

Tolerance, the Constitution, and the Limits of an Open Society

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Keynote Address

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“Tolerance, the Constitution, and the Limits of the Open Society”

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When Bob Paquette asked me the other day for a title for my remarks this evening, I told him I’m using the title of the colloquium since it nicely captures not only our readings but what I’d like to say in a general way about the issues we’ll be discussing over the next couple of days. At least since Locke, tolerance has been thought an important public or political virtue—indeed, a political necessity, given the brutal history of religious intolerance that Robert Weissberg sets forth early in our colloquium readings. And tolerance is also a useful private or personal virtue, although that’s a more complex issue, as Weissberg suggests. But as a political virtue, tolerance is central to the American vision, rooted as we are in the Lockean tradition. It’s incorporated in our basic law, the Constitution, or so I’ll argue, even if its incorporation in our statutory and case law has been uneven, to say nothing of its incorporation in our practice. So there’s the second issue in our colloquium title, the Constitution, about which I’ll have a fair amount to say. That brings us to the third issue: Are there limits to the open society, and if so what are they? It’s one thing to tolerate or suffer obnoxious views, even obnoxious behavior, quite another to do so when they threaten to undermine or destroy the very institutions that protect them. As many have written, including Judge Posner later in our readings, the Constitution is not a suicide pact.

So let me begin with something of a roadmap for what I’d like to cover—the idea being not so much to answer all the questions before us but rather to raise some questions and then to suggest a few answers of my own. I’ll start with just a few thoughts about the idea of tolerance, especially as it came to be part of the classical liberal vision. Then I’d like to draw that vision out a bit as it’s manifest first in America’s birth certificate, the Declaration of Independence, and then in the Constitution, especially as our basic law was amended shortly after the Civil War. I’ll then step back and reflect briefly on how tolerance plays out under that regime, quite apart from how it has historically. With that as background, I’ll turn next to the Progressive Era and its rejection of the original American vision, arguing that as progressivism unfolded and matured into modern liberalism, we saw something of a paradox: greater tolerance for personal differences and personal liberty, but less for economic liberty, resulting in implications that have been too little noticed until recently, although they were long ago predicted by more thoughtful observers. Finally, I’ll conclude with a few reflections on some of the more specific topics in our readings—again, more to stimulate discussion than to settle it.

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My thesis is simple and straightforward, and would be unremarkable save for the times in which we live—where too many students and faculty alike are so certain they’re right that they’ll have no truck with alternative views or speakers; where religious liberty is increasingly under attack from the left and large corporations alike; where tyrannies around the world go largely unchallenged while the only democracy in the Middle East endures relentless attacks; and where those who question allegedly “settled science” are subject to prosecution under, of all things, the Racketeer Influenced and Corrupt Organizations Act. That otherwise unremarkable thesis, then, is that with the rise of the individual in the late Middle Ages, through the Renaissance, the Reformation, and the Enlightenment, and the decline accordingly of the authority of the apostolic faith, the need for public tolerance of individual differences grew ever greater, secured under liberal constitutions that protected liberty and tolerated all but intolerance of a kind that would undermine that liberal order. Thus, there are limits on an open society that stem from and reflect the very point of such a society, namely, to enable individuals to flourish as they wish, respecting the rights of others to do the same. In a nutshell, liberty requires and in turn begets tolerance.

Let’s start, then, with a few thoughts on “tolerance” itself. As we see in the several definitions that open our readings, the idea is freighted with normative implications. Let me reduce those definitions or usages to three, however. First, as in medical contexts, we speak of tolerance as sufferance of something said to be *objectively* bad, like pain—objective in the sense that all of us, save perhaps the rare masochist, would find such an object as pain bad. And conversely, *intolerance* in this sense is the *refusal* to suffer something thought objectively bad, like injustice. Second, we speak also of tolerance or sufferance of something thought to be *subjectively* bad—religious or aesthetic views one finds abhorrent, for example, but about which demonstration concerning its normative qualities may be difficult or impossible. Finally, we speak often of tolerance not so much as sufferance but in a more positive, even honorific sense, as acceptance and perhaps even as encouragement of individual differences—values not necessarily our own but concerning which we may be indifferent or toward which we may be attracted or even welcoming.

Clearly, analytically useful as those three definitions may be, there are no bright lines between them. But just as clearly, while all three have a role in the liberal order, it’s that third sense of tolerance that especially informs the liberal vision, particularly as articulated by John Stuart Mill, who welcomed opposing views as a way to test his own—an attitude all too often absent in academia today, as I’ll discuss later. Not that this third sense need be held or practiced uncritically, of course: One can be tolerant in the sense of being open-minded and even welcoming of opposing views and yet critical of those views all the same. Indeed, is that not the teaching of Socrates, who began always with healthy skepticism? That’s why good introductory philosophy courses, to the extent they’re still around, begin with Plato’s dialogues.

And that spirit of confident skepticism is in fact the spirit with which America began, although it’s seldom noticed, understandably. After all, does not the most famous passage in political philosophy, reduced to a muniment of our rights, begin by asserting that “We hold these Truths to be self-evident”? On its face, that’s hardly a self-evident bow to skepticism. Yet what follows, properly read, is a virtual testament to moral and political modesty and hence is a call for public or governmental toleration.

There is first the very strategy of the Declaration: Far from taking the public sector or government as given, as inherently legitimate, the Founders required government to be “derived” and hence *justified* by logically prior *moral* principles. Thus, drawing from Lockean state-of-nature theory, they set forth the moral order first. Only then did they derive the political and legal order from it. They understood, that is, that the king’s “long Train of Abuses and Usurpations” that purported to justify their independence had to be placed within a larger moral and political vision that rendered those acts unjust and intolerable.

But second, that larger vision itself began with a bow to moral epistemology, for not only did government need to be justified, so too did the prior moral order from which government was derived—justified by reason, common to all, the foundation for those “self-evident truths.” The premise of that moral order is simple and straightforward: All men are created equal, as defined by our equal natural rights to life, liberty, and the pursuit of happiness. Implicit in that premise, therefore, is an appeal to Occam’s razor, a rule of parsimony: If someone wants to claim superior or more extensive rights than others have—a less modest, more ambitious claim—the burden is on him to demonstrate it, failing which the simpler, more modest premise holds, namely, that in the beginning we all have equal natural rights.

And with that “right to pursue happiness” we have a third bow to modest assumptions, one with important implications for tolerance. For here too we find an implicit distinction—here between rights and values. Without going into the deep analytical structure of these issues, rights and values are very different moral notions, coming from different domains of morality. Rights are justified claims to stand in relationships with others such that those others have correlative obligations to do or not do certain things. They’re grounded in reason and hence are objectively determined. By contrast, values are those objects toward which, subjectively, we may or may not have an affective regard, either positive or negative. What makes you happy is not necessarily what makes me happy—or, as economists put it, there’s no accounting for taste. Given that subjectivity in values, it’s no surprise that in pursuing happiness in our various ways, we’ll often say and do things that offend others, intentionally or not. But there’s no right not to be offended, which poses a challenge for tolerance. I’ll say more about this later.

Finally, among our natural rights is the right to voluntarily associate with others, to bring new, special relationships into being, defined by the special rights and obligations the parties themselves create. Of course, we can also bring special relationships into being when we commit torts and crimes. Thus, the world of rights and obligations changes as contracts, accidents, and crimes bring that about. And as Locke saw, all of these rights are reducible to *property*—broadly understood as “lives, liberties, and estates,” as he put it. We violate rights, therefore, by *taking* what belongs free and clear to another. Hence the importance of carefully defining the property we claim by right.

But as Hobbes famously noted, life in the state of nature is “solitary, poor, nasty, brutish, and short.” So to remedy what Locke called that state’s “inconveniences,” the Declaration tells us that “Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Government is thus twice limited: by its ends, to secure our rights; and by its means, which must be consented to. But further to this idea of limited government, it must be

added that satisfying that consent requirement raises well-known problems that social contract theory has never fully answered. Indeed, unlike voluntary private organizations, government at bottom is a forced association. And it's important to recognize that, because it enables us to get our presumptions and burdens of proof right. Given the inherent air of illegitimacy surrounding government as such, there's a strong presumption against doing things through government, where dissenters are forced to go along or leave, and a substantial burden on those who would enlist government for such ends to show why that must be done, in violation of the rights of dissenters, rather than left to the private sector where they can be done voluntarily and hence in violation of the rights of no one. Here of course the issue of "public goods" arises, as economists define that concept, invoking free riders, nonexcludability, and nonrivalrous consumption.

In sum, the world envisioned by the Declaration, even when fleshed out more fully than I'm able to do here, is essentially one of live-and-let-live. It's a world in which we're free to pursue happiness as we wish, even if we offend others in the process—a world that tolerates disrespect (that second sense of tolerance I noted earlier), but respects rights, the violation of which cannot be tolerated (the first sense noted earlier). But of course it's also a world that *encourages* tolerance (the third sense), because in a free society, as history demonstrates, individuals who can bring themselves to tolerate and even respect the differences of others are more likely to engage in cooperative exchanges with those others, and both parties to a contract, by definition, improve their situation. Thus freedom, tolerance, and prosperity are intimately connected.

Let's turn now to the real world. It would be a mistake to believe that the Declaration's vision informed the Articles of Confederation. The Declaration calls for a government that protects all and only the rights that we have, leaving us otherwise free to live our lives as we please. The Articles, however, didn't do that. First, by authorizing only a weak national government, they too little protected our rights against foreign threats. And second, states were allowed to erect tariffs and other protectionist measures, thus frustrating our rights of free interstate commerce. Those were the two main concerns that drove the Framers to Philadelphia in 1787 to draft a new Constitution. More generally, however, James Madison had before him the task of drafting a document that authorized a government that was at once strong enough to secure our rights and do the few other things we might want it to do yet was not so strong or extensive as to violate rights in the process. What eventually emerged was a plan that authorized, instituted, and empowered a stronger national government, but at the same time limited it. Given the size of that government today, I'll touch briefly on only the limits, with the aim of showing how the plan largely reflected the Declaration's vision of liberty and tolerance.

To begin, as with the Declaration, state governments aside, the Preamble puts us right back in the state of nature: "We the People," for the purposes listed, "do ordain and establish this Constitution." All power, that is, rests initially with the people. They authorize, institute, and empower the federal government. The government doesn't give them their rights. They already have them, the natural rights they were born with. Right there, at least as a *practical* matter, is the Constitution's theory of legitimacy: Power comes from the people, but the people may grant the government only those power they first have to be granted.

As we work our way through the document we see the many ways that power in fact was granted and then restrained: federalism—the division of powers between the federal and state governments, most power left with the states; the separation of powers among the three branches, each defined functionally; a bicameral legislature, each chamber constituted differently; a unitary executive with the power to veto legislation; provision for an independent judiciary with implicit power to check the political branches and the states to ensure conformance with the document’s strictures; provision for periodic elections to fill the offices the document established; and the addition of a bill of rights two years later. Those are just a few of the Constitution’s restraints.

But the main restraint on overweening government took the name of the doctrine of enumerated powers, which I can state no more simply than this: If you want to limit power, don’t give it in the first place. We see that doctrine in the very first sentence of Article I, section 1: “All legislative power *herein granted* shall be vested in a Congress.” By implication, not all legislative power was “herein granted.” Look at Article I, section 8, and you’ll see that Congress was granted only 18 legislative powers or ends. And in the last documentary evidence to come from the Founding period, the Tenth Amendment, we see the doctrine of enumerated powers spelled out expressly: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In other words, the Constitution establishes a government of delegated, enumerated, and thus limited powers.

The Ninth Amendment too is crucial for understanding the Framers’ vision. It’s the converse of the Tenth. Whereas the Tenth Amendment speaks of powers, the Ninth speaks of rights. It reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Here the history is instructive. During the state ratification debates it became clear that the Constitution would not be ratified unless a bill of rights were added. But there were objections to adding such a bill. Doing so, it was said, would be both unnecessary and dangerous. Why should it be said, wrote Alexander Hamilton in *Federalist 84*, “that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” Notice, he took the doctrine of enumerated powers seriously as the *main* restraint on overweening government. Moreover, it was said that a bill of rights would be dangerous because it would be impossible to enumerate all of our rights; but by ordinary principles of legal construction, the failure to enumerate all members of a category will be construed as meaning that only the enumerated members were meant to be covered. Thus, it was to address that problem that the Ninth Amendment was written, which reads, again, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Since you can’t “retain” what you don’t first have to be retained, the natural reading of that amendment is that we have both enumerated *and* unenumerated rights. And it falls to the courts to protect both.

Thus, the Ninth and Tenth Amendments recapitulate the principles first set forth in the Declaration, making it clear that the Constitution secures the same vision we found there, namely, that each of us has a right to pursue happiness as he thinks best, provided that he respects the rights of others to do the same, and government exists to secure those rights and do the few other things we may have authorized it to do. The Constitution, like the Declaration, envisions a tolerant, live-and-let-live political order.

And for the next 150 years we lived under that vision of limited government, more or less. It wasn't perfect, to be sure—far from it. Intolerance of religious and other minorities was hardly unknown, and legal authority was often absent if not complicit in that. But as a matter of law, the Constitution's cardinal sin was its oblique recognition of slavery. The Framers knew, of course, that slavery was inconsistent with their founding principles. They hoped it would wither away in time. It didn't. It took a civil war and the passage of the Civil War Amendments to finally end slavery. And with those amendments—the Fourteenth Amendment in particular—the Bill of Rights was brought to bear at last against the states, which hadn't been so before that. By 1870, then, with the exception of female suffrage, one could say that the grand principles of the Declaration were finally incorporated in the Constitution—the Constitution was “completed” at last.

But it wasn't to last. In the infamous Slaughterhouse Cases of 1873 the Supreme Court reduced the Fourteenth Amendment's core provision, its Privileges or Immunities Clause, to “a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage,” wrote Justice Stephen Field in dissent. With that, and with enthusiasm for Reconstruction waning, Jim Crow settled in in the South. Thus, as with slavery before it, racial intolerance was not simply a matter of private practice, as in most of the North, but of government policy as well, perpetuated by the force of law. These things would stand for nearly another century.

We come now, however, to the great watershed in constitutional history, the Progressive Era. Fundamentally rejecting the Founders' vision of liberty under limited government, and manipulating the populism that is always just below the surface, progressives took root largely in the elite universities of the Northeast. They looked to Europe for inspiration—to Bismarck's social security scheme in Germany, to the rise of utilitarianism in England, which had supplanted natural rights theory, and to home-grown pragmatism as well—all in the service of scientific planning, social engineering for the betterment of mankind. To paraphrase the DuPont ad of a few years ago, it was to be “better living through bigger government.” The only thing standing athwart that effort was of course that pesky Constitution and the willingness of judges to enforce it, which they did to a large extent over the early decades of the 20th century, though not entirely.

Things came to a head, however, during the New Deal as the political activists shifted their focus from state legislatures to the federal level. But during Franklin Roosevelt's first term the Court held firm, for the most part, finding several of his programs unconstitutional because they exceeded Congress's constitutional authority. So after the landslide election of 1936, Roosevelt unveiled his infamous Court-packing scheme, his plan to put six new members on the Court. There was uproar in the country. Not even a four-to-one Democratic House would go along. Nevertheless, the Court got the message. With the famous “switch in time that saved nine” it began rewriting the Constitution without benefit of constitutional amendment.

And it did that in three basic steps. First, in 1937, in a pair of decisions reinterpreting the General Welfare and Commerce Clauses, the Court eviscerated the doctrine of enumerated powers, the very foundation of the Constitution. Then in 1938's *Caroleen Products* decision, in a famous footnote that's been called the foundation of modern constitutional law, the Court gave

us a bifurcated theory of rights and invented a bifurcated theory of judicial review. Finally, in 1943 the Court jettisoned the non-delegation doctrine, thus enabling Congress to delegate ever more of its legislative power to bureaucrats in the now nearly 450 executive branch agencies where today most of the law that redistributes our assets and regulates our lives is written.

And so today we have massive government, federal, state, and local—public programs that enjoy little legitimacy under a properly read Constitution. And they're beginning to take a toll on the tolerance that undergirds the liberal order. Let me state this point in a fairly general way and then offer a few illustrations. As the ideological foundations for today's Leviathan were being laid during the Progressive Era and through the New Deal, the focus was largely on expanding economic regulation and redistribution. To be sure, social planners occasionally ventured into the area of personal liberty, as when champions of the "eugenics" movement such as the founder of Planned Parenthood and the president of Stanford University, anxious to improve the human race by sterilizing people thought to be of insufficient intelligence, brought a "sweetheart suit" against Virginia's sterilization program, which the Court upheld in a notorious 1927 decision called *Buck v. Bell*. But as this reengineering of our economy was going on there were parallel, often successful efforts to expand speech rights, for example, and civil rights and personal liberties as well as the 20th century wore on, all of which was perfectly consistent with the Court's bifurcation of rights in the 1938 *Carolene Products* decision. And so it looked like we were moving in an ever more liberal, ever more tolerant direction, and in many dimensions we were, in both public and private domains.

But as progressivism evolved into liberalism, and liberalism was challenged in turn by the so-called New Left, we started to see splits on the left that have gradually moved that camp further in that direction. Perhaps nowhere is that more clear than in the area of political speech as increasingly restrained by federal and state regulations of campaign finance. Beginning in the 1970s, for example, the American Civil Liberties Union was solidly opposed to such restrictions, but more recently they've flipped. That split remains, with many of the older members still opposed to such restrictions, but the generational shift is clear.

And we see that general shift also in academia. Whereas Berkeley led the free speech revolt in the 1960s, for some time now colleges and universities across the country have enacted so-called speech-codes, and erected small, often inconvenient "free-speech zones." FIRE, the scrappy Foundation for Individual Rights in Education, has been litigating complaints about such restrictions for well over a decade, including complaints brought by faculty members who've found themselves sanctioned and even fired for politically incorrect speech. More recently, however, freedom *from* speech has been the issue as so-called crybullies have demanded so-called trigger warnings lest they be traumatized by ideas that make them uncomfortable. In this audience I need only mention Missouri, Yale, Amherst, Dartmouth, Princeton, Bowdoin, Brown, Claremont McKenna, and Vassar to illustrate the point, and that hardly exhausts the recent incidents. University protests to block outside speakers go back to the 1960s, of course, but more recently they've enjoyed a recrudescence involving people like Condoleezza Rice, Charles Murray, Ayaan Hirsi Ali, and George Will. And it isn't only speech by noted conservatives or libertarians that cannot be tolerated. People with no such ideological "baggage" have been blocked as well, like former Berkeley, Chancellor Robert Birgeneau and International Monetary Fund head Christine Lagarde.

So what's going on here with this more recent wave of intolerance? Let me suggest, as I only hinted earlier, that this intolerance is not unconnected to the gradual growth of government over the 20th century and the accompanying growth of economic regulation and concentration, which is why I've focused on that larger background issue. As evidenced in the *Carolene Products* decision, one of the core conceits of modern liberalism is that economic and personal liberties occupy separate spheres, and that the regulation of economic affairs will not spill over to personal affairs. History suggests otherwise, something we see clearly in highly collectivized regimes: the Soviet Union, China, North Korea, Cuba, and plainly today in Venezuela. Just to be clear: We're not there yet—far from it. But the risk is real. It's implicit in the slogan we've heard coming so often from the White House in recent years, especially concerning Obamacare: "We're all in this together." Well if we are, in fact, all in this together, whether we want to be or not, then presumably no one should be rocking the boat. We should all "get with the program," because dissent and controversy can only impede our progress and so cannot be tolerated. Progress toward what? Toward whatever the collective decides in the post-New Deal democratic order.

But of course collectives "decide" only in the fevered minds of philosophy seminarians. In the real world it's those who gain control of the collective who make the decisions, as early progressives like Woodrow Wilson understood when he championed ruling elites with "large powers and unhampered discretion"—those who today run the modern administrative state, those 450 executive branch agencies in Washington where most of our law is actually written, not by legislators but by bureaucrats at the IRS, EPA, FTC, SEC, and on and on.

But if you think me overstating this, consider an ominous threat to free speech—indeed, to scientific inquiry—that took place little more than a fortnight ago in New York when 17 attorneys general—all Democrats save for one Independent—held a press conference to promote their various inquiries into whether ExxonMobil and others have been engaged in fraud as "climate change deniers." Led by New York's Eric Schneiderman and California's Kamala Harris, and joined by former Vice President Al Gore, the AGs threaten to bring racketeering charges against multiple deniers. In fact, just last week, a Washington environmental think tank, the Competitive Enterprise Institute, was hit with a subpoena demanding 10 years' worth of documents relating to a wide range of topics only days after criticizing the investigation. U.S. Attorney General Loretta Lynch has weighed in on the issue as well, referring the matter to the FBI for consideration. Climate change is, after all, "settled science," much like geocentric cosmology, Newtonian mechanics, phlogiston theory, and eugenics. Dissent will not be tolerated.

Nor, it seems, will religious liberty be tolerated if it can be recast as discrimination. We come thus to yet another issue that is burning at the moment—and a difficult issue it is because our basic right to freedom of association has come under withering attack in recent decades. As I discussed earlier, in a free society like the one envisioned by the Declaration of Independence and the amended Constitution, people would be free to enter into voluntary associations as they wished—or free to decline to do so for any reason, good or bad, or no reason at all. And only government would be authorized to use force, sparingly, to protect rights and to provide "public goods," defined as economists define them.

Assuming that it's a denial of the equal protection of the laws if government declines to grant same-sex couples the same legal recognition and benefits of marriage it grants to opposite-sex couples, it is a separate question whether *private* parties must grant that same recognition. Were they compelled to do so, their basic right to freedom of association—including their right *not* to associate—would be violated. That is the heart of the matter today. The religious rationale ordinarily offered as the ground for that right arises only because it is recognized in the positive law of the First Amendment. Truth to tell, the proper rationale, grounded in freedom itself, is far broader and perfectly generalizable.

Why, then, is there such a problem today. Here again, the answer is rooted in history. As I outlined earlier, both slavery and de jure segregation were sustained through the force of law. They flew in the face of voluntary association, and in the South they were deeply rooted in the culture. When Congress finally decided to end segregation through the Civil Rights Act of 1964, members were faced with the question of whether to prohibit *private* discrimination as well, which would otherwise be allowed in a free society. The issue was bitterly fought. But in the end it was decided to do so—probably rightly, as the only way, under the circumstances, to break the back of that deeply rooted social system. But that's a close call, and respectable arguments can be made on both sides. It soon became clear, in fact, that affirmative action would be required as a means of enforcement, and that raised a host of other problems, not least the reintroduction of discrimination based on race and the further question of how much longer we were going to require such racial discrimination.

The upshot, however, is that today we have a continually growing body of federal, state, and local anti-discrimination statutes that articulate various grounds on which both public and private parties may not discriminate in a variety of human interactions—employment, housing, lending, insurance, educational athletics, and more. And among other things, this law runs up against the free exercise of religion as protected under the First Amendment plus federal and state religious freedom restoration acts passed in response to a 1990 Supreme Court decision, *Employment Division v. Smith*.

To concretize the issue with a question, must a private caterer with religious objections for doing so cater a same-sex wedding if the couple asks him to do so? The law is presently unsettled on the question, although recent decisions are trending in the affirmative direction—animated often by animosity toward his “intolerance.” But who here is the intolerant party?

At common law, private parties were required to serve all comers if they were in the position of a monopolist, especially under a public monopoly grant, or if they were a common carrier. Otherwise ordinary merchants were closer calls, but if they held themselves out as “open to the public”—as opposed to being a private club, say—they were generally held to their own representation. And the cases currently in play tend to follow that pattern: Religious owners of bakeries, florist shops, and the like ordinarily serve gay couples who walk in off the street to purchase their wares. The issue generally arises at the next step—when the baker, florist, caterer, photographer, musician, what have you is asked to *participate* in the wedding more actively. But those can be close calls, depending on the facts in a given case. Surely *clergymen* should not be compelled to officiate at weddings they oppose, yet there are those who would deny tax-exempt status to the churches, temples, or mosques of such clergy.

And so we come back to the question: Who here is intolerant? Obviously, *both* parties are intolerant of the other's beliefs and practices—as both have a right to be—but only one of these parties is resorting to force, only one party is unwilling to live and let live.

Let me say just a few words finally about our third subject, the limits of an open society, which is doubtless the most complex and difficult subject before us, as a result of which I will make just a few very general and hardly profound points. The principle is easy enough to state: A liberal, open society can and should tolerate all but that which would close it. The application of that principle, however, is a bear. In particular, it invites us to ask what precisely *would* move a society from open and tolerant to closed and intolerant, and that is no easy question.

One would start, presumably, by noticing that the very object of the inquiry, “society,” is a vague notion. Is it defined politically, as a nation state, like America, or Japan? Or is it defined more broadly, denoting, for example, various diaspora—the English speaking people, or the Jewish people, people who may be scattered around the world? Let's limit the word to connoting a politically distinct, geographically defined people, like America or Japan. But what then does it mean to say that such a society is “open”? America's motto, *E Pluribus Unum*, out of many one, stands for the idea that America, with exceptions, has been open historically to immigrants from around the world who then have become “Americans.” By contrast, on that same criterion, Japan has been a famously closed society. But is Japan not “open” in being today a fairly liberal society? Clearly, a nation's policy on immigration is only one factor in labeling it “open”—as the case of Israel illustrates, a nation that for historical and practical reasons must be selective in its immigration policy.

But among a number of other such issues, immigration is clearly a crucial factor with respect to the broader question, for if a society is defined not only by its geographical boundaries but by its history, language (or languages), culture, religious proclivities, and legal system, the infusion of a significant number of significantly different people through either immigration or migration would raise the question of whether the society may block that migration and may be said to be “intolerant” for doing so. Clearly, I allude to what many believe is happening today in Europe—and if the results of this primary season are any indication, what many believe is happening here in America as well, if to a lesser degree. Whether the numbers in either case are significant enough to justify those concerns is an open and difficult question, of course. There are doubtless some who believe that it is still too early to tell whether the invasion of the Irish to our shores was the beginning of the end.

But I'll conclude on a more serious note. As I've said all along in various ways, I believe history demonstrates an intimate connection between liberty, tolerance, and prosperity. And so the answer to this question about the limits of an open society must rest ultimately on considerations about whether the object or objects to be tolerated, or not, are ones that are conducive to preserving liberty, or not. But to understand that subject, we must first better understand the nature, foundations, and institutions of liberty, which I trust the discussions of the next few days will help us all to do.