds that there are ways in which religious institutions and government institutions can cooperate on common goals without compromising the integrity of either and without intruding into the activities proper to each other.\(^{44}\) Such a notion of structured

\(^{42}\) *Id.* at 20 (emphasis added). Note that Glendon is concerned that the migration of our libertarian notions of religious liberty to other nations and to international tribunals will begin to erode the dignitarian tradition. *See id.* at 29.

\(^{43}\) *Dignitatis Humanae*, in *THE DOCUMENTS OF VATICAN II*, supra note 24, at 675, 683 (emphasis added).

cooperation is closely related to the theological category of church, as opposed to sect, and is also more closely associated with the dignitarian tradition of cooperative church-state arrangements. But such cooperation is rejected by separationists, including pietistic ones, who continue to insist that religious families and religious communities need only autonomy from the government. Glendon laments the way in which separationism discourages structured cooperation in education and social services between government and religious organizations. Because the state controls vast resources for these purposes, separationism renders "the Court... a collaborator, witting or unwitting, of the cultural forces bent on secularizing America."45

B. Correcting the Antimajoritarian Reading

Glendon highlights the education issue to illustrate the internal contradictions within the Court's jurisprudence, but her critique goes well beyond that to address what needs to be within our field of vision when we legislate and adjudicate. Unlike most commentators, Glendon does not think the Court's precedents are in hopeless disarray. To the contrary, she thinks they cohere around a central antimajoritarian theme: separation and free exercise are used to protect minority religions from majority religions. This libertarian view of rights and its antimajoritarian thrust, Glendon points out, are not Lockean but Millean, in the sense that "the true domain of human liberty is one's own conscience, thoughts, feelings, expressions, tastes, and pursuits."46 John Stuart Mill posited that the "main threat to liberty... [is] the power of the people themselves, the tyranny of the majority."47 In the rights revolution, the American legal system has largely accepted Mill's version of individual liberty, which justifies interference with freedom of conduct and opinion only to prevent harm to others.48 We have adopted Mill's view in the articulation of religious liberty. Separation protects the minority from majority religious images, texts, and teachings, and permits each individual to "choose" his or her own beliefs and community of beliefs. In this way, secularization of the schools protects minority religion from majority religion, and a no-aid position on religious schools protects them from government intrusion, which in turn protects the minority religionist who

45 Yanes & Glendon, Religion, supra note 1, at 30.
46 Glendon, Rights Talk, supra note 2, at 72-73.
47 Id. at 52 (citing John Stuart Mill, On Liberty, in Utilitarianism, Liberty, and Representative Government 81, 85(1951)).
48 See id. at 53, 57.
chose a religious education over a secular one.\textsuperscript{49} It seems that the language of separation is the "rights talk" of the Religion Clause jurisprudence.

But Glendon brings to the religion context her larger concern with the task of sustaining the background institutions of civil society, both legal and social. A jurisprudential imbalance in favor of "rights" without concomitant attention to matters of constitutional design and structure (separation of powers, checks and balances, federalism, and representative government) threatens those very rights of religious freedom for both minority and majority religions. And a jurisprudential imbalance toward individual and minority religious protections, without concomitant protections for group and majoritarian religious practices, threatens the very existence of protections for minority faiths. For Glendon, the Constitution protects majority and minority religions, and, in its overall design, contains both anti-democratic and democratic themes that work together to protect individuals and minorities from state and local governments and to protect majorities from centralized and unrepresentative government.\textsuperscript{50}

Thus, an unqualified antimajoritarianism in constitutional interpretation will, in the end, harm the very minorities that it is intended to protect. Judicial assumptions of the health and strength of communities, and consequent inattention and indifference to them in the last half of the twentieth century, together with the libertarian over-emphasis on individual rights, have led to a situation of dangerous deterioration. Glendon writes:

Lawyers... have simply tended to take for granted the crisscrossing networks of associations and relationships that constitute the warp and woof of civil society. Thus, it is not surprising that scholars and judges in the 1950s and 1960s, in their zeal to increase legal protection for certain preferred liberties, gave little thought to the social costs they might be inflicting on structures that help to create a culture in which human rights and dignity will be respected.\textsuperscript{51}

Glendon would be considered a political and theological "centrist" on the issue of religion's role in the democratic experiment.\textsuperscript{52} Political centrists have a positive view of religion as it supports democracy, noting that religious communities teach their members virtues and habits necessary for self-government and contribute to social well-
being in numerous ways. Religious centrists have a positive view of the state and acknowledge that on the occasions where the state and church have common social goals, they may cooperate in ways that do not compromise the integrity of either. These positions stand in contrast, on the political side, to those of enlightenment separationists who emphasize religion's divisive nature and tyrannical tendencies and consider religion an interior, private phenomenon; and, on the religious side, to those of pietistic separationists, mentioned earlier, who think the purity of the "sect" will be tainted by the state, and hence believe that no relationship could be appropriate.53

The connections between centrists and majoritarian concerns, and between separationists and minority concerns, are unmistakable; but Glendon does not place them in opposition. In keeping with her organic view of social structures—quintessentially Catholic in its emphasis on harmony rather than conflict—Glendon argues that failing to protect majorities will directly endanger minorities. Contrary to social critics who complain about the "unfairness" of minority protections, Glendon's concern is precisely that the overemphasis on disconnected "rights," together with the inattention to majority communities and majoritarian structures, will leave minority religions in the dust.

Unlike the sectarian/separationist/libertarian approaches, the dignitarian rights tradition of western European liberal democracies promotes institutional, associational, and individual religious freedom as a positive right, and not simply a right of non-interference. These nations permit the funding of religious charitable activities, the teaching of religion widely in public schools, and cooperation between church and state. These practices are not considered inconsistent with, or antithetical to, the protection of religious freedom. In fact, religious groups are seen as "[partners] with the state in caring for the needs of the citizens, and . . . any state action which detracts from the church's religious identity is a [constitutional] violation."54

Glendon does not envision any such close ties between church and state in America. Ideas that have grown up elsewhere should be .

53 For example, Glendon rejects the Court's presumption, set out in Wisconsin v. Yoder, 406 U.S. 205 (1972), that for the vast majority of Americans, faith and life are disconnected. In that case the Court marveled at the unusual integration of the Amish way of life and faith and their ability to maintain a sixteenth century lifestyle in the face of modernization. It is not only the Amish and sects like them who are threatened by modern society's "hydraulic pressures toward conformity" but all our social environments. Glendon & Yanes, Structural Free Exercise, supra note 1, at 547; see also Yoder, 406 U.S. at 217.

54 Glendon, Sheep's Clothing, supra note 1, at 22.
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borrowed cautiously, if at all. But such a comparative exercise teaches us that the emphasis on segregating religion from other human activities, the sharp distinction between secular and religious, is not shared by other liberal democracies that recognize rights to religious freedom, but is exclusively "the product of a particular philosophy that has found its fullest expression only in the laws of countries attached to pre-1989 communism, and in certain decisions of the U.S. Supreme Court."56

C. The Challenge to Separation and Antimajoritarianism

Despite the prominence in the Supreme Court's religion cases of the libertarian image and separationist reading of the Religion Clause, Glendon finds significant elements within the Court's decisions that could be pieced together to construct an "ecological" approach to the Religion Clause. On occasion the Court has recognized the significant social function of religious communities to the larger society.57 Other decisions have recognized the fact that free exercise has associational and institutional dimensions and that protecting those dimensions ensures individual free exercise.58 And still other cases recognized the importance of parental decisions regarding the religious upbringing of their children.59

In fact, Glendon notes, beginning in the 1980s, separationism with its "antimajoritarian gloss"60 began to lose its hegemony on the

55 See id. at 23.
56 Glendon & Yanes, Structural Free Exercise, supra note 1, at 516.
59 Glendon's praise is greatest for the decision in Wisconsin v. Yoder, 406 U.S. 205 (1972). The decision held in favor of Amish parents seeking exemption for their children from public education past the eighth grade in order to protect them from the encroachment of worldly values. Though it followed the narrow structure of most free exercise claims (a minority group seeking an exemption from a general law), the Court's analysis was exquisitely textured. The decision expresses a holistic or ecological understanding of what was at stake in the case. Much more was at issue, [Burger] saw, than the immediate disagreement over how individual school children would spend their day. The retention of the ability of the Amish community to set conditions for its own long-term perpetuation was the real heart of the . . . claim.
60 See Glendon & Yanes, Structural Free Exercise, supra note 1, at 506.
Court, and has slowly been replaced by an "emerging deference doctrine" that applies to both clauses. The Court became more willing to permit religious groups to benefit from generally applicable programs of government assistance under Establishment Clause interpretation, but it also became less willing to protect religious activity from generally applicable laws. For Glendon, however, such mere mechanical deference, like its predecessor, fails to address the heart of the problem because it is not based on "a clear judicial sense of the purpose and meaning of the Constitution's religion language."61

Glendon, writing in the early 1990s, detected the shift away from a rigid separationism in several cases in the 1980s,62 and was prescient in her predictions that the Court would continue along that trajectory. But throughout the 1990s, it became apparent that the Court was not simply deferring to the political branches but rather independently articulating the substantive value of non-discrimination in the distribution of, and the granting of access to, governmental resources. This has marked the rise of an egalitarian paradigm that is a formidable challenge to the separation paradigm.63 While separation calls for the exclusion of religious groups from involvement with government programs and resources, an egalitarian model permits (or requires) their inclusion. When discussing the nature of the government benefit (and its beneficiaries), the Court has repeatedly used concepts of equality, parity, general availability, facial neutrality, and evenhandedness to place religious expression and activity on a par with comparable secular expression and activity. In this way the Court (often by a bare majority) has thus been more solicitous toward religion whenever funds,64 services,65 or facilities66 were generally available to a broad class of citizens on the basis of secular criteria.

61 Id. at 523.
64 See Rosenberger, 515 U.S. at 819; Bowen v. Kendrick, 487 U.S. 589 (1988); Witters, 474 U.S. at 481; Mueller, 462 U.S. at 388.
65 See Agostini, 117 S. Ct. at 1997; Zobrest, 509 U.S. at 1.
66 See Rosenberger, 515 U.S. at 819; Capitol Square Review & Advisory Bd., 515 U.S. at 753 (Scalia, J., plurality); Lamb's Chapel, 508 U.S. at 384; Mergens, 496 U.S. at 226; Widmar, 454 U.S. at 263.
Congress has been a leader in the "equal treatment" approach. In 1981—the year the Supreme Court began to make use of its "egalitarian" approach—Congress enacted legislation to fund governmental and private (including religious) entities making efforts to combat teenage pregnancy. In 1984, it passed the Equal Access Act to permit the formation of religious clubs at the high school level on the same basis as other noncurricular activities. In 1990, Congress enacted child welfare legislation that permitted states to provide parents with day care vouchers that could be redeemed at religiously-affiliated as well as secular day care centers. Most recently, in 1996, Congress' welfare reform legislation rendered all social service activities undertaken by religious groups eligible for public funding on a par with secular providers. There is specific language protecting the religious identity of these providers—in other words, the religious recipients do not have to "'sanitize' their environments of religion" as they had to prior to the enactment of this law. Education vouchers for use at schools of one's choice, including religious schools, will be next on the agenda—if not at the federal level, certainly at the state level.

67 See Widmar, 454 U.S. at 263; see also, Angela C. Carmella, Everson and Its Progeny: Separation and Nondiscrimination in Tension, in EVerson ReVISITEd: RELIGION, EDUCATION AND LAW AT THE CROSSROADS 103 (Jo Renée Formicola & Hubert Morken eds., 1997) [hereinafter Carmella, Everson and Its Progeny].

68 The inclusion of religious participants was upheld. See Bowen, 487 U.S. at 589; see also Glendon & Yanes, Structural Free Exercise, supra note 1, at 538.

69 The Act was held constitutional in Mergens, 496 U.S. at 226.

70 See GLENdON, RIGHTS TALK, supra note 2, at 139.


the purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations.


72 Glendon, Sheep's Clothing, supra note 1, at 22.

These kinds of governmental-nongovernmental partnerships seem to be precisely the types of relationships Glendon encourages when she speaks of the government's affirmative duties to provide the conditions for the health and vitality of communities so that they can, in turn, perform their civic functions. There are obvious benefits to treating all communities engaged in similar activity similarly; religious communities are recognized as significant civic actors, do not suffer special disabilities, and are given special protections if necessary to assure free exercise.

But I doubt that Glendon would see these advances as the eclipse of the sectarian, libertarian model of church-state relationships. Her comments on the recent cases that articulate an egalitarian approach emphasize that the underlying problems persist.\textsuperscript{74} The separation paradigm has not been displaced; in fact, the egalitarian model has developed largely within the confines of separationist language and concepts. Furthermore, the mere fact that government resources are generally available in any given program is not dispositive of its constitutionality. It is quite possible that the welfare reform legislation of 1996, if challenged, would be found unconstitutional by a 5-4 decision. Glendon's fundamental criticism of recent cases in the egalitarian paradigm is that the Court continues to "pass up . . . ideal opportunit[ies] to refashion an establishment jurisprudence that for fifty years has regularly subjugated the institutional and associational aspects of religious freedom to the secularizing project of constructing a wall of separation between religion and government."\textsuperscript{75}

III. A Proposal for "Structural" Free Exercise and the Emergence of Public Religion

Glendon's scholarship sets forth the elements necessary for an "ecological" reading of the Religion Clause, which is sensitive to constitutional history, text, and tradition. Her approach accepts the reality of public religion and elevates religious liberty so that it is served by, and does not serve, concepts of church-state interdependence and independence.

\textsuperscript{74} See generally Glendon, Symposium, supra note 1; Yanes & Glendon, Religion, supra note 1.

\textsuperscript{75} Yanes & Glendon, Religion, supra note 1, at 30; see also Glendon, Symposium, supra note 1, at 29 (referring to O'Connor's opinion in Agostini v. Felton, 177 S. Ct. 1997 (1997), as a "cautious overruling of Aguilar [v. Felton, 473 U.S. 402 (1985)] [that] tells us little more than that the prior decision went too far when it extended the establishment ban to a situation involving so little connection between religion and public authority").
Glendon’s assessment of the historical record leads her to conclude that the founders themselves recognized that “religion is a positive good, protected as such by the Constitution.” They “considered religion to be a great public good, to be protected in its associational and institutional, as well as individual dimensions. . . . It is that understanding that can resolve the interpretive chaos that has characterized the Court’s religion decisions for half a century.”

But Glendon does not argue that simply because the framers understood religion in this way, we are bound to do so as well. Hers is not an originalist reading of the framers’ intent. She proposes that we read the Religion Clause within its various contexts. “Structural free exercise,” her name for this holistic approach, refers to relations within and among texts, and between legal and social institutions [and] situates the religion language within its historical and literary context. It takes into consideration the institutional and associational, as well as the individual, aspects of religious freedom. It is informed by an awareness of the role of America’s religions in the cultural foundations of the democratic experiment.

Glendon’s appreciation for the common law approach is evident here, as she calls for an interpretive process that focuses on a case by case approach to current issues that seeks continuity with history and tradition.

The structural approach is intended to correct the tendency to focus on isolated clauses within the Bill of Rights by emphasizing the need to see how the language relates to other provisions in the Bill of Rights and in the body of the Constitution. For instance, the placement of religious exercise among other freedoms (like speech and assembly) argues in favor of the “one clause” approach. Furthermore, this relational approach brings into view the variety of constitutional elements designed to protect majorities from unrepresentative or centralized government and to protect intermediate associations—like churches—that provide the foundation for good citizenship. Placed in this context, rights to religious freedom are easily understood to be held not only by minority faiths and individuals but by majorities and religious institutions and associations as well. Most significantly, it becomes clear that protecting religious freedom in part through the prohibition on religious establishments ensures that religious associations

76 Glendon, Symposium, supra note 1, at 30.
77 Id. at 31.
78 Glendon & Yanes, Structural Free Exercise, supra note 1, at 537.
79 Id. at 550.
are free from governmental control so that religious choice is "both possible and meaningful."

Glendon recognizes that "[i]nstitutional, associational, and individual free exercise rights . . . will sometimes be in tension with each other and with other constitutional values." Her proposal gives "as much scope as possible to the constitutional guarantee of free exercise in its personal, associational and institutional dimensions, while respecting the freedom of conscience of nonbelievers and without preferring one religion to another." This necessarily remains a difficult equilibrium to maintain. The goal is to ensure that the emphasis given to individual rights and claims does not undermine the background structures that make the exercise of those rights possible. Consistent with her common law emphasis, she leaves the process open-ended and calls for "a regime of rights where freedom, responsibility, privacy and sociality could coexist in fruitful dialogue."

Glendon’s deep understanding of how religious organizations function within the polity make it possible for her to articulate this organic approach. Religious groups "promote self-government by fostering participation in public life, protecting the seedbeds of civic virtue, and educating citizens about their rights and obligations." Because of this, Glendon argues, the Religion Clause gives constitutional status to religious groups as intermediate associations and structures of civil society, in part, to perform these social roles. The Constitution recognizes "rights that help to create conditions for the exercise of other rights," not unlike those condition-creating elements in the structure of the federal government: representative institutions, separation of powers, and checks and balances.

In fact, Glendon applauds recent Supreme Court decisions that recognize that the "Constitution is not only a charter of rights but a design for government." The Religious Freedom Restoration Act, a federal law recently held unconstitutional, was intended to restore a strict scrutiny standard of review in free exercise cases. Rather than lamenting the decision, as many commentators have done, Glendon accepted it as another example of the Court limiting federal powers in

80 Id. at 544 (citation omitted).
81 Id. at 549.
82 Id.
83 GLENDON, RIGHTS TALK, supra note 2, at 144.
84 Glendon & Yanes, Structural Free Exercise, supra note 1, at 544.
85 Id. at 543–44.
86 See id.
87 Glendon, Symposium, supra note 1, at 30.
order to revitalize a decentralized democracy. This, she believes, is "good news for friends of religious freedom."\footnote{Glendon, Symposium, supra note 1, at 30. For a discussion of separation of powers arguments against the Religious Freedom Restoration Act, see Eugene Gressman & Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 Ohio St. L.J. 65 (1996).} This echoes her understanding of the civic role played by religious communities in nurturing an active citizenry concerned with the common good.

In essence, Glendon's constitutional approach shifts our definition of religion from a unique, solely private phenomenon to a comprehension of both its private and public natures. Without ever saying it directly in theological terms, Glendon understands religion's two natures. It is, on the one hand, a unique human activity, without secular analog, a phenomenon \textit{sui generis} that differs radically from other dimensions of life. On the other hand, however, religion is thoroughly engaged in everyday life. Religious commitments, like other commitments, are manifested through speech and association, the education of children, the advocacy of moral-political positions, the delivery of social services and health care, the collection and investment of money, the ownership and use of property, and the building and nurturing of institutions. The question at the heart of the debate between the competing models of egalitarianism and separation is whether religion is most appropriately treated in parity with "secular" activities, or only as a unique phenomenon. The question comes down to whether religious speech and association, religious education and charity, and religious property and institutions should be given equal access to government benefits on secular criteria, or denied such access precisely because they are religious.

The separationist reading of the establishment provision has always stressed the unique and distinctive nature of religion and adopted a sectarian understanding of religion. Separation is necessary to protect the integrity of church and state, but particularly to avoid tainting the religious community. This separationist "sectarian" approach describes very few religious groups. Most are, theologically and sociologically, "churches" in which religion is public, has something to say to the world about temporal concerns, engages and learns from the world, and can, under certain circumstances, cooperate with government on shared goals like education and welfare. The distinctiveness of religious conviction is not lost just because it is lived in engagement with the world rather than separation from it.

The egalitarian argument of the 1980s and 1990s posed a significant challenge not only to the separation model but also to the sectar-
ian theology at its foundation. Suddenly, religion was no longer a distinct, other-worldly endeavor that the state might profane with its touch. Now, in some circumstances, religion can (or must) be treated like other similar endeavors, like non-religious speech, education, and charity. This approach at first glance appears to be without theological assumption, based wholly on civic concerns of nondiscrimination. One might conclude that religion is rendered irrelevant, collapsed into whatever secular counterpart it resembles. But on closer examination, egalitarianism seems instead to acknowledge that religion pervades life and is engaged in the building and maintenance of public culture. Religion finds its expression more through "churches" than through "sects," and more through citizens whose religious lives call them to engage than through those who choose to separate from the world. The availability of government funds, facilities, and services to religious persons and groups on a par with others engaged in comparable activities seems a recognition of religion's widespread engagement with culture—essentially, a recognition of religion in its "church" or public dimensions. And in this connection, the egalitarian approach may contain the seeds of a view of the person as fundamentally social.

A sign that egalitarianism at least has the capacity to recognize the social nature of the person and the public nature of religion came in the 1997 Supreme Court decision, Agostini v. Felton, which overruled Aguilar v. Felton. Aguilar had held on-site remedial educa-

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90 I made this argument in prior writings. See Carmella, Everson and Its Progeny, supra note 67.


The brief argued that the entanglement test should be abandoned because "[i]t rests on an ideal of total separation of church and state that is unnecessary to a faithful application of the religion clauses, and it undermines the notion of neutrality that is necessary to a proper understanding of those clauses." Petitioner's Brief at 3, Agostini (Nos. 96-552, 96-553). Neutrality, not separation, is required by the Establishment Clause. See id. at 15. "For it is only by maintaining 'impartiality, not animosity, toward religion' that the government can fully protect the object of the religion clauses—the right to believe or not to believe as one chooses." Id. (quoting Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet (1994) (O'Connor, J., concurring)).

Petitioners argued that neutrality (nondiscrimination) and religious liberty are consistent. The provision of remedial services on-site should be constitutional "[b]ecause such a program affirmatively promotes the values of neutrality and religious freedom that underlie both of the First Amendment's religion clauses... . . . Everyone can choose a religious education or a non-religious one, without suffering any penalty or receiving any reward." Id at 19. The entanglement analysis of Aguilar
tional services for poor children at parochial schools unconstitutional. *Agostini* rejected the presumption in *Aguilar* that public school em-
ployees would engage in indoctrination of students, and held the on-
site delivery of remedial services constitutional as long as there were
safeguards in place. 92 Glendon noted that "the Court made impres-
sive strides toward common sense in *Agostini*." 93 

Of course, the mere recognition of the public dimension of reli-
gion will not necessarily bring about greater religious liberty. While
the egalitarian approach seems to have done so in the establishment
context, it has in fact had the opposite impact in the free exercise
area. 94 Because the egalitarian paradigm promotes the values of
equal treatment, by definition it subordinates substantive liberty—es-
pecially when differential treatment is necessary to achieve substantive
liberty. This only demonstrates the wisdom of Glendon's structural
approach, which "address[es] problems of fairness to all Americans,
whatever their beliefs, through considering the complex interplay
among free exercise, free speech, and equal protection principles." 95
I would add that while liberty will often demand inclusion of religious
communities in programs of general benefit, a case by case assessment
may show that on some occasions exclusion better promotes liberty.
In other words, the pietistic separationist and sectarian arguments re-
main important in any effort to rethink religious liberty. 96 The

only make[s] sense if separation, not neutrality, is seen as the overriding
consideration. But separation is not a value in and of itself, and this Court
has never gone so far as to suggest that complete separation of church and
state is required by the Establishment Clause. Religious freedom is the ob-
ject of the religion clauses—freedom to exercise one's own religion and
freedom from the establishment of someone else's. Neutrality is a necessary
condition of religious freedom, but total separation is not.

*Id.* at 29–30.

With respect to pietistic separationist concerns that the church's mission would
be tainted, the petitioners wrote,

> these routine contacts present no risk that the city will stifle religion in the
> schools' regular classes, nor do they present any other imaginable risk pert-
>aining to an establishment of religion. . . . Petitioners would agree that if
> City officials were to impose their judgments on matters "of deep religious
> significance," a free exercise issue would arise. But no one has identified
> such an incident. Certainly the church-related schools, which would have
> standing to object to such an intrusion, have not raised any complaint.

*Id.* at 27.

93 *Glendon, Symposium, supra* note 1, at 29.
95 *Glendon & Yanes, Structural Free Exercise, supra* note 1, at 549.
emerging egalitarian paradigm creates the needed space for such a definitional shift regarding the nature of religion, but it is far from Glendon’s structural reading, which would give that definitional shift its fullest meaning: religious freedom.