JOURNAL of CHRISTIAN LEGAL THOUGHT

CONSTITUTIONALISM AND THE COMMON GOOD

VOLUME 14 2024 NUMBER 1

JOURNAL of CHRISTIAN LEGAL THOUGHT

VOL. 14, NO. 1 | 2024

PUBLISHED BY

Christian Legal Society (CLS), founded in 1961, seeks to glorify God by inspiring, encouraging, and equipping Christian attorneys and law students—both individually and in community—to proclaim, love, and serve Jesus Christ through the study and practice of law, through the provision of legal assistance to the poor and needy, and through the defense of the inalienable rights to life and religious freedom.

COVER EMBLEM

The inside design symbolizes the spirit of a builder in its dislocated features resembling the architecture of layered bricks and the four pillars representing the four ministries of CLS. The branches represent harvest and the ongoing mission of the Church to toil the land, water the seeds, and pray to God to send the increase. The circle represents completion—embodied in the incarnation and second coming of Christ as the proverbial Alpha and Omega.

"For we are co-workers in God's service; you are God's field, God's building." (1 Corinthians 3:9)

STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God—as well as the practical implications of the Christian faith for their daily work. The *Journal* exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work; and, second, to provide legal scholars a medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across time.

While the *Journal* will maintain a relatively consistent point of contact with the concerns of practitioners and academics alike, it will also seek to engage outside its respective milieu by soliciting work that advances the conversation between law, religion, and public policy. Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds.

EDITORIAL POLICY

The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's calling. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of Christian Legal Society or any of the other sponsoring institutions or individuals.

To submit an article or offer feedback to Christian Legal Society, email us at CLSHQ@clsnet.org.

TABLE OF CONTENTS

BOARD OF ADVISORS

The Common Good is Plural: What Then Should We Require of Government? (A Brief Reflection)

*by Stanley Carlson-Thies**

Introduction

Christians from many different theological streams share a conviction that our faith ought to have something to say about social-political issues. At the same time, Christians rightly perceive that our influence in the broader culture is waning. Fewer people call themselves Christians in America than ever before, while expressive individualism and its associated harms are culturally ascendant. Common good constitutionalism is one prescription for this diagnosis, a call to abandon positivism and viewpoint neutrality and boldly enact "the good." Yet in this case, the prescription might be worse than the disease.

How then should we as Christians more surely promote and secure justice and goodness for the citizens of this country? This vital question is at the root of common good constitutionalism, but it also motivates the push of progressivism, populism, and more. Each of these movements is post-liberal, or non-liberal, frustrated and impatient with the ways liberalism has failed to protect and promote crucial values. Without a doubt, although liberalism is indeed flawed, it has indispensable strengths which should be preserved,[1] albeit within the better framework of principled pluralism.

Don't Let Caesar Pretend to be God

Activists and scholars who call for radical change—for the development and practice of some kind of post-liberal or pre-liberal way of organizing our social and political lives—are right to raise the alarm. A sober look at our society surely must drive us to pray for deep and extensive change or a sweeping revival that can make our society substantially better—less unjust, racist, self-indulgent, polarized, heedless, lonely, consumerist, and fragmented. And surely, we must acknowledge that these troubling and even terrible realities developed within and were facilitated by the ideas and arrangements of Enlightenment liberalism. The principles and practices of liberalism may have been an advance when they won the day, yet they neither curbed nor cured, but rather accelerated a rampant, self-centered individualism, with its detachment from others and the denial of accountability outside of oneself. It seems that manifold freedoms—rather than liberating individuals, groups, and societies to achieve their best—gave free reign to much that is harmful and corrosive.[2]

But the solution to the fragmentation and self-centeredness of our society is not to make government and the courts more powerful (or less limited) so that they will be able to form everyone toward the common good. Such formation would inevitably involve not merely nudging, but also compelling everyone to follow the government-specified notion of the common good.

When there is no broad desire in society to follow God's ways, but instead everyone is hell-bent on doing what is right in their own eyes—just our contemporary situation—then making government's coercive power stronger and ex-

---

* Founder and senior director of the Institutional Religious Freedom Alliance, a division of the Center for Public Justice. With special thanks to Michelle Kirtley of the Association for Public Justice for her editorial suggestions.

1 Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith, in* Christian Perspectives on Legal Thought 5-24 (Michael W. McConnell *et al.* eds., 2001).

2 Patrick J. Deneen, Why Liberalism Failed (2018).

tending its reach further would counter the very goals of greater goodness and justice that the critics rightly seek. Empowering government to impose on everyone the current majority's damaging norms and misunderstandings would not foster the spread of beliefs and practices that conform more closely to God's ways that yield shalom. Instead, such empowerment would further hamper those who do want to follow God's narrow way, making life more dangerous for people who desire to follow the Galilean rather than the crowd.

Against the mirage that a strongly formative government can turn a society to love of neighbor and constructive communal action, we should soberly recall the tragic historical record of strongly directive governments. Note, for instance, from the long list of these horrific examples: Stalin's Soviet empire, Mao's China, Hitler's Third Reich. Millions were slain for not conforming to the regimes' respective standards of belief, thought, conduct, or identity. Civil society organizations were compelled to reconstitute themselves as parrots of the state's ideology and directives or were closed. Churches were forced underground, shuttered, or had to become worship sites for the regime's religion. And there is a painful history, too, of Christian governments coercing in the name of "right" theology and righteous living: Roman Catholic states against Protestants; Calvinists and Lutherans against Catholics and each other; Anabaptists besieged by other Christians.

Yet we should set against those lamentable Christian episodes a key historic Christian political calling and achievement: to limit rather than swell the span and intrusiveness of government. The belief that a political community should be a *polis*, a totality conforming its members under the civic religion, is persistent, says Francis Oakley, but was decisively rejected by Jesus, setting Christianity on a different course, in principle.[3] Jesus said to render to Caesar (only) what is due to him, which cannot be all things,[4] for it is only to God that we may look for ultimate guidance and to know how much authority should be allotted to governments, families, schools, and churches.[5]

Notably, when Constantine became the Christian ruler of the Roman Empire, he dictated that worship of the empire's gods be replaced not by obligatory worship of the Christian God but by an unprecedented and real, if imperfect, religious freedom.[6] True that within a few decades a successor Christian emperor, Theodosius, elevated Christianity and banned paganism. But his action wrought not a totalistic Christian state but a perennial battle between church and government authorities, between popes and emperors, church and state. And the early Christian reflection on the virtue of religious freedom—of limiting government in matters of deep conviction—was ready for (slow and uneven) adoption when the Reformation fractured the Catholic Christian western world and new rules had to be crafted for managing the relations of governments and multiple (co-existing) religious communities.[7]

In our era, between the Fall and the Second Coming, we should not be surprised that societ-

---

3 *See* Francis Oakley, The Emergence of Western Political Thought in the Latin Middle Ages (3 Vols) (2010-2015) (especially volume 1); *see also* Peter J. Leithart, *Antiquity: Constantine and Constitutionalism, in* Christianity and Constitutionalism 75-90, 83-90 (Nicholas Aroney & Ian Leigh eds., 2022).

4 Luis E. Lugo, *Caesar's Coin and the Politics of the Kingdom: A Pluralist Perspective, in* Caesar's Coin Revisited: Christians and the Limits of Government 1-22 (Michael Cromartie ed., 1996).

5 As Jonathan Chaplin comments:

> Christian thought has typically asserted that God authorizes many institutions, each with their own proper and limited sphere of authority. . . . The authority of each must in the first instance be deferred to by other institutions, including by the political community. . . . No single human institutions can arrogate to itself comprehensive authority over society or suppose that it is the sole fount of authority from which all other kinds derive.

Jonathan Chaplin, Faith in Democracy: Framing a Politics of Deep Diversity 16-17 (2021).

6 *See* Peter J. Leithart, Defending Constantine: The Twilight of an Empire and the Dawn of Christendom (2010); Leithart, *supra* note 3.

7 Robert Louis Wilken, Liberty in the Things of God: The Christian Origins of Religious Freedom (2019); Timothy Samuel Shah, *The Roots of Religious Freedom in Early Christian Thought, in* Christianity and Freedom, vol. 1 Historical Perspectives 33-61 (Timothy Samuel Shaw & Allen D. Hertzke eds., 2016).

ies are marked by sin and riven by divergent fundamental belief systems. At the least, only some desire to follow God, while many are determined to obey other gods. This reality should make Christians always deeply suspicious of political authoritarianism, of plans to use government to bring about uniformity, however much righteousness is claimed as the goal. Our faith teaches us that the heart is deceitful above all things and that even men (and women) after God's own heart fail to avoid the temptation to abuse power to satisfy their own ends.

We ought, instead, to work for limits on government, broad religious freedom, and for strong protections for conscience, associations, and speech. We—you and I—need the freedom to believe, profess, and live as we—individually and in community with others—are convinced God requires us to live. We need a government that protects that freedom, not one that more strongly than ever will compel everyone to follow whatever beliefs the ruler or the majority of the people favor. Borrowing an idea from Jonathan Chaplin, the Reformed Christian political theorist, what our times call for is neither the construction of a more totalitarian state nor a return to the classical, liberal, minimal state that praises, protects, and promotes almost any behavior and thought any person has. But, instead, they call for the development of a Christianly corrected liberalism.[8]

We Need Liberalism, but a Liberalism Corrected into Principled Pluralism

Classical liberalism, with its dedication to limits on government instead of a commitment to a totalizing state, is the place to start. Put not our trust in princes or even the most well-intentioned majority of the day. We need a weaker, not stronger, government, or rather a government that is less extensive and less intensive, strong but more narrowly cabined. But we need more than that. We need stronger—more faith-full, more formative—social groupings: stronger marriages and families; congregations that shape their members against the immense pull of the culture; distinctive, faith-based schools and think tanks; bold Christian Legal Society student chapters; courageous, faith-shaped businesses; and Christian adoption agencies and rescue missions that do not simply mimic professional best practices. And for that, government policy should become not more classically liberal but more principled pluralist.

Liberalism limits government to liberate individuals. But to flourish, even just to exist, individuals need social connections and social entities. Although this is not well-articulated in American political thinking,[9] our lives depend not only on our individual capabilities and health, good government policies, and a healthy economy, but also on a vast and diverse group of civil society institutions. And for these institutions to do well what only they can do (i.e., a family is not a business or a recovery group), they need appropriate authority and power. They need the ability to define their particular purposes and decide what specifically to do, the freedom to decide who will become an employee and who not, and so on. Moreover, often these different varieties of social organizations have been created to operate in line with some particular faith: not just a private school but a Lutheran or Jewish school; not just an adoption agency rather than a talent agency but a Catholic adoption agency.

The theory and practice of liberalism, while not wholly insensitive to civil society, tends strongly to pit individual rights and secularism against the prerogatives of civil society organizations, insisting (unless pushed back) that a faith-based organization (except maybe churches) should hire without regard to sexual conduct and identity and generally ought to serve everyone without taking any account of the particular teachings of its religion. But, of course, a Muslim prison ministry cannot serve Muslim prisoners excellently if the religion has to be washed out, and an evangelical pre-K school cannot serve

8 Jonathan Chaplin, *Rejecting Neutrality, Respecting Diversity: From "Liberal Pluralism" to "Christian Pluralism,"* 35(2) Christian Scholar's Rev. 143-75 (Winter 2006); Chaplin, *supra* note 5; *see also* Nicholas Wolterstorff, *Fidelity in Politics: Hallmarks of Christian Political Activity in the Tradition of Reformed Protestantism,* 52(3) Christian Scholar's Rev. 9-20 (Spring 2023).

9 Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991) (see chapter 5).

low-income families well if the state requires absolute secularism as the condition of participating in its universal pre-K program. The result of such mandated secularism will be the vast retreat of religiously motivated organizations from participation in our shared common life, which will only lead to more unmet needs and more social fragmentation. Civil society institutions that are not free to be religiously or ideologically distinctive cannot be strong, formative influences on those who work there or are served by them. Formation is an inherently value-laden enterprise. Liberalism's preferential treatment of individuals over institutions contributes thus to the self-centeredness that we witness all around.

The necessary corrective to our current fragmentation is neither the further growth of state power nor a retreat to a liberal state that maximizes individualism. Instead, we need a public policy and practice of principled pluralism. This principled pluralism must be understood not only as promoting the vital virtue of accepting and co-laboring with those whose beliefs we do not share,[10] but more fully as a government commitment to respect and uphold the roles and authority of the manifold nongovernmental institutions, while also honoring and protecting the freedom of organizations to manifest *their own respective* animating systems of belief and conduct.[11] That is, the government's reach should be curtailed not only so that *individuals* may pursue their distinct dreams and religions, but also so that *various social institutions* can play their varied roles in accordance with their respective religious tenets. Moreover, for individuals to flourish, the government must uphold the freedom of those institutions to be true to their missions and not allow individuals to demand that an institution must conform instead to their own, different, beliefs and practices.[12] In societies with multiple systems of values, only a principled-pluralist policy enables people to find and partner with institutions that deeply embody their respective values—institutions whose formative power they can accept rather than fight.

Dare To Be a Daniel or a Rahab!

Our society does not need even greater political absolutism. We need more principled pluralism so that the beauty and truth of God's ways can be displayed amidst the many other competing worldviews and value systems. This will require Christians with more biblical insight and more biblical courage. We need more Christian people, churches, nonprofits, and businesses that shine like stars in the sky (Phil. 2:15), witnessing in word and in deed to the truth of the Christian account of life, persons, relationships, organizations, sin, salvation, and redemption. Accepting the reality of our pluralist society in the now and not yet does not mean that we are joining the shallow directive of our times to "celebrate diversity." We ought to be glad that our government protects diversity of conviction and that constitutionally, and to a great extent in practice, we have "the right to be wrong."[13] Not because wrong is good, but because the government is not authorized to define the ultimate right. Instead, people and organizations bear their own responsibility to seek the truth and to live by it. When our compatriots push what is not good, then, rather than celebrating diversity, we may need to confront them and strongly advocate for something better. Respect for others, a true love of neighbor, requires not acquiescing to whatever they advocate but confronting what is bad with what is good. That will be possible precisely because the government has preserved our freedom to do so, in both word and deed.

Rather than joining the clamor from the right and the left for a bigger government that will steer people and organizations to follow

10 Kenneth Townsend, *The Necessity of Hope in Legal Education: Character Development in Pluralist Contexts,* 13(2) J. of Christian Legal Thought 7-13 (2023).

11 *See* James W. Skillen, Recharging the American Experiment: Principled Pluralism for Genuine Civic Community (1994) (chapter six offers a more comprehensive notion of principled pluralism); *see also* Chaplin, *supra* note 8; Stephen V. Monsma, Pluralism and Freedom: Faith-Based Organizations in a Democratic Society (2012); Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives (Jeanne Heffernan Schindler ed., 2008).

12 Steven V. Monsma & Stanley Carlson-Thies, Free to Serve: Protecting the Religious Freedom of Faith-Based Organizations (2015).

13 Kevin Seamus Hasson, The Right to be Wrong: Ending the Culture War Over Religion in America (2005).

what one side or the other is convinced is true, Christians ought to get serious about utilizing the many freedoms we have to better discover, learn, and be shaped by and practice God's good will for personal and community life. In Romans 12:2, the apostle Paul tells believers not to be conformed to the world, but instead become faithful to God's ways and intentions by having our minds and our worldviews transformed. Isn't it evident that, despite our extensive freedom as Americans to follow biblical ways, we have let our churches and other Christian organizations become shallow and barely formative? We Christians do not have much to offer our society to help it get beyond its many weaknesses and injustices because we are more conformed to the culture—whether that be the culture of the right or the left—than to the Word.[14] But we cannot blame liberalism for our failure to be agents of intellectual and cultural formation.

Our society, as deeply shaped by liberalism and as individualistic as it is, nevertheless has afforded Christians extensive institutional and individual freedom. We enjoy broad religious freedom in this country: extensive constitutional, statutory, and regulatory protections for our individual and institutional exercise of religion, even when these conflict with laws and social expectations. But as Dr. Jacqueline Rivers stresses in a lesson drawn from the hard experience of Black Christians in the United States, real religious freedom is not what is written in court decisions, the Constitution or legal codes, but rather is what believers actually *do*—it is forthrightly acting in obedience to God without first checking to see if the government gives permission.[15] As Christians, we can and must use these gifts of extensive individual and institutional freedoms to create, support, and be guided by churches and Christian organizations that will conform us to godly wisdom rather than the thin ways of our society. We should not twist Christian organizations into platforms to show ourselves off.[16] Rather, we should join such institutions and embolden them to be the Jesus-honoring hands and feet of the Christian community. And those organizations, rather than bending to anti-Christian cultural trends or "preemptively capitulating" at the threat of some government penalty for not following society's mores,[17] should ground themselves more firmly in biblical soil and work harder and more creatively to embody biblical views and standards in their operations, staff training and interactions, and services.[18]

Conclusion

For American society to become better, more just, we do not need stronger government. We need stronger churches and other Christian organizations that can more effectively, more faithfully, shape us into God-honoring ways. And we need to more actively and more courageously shine that brighter light into our society—into the legal profession, public policymaking, corporate decision-making, the entertainment industry, the media, K-12 and higher education, and more. This is a battle, a battle of spirits, not of weapons of compulsion and cancellation.

There is no single—common—societal good that Americans, even American Christians, can agree on. Demanding a stronger, farther, and deeper-reaching government entails accepting the strong likelihood of the suppression of Christian truth as other conceptions are enforced on all. We should work instead for greater legal protection of the ability of private organizations to be distinctive and formative—for more institutional coherence and impact and less ability for

14 Tim Keller calls for the development of specific teachings, a "counter-catechesis," that can shape church-goers into conformity with Christian understandings rather than our culture's views. *See* Timothy Keller, *The Decline and Renewal of the American Church (Extended Version)*, Gospel in Life (2022), https://quarterly.gospelinlife.com/decline-and-renewal-of-the-american-church-extended/.

15 Jacqueline C. Rivers, *The Paradox of the Black Church and Religious Freedom,* 15 U. St. Thomas L.J. 676 (2019).

16 *See* Yuval Levin, A Time to Build: From Family and Community to Congress and the Campus, How Recommitting to our Institutions Can Revive the American Dream (2020) (offers an insightful description and critique of the contemporary trend to use organizations as platforms for individual display).

17 I owe the concept of "preemptive capitulation" to Luis Lugo.

18 *See* Monsma & Carlson-Thies, *supra* note 12, ch. 10; *cf.* Peter Greer & Chris Horst, Mission Drift: The Unspoken Crisis Facing Leaders, Charities, and Churches (2014).

objecting individuals to weaken the distinctive beliefs and practices of educational, worship, cultural, and service institutions. Then those organizations, their staff, and those they influence, can more strongly make a distinctive—Christian—contribution to our common good.[19]

19 Stanley Carlson-Thies, *The Common Good Requires Robust Institutional Religious Freedom,* 15 U. St. Thomas L.J. 529 (2019).

Christians, the Public Square, and the Ambrose Option

*by Jeffery J. Ventrella**

Introduction

Many Christians are dissatisfied with classical liberalism, viewing it as an insufficient bulwark against secularist and neopagan social and political gains. Suggestions for how to react to our cultural situation seem to take two broad—and perennial—avenues, corresponding to dualisms between the "heavenly, spiritual, and eternal" realm and the "earthly, carnal, and temporal" realm. Pietism and world flight, or aggressive embrace of worldly ways? Is our choice between Rod Dreher's *Benedict Option*, which counsels retreat (albeit "strategic") from the culture war, or Andrew Isker's *Boniface Option*, a call for an all-out frontal assault in the culture war?

The question of Christian engagement in the world always seems to involve these twin all-too-familiar risks: either (1) the Christian retreats from public engagement into a cocoon of privatized pietism,[1] or (2) the Christian swashbuckles into the public square like a clanging cymbal or a bull set loose in a china closet, precipitating public relations and legal setbacks.[2] In this article, I offer what I believe are three basic characteristics Christians should embody to effectively engage culture and then to offer an "option" of my own that avoids dualistic simplicities.

Competence

A story is told about a priest and a rabbi who became friends. They would enjoy coffee together and attend opera, and even some sporting events, together. One evening they attended a boxing match, something the rabbi had never seen. One scene captivated the rabbi: a Latin American competitor entered the ring, knelt down, and made the sign of the cross. The rabbi with bold enthusiasm demanded to know: "What's that mean, what's that mean!!??" The priest responded, "What's what mean?" The rabbi explained: "That man, after he entered, he knelt and did this thing with his hands; what's that mean!!??" The priest wryly responded: "Oh, that; that doesn't mean a darn thing . . . unless he can fight."[3]

Piety is never a substitute for technique.[4] One cannot "do good" culturally, politically, or legally unless he does certain things well, with excellence and skill. Far too many zealous people rush into cultural battles (or their daily jobs) armed perhaps with having the "right answers" but yet have failed to cultivate, forge, and hone the skills, character, and expertise necessary for implementing those answers in an effective way. Christians must be both pious *and* competent as they voice and implement choices pertaining to social engagement. A free society rooted in ordered liberty valorizes competence. Competence lubricates an effective feedback loop—namely, a free marketplace is based on individual responsibility and accountability; competence results in success, and incompetence results in consequences. Both individual responsibility and accountability stem from Christian concepts.[5]

---

* Adjunct Professor, Trinity Law School.

1 Radical "two-kingdom" theology seeks to justify this sort of retreat. For a rebuttal, *see* John M. Frame, The Escondido Theology: A Reformed Response to Two Kingdom Theology (2011) and Brian G. Mattson, Cultural Amnesia: Three Essays on Two Kingdoms Theology (2018).

2 This often occurred in conjunction with the so-called "abolitionists" who rightly opposed abortion, but whose tactics actually galvanized cultural and legal opposition. Thankfully, the strategic "incrementalists" prevailed in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

3 I first heard this story when Secretary of Defense Leon Panetta addressed a class of newly commissioned USMC officers.

4 Thanks to my friend Fr. Robert Sirico for relating this notion based on the twentieth-century Thomist Etienne Gilson.

5 Note that Paul directs that "If anyone is not willing to work, let him not eat" (2 Thess.3:10). There exists an immediate market-based feedback loop—a growling stomach based on individual responsibility and accountability.

What's Your Textual Orientation?

Pop Quiz![6]

1. TRUE or FALSE: Delilah sheared Samson's hair.[7]
2. WHERE in the Bible does it say: "Ashes to ashes, dust to dust"?[8]
3. TRUE or FALSE: The Bible says, "Pride goes before a fall."[9]
4. TRUE or FALSE: Noah's ark landed on Mt. Ararat.[10]
5. FILL in the BLANK: "The ____ will dwell with the Lamb."[11]
6. TRUE or FALSE: Elijah was taken to heaven in a fiery chariot.[12]
7. Question: How many wise men came to visit Jesus while He lay in a manger?[13]
8. TRUE or FALSE: The Bible says, "There is no God."[14]
9. TRUE or FALSE: Jesus stumbled and fell while carrying his cross.[15]
10. Question: Where is 6-6-6 found in the Bible?[16]

You were not expecting a sword drill (or "Baptist Air-Conditioning Exercise"). What is my point? We at times are so certain about our own picayune preferences—Psalms or hymns; PowerPoints or hymnals; Bible translations and textual traditions; schooling modes (home, Christian, classical);[17] dating or "courtship"; the color of the carpet—and yet we often do not even know the normative text of our faith!

If we are to develop and embrace Christian convictions to inform ordered society and public justice, we need to know our Bible, at the very least, and we ought to avoid the temptation to convert our "anthill" preferences into "mountains-to-die-on" precepts.[18] Or, perhaps better, as Jesus himself put it, we ought not tithe our mint and dill while ignoring the "weightier matters of the law." Far too often people seeking the limelight label a policy or legal position "Christian," which helps to gain followers or funding, yet there may be nothing "Christian" about it; sometimes the proffered view is even flatly confuted by the Bible.

Textual ignorance is a problem, and arrogant textual ignorance is worse. Because the Bible itself addresses society and public justice, we must know it.[19] Or, put differently, to be Christlike, we

---

6 Many of these are derived from Gary DeMar, Myths, Lies & Half-truths: How Misreading the Bible Neutralizes Christians (2010).

7 False (*Judges* 16:19).

8 It does not—that is language from the Book of Common Prayer.

9 False—"Pride goes before destruction" (*Proverbs* 16:18).

10 False—"The mountains of Ararat" (*Genesis* 8:4).

11 "Wolf" (not "Lion") (*Isaiah* 11:6 and 65:25).

12 False—a whirlwind (2 *Kings* 2:1, 11).

13 Zero—they saw Him in a *house* and gave *three gifts*; the actual number of Magi, however, is never disclosed (*Matthew* 2:11).

14 True (*Psalm* 14:1; 53:1).

15 Indeterminate. No textual evidence exists that indicates one way or another; what is known is that another—Simon the Cyrene—carried the cross and thus some have inferred that Jesus stumbled and fell, dropping the cross (*see Matthew* 27:32).

16 Technically, it's not, as the Greek and Hebrew reflect 600, 60, and 6. The Bible's original languages—Hebrew, Aramaic, and Greek—do, however, reflect gematria (values derived because the linguistic symbols contain alpha-numeric coding) totaling six hundred sixty-six (*see Revelation* 13:18 and 1 *King*s 10:14).

17 A recent further hyphenated sub-distinction describing yet another version of schooling is now "Christian, Classical, and Constitutional." *See, e.g.,* Tipping Point Academy, https://tippingpointacademy.com/ (the term "Classical" appears recently to have been replaced by "Conservative").

18 Jeffery J. Ventrella, *When Preference Becomes Precept,* New Horizons (May 1999), https://opc.org/nh.html?article_id=349.

must know what Christ is like as Scripture reveals Him and His will for the created order.

What's Your Theological Orientation?

Just as important, however, is understanding the faith confessed as a whole unit—that is, as it is articulated in its confessions and creeds.[20] Creeds provide a foundation and structural cues for ordering society and maximizing public justice. This is because, first, these statements of faith or mini-systematic theologies summarize or crystallize scriptural teaching, thereby forming and providing the church's non-negotiable identity. Al Mohler notes, "The church must also stand on confessional fidelity as a hallmark of its identity. The faith once delivered to the saints must be expressed and defined and defended in confessional form."[21]

Second, there are, and must be, creedal implications for law because law and ethics correlate to theology and doctrine. This correlation between creed and conduct is recognized by leading legal scholars: Cass Sunstein, a non-Christian, and Adrian Vermuele, a Christian, note that the Nicene Creed, like the U.S. Constitution and the Declaration of Independence, reflects "enduring legal and political frameworks."[22] Indeed, as Jonathan Burnside noted, "law is a backstage pass to theology."[23] Law and theology correlate and, accordingly, much of the "culture wars" stem from which theology and, therefore, which law will gain ascendance in society. Accordingly:

> Every social order rests on a creed, on a concept of life and law, and represents a religion in action. Culture is religion externalized, and, as Henry Van Til observed, "a people's religion comes to expression in its culture, and Christians can be satisfied with nothing less than a Christian organization of society." Wherever there is an attack on the organization of society, there is an attack on its religion.[24]

To rightly order society and to influence culture in that direction, Christians must know the faith's foundational text and its foundational creeds and confessions, as they all supply key content for understanding reality as it really is. Despite its many critics, classical liberalism actually invokes key aspects of "real reality" as it structures society's political economy: a valorized, yet fallen, individual imbued with liberty; a limited state, civil society teeming with innovative mediating institutions; a virtuous market with free trade—all operating within an overarching moral framework.

The Ambrose Option

With the Edict of Milan in 313 A.D., the practice of Christianity ceased to be illegal. This became known as the "Constantinian settlement."[25] The empire continued thereafter, albeit with a new aroma of tolerance and liberty, including religious liberty, furnished by the budding public application of Christian precepts societally.

---

19 For example, Scripture proscribes theft generally whether by individuals, groups, or the state (Eighth Commandment). Similarly, Scripture proscribes envy and covetousness (Tenth Commandment). And Scripture, in describing societal justice, proscribes favoring both the wealthy and the poor (*see, e.g., Exodus* 23:3; *Leviticus* 19:15; *Deuteronomy* 1:17). This stands to reason because Scripture, according to Paul, equips the godly for "every good work" (2 *Timothy* 3:16, 17), and both the Cultural Mandate and the Great Commission comprise public and societal good works requiring ordered liberty. Scripture supplies the key predicates for ordering society so that those public good works can be optimally accomplished. Accordingly, Christians need to know Scripture.

20 This is not to suggest that creeds and confessions supersede or supplant the Holy Scriptures. Rather, creeds and confessions evidence mature reflection by the Christian community regarding the fundamental tenets of what the Holy Scriptures teach. And those tenets concretize what we are to believe and how we are to live, including living socially and publicly. This contrasts with the "hot takes" approach so rife on social media, takes that often deviate from Christian maturity and even orthodoxy.

21 R. Albert Mohler Jr., The Gathering Storm: Secularism, Culture, and the Church 36 (2020).

22 Cass R. Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State 6 (2022).

23 Jonathan Burnside, God, Justice, and Society: Aspects of Law and Legality in the Bible xxviii (2011).

24 Rousas John Rushdoony, The Foundations of Social Order 219 (1968).

25 *See generally* Peter J. Leithart, Defending Constantine: The Twilight of an Empire and the Dawn of Christendom (2010).

Seventy years later, another emperor, Theodosius, permitted immigration in the empire's eastern region. This policy of welcoming aliens and strangers itself derives from Christian precepts rooted in the Old Testament, now being applied beyond Israel to Roman society.[26] Four years beyond, in 387, a cleric (ironically from Milan) performed a now-common and routine "religious, spiritual, and heavenly" ritual of initiation: baptizing a disciple named Augustine. That's what clerics do and, according to the thinking of those with a dualistic frame of mind, supposedly only do: spiritual and "otherworldly" or "higher" or "heavenly" things.

But in 390, the Roman Empire experienced an uprising in the east, specifically involving immigrants in the city of Thessaloniki. This riot resulted in the death of a Roman military officer. When the news reached Emperor Theodosius's ear, he immediately sent troops to quell the riot and, in the process, sent a message by indiscriminately slaughtering about 7,000 immigrants: men, women, and children. The message conveyed? Don't mess with Rome.

However, that baptizing cleric, who had discharged his "spiritual" and "higher" duty by preaching and performing the sacraments, learned of these killings. He was not satisfied merely with his higher calling of conducting spiritual rituals. He confronted Emperor Theodosius to his face.[27] This cleric, Bishop Ambrose, possessed the moral clarity, moral conviction, and moral courage to engage temporal matters in the public square for public justice and the common good. He rejected the fable that his calling confined him to only doing supposedly otherworldly "heavenly" tasks in spiritual spaces involving preaching and rituals. Instead, without hesitating or flinching, he informed the emperor, that as a Christian man, taking one innocent life violates the Lord's law; how much more does taking 7,000 innocent lives compound his sin? Ambrose then barred the emperor from the Eucharist until he repented. And Theodosius did so, by God's grace, seven months later.

Ambrose's action was not optional, outside, or beyond his vocation as bishop, but rather cohered with and expressed it. What he believed (theology) and how he acted (ethics) correlated. The lesson here is plain and counters all sacred/secular dualisms: religious conviction should actuate and generate public religious exercise for the common good. This incident illustrates something about how ordered liberty should look: there must be public and civic space—that is, liberty—for the faith to be proclaimed and practiced, including its moral precepts beyond the church's doors.

A rightly formed Christian, like Ambrose, ought to reject any dualism that pits law against gospel, sacred against secular, nature against grace, clergy against laity. Dualism at best privatizes the faith and over time will, at worst, subject society to increasing injustice. Neither is an option for ordered liberty. This "Ambrose Option" illustrates a course of conduct that reflects Christian calling, protects human flourishing, and promotes the common good for all, while avoiding the invocation of and reliance upon an overreaching Leviathan State.[28] In fact, the state comprised the very problem here! Classical liberalism "incarnates" these precepts at many points.

This Christian conception of the public sphere provides a foundation for ordered liberty. That foundation establishes that (1) no ruler is above God's law, (2) arbitrarily destroying humans made in God's image and likeness—irrespective of tribe, clan, citizenship, etc.—manifests injustice, and, therefore, (3) the state, and thus its positive law, have roles as well as limits or boundaries. This is a crucial recognition, as Benjamin Wiker explains:

---

26 *See, e.g., Matthew* 5:17-20; 2 *Timothy* 3:16, 17.

27 This is not unlike John the Baptist confronting King Herod for violating another creational norm: marriage (*Matthew* 14:1-4). To assert that the faith has nothing to do with the political—politicians or policies—is to ignore not only the implications of Christ's Lordship, but also wide swaths of Scripture's narrative. *See also* Jeffery J. Ventrella, Law & Public Policy: NOT a Gospel Issue???!! (2019).

28 A Leviathan "savior State" cannot comport with Christ's Lordship. If Christ is the omnipotent King, the state cannot rightly act as such.

> By recognizing a moral code that stood above all merely human laws and judged them, the Christian Roman civil law instilled in the minds of the converted the profoundly revolutionary truth that the sovereign's will is only law insofar as it conforms to God's revealed moral law—and no farther.[29]

Notably, Ambrose did not invent or improvise his actions. Rather, he applied the developing Christian practice of public justice based on God's universal moral standards. Glimpses of this began emerging soon after Christ's Ascension. For example, already in the second century Tertullian advocated for and coined the term, "religious liberty."[30] Gregory of Nyssa preached boldly against a predominant social evil: chattel slavery.[31] Emperor Justinian's Christian-based legal code protected conscience and religious liberty among both pagans and Jews.[32]

Conclusion

Ambrose of Milan exhibited competence, and he had a properly Christian textual and theological orientation. So armed, he did not retreat from matters of public justice or "culture war," but engaged—not with the carnal weapons of the world, but with the Word of God—and it bore fruit for generations to come, not least through his discipleship of arguably the greatest theologian the western world has ever known: St. Augustine. Ours is an increasingly mixed society of Christians and pagans—just like his. And it is, so to speak, the "Edict of Milan" of our own day—classical liberalism—that likewise provides us all the place, space, and opportunity to follow in his footsteps and choose the "Ambrose Option."

---

29 Benjamin Wiker, Worshipping the State: How Liberalism Became Our State Religion 70 (2013). Compare this to the contemporary coziness to state power being advocated today on the political Right by Catholic Integralists and Protestant "retrievalists," as well as advocates for "National Conservatism" and so-called "Christian Nationalism."

30 *See* Robert Louis Wilkin, Liberty in the Things of God: The Christian Origins of Religious Freedom (2019).

31 Simonetta Carr, *Gregory of Nyssa—A Lone Voice Against Slavery,* Place for Truth (August 11, 2020), https://www.placefortruth.org/blog/gregory-of-nyssa-a-lone-voice-against-slavery.

32 Wilkin, *supra* note 30.

A Christian Case for Limited Government

*by Matthew T. Martens**

Introduction

I'd like you to join me in a thought experiment: If you were forming a country from scratch, if you were writing the laws of a country on a clean slate, how would you design that country? I'm particularly asking that question of you if you're a Christian. How would you, as a Christian, design a country if you were the original designer, if you were a founder, if you were a framer?

If you've been paying attention at all to recent events, you might have noticed that the question of whether America is a Christian nation and whether it *should be* a Christian nation has been a topic of hot debate. The NBC news show *Meet the Press* hosted an episode on the topic of Christian nationalism featuring a professor from Indiana's own IUPUI.[1] The president of the country's largest evangelical seminary gave a speech in Atlanta insisting that Christians are "unfaithful" if they vote "wrongly."[2] The third National Conservatism convention, this one in Miami, included speakers from politics and religion arguing for a renewed nationalism in the United States, which they label as "conservativism."[3] Paul Miller, a Georgetown professor and former fellow church member of mine, released a book entitled *The Religion of American Greatness: What's Wrong with Christian Nationalism*.[4] One need not look far to see this debate occurring.

In each instance and phrased in various ways, the underlying question is about what role religion and, in particular, the Christian religion should play in shaping the laws and culture of America. Or, as I proposed in my thought experiment, the question being raised is how you as a Christian would and should design a country if you were in charge of designing it. Is there a single Christian way to govern? These are the questions that I want to consider.

Society As Shared Belief

To begin answering these questions, I first want to debunk the notion that a society should not be formed around religiously rooted moral beliefs and that the law should somehow be neutral regarding matters of biblical morality. You've probably heard it said that you can't legislate morality. That is, of course, foolish. Legislating morality is exactly what a law, any law, does. A law is a means of coercing compliance with somebody's moral judgment. Laws dictate that somebody's moral vision will control in a given society.

A society is a group of people who interact according to some understood rules, whether those rules are formal or informal. If that group of people is large enough, if they have a territorial boundary, and if they agree to enforce those rules, or at least some of those rules, through the coercive authority of government, then you have a nation-state—what we call a country, like the United States. Or on a smaller scale, the same dynamic plays out in states. The State of Indiana is a group of people with a territorial boundary who have agreed that it is wrong, to take one example, for one member of the community to kill another member of the community, and you as a group of people have decided to enforce that shared belief through coercion by imprisoning anyone who commits murder.

Every society, and thus every country, depends for its existence on an agreement by its members around some number of issues, wheth-

---

* Matthew is a trial lawyer and partner at Wilmer Hale in Washington, D.C., and the author of *Reforming Criminal Justice: A Christian Proposal* (Crossway 2023). He is featured on Episode #161 of the *Cross & Gavel* podcast. See inside back cover for QR Code. The content of this article was delivered on September 19, 2022, at Taylor University in Upland, Indiana, as part of the school's Constitution Day observance.

1 *Theocracy Rising & Money and Politics: Meet the Press Reports Special Edition,* NBC News (Sept. 26, 2022), https://www.youtube.com/watch?v=BLhzOI3iAG0.

2 Albert Mohler, Pray Vote Stand Summit (Sept. 12, 2022).

3 *See* National Conservatism Conference (Sept. 12-23, 2022).

4 Paul D. Miller, The Religion of American Greatness: What's Wrong With Christian Nationalism (2022).

er that agreement be about the value of human life or property rights or bodily autonomy or whatever. Without an agreement around some number of issues, you don't have a society, and without some degree of coercion to enforce compliance with rules based on those shared beliefs, you can't form, or at least can't preserve, a state or a country in any meaningful sense.

Without some agreement around some rules that will be enforced by coercion, you have instead what political theorists call a "state of nature." The wild, or the wild west, you might say. Societies emerge and countries are formed when people leave the wild and come together around some shared beliefs that they agree will be enforced.

Society Founded on Shared Religious Belief

For much of history, the shared beliefs of societies and thus countries centered around religion. As we've been reminded with the passing of Queen Elizabeth II, the United Kingdom is, at least in theory, a melding of the state and the church, a melding of coercive power and religious belief. Upon his coronation, King Charles III took this oath:

> I, Charles the Third, . . . King, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as established by the Laws . . . together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland. So help me God.[5]

Notice that he referred to "the True Protestant Religion as established by the laws." There is a view, at least in the United Kingdom, that the religion should, at least to some degree, be compelled or at least preserved by law.

This is, historically at least, not an unusual position. Societies and thus countries have formed around a shared religious belief, and compliance with that shared religious belief has been compelled to some degree or another by the state authorities. It may sound strange to us living in the United States today, but it was the norm for much of human history and still is quite common around the world today.

In fact, it was the norm in the United States in the early years after the country's founding. Our federal Constitution says that Congress may not establish religion. Our federal Constitution also prohibits religious tests for holding official positions in the federal government. But those provisions did not initially apply to the states, and, in fact, a number of the states had established churches in one form or another. The South Carolina Constitution of 1778—two years after the Declaration of Independence was signed—stated that "the Christian Protestant religion shall be . . . deemed, and is hereby constituted and declared to be, the established religion of this State."[6] Maryland had an established Episcopal church.[7] New Hampshire had an established church until 1817.[8] Connecticut had an established church until 1818.[9] It wasn't until 1833 that the last state, Massachusetts, disestablished its church.[10]

While established churches passed away in the early 1800s, the idea that religiously based morality should be enforced by law was understood as the norm in the United States well into the mid-1900s. During the Civil Rights Movement of the 1960s, Dr. Martin Luther King, Jr., appealed to the nation by quoting Scripture and invoking Christian teaching as a basis for changing the law to recognize the full equality of Black men and women in America. This was under-

5 *His Majesty the King's Oath relating to the security of the Church of Scotland,* The Royal Household (Sept. 10, 2022), https://www.royal.uk/his-majesty-kings-oath-relating-security-church-scotland.

6 S.C. Const. art. XXXVIII (1778).

7 Arthur Pierce Middleton, Anglican Maryland, 1692-1792 (1992).

8 Steven K. Green, The Second Disestablishment: Church and State in Nineteenth-Century America 119-46 (2010).

9 Matt Martens, *The (Past, Present, and Future) Law of Religious Liberty,* London Lyceum (Feb. 20, 2023), https://thelondonlyceum.com/the-past-present-and-future-law-of-religious-liberty/.

10 Mass. Const. amend. XI (1833).

stood at the time as a totally legitimate and effective line of argument.

But if you asked the average American today whether a country should enforce religious norms by law, I think most Americans, including most American Christians, would tell you "no." Most Americans would say they want neutrality on matters of religious belief. Following the adoption of the Fourteenth Amendment after the Civil War, the First Amendment's prohibition against Congress establishing a national religion is now also understood to apply to state governments as well.[11]

But saying the government will not establish a religion for the country does not—and cannot— mean that the government cannot enact laws that promote a particular religion's view of morality. There is no such thing as government neutrality when it comes to religious morality. Either a law promotes my view of morality, a view that is founded on my religious views, or it doesn't. And if it doesn't, that law is not neutral toward my religion but is actually hostile to it. And in the same way, a society cannot be neutral toward religion. A society's practices will either promote a view of morality that is consistent with my religiously based view of morality, or that society will fail to do so and thus act contrary to my religiously based view of morality. There is no neutrality. Every society and every law embody someone's belief, and almost always a religiously rooted belief, about morality.

But somehow, people have fallen for the notion that there is, and should be, some strict neutrality and separation between religious belief and law. I once had a discussion with another lawyer in Washington, D.C., who, though he was a Christian, was appalled by my claim that there is only one true definition of justice. That definition, the only true definition, of justice is rooted in the character of God. Any other definition of justice is a false justice premised ultimately on a false god. There is only one true God, and he alone defines what is just.

So, when I go into the public square to advocate for a society that is just, I will, as a Christian, necessarily advocate for a view of justice as God has defined justice because there is only one definition of justice. To advocate for any other definition of so-called justice would be to advocate for a lie.

How Much Religious Belief Must Be Compelled

The question, then, isn't whether a society should be neutral on matters of religious morality. It won't be. The question isn't whether society should be formed around religious belief. It will be. And the question isn't whether society should compel by law compliance with a morality founded on religious belief. It will. For me, as a Christian, and for you, if you are a Christian, the question is this: What does my faith tell me about the extent to which I am authorized to, by coercive government force, compel compliance with my understanding of morality?

This is important, so let's pause here for a moment. As a Christian, I must answer two moral questions. The first question is this: What is the moral way to act? The second question is about whether it is moral to bring about by force compliance with that moral way of acting. In other words, the question I must answer is not only whether conduct is moral or immoral, but also whether I am morally authorized to compel your compliance with that moral teaching. Let me give two examples to crystallize what is I think a critical point.

On *one* end of the spectrum, I think murder is immoral. It is morally wrong for me or you or anyone else to murder. I also believe that a society, through its government, has a moral obligation to use its coercive power to prevent murder if it can and punish murder when it occurs. In other words, I believe both that murder is immoral and that it is immoral for a society to fail to stop murder. Or stated another way, it is unjust to murder, and it is unjust for a society to fail to use coercive power to stop murder. I trust this isn't controversial, but I will return in a bit to explain why I believe the second point in addition to the first—why it is immoral or unjust for a society to fail to use its coercive power to stop murder.

But let me give a *second* example to illustrate the point. As a Christian, I also understand it to be immoral to blaspheme God. That is a different question from whether I am morally authorized to use the coercive power of the government to

11 Martens, *supra* note 9.

prevent you from blaspheming God if you wish to do so. The act of blasphemy is a moral wrong, but it could also be a moral wrong for me to, by force, stop you from engaging in blasphemy. Both can be true. But it might not be true that it is wrong for me to prevent you, through government force, from blaspheming. We need to figure out whether both are true. Is it morally wrong for me to stop you by force from committing the moral wrong of blasphemy? Or is it a moral wrong for me to not stop you from committing blasphemy? It's one or the other. There is no neutrality. Either I am morally obligated to use government force to stop you, or I am morally prohibited from using government force to stop you. Which is it?

You might be tempted to point out that the U.S. Constitution prevents me from stopping you from blaspheming as you see fit. That's true. The Constitution guarantees you freedom of speech.[12] But I'm a Christian before I'm a constitutionalist. And recall, we are doing a thought experiment here. What would you do if you were starting from scratch?

In creating this new country, you can write your constitution any way you like. You don't have to afford people freedom of speech. You need to decide whether you should do so. Should you, as a Christian, allow people to blaspheme? Or should you use the coercive power of the government to stop them from doing so? Must you, as a Christian, coercively stop them from doing so? To state the question succinctly: Can government morally allow you to act immorally? What sin is it morally permissible for the government to stop? What sin is the government morally obligated to stop?

Government As a Terror to Evildoers

To answer these questions, let's go back to the murder example from a minute ago. As a Christian, I believe that it is unjust for me or you to murder, and I believe that it is unjust for the government to fail to use its coercive power to stop murder. Both are unjust. I can commit an individual injustice against you were I to murder you. But our society can, at a structural or systemic level, commit an injustice by failing to use its coercive power to prohibit, prevent, and punish murder. You might call that injustice by the government a social injustice or a systemic injustice. A society can organize itself through its system of laws in a way that permits or facilitates the injustice of murder.

An example of this is elective abortion. A doctor or other medical professional who performs an elective abortion commits a murder and thus engages in an individual act of injustice. But a society that passes laws that permit that murder (i.e., permit that injustice) is committing a social or systemic injustice. It is immoral for the government to fail to prevent and punish those individual acts of murder (i.e., individual acts of injustice).

Why do I say that? Why do I, as a Christian, believe that government has a moral obligation to use its coercive power to prevent those injustices? My answer begins in Genesis 9 and continues to Romans 13. In Genesis 9, after the flood, God in a sense re-commissions humanity—Noah, and his family—to be fruitful and multiply like he had commissioned Adam and Eve in Genesis 1. But because the commission in Genesis 9 is after the Fall, God makes clear in Genesis 9 that life in a fallen world requires governance of humankind over humankind, which requires human punishment of wrongdoers. And God demands that humankind exercise that punitive governance over those who commit violence against others. "Whoever sheds blood, by man shall his blood be shed," God commands in Genesis 9:6. Governance, the punitive use of physical force by humankind over humankind, becomes a moral obligation of humankind.

This notion is repeated in Romans 13, where the apostle Paul reaffirms what we saw in Genesis 9, which is that God has conferred on humankind the authority to "bear the sword"—that is, to use punitive, coercive, physical force—against "wrongdoers." Literally, in the Greek, "evil doers." Government authorities, Paul explains, are commissioned by God to fulfill this task. They are morally obligated to do so, and to fail to do so is a failure of obedience. It is immoral and unjust to fail to wield this power against evildoers.

---

12 Actually, this is a contested legal question. *See Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) (noting that "profane" speech is not protected by the First Amendment); Martens, *supra* note 9 (explaining the history of blasphemy prosecutions in the United States).

Notice, there is no neutral position on this question. If I believe both that abortion is murder, an act of evil, and if I thus believe based on Genesis 9 and Romans 13 that the government has a moral obligation commanded by God to use its coercive power to prevent and punish that murder, then it is moral and just for government to act and immoral and unjust for government to fail to act. There is no morally neutral position on this.

Limited Government

Now, at this point, you might be wondering where the whole limited government thing that I promised to talk about comes in. Because, so far, I've only been talking about what the government can do and what the government must do. But what shouldn't the government do? In what ways should Christians understand government power to be limited? And how does any of that help us think about whether the government should or should not, must or must not, criminalize things like blasphemy? Let me offer four concepts that limit government and that I believe a Christian must consider in attempting to resolve these questions.

First, God has only allowed humans to use coercive government force against evildoers. Now I've mentioned several times this idea of government coercive force. What I am referring to is the fact that, when it comes to the criminal law at least, the government operates by actual or threatened force. A criminal law is a threat that the government will use physical force against you if you do something the government forbids or refuse to do something the law requires. No one ends up in a jail cell aside from a threat of physical force. You either submit to that threat of force and go into the cell willingly, or you refuse to consent, and the government stuffs you in the cell by force. And in either event, the government holds you in the cell by force in the form of bars and guards. The government operates by coercion premised on actual or threatened physical force.

You see this in Romans 9, where Paul speaks of the government bearing the sword. A sword is, of course, a tool of violence. You kill people with swords. Paul tells us that God has conferred on government officials the authority to bear the sword, to threaten, and if necessary, to use actual violence against other people. But that divine authorization is only given against those who are evildoers. If an act isn't evil, the government has no divine authority to use its coercive power to prevent someone from performing that act. And divine authority is the only authority there is. Whatever authority we have to coerce other humans exists only because God had delegated to us some of the authority that he possesses. Without that delegation, we have no such authority.

Now lots of things that the government criminalizes are evil (e.g., murder, rape, assault). Bearing the sword and using coercive power against these evil acts are certainly within the authorization God conferred on government. But the problem becomes when the government decides to criminalize actions that aren't evil. Criminologists refer to two types of crimes. Some crimes are *malum in se*, meaning that the crimes are actions that are inherently immoral. But other crimes are *malum prohibitum*, meaning the actions are crimes merely because the government says they are, not because they are inherently evil actions.[13]

My favorite example here is that it is a federal crime to sell sliced peaches as "sliced" peaches if they are sliced other than in wedge-shaped slices.[14] There's nothing immoral about sliced peaches that aren't wedge-shaped. But it's a crime to sell peaches sliced that way. But, for the Christian, can non-wedge-shaped sliced peaches be a crime? Is there any moral authority for the government to coerce you into slicing your peaches in wedges and punish you with physical force if you refuse? Has God conferred on government the moral authority to use its coercive power against actions that are not immoral? The answer, I think, is no. What Genesis 9 and Romans 13 tell us is that the government can use physical coercion against evildoers, the implication being that it can use coercive force only against evildoers and not against, for example, horizontal peach-slicers.

---

13 *See generally* Matthew T. Martens, Reforming Criminal Justice: A Christian Proposal 188-89 (2023) (discussing these two types of crimes).

14 21 U.S.C. § 333; 21 C.F.R. § 145.170(a)(2)(iii)(e) (2023).

But this doesn't entirely answer the blasphemy questions for us because blasphemy is immoral. So blasphemy, if made a crime, at least meets this test. But not everything the government criminalizes is immoral. Not everything made a crime is evil. And that is itself immoral. Government is limited, by God, to using its physical coercive force against evil, not merely to achieve its preferences.

This brings us to my *second* point, which is this: The fact that God has authorized government to use its physically coercive force against evil does not mean that it can or should use such force against any and all evil. Now, at a commonsense level, you know this to be true. Lying to your parents about where you were last weekend is immoral for sure. But I don't know of anyone, and certainly not any Christian, who seriously argues that the government should use physical force against you as punishment for lying to your parents. We know this as a matter of commonsense. But why is that so? At least part of the reason is because what God told Noah in Genesis 9 was that he could use physical force against those who committed physically violent crimes. There is no authorization in Scripture to use physical violence against parent-deceivers.

But what about blasphemy? Earlier, I made reference to the ongoing debate about Christian Nationalism. If you observe the debate over Christian Nationalism for long, you will hear reference to the "first table" and the "second table," meaning the first and second table to the Ten Commandments. The "first table" refers the first four commandments, which are sins directly against God such as worshipping false gods, making graven images, and the like. The "second table" refers to the last six commandments, which are sins against fellow humans like murder, stealing, adultery, and bearing false witness. The debate you will hear around Christian Nationalism is often phrased in terms of whether we are authorized by God to use physically coercive force to punish sins on the first table—that is, sins against God alone. I don't think we are.

Now, you might say, wait a minute. The Old Testament law does provide for the death penalty for those who blaspheme. And that is true. It does! But that law was given to a particular people at a particular time, a people who had no king and who were ruled directly by God. We are not them. We are not a theocracy, and, unlike them, we have secular rulers. So, while God called for the death penalty for blasphemers in the particular context of one theocratic nation, that doesn't answer the question whether secular government authorities outside the context of ancient Israel are authorized to use physical violence against blasphemers. I see no authorization in Scripture for such. Or at least I don't see a biblical requirement that secular authorities *must* use their coercive power to punish blasphemers. So even though blasphemy is evil, it is doubtful to me that blasphemy is among the offenses for which God has authorized, much less required, secular government to use physically violent coercion to prevent or punish.

The *third* principle that can help us as Christians answer questions about the proper scope of government is that government is necessarily administered by sinners who must themselves be restrained from evil in their governance. Those of us who are Christians necessarily believe in universal fallenness. All mankind is infected by sin. This is true of civilians. And it is true of government officials.

When I was growing up, one of TV's most famous talk show hosts was a man named Phil Donohue. He hosted a daytime television show, creatively called "The Phil Donohue Show," in which he would interview interesting people. One of the people Phil Donohue interviewed, twice actually, was University of Chicago economist Milton Friedman. Friedman was a devoted proponent of free market economics. In one episode of his show, Phil Donohue questioned Milton Friedman about how we could trust the free market when market participants act in their self-interest. Don't we need government actors to protect us from these self-interested actors? Friedman responded, "Just tell where in the world you find these angels who are going to organize society for us?"[15] Friedman, of course, was parroting to some degree James Madison, who famously said:

> If men were angels, no government would be necessary. If angels were to

15 "The Phil Donohue Show" (1979), https://vimeo.com/199332682.

> govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.[16]

And, in fact, there are no angels. Government is administered not by angels but by sinners who sin not only in their private lives, but also in their administration of government. They commit evil acts under the authority of government.

This reality, this Christian reality, is important to the thought experiment that I proposed. When I asked how you would design the government if it was up to you as a Christian to design it, I meant, how would you as a Christian design the government if you knew, as Christians know, that we live in a fallen world that will not be governed by angels? I'm not asking you to think about how to design government for some utopian world that doesn't exist. I'm asking you to think about how to design government for the fallen world we live in. How would you design government for the fallen world in which fallen people will administer that government, or at least could administer that government?

In that world, the real world, the world of this life in which human government is needed, we must account for the fact that there are no angels. And so, we must design the world to protect against the demons, both those outside of government and those within it. This means that we must design a government that must not confer too much power on those demons and must restrain them from acting on their devilishness. The government too must be restrained. The second-century Christian bishop, Irenaeus, in his famous work *Against Heresies*, said that if the magistrate acts unjustly, then he too must perish.[17] In other words, the sword must be wielded not only against citizen evildoers, but also official evildoers. No one is above the sword of the law. In a fallen world, no one can be above the sword of the law.

Returning to blasphemy: In a fallen world administered, not by angels, but by fallen men and women, many of whom are not and will not be Christians (i.e., the real world), should I as a Christian grant to those government officials the power to wield the sword against those whom they deem to be blasphemers? Would they, as unbelievers in the one true God, even be able to rightly determine what is blasphemous? How would they do so? Even fallen men and women know murder is wrong. They know rape is wrong. They know robbery is wrong. They know physical assault is wrong. But is that true of blasphemy? And do I want to confer on fallen men and women, some of whom, and maybe many of whom, reject belief in Yahweh, the determination of what does and does not blaspheme a god of their imagination? Am I confident that they can wield that sword rightly?

Here's another issue we must consider as we consider whether to allow the state to punish blasphemy. Blasphemy usually takes the form of speech. And so, granting to government the power to punish blasphemy would require saying that, in the government you are creating, the nation you are founding, the constitution you are framing, speech, or at least some speech, is not protected. Some speech, you would be saying, can be coercively prohibited and punished by the state. Are you prepared to do that in a fallen world? Should a Christian give away that freedom in a fallen world? I don't think so. Here's why. Short of a violent overthrow of the government, speech (in one form or another) is the primary way we restrain government officials from committing wrongdoing. Whistleblowers tell about corruption. Newspapers report on corruption. Politicians campaign against their opponents' corruption. And citizens vote—itself a form of speech—against the corrupt.

But if we give away the principle of free speech, if we say that government officials can restrain speech that is blasphemous against God,

---

16 The Federalist No. 51 (James Madison).

17 *See* Irenaeus, Against Heresies bk. 5, ch. 24, §2 ("And for this reason too, magistrates themselves, having laws as a clothing of righteousness whenever they act in a just and legitimate manner, shall not be called in question for their conduct, nor be liable to punishment. But whatsoever they do to the subversion of justice, iniquitously, and impiously, and illegally, and tyrannically, in these things shall they also perish; for the just judgment of God comes equally upon all, and in no case is defective.").

what is to preclude those same government officials from restraining speech that is critical of them? We must, I believe, hold the line on freedom of speech because any attempt to redraw the line when it comes to the freedom of some speech is not a line that will hold. We should, as Christians, support free speech because we know that there are no angels.

Does that mean that everyone will use the freedom of speech wisely? Sadly, it doesn't. We are not angels. There are no angels. Some among us will use the freedom of speech to blaspheme God. Some will use it to falsely accuse government officials of wrongdoing. And some will use it to call out real corruption in government. Such is life. Such is life in a fallen world, the real world, the world in which we live, the world in which we must devise a government system. In that world, we are left with imperfect options. We must protect the right to speech, which can be abused, to protect the ability to restrain government power from being abused.

But, you might ask, does this mean that we should do nothing as Christians to restrain moral evils like blasphemy? Should the world we are devising in this thought experiment I proposed simply leave blasphemy be? Should we as a society remain neutral on blasphemy? Could we remain neutral on blasphemy? The answer to that is "no."

This brings me to my *fourth* and final principle, and it is this: Government is not the only institution ordained by God. Government restrains evil by the sword, by physical coercion, and so in constructing a societal system, we must determine the proper role for government that allows government to restrain evil with the sword without at the same time empowering an unchecked government to do evil with that sword. After all, remember that government is not the only institution ordained by God to restrain evil. Other institutions ordained by God restrain evil in other ways by other means. Churches preach against evil. Schools teach against evil. Parents discipline their children to avoid evil. Social circles shame those who commit evil. All of these are means of God's grace to keep us and our nations from evil. They do so without the sword. But they can nonetheless do so effectively. The danger, as Christians, is that we overlook these other means of God's grace and too quickly resort to the sword. There is a risk that we prefer the brute force of government to the soft power of persuasion. And by giving government too much power to restrain injustice, we risk facilitating governmental injustice in the name of justice.

If all of this seems a bit frustrating, it is. It is frustrating to know that I can over-authorize government to restrain injustice and thereby cause more injustice. It is frustrating to know that while some measure of justice can be and should be pursued through government now, I must do so in a measured way that, in the name of stomping out evil, does not empower more evil in the process. I would prefer a world in which the government was populated only by angels. But that is not the world in which we live. Not yet. But one day it will be.

Conclusion

When we as Christians recite the Nicene Creed in our worship services, we are reminded that justice, true justice, is ultimately for a world to come. Justice in this world is intermediate. It must be intermediate. But one day it will be ultimate. We pray for that kingdom to come. But we cannot make it come, at least not in its fullness. "He will come again in glory to judge the living and the dead," we profess. And when we make this profession, we are reminding each other that, while justice in this life is frustrating, that frustration will be resolved.

He will come again in glory. Jesus will judge the living and the dead. He will do so with perfect justice. And so, we pursue some limited measure of justice now through God's institution of government, but we ultimately wait for that day when Christ will judge with perfect justice. We look, as the apostle Peter said, for the new heaven and the new earth in which righteousness, and only righteousness, will dwell.[18] We look, as the Nicene Creed says, for the resurrection of the dead and the life of the world, a just world, to come.

How would I design a world if I could design the world? Well, ideally, like the world to come. For now, I must settle for something less and long for the day of something more. You want a thought experiment to mediate on? Think on these things.

---

18 2 *Peter* 3:13.

Judicial Value Judgments and the Common Good

*by Gerard V. Bradley**

Introduction

"Common good constitutionalism" is chiefly a criticism of what might be helpfully described as "mainstream" legal conservatism—the prescription for constitutional adjudication exemplified in the opinions of Antonin Scalia and those (in and out of the judiciary) who follow his lead. The "common-good" constitutionalists' critique centers on the stated commitment of contemporary judicial conservatism to *originalism*; that is, to interpreting the Constitution according to its original public understanding as nearly as possible given the limitations of historical sources and the development of the law since the founding.[1] I think that this defining commitment is correct, for it satisfies two fundamental requirements of any sound theory of constitutional interpretation. The first is that the constitutional *text* and only that text is authoritative. The second is that interpretation is the right method for deriving the meaning conveyed by those who wrote and ratified that text. Constitutional interpretation, at least in America, is, when done right, still anchored by the historical project of reconstructing the sequence of normative thinking which culminated (if you will) in the ratified constitutional document.

But beginning in the mid-1980s and especially since the millennium, "mainstream" legal conservatives have wed these sound originalist instincts to a methodological doctrine of judicial restraint—a normative approach to how to decide constitutional cases that is allergic to critical moral reasoning. These conservatives say that they scrupulously avoid relying upon "value judgments" in justifying their decisions.[2] They say that, in our constitutional order, legislators get paid to make judgments about moral value and that judges do not.

In the event, value-neutralist methodology has eclipsed interpretation. Avoiding judicial "moralizing"—or what Justice Scalia described as his brethren's "predilections"[3]—has become for many conservatives the overriding *desideratum* of constitutional adjudication. So, Supreme Court nominees are regularly heard to insist that (in my paraphrase): "I would never dream of imposing my morality on the law."[4]

Note that, while originalism is an interpretive theory, this hypothesized "value" neutrality is not. It is rather a self-imposed limitation upon the quest for original meaning, which implicitly (and sometimes explicitly) trades upon doubts regarding the objectivity of moral norms. This commitment to avoid "values" has no tendency whatsoever to yield the original understanding of any part of the Constitution if only because there is no historical basis for assuming that the Founding Fathers doubted the abilities of judges the way modern judges doubt themselves.[5]

---

* Professor of Law, University of Notre Dame; Co-Director, Natural Law Institute (University of Notre Dame); Visiting Fellow, Hoover Institution (Stanford University); Senior Fellow, Witherspoon Institute.

1 *See, e.g.*, Hon. William H. Pryor, *Against Living Common Goodism*, 23 Federalist Soc'y 24, 26 (2022) (arguing that, while they germinate from different substantive moral beliefs, living constitutionalism and common good constitutionalism are methodologically identical).

2 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989). *But see* Josh Hammer, *Common Good Originalism After* Dobbs, Am. Mind (Sept. 21, 2022), https://americanmind.org/features/florida-versus-davos/common-good-originalism-after-dobbs/ ("there is *no such thing* as 'values-neutrality.' [The] preference of Thayerian deference to legislative majorities [is] *itself* a 'pro-democracy' value judgment.").

3 Scalia, *supra* note 2, at 863.

4 *See, e.g., infra* Part I (Judges and Umpires).

5 *See* Adrian Vermeule, *Beyond Originalism*, The Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ ("Originalism . . . can now give way to a new confidence in authoritative rule for the common good."); *see also* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1, 21 (2018) (offering "compelling" indications that the founders regarded the judiciary subject to fiduciary norms such as Hamilton's contention that judges are obliged to prefer the "intention of the people to the intention of their agents" when legislative intent conflicts (quoting The Federalist No. 78 (Alexander Hamilton)).

The effect of this stipulated, methodological constraint may be usefully compared, I think, to the possibilities for sound New Testament exegesis executed on the *a priori* supposition that either miracles simply do not occur (think Bultmann) or that intelligible public revelation does not happen (think Jefferson). Bultmann's liberal Christianity and Jefferson's sanitized Bible are interesting constructs. Neither is the Gospel of Jesus Christ.

Judges and Umpires

This cultivated "value" neutrality was articulated most memorably by John Roberts at his 2005 chief justice confirmation hearings: being a justice is like being an umpire calling balls and strikes.[6] Roberts was not referring just to the impartiality of umpires as a model stance; that indeed is a desirable quality in judges (as in umpires). Roberts also compared very favorably the act of judging balls and strikes to the act of judging strictly technical means, such as the use of facial recognition software at airports as violating the constitutional norm against "unreasonable search and seizure."[7]

The comparison is ridiculous. There is no useful similarity or analogy between accurately seeing the relationship between two objects—home plate and a pitched baseball—and deciding whether to reverse *Roe v. Wade* or whether the Fourteenth Amendment bars Donald Trump from running for president.[8] New Deal-era Justice Owen Roberts's view—that in constitutional cases a judge puts the statute beside the Constitution and asks whether the "latter squares with the former"—is, by comparison to the umpire picture, quite sophisticated.[9] Yet it too is hopelessly naïve. Interpretation of a text is much harder work than taking a good look. In any event, Chief Justice Roberts's umpire analogy is outdated. Professional baseball is experimenting with automated umpires now.[10] Besides, do we really want constitutional law that could be done by Siri sitting behind a big wooden bench? Turbo-con-law?[11]

Chief Justice Roberts revisited sports analogies in his December 2023 end-of-the-year Report on the Federal Judiciary.[12] Taking up the question of whether AI could ever replace human judges, Roberts this time looked to tennis, not baseball.

> Many professional tennis tournaments, including the US Open, have replaced line judges with optical technology to determine whether 130 mile per hour serves are in or out. These decisions involve precision to the millimeter. And there is no discretion; the ball either did or did not hit the line. By contrast, legal determinations often involve gray areas

6 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) [hereinafter *Roberts Hearing*].

7 Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 Minn. L. Rev. 1105, 1132 (2021) (using Chief Justice Roberts's "digitally aware" Fourth Amendment jurisprudence as a complete basis for an analytical framework in the likelihood of future facial recognition court cases).

8 *See Roberts Hearing*, *supra* note 6, at 185 (statement of Sen. Joseph Biden) (continuing the metaphor, then-Senator Biden asked where "unreasonable search and seizure" fell in terms of the strike zone, which in baseball, is clearly defined as between the shoulders and the knees, and how, as an "umpire," a judge could determine "reasonable" without defining the strike zone himself).

9 *United States v. Butler*, 291 U.S. 1, 62 (1936) (using this term to describe the judicial branch's "only one duty"). "The only power it has, if such it may be called, is the power of judgment." *Id.* at 63; *see also* D. Grier Stephenson, Jr., *The Judicial Bookshelf*, in 2 Journal of Supreme Court History 168-88 (1996).

10 Relatedly, robots use the "formalist" two-dimensional strike zone as defined by official "Constitution" of baseball. Umpires have been "functionally" using a three-dimensional strike zone. Ronald Blum, *What is a Strike in Baseball? Robots, Rule Book, and Umpires View it Differently*, AP Sports (July 10, 2023 12:46 AM), https://apnews.com/article/mlb-robot-umpires-strike-zone-40ec7285ae4d1ccaf2621adcb8d72b02.

11 *But see id.* ("I enjoy[] [automated umpires] because [they are] consistent. You want to know what the zone is at all times, even if it's a little funkier, a little different.").

12 Chief Justice John G. Roberts, Jr., Year-End Report on the Federal Judiciary 6 (2023).

13 *Id.*

> that still require application of human judgment.[13]

What sort of "human judgment" did the chief justice of the United States believe to be irreplaceable by digital brains?

> Machines cannot fully replace key actors in court. Judges . . . measure the sincerity of a defendant's allocution at sentencing. Nuance matters: Much can turn on a shaking hand, a quivering voice, a change of inflection, a bead of sweat, a moment's hesitation, a fleeting break in eye contact. And most people still trust humans more than machines to perceive and draw the right inferences from these clues.[14]

Leave aside the question whether AI could deliver over the broad run of cases more accurate "inferences" about witnesses' or defendants' credibility.[15] Never mind for the moment that "inferences" about credibility are most often drawn by lay jurors in the course of deliberations about guilt and not by judges and that jurors do not need any specific legal training in order to make them. Jurors and judges rarely, if ever, rely, moreover, upon gross anatomical and behavioral factors such as beady eyes or sweaty palms in making them.

It has been decades since I prosecuted jury cases myself, but I tried many of them when I did. Never did I—nor any lawyer in my presence nor any judge—ever indicate that they relied upon such gross indicia of a test for truth-telling. Nor should they have. Any trial lawyer will tell you that honest witnesses are often fidgety and that many liars exhibit an actor's aplomb. I taught trial advocacy in law schools for decades thereafter and never once suggested to students that they make credibility arguments based upon quivers or the shakes.

Drawing inferences about credibility has nothing to do with making law or with moral evaluative judgments. Identifying a truth-teller involves evaluative judgments of a sort. But it does not require reliance upon any critical moral norm. Drawing such inferences has to do with settling upon the factual basis for a verdict and, perhaps, for making some law of the case.

In his end-of-the-year report, Chief Justice Roberts remarks that "[a]ppellate judges, too, perform quintessentially human functions. Many appellate decisions turn on whether a lower court has abused its discretion, a standard that by its nature involves fact-specific gray areas."[16] Other appellate decisions "focus on open questions about how the law should develop in new areas."[17] Indeed, they do. And it is right here, when facing the challenge of making and not just finding law in a new area, that "common-good" critics (among other detractors) of judicial moral reticence expect judges to resort to sound norms of natural law (rational morality): that is, norms of justice that are not overtly found in constitutional text but rather have earned status within law by dint of being *true* and, consequently, inescapably inherent within countless rules and doctrines of our (positive) law. Perhaps the best compact expression of this criticism is that the positive law, especially including our Constitution, is normatively much thicker than constitutional "textualists" typically suppose.

What, then, do human judges bring to that task that AI cannot or at least presently does not? Chief Justice Roberts's answer: "AI is based largely on existing information, which can inform but not make such decisions."[18]

The only sure takeaway from that murky claim is that humans are, somehow, able to gather a particular sort of "information," evidently that which goes beyond "existing" stocks, that is characteristically beyond the capacity of AI. And there is an end to it: "I predict that human judges will be around for a while."[19] The chief

14 *Id.*

15 *See id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

justice ended without acknowledging one thing that human judges can do that AI could never do: make critical moral judgments and choices about what is most conducive to that which is genuinely good for humans and for their lives together in a political community.[20]

Invited to opine on the umpire analogy during a 2009 appearance at Pepperdine Law School, Justice Alito said that umpiring "is not as mechanical as a lot of people think" and that umpires themselves "really exercise a lot of discretion."[21] In fact, he added, umpires exercise "more discretion in some areas than judges should exercise."[22] He did concede that the chief justice's analogy nonetheless contained a "very valid point, which is that umpires have rules to apply, and judges have rules to apply. It is our job, just as it is the job of the umpire, to apply those rules, not to make up new rules."[23]

"Common-good" critics rightly object to this understanding of what appellate judges do as naïve and productive of mischief. But their target is too narrow. The Court's liberals say that they share Chief Justice Roberts's rejection of recourse to sound norms of natural law and justice. They say that they too believe that legal source materials—text, relevant history, precedent—massaged by technical legal reasoning are invariably (or almost always) *determinate* enough to resolve constitutional cases.

One recent Supreme Court nominee, for instance, resisted the umpire analogy because, she asserted, it suggested that judging is "akin to a robotic enterprise."[24] Elena Kagan nonetheless left no room in her preferred model of judging for critical moral reasoning or, evidently, for making law at all. Even though judges have some discretion,

> [t]hat does not mean that they are doing anything other than applying law. I said yesterday . . . it is law all the way down. You know, you are looking at the text, you are looking at structure, you are looking at history, you are looking at precedent. You are looking at law and only at law, not your political preferences, not your personal preferences.[25]

A different Supreme Court nominee, and the biggest baseball fan of them all,[26] also pushed back against the chief justice's "umpiring."

> I prefer to describe what judges do, like umpires, is to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands. It's a refrain I keep repeating because that is my philosophy of judging, applying the law to the facts at hand. And that's my description of judging.[27]

---

20 *See generally* Joe McKendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, Harv. Bus. Rev. (Sept. 15, 2022), https://hbr.org/2022/09/ai-isnt-ready-to-make-unsupervised-decisions (illustrating through several examples of what happens when AI is confronted with the quintessential "trolly problem" in an effort to explain that AI fails to capture intangible human factors such as moral and ethical considerations).

21 Samuel A. Alito, Jr. et al., *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 Pepp. L. Rev. 33, 35 (2009).

22 *Id.*

23 *Id.*

24 *Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 203 (2010) (statement of Elena Kagan, Nominee to be an Associate Justice of the Supreme Court of the United States).

25 *Id.*

26 "Few judges could claim they love baseball more than I do, for obvious reasons." *Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 79 (2009) (statement of Sonia Sotomayor, Nominee to be an Associate Justice of the Supreme Court of the United States) [hereinafter *Sotomayor Hearing*]; *see also* Barack Obama, U.S. President, Speech Nominating Hon. Sonia Sotomayor to the United States Supreme Court (May 26, 2009) (adding that an injunction she ordered was widely known for saving baseball).

27 *Sotomayor Hearing*, *supra* note 26. That is not how most lawyers would describe her judging.

Conservatives who complain about the value-neutrality of the Court's conservatives fail to see the broader reach and depth of the value-aversion problem. They do not see that their nemesis, a pronounced judicial moral-reticence, is caught up in an enveloping claim about the infrequency and very limited extent of judicial *lawmaking*—a claim not limited to those on the right side of the judicial aisle.

One might imagine that the relationship between value-neutrality and the determinacy of legal materials embraced by Justices Roberts, Alito, Kagan, and Sotomayor (among others) presents a classic chicken-egg quandary. Is it that they rarely or never *make* law, and therefore have no need to rely upon true moral norms in doing so? Or is that, having derived a striking moral reticence from considerations of democratic theory and judicial competency, the justices recognize that they should refrain from the value-laden task of making law? The relationship is rather, I think, not one of prioritizing first and then second. It is dialectical; there is a mutually reinforcing to-and-fro between the twin commitments to steer clear of both lawmaking and value-laden decisions for the sake of the Court's legitimacy within our democratic system of government.

Judicial Value Judgments

Notwithstanding the justices' protests that they stick strictly to legal craft, it is abundantly clear that the Supreme Court commonly makes law and that, when it does, it unmistakably relies upon critically justified norms of natural law and natural justice.[28]

The roster of constitutional issues that have required judicial value judgments for their resolution is a very long one. It might be most helpful to proceed vertically, from the top down. At the heights, we discover the interpretive challenge: What is the original public meaning of a contested constitutional provision? A select list of provisions that bears overt moral evaluative content includes laws that "impair[] the obligation of contract,"[29] or that impose "excessive" bail and fines or "cruel and unusual punishment,"[30] or that deny "equal protection" or "due process" of law,[31] or that violate persons' rights to be free of "unreasonable search and seizure."[32]

The roster also includes the guarantees of "just compensation" for government takings and a "fair trial."[33] It extends to the meaning of such key constitutional terms as "religion," "speech," "liberty," "search and seizure," and "compelled" "confession" especially because—following Aristotle—the meaning of these terms is most re-

28 "Judges are seldom content merely to annul the particular solution before them. . . . On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute it to a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." Learned Hand, The Bill of Rights 70 (1958).

29 "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. I, § 10.

30 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

31 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

32 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

33 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

34 *See* Aristotle, The Nicomachean Ethics 1 (Davis Ross trans., 2009). "[T]he most universal and effectual way of discovering the true meaning of a law . . . is by considering the *reason* and *spirit* of it." 1 William Blackstone, Commentaries *61. "[O]riginalism must be committed to the Constitution's original spirit as well—the functions, purposes, goals, or aims implicit in its . . . design. We term this spirit-centered implementation 'good-faith constitutional construction.'" Barnett & Bernick, *supra* note 5, at 3.

liably gained by grasping the point, the purpose, the good that a constitutional provision is wont to do.[34] Want to know what the "free exercise of religion" at least presumptively meant to the founders? Consider what they thought religion is and what it is good for.[35]

The roster includes some provisions that bear less overt moral normative content. Chief among these is the Court's 2022 rendering of the Second Amendment right "to keep and bear arms."[36] Against more than a century of precedent just then recently abandoned, the Court then held that the Amendment "codified" a pre-existing natural right of armed self-defense in case of confrontation outside the home.[37]

Down-slope from the interpretive task lies the construction site of judicial doctrine. In Thomist terms, this is *determinatio*—creating law by adopting by choice a proposed standard, rule, or test in preference to an already available standard, rule, or test.[38] There are countless examples in the US Reports of such judicial lawmaking. Here is a tiny sampler: the four-part *O'Brien* test for content-neutral regulations of expressive conduct;[39] the prevailing *Smith* "neutrality" and "general applicability" tests under the Free Exercise Clause;[40] the "important government interest"/"substantial relationship" test for unconstitutional sex discrimination;[41] and the "compelling state interest"/"least restrictive means" test for content-based speech regulations.[42]

The "actual malice" test for defamation of public figures in *New York Times Co. v. Sullivan* is a particularly strong example.[43] Sixty years ago, the Court derived that demanding standard for defaming plaintiffs from value judgments about the need for a robust press in our democracy compared to the value of reputation and privacy for anyone who comes under the heading of "public figure."[44] Should the Court reconsider the holding (as Justice Thomas suggests),[45] it would very likely take a deep dive into early constitutional history. But the Court will also have to consider—as it should and does in overruling any case—whether there are "reliance" interests in the wake of *Sullivan* that it would be unjust to upset.[46]

Since Miranda warnings were established in the namesake 1966 case,[47] the Supreme Court has repeatedly revisited the question of whether the warnings are part of the Constitution or

35 *See* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991).

36 "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

37 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022).

38 *See, e.g.*, Gary Lawson, Evidence of the Law: Proving Legal Claims 75 (2017) ("[A] legal proposition is deemed correct if it is better, meaning more plausible, than its available alternatives.").

39 *United States v. O'Brien,* 391 U.S. 367 (1968). The four-part test, if you're curious, is whether the government's regulation 1) is within the scope of their authority, 2) promotes a substantial governmental interest that, 3) is unrelated to suppressing expression, and 4) is necessary to achieve that interest. *Id.* at 377.

40 Essentially, if a law's direct objective is to hinder religious exercise, it is analyzed with strict scrutiny. Otherwise, if the law is read broadly to be neutrally applicable and thus the burden on religion is merely incidental, it receives only rational basis. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

41 "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

42 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (ruling that any regulation that "stifles speech on the account of its message" contravenes the First Amendment and therefore, the regulation is subject to strict scrutiny analysis); *see also Texas v. Johnson*, 491 U.S. 397 (1989).

43 *New York Times Co. v Sullivan,* 376 U.S. 254 (1964).

44 *Id.* at 279–80 (requiring actual malice as a requisite for a defamation claim made by a public official and defining actual malice as "knowledge that [the speech] was false or reckless disregard of whether it was false or not").

45 *See Coral Ridge v. Amazon.com, Inc.*, 6 F.4th 1247 (July 28, 2021), *cert. denied*, 142 S. Ct. 2453, 2455 (June 27, 2022) (Thomas, J., dissenting) (expressing his desire to grant certiorari in this case to "revisit the 'actual malice' standard in *Sullivan*").

46 Stare decisis protects interests of those who have acted in reliance of past decisions. A factor to consider when overruling settled case law is upsetting those reliance interests. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263, 287-91 (2022).

47 *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

whether they instead amount to a judge-made "prophylaxis." Either way, no one thinks that *Miranda* is derivable from the text of the Constitution or from its original public meaning without mediation by a value-laden judicial choice. *Miranda* was an act of creative judicial lawmaking rooted in 1) some behavioral premises about psychological pressures in the stationhouse,[48] and, more importantly, 2) a strong reflection of the doctrine that it is better for ten guilty men to escape justice and wreak future havoc than that one innocent man be convicted.[49] That is, *Miranda* was a value-laden choice to sacrifice probative evidence and some accurate convictions for the sake of protecting more effectively against the risk of coercion. This is likewise true of the Court's Fourth Amendment "exclusionary rule,"[50] which no one thinks is in any straightforward way part of or derivable from the Constitution.[51] It is a judicially created remedy/sanction to deter police misconduct.

The Court has consistently stood by the *Miranda* Court's choice to protect values of individual autonomy over the asserted requirements of effective law enforcement ever since. The exclusionary rule is now, practically speaking, beyond recall because of the "force of precedent" and because, although its provenance as an original matter in or around the Fourth Amendment remains debatable, its adoption by the Court as constitutionally required (first, in 1949 pertaining to the federal government[52] and then in 1961[53] with regard to the states) is not an "egregious" error demanding reversal, as was *Roe v. Wade* for the *Dobbs* Court.[54]

The Court adopted a structurally similar line of value-balancing in its right-to-counsel cases. In *Scott v. Illinois*, the Court established that the Constitution does not permit any indigent person to be sentenced to a term of "actual imprisonment," save where the person was afforded the opportunity to be represented by appointed counsel.[55] The Court had earlier judged in *Gideon v. Wainwright* that, although some indigent persons could represent themselves well enough to carry off a genuinely "adversary" proceeding, the "average" defendant could not do so.[56] To guard against the risk that some (many? most?) "average" persons would be denied a fair trial if the matter of adequacy were litigated one case at a time *post hoc*, as was the case before *Gideon*, as it was with "involuntary" confessions before *Miranda*,[57] the Court adopted a prophylactic rule: *every* indigent defendant in a non-petty criminal case must be offered the services of a public defender.[58]

What of defendants in cases where a jail term is not in the offing? These many defendants are *not* constitutionally entitled to counsel as a matter of course.[59] They must receive a public defender only where "circumstances" "special" to their cases make it apparent that justice will not be served without the assistance of counsel. This line between jail or no-jail originated in and has

48 *Id.* at 450.

49 4 William Blackstone, Commentaries *352. The phrase is actually "than that one innocent person suffer," but you get my drift.

50 *See Mapp v. Ohio*, 367 U.S. 643 (1961).

51 Gerard v. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and its Progeny*, 30 St. Louis U. L.J. 1031 (1986).

52 *Wolf v. Colorado*, 338 U.S. 25 (1949).

53 *Mapp v. Ohio*, 367 U.S. 643 (1961).

54 *Dobbs*, 597 U.S. at 321.

55 *Scott v. Illinois*, 440 U.S. 367 (1979).

56 *Gideon v. Wainwright*, 372 U.S. 335 (1963). "Reason and reflection require us to recognize that in our adversary system . . . any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided[.]" *Id.* at 344.

57 That is to say, the Court in *Miranda* abandoned their prior practice of reviewing on appeal or cert the facts of a given case to decide whether or not a particular confession was "voluntary." They adopted the *Miranda* prophylaxis to "assure" that confessions passing that muster and only those would be admitted in evidence and that the warnings were a practical guarantee of "voluntariness."

58 *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

59 *Nichols v. United States*, 511 U.S. 738, 746 (1994).

been sustained partly ever since by a calculus of evaluative, though not-quite-overtly moral judgments, about trials, the "average" person's abilities, and the meaning of "adversariness." Above all, however, it has always depended upon the Court's moral judgment that the risks of inadequate defenses and thus of unfair (because not really adversarial) trials are worth running, only where the consequences of miscarriage—no "actual imprisonment"—are tolerably unjust.

Farther down the vertical arc lie more prosaic, judicially created rules, tests, and standards, sufficiently concrete to resolve cases at hand. Even these very practical metrics are often stubbornly morally normative. The standing definition of Fourth Amendment "*probable* cause" is, notwithstanding its arithmetic ring, a fluid, normative standard of justice: "*fair* probability."[60] In one case, a scant likelihood of apprehending, say, a murderer by detaining hundreds of concert goers might be just, whereas the same detention would be unjust to arrest a shoplifter. In other words, it is settled Fourth Amendment law that, say, five percent "probable cause" is enough in some cases but not in others, depending upon a judicial balance of values such as freedom from restraint and the importance of solving the more serious crimes.

The threshold question in *any* Fourth Amendment case, moreover, is whether public authority has engaged in what could be called "Fourth Amendment activity." This was established in the 1967 case of *Katz v. United States*.[61] The initial question is whether state action abridged a person's subjective expectation of privacy in the place searched or the matter seized and that this expectation was "reasonable."[62] In our digital world, this question has become a vexed one as well as one impossible to answer without resort to balances of the values of privacy against the government's rightful authority to obtain evidence of wrongdoing.[63]

The Court's conservative justices have acted upon their wariness of moral judgments in several recent high-profile cases. In a single 2022 Term, the Court abandoned value-laden doctrines under the Establishment Clause,[64] in Second Amendment cases,[65] and substantive rights determinations under due process.[66] In each instance, the conservative justices substituted a "history and tradition" test of constitutionality for a morally normative doctrinal test.

Even so, the following year, the chief justice wrote for himself, as well as for Justices Alito, Kavanaugh, and Jackson, about the inevitability of judicial lawmaking based upon choices among "values" in a case involving the "balancing" of interests in "dormant" commerce clause cases.[67] In a concurrence, the chief justice acknowledged that Justice Gorsuch (who spoke for Justices Thomas and Barrett, too) "objects that balancing competing interests under *Pike* is simply an impossible judicial task. I certainly appreciate the concern, but sometimes there is no avoiding the need to weigh seemingly incommensurable values."[68]

Roberts proffered a short list of such unavoidable occasions.[69] These include weighing "'the purpose to keep the streets clean and of good appearance' against 'the constitutional pro-

60 *Illinois v. Gates*, 462 U.S. 213 (1983).

61 *Katz v. United States*, 389 U.S. 347 (1967).

62 *Id.*

63 *See, e.g., Riley v. California*, 573 U.S. 373 (2014) (ruling that cell phones are subject to Fourth Amendment protections). "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (determining that a thermal scanner used to detect the interior temperature of a home for incriminating purposes was an invasion of privacy).

64 *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

65 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

66 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

67 *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 394 (2023) (Roberts, C.J., concurring).

68 *Id.* at 396. Roberts was referring to the Court's seminal dormant commerce clause case. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

69 *Pork Producers*, 598 U.S. at 394.

tection of the freedom of speech and press;"[70] society's interests in "surgical intrusions beneath the skin" against a person's Fourth Amendment privacy interests;[71] and the state's interest in "committing the emotionally disturbed" against an individual's liberty interest in "not being involuntarily confined indefinitely."[72] Roberts concluded that "[h]ere too, a majority of the Court agrees that it is possible [and, evidently, that it is also *appropriate*] to balance benefits and burdens under the approach set forth in *Pike*."[73]

The Court's Value-Avoidance Story

The Supreme Court habitually makes law in constitutional cases based on the justices' choices between and among relevant moral values. Why so many members of the Court maintain that they do no such thing is an important question, not so much of law as of history, biography, and political science. I leave that whole matter aside for now. I should like to focus instead, in the remaining parts of this essay, on some of the collateral damage done by propagating and trying or professing to be guided by the justices' apocryphal story about value-avoidance.

One tranche of justifications for that story is comprised of descriptions of what making law in light of genuine values looks like. It is not a pretty picture. The main intended effect of the justices' unflattering portrayal of lawmaking seemingly is to depict a project so foreign to legal analysis, while sounding so practical and reasoned that no one could sanely expect courts to go near it. The justices say or imply that such dirty work is properly for the people and their elected representatives.[74]

The main effect of this rhetorical takedown of lawmaking in our democracy is rather exhibiting that the justices do not possess the sufficient reflective understanding of practical (including moral) reasoning to carry off their stated project. Put differently, even the improbable project of *trying* to decide constitutional cases without resort to "value judgments" requires more philosophical sophistication than the justices typically display or, given their aversion to critical moral reasoning, are inclined to cultivate. A secondary effect is to present lawmaking as shambolic and irrational, so much so that no decent person would engage in it and no concerned citizen would tolerate it.

Consider first the chief justice's 2019 concurring opinion in the abortion regulation case, *June Medical Services v. Russo*.[75] Because I refer to the following excerpt as illustrative of a pervasive problem and not as a statement of authoritative law, the fact that the holding in *June Medical* has been superseded by *Dobbs* is no matter.

Here is Chief Justice Roberts taking the measure of a Louisiana law that stipulated that any doctor who performs abortions must have "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed or induced"[76] and defined "active admitting privileges" as being "a member in good standing" of the hospital's "medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient."[77] Abortion regulations were then generally evaluated by the Court according to a complex, judge-made "balancing" test for constitutionality:

> Courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. There is no plausible sense

70 *Schneider v. State*, 308 U.S. 147, 162 (1939).

71 *Winston v. Lee*, 470 U.S. 753, 760 (1985).

72 *Addington v. Texas*, 441 U.S. 418, 425 (1979).

73 *Pork Producers*, 598 U.S. at 397.

74 *See, e.g., Dobbs*, 597 U.S. at 232 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting)).

75 *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020), *abrogated by Dobbs*, 597 U.S. 215 (2022).

76 La. Stat. Ann. § 40:1061.10(A)(2)(a) (2022), *invalidated by June Med. Servs.*, 140 S. Ct. 2103.

77 *Id.; June Med. Servs.*, 140 S. Ct. at 2113.

> in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy." Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus."[78]

Which "values" does the chief justice see? Take one he seems to treat as intelligible and relevant: protecting potential human lives. What sense can we make of it? There is no such thing as "potential life." Harry Blackmun invented that term in *Roe* to make his decision there seem less barbaric than it would if he frankly admitted the truth that even on a bare-bones biological account, abortions kill living, individual human beings. (Whether every such creature is a rights-bearing subject—a "person"—is a deeper philosophical question.) What the state's interest is in "protecting" the notional entity "potential life" is anyone's guess.

"Women's health" as described in *Roe* is a commodious legal term of art that refers to all aspects of her well-being—*as she understands it*.[79] It is just another way of saying that a pregnant woman gets to make the abortion decision unilaterally, for any or for no reason. There need be nothing of "value" there to evaluate: her word is law. The *Casey* Mystery Passage[80] does not identify any particular moral value either. It is rather the universal solvent; the diversity of true, objective goods that constitute human flourishing disappears into the maws of raw subjectivity: *all value* resides in the act of choosing, of a decision being really, *really* mine. *What* I choose is a matter of value indifference. Why should moral truth get in the way of my desires? What the heart wants, the heart wants.

Chief Justice Roberts evidently holds, moreover, that any judicial decision trying to make the required "balance" about abortion would be an act of brute will, presented to others (for some reason) as a "neutral utilitarian calculus." But there is nothing "neutral" about utilitarianism. And there are workable ways to compare real, albeit incommensurable, goods such as the emotional health of one person—call her, "Mom"—and the life of another person, whom some would call her "baby." We do it all the time when we punish a distraught mother for smothering a colicky infant. Our law about the justified use of deadly force—only to prevent death or serious bodily injury to another—is not an act of "will." It is rather a norm of justice identifiable by the Golden Rule of fairness.

There is no need to eschew (disclaim, disavow, go without) critical moral reasoning in constitutional cases if Roberts's *June Medical* opinion is an illustration of it in action. Sound critical moral reasoning has disappeared in a swamp of confusion. Even Socrates would get stuck in this muck.

Speaking of "Incommensurability"

The Supreme Court decided *National Pork Producers Council v. Ross*, a "dormant" commerce clause case, in May 2023.[81] Dormant commerce clause cases generally involve "protectionist" state laws that improperly "discriminate" against out-of-state commerce and are therefore deemed to be invalid because such laws trespass on or usurp the power of Congress to regulate interstate commerce, whether or not Congress has actually exercised its power in relation to the matter in question.[82] More specifically, and in the words of Justice Gorsuch, courts in such

78 *June Med. Servs.*, 140 S. Ct. at 2136 (first quoting *Casey*, 505 U.S. at 851; then quoting *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 891 (1988) (Scalia, J., concurring); and then quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

79 *Roe v. Wade*, 410 U.S. 113 (1973).

80 "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S at 851.

81 *Pork Producers*, 598 U.S. at 356.

82 *See id.* at 369. "By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound/Owatonna, Inc., v. Town of Harrison*, 520 U.S. 564, 578 (1997).

cases are sometimes called upon to assess "the burden imposed on interstate commerce by a state law and prevent its enforcement if the law's burdens are clearly excessive in relation to the putative local benefits."[83]

There was no opinion of the Court in *Pork Producers*. Justice Gorsuch announced the Court's judgment and, in a portion of his opinion joined by Justices Barrett and Thomas, asked:

> How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy."[84]

Maybe so. But should one hold, as Gorsuch evidently does, that where judges cannot resolve a case by "neutral legal rule" or "juridical principle," they have emptied the cache of properly judicial tools and so should punt the matter over to the legislature?

Justice Gorsuch then doubled down on the radical unsuitability of judges choosing between or among "incommensurable" goods:

> So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. . . . Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours. More accurately, your guess is better than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.[85]

I harbor no opinion about *Pike* or "dormant" Commerce Clause jurisprudence generally. I do not know what the right answer to *Pork Producers* is or how many "right"—i.e., not-wrong—answers there are. I do know, however, that courts routinely decide cases involving "incommensurable" values, as the brief recitation from the chief justice's aforementioned opinion, along with my own sampling of other examples, demonstrates. Justice Gorsuch is surely right to raise as a question whether the Constitution and the tradition of its interpretation to date have committed the authoritative resolution of this particular open-ended choice among values to another branch of the federal government or to the states and not to the judiciary. But he is surely mistaken in suggesting that there is a straight-line inference from the presence of indeterminacy to the lack of judicial competence.

In *Pork Producers,* Justice Kagan joined a brief concurrence by Justice Sotomayor, who wrote that Justice Gorsuch spoke only for a *plurality* of justices. She and Kagan aligned themselves with Roberts's view that "courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency."[86] Sotomayor added that the "means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble."[87]

My aim here is not to pile on proof that, notwithstanding laments such as that of Justice Gorsuch, courts routinely "balance" competing values or goods of different sorts and decide cases on that basis. That they surely do. My point is rather to highlight the inadequacies of Gorsuch's *philosophical* analysis of the situation. No doubt there are incommensurable basic goods in the world, even though many in and out of law dispute that claim. Many who call themselves utilitarians, for example, hold that appearances of incommensurability disappear when a universal

---

83 *Pork Producers*, 598 U.S. at 377 (quoting *Pike*, 397 U.S. at 137); *see also Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (establishing the balancing test for dormant commerce clause cases).

84 *Pork Producers*, 598 U.S. at 381 (quoting *Bendix*, 486 U.S. at 897 (Scalia, J., concurring)).

85 *Id.* at 382.

86 *Id.* at 392.

87 *Id.* at 393.

metric, such as pain or pleasure or preferences, is introduced into the picture. Others who call themselves economic analysts of law hold that markets in instrumental goods such as money provide all the "commensuration" a just society needs.

Justice Gorsuch is nonetheless right to say that comparisons of goods in many situations cannot be made according to a common metric, as if a kind of arithmetic solution, one rationally compelled by logic, should be expected in cases such as *Pork Producers.* But that does not mean that it is all guesswork. For one thing, justices rarely face an entirely *novel* question that presents in naked form (if you will) an unfettered choice among incommensurable values. For most often, the range of appropriate judicial options is already limited by precedent, tradition, social custom, and settled legal standards in analogous areas of law.

More fundamentally, Gorsuch does not take up the prospect that, where incommensurable goods are in play for decision, *choice guided but not determined by reason* is the way that persons and their communities resolve ("balance") incommensurable goods ("values"). Just as an individual, when faced with live options to either go to graduate school for the sake of vocational possibilities or instead to stay home with his elderly parents or to stop everything and enlist in his nation's military, *settles* the matter not by some objectively verifiably correct calculation but by self-determining free choice, so too do public authorities *settle* that a nation is to be more and not less globally engaged, or devoted to industry and not to agriculture, or accepting of free press at the expense of personal privacy or fair trials. Again, these are all *choices,* not "guesses." One might well inquire: a "guess" as to what? Some hypothesized but presently unknown objectively certain, value-neutral answer? None exists in the situations described above.

"In a functioning democracy, policy choices like these usually belong to the people and their elected representatives."[88] It rather seems *that* is the constitutional question, not its answer. To which branch of the national government has the Constitution assigned this authoritative *choice*? Or does our fundamental law commit the authority to the states? Gorsuch wants to resolve this textured question by dint of a categorical philosophical claim: certain questions about what to do as a community are "guesses," and "guesses" are just the kind of things that legislators do and judges don't do.

Internal and External Views of Morals Legislation

In our constitutional world, every act of public authority must have a "rational basis." This universal minimum means that judges must adopt the *internal point of view* of the legislative, executive, or administrative lawmaker.[89] What is the train of reasoning that resulted in—lies behind, makes sense of, justifies—the norm(s) found in the legal text at issue? Somewhere along this way one would have to find at least one morally normative premise, a lawmaker's judgment that this or that behavior is simply wrong, unjust, anti-social, destructive of the common good.

In the all-important area of public morals laws (against, for example, selling obscene pornography, parading naked in the park or, before the Court began striking down such laws, strictures against non-marital sexual relations including homosexual sodomy), conservative constitutionalists have characteristically refused to consider, still less to evaluate, the lawmakers' train of thought. They have scorned the internal

88 *Id.* at 382.

89 Rational basis is a test used when a law is challenged for being unconstitutional. It, like other, less government-friendly analyses (intermediate and strict scrutiny), requires the Court to identify a "legitimate government interest" that justifies the challenged law. Though rational basis is almost a guaranteed loss for the challenger, it still requires the Court to posit a sound explanation for the law's existence, sometimes just the general diffuse (and malleable) "police power." *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (declaring a Colorado law unconstitutional because they could not find a legitimate purpose); *cf. id.* at 636 (arguing that Colorado voters made a permissible moral judgment) (Scalia, J., dissenting). Courts use rational basis to assert that they do not want to insert the judiciary into the democratic process. *See e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (declaring that unless a statue is "inherently invidious" or it "impinges on fundamental rights, areas in which the *judiciary has a duty to intervene* in the democratic process" it would rather leave the elected body to review its laws) (emphasis added).

point of view and decided these cases on *external* grounds.

How so? For more than a generation, conservatives have been confused (to outward appearances) by the normative justification for morals laws. They have consequently relied upon the pluripotency of what they call "majoritarian morality." They say in so many words that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is . . . a sufficient reason for upholding a law prohibiting the practice."[90]

It is not. No lawmaking authority's *conclusion* that, say, prostitution should be a crime, supplies the needed "rational basis" because it is precisely that conclusion the Court is called upon to interrogate, to see if it is indeed based in reason, as opposed to bias or prejudice or simply animus. And the fact that anyone or everyone holds a particular moral view—say, that using pornography is bad for persons—is not yet a reason for action, apart from the reasons why one holds the view to be true. That a lot of people (a majority) hold a negative view of some sexual practice needs to be made transparent for the reasons why those people disapprove. Otherwise, it cannot begin the work of giving a "rational basis" for a morals law.

Almost no one says, "I am opposing this practice because it is my view that I am opposing this practice." People say instead, "I am opposed because it is wrong in the following way, and that is my moral conclusion." For example, many people who say that prostitution is wrong mean that it is wrong for everyone, that it is objectively and categorically immoral. This view could be false. If it is, its falsity is sufficient reason to discard the judgment and everything it might entail. Saying that a negative judgment about sodomy is "just your view and it would be unfair to impose your view upon someone who does not share it would be wrong" evades the matter asserted: sodomy is wrong simpliciter, for you and me and everybody. Saying "it's just your view" is also self-refuting, for the judgment that imposing one's view on others is "wrong" is, one could just as well say, merely your view of justice—and it would be wrong for you to impose it on me.

The Court's treatment of "obscenity" illustrates the morass into which externalist accounts of "rational basis" leads.[91] A couple of semesters ago, I examined my constitutional law students on this question: what is the "rational basis" for laws punishing transmission of obscene webcam performances? The answer is surely not in the 1973 three-part *Miller* test for *identifying* obscenity.[92] That test does not tell you what if anything is wrong with obscenity. It just tells you what counts as "obscene."

The same day that the Court established the *Miller* test, which is still considered good law, Chief Justice Burger tried to answer my exam question. Here is the climax of his argument:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[93]

The Court's scare-quotes could possibly have been a clumsy way of signaling the sound dis-

90 "The Court embraces [the] declaration that . . . 'the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (*overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

91 *See generally* Gerard V. Bradley, *Prolegomenon on Pornography*, 41 Harv. J.L. & Pub. Pol'y 447 (2018) (analyzing how to morally evaluate the new age of computerized porn).

92 All too briefly: an average person applying contemporary (state) community standards would find the work as a whole lacks serious artistic value, appeals to prurient interest in sex, and is explicit in a patently offensive way. *Miller v. California*, 413 U.S. 15, 24 (1973).

93 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

tinction, made by writers as different as Thomas Aquinas and John Stuart Mill, between acts of private immorality, which public authority either prudentially should judge it better to leave alone or which might be beyond, as a matter of principle, the just reach of the state's coercive authority. Much more likely, though, "wrong" and "sinful" signal the Court's intent to keep the critical moral viewpoint at arm's length. So too, at first glance, is the highly implausible claim of moral neutrality when asserting that there is a communal injury or a danger to public safety. Not coincidentally, prosecutions for obscenity have gone the way of the Dodo bird. The last federal indictment for trafficking adult-actor "obscenity" was originally handed down in 2007, against Ira Isaacs, in the Central District of California.[94] State prosecutions are rare.

The Value-Avoidance Fallout

The most compelling evidence of the collateral damage caused by the justices' polemics about avoiding "value" judgments lies in the catastrophic mistakes these justices made on the two most important questions in recent constitutional law: abortion and same-sex marriage, as well as a crucial one they flubbed in a statutory case—transgenderism in the *Bostock* decision.[95] Many factors have contributed to the present state of the law in these sectors, and I do not mean to suggest that the *Dobbs* ruling is less than a momentous leap forward in constitutional law, even if it is not the complete truth about what the Fourteenth Amendment has to say about the legal protection of unborn human beings. But in each area, the Court's conservatives have miscategorized the decisive question as a value judgment beyond judicial ken.

First, when do "persons" come to be and have a Fourteenth Amendment right to the "equal protection" of state laws against homicide? A masterful *amicus* brief by John Finnis and Robert George in *Dobbs* persuasively showed that, even on strictly historical grounds, the original public understanding of that clause included the unborn.[96] The *Dobbs* Court said nothing about that brief's argument or the originalist argument about unborn personhood. Right now, the Court seems stuck in the groove cut by Justice Scalia decades ago, when he asserted that when people come to be is a "value judgment" that simply cannot be resolved by legal reasoning.[97] Alas, the *Dobbs* majority stated repeatedly that abortion presented a clash of moral values that (for that reason, seemingly) must be consigned to the vicissitudes of the democratic process.[98] "Abortion presents a profound moral issue on which Americans hold sharply conflicting views."[99] "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[100] "That is what the Constitution and the rule of law demand."[101] Most surprisingly, then, did Justice Alito show convincingly in his *Dobbs* opinion for the Court that the straight-on truth of when people with a right not-to-be-killed begin is a matter of coherent philosophical thinking that does *not* depend upon an ethical or "value" judgment at all. It is a matter of metaphysical reality.

Since the 2015 *Obergefell* decision,[102] there has been no sense in denying that lawmakers have stipulated that civil "marriage" includes same-sex pairs. However misguided these stipulations may be, they nonetheless are intra-systemically valid, though morally defective. But that there is a *truth* about marriage, that it truly is the conjugal union

94 *United States v. Isaacs*, No. 13-50036 (9th Cir. Mar. 25, 2014).

95 *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

96 John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 Harv. J.L. & Pub. Pol'y 927 (2022) (expanding their original amicus brief with supplementary historical analysis).

97 *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting).

98 *Dobbs*, 597 U.S. at 215.

99 *Id.* at 223.

100 *Casey*, 505 U.S. at 979 (Scalia, J., dissenting) (quoted in *Dobbs*, 597 U.S. at 232).

101 *Dobbs*, 597 U.S. at 232.

102 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

of man and woman, and that this truth is one of metaphysics and not of moral "value," are realities which no lawmaker can alter.

The caustic *Obergefell* dissents of Chief Justice Roberts and Justices Scalia, Thomas, and Alito nonetheless scrupulously avoided the truth about marriage, even as they denounced the majority's adoption of same-sex "marriage." Justice Scalia's blistering dissent opened with these words:

> The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage.[103]

Finally, the question at the heart of the burgeoning "transgender" cluster of issues involves no ethical or "value" judgment. The decisive proposition here too is a metaphysical conclusion informed by biology and associated fields of knowledge, all based in logic: one's sex is innate, binary, and immutable. No one, therefore, is "born in the wrong body;" indeed, that is scarcely an intelligible proposition, akin to the lament that one was "born to the wrong parents." There simply is no me (or you or him or her) but *this* male or female embodied rational being. That no one is better off repudiating his or her natal sex and adopting instead the delusion that one is "in the wrong body" *is* a moral judgment. But it follows almost ineluctably from the metaphysical truth that our bodies are our selves, whether we like it or not.

Conclusion

One strong and utterly respectable impetus behind the Court's story of moral neutrality is a healthy respect for the constitutional separation of powers. The justices, after all, are charged with exercising only "judicial power." This essay shows how keenly they loathe the prospect of exercising properly legislative power. The point is well-taken: a robust, solidly grounded account of how proper judicial lawmaking differs from that fit for legislative lawmakers is desirable, even necessary for the right working of judicial review. But that important project is dumbfounded by judges who say that they never make law at all, further undermined by them saying they do nothing that depends upon their own judgments of what natural law and natural justice require and blown up by the grotesque caricatures of popular lawmaking that the justices have so often promoted.

103 *Id.* at 714 (Scalia, J., dissenting).

Moral Reality as a Guide to Original Meaning: In Defense of *United States v. Fisher*

*by Christopher R. Green**

What does ethics have to do with interpretation? Some, like Justice Scalia for the Court in *District of Columbia v. Heller*, say nothing at all—grasping the meaning expressed by the Constitution's words in their original context is one thing, and assessing the desirability or moral praiseworthiness of that meaning is something completely different: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[1] Others, like Ronald Dworkin, and perhaps his followers like Adrian Vermeule, say that the two categories are really just one: that there should be a "fusion of constitutional law and moral theory."[2]

Chief Justice John Marshall and others in the founding generation followed a third way, most prominently in *United States v. Fisher* in 1805,[3] which held that normative considerations like justice and fairness are legitimate interpretive considerations but are not decisive if the meaning expressed by the relevant text in its original context is sufficiently clear. James Madison's pragmatic arguments against the bank in 1791[4] and William Blackstone's recapitulation of Edward Coke's opinion in *Bonham's Case*[5] take the same approach to interpretation: ethics matters but cannot trump sufficiently clear original meaning.

---

* Jamie L. Whitten Chair in Law and Government, University of Mississippi School of Law.

1 *District of Columbia v. Heller,* 554 U.S. 570, 634 (2008). Scalia grounded this hostility to policy considerations in Originalism:

> Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . The Second Amendment . . . is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew.

Id. at 634-35. Others have likewise viewed hostility to the relevance of policy arguments as definitive of originalism. *See* Kevin Tobia, Neel U. Sukhatme & Victoria Nourse, *Originalism as the New Legal Standard? A Data-Driven Perspective* 53 (Geo. Univ. Law Ctr. Research Paper No. 2023/15), https://ssrn.com/abstract=4551776 ("Originalism may well be defined, as some scholars urge, based on these exclusions (namely, prudential or ethical argument, which originalists reject as arguments of policy), as much as the inclusions"). On other occasions, however—one of them just two weeks before *Heller*—Justice Scalia highlighted policy consequences in his opinions. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (complaining that the majority's interpretation of the Suspension Clause "will almost certainly cause more Americans to be killed").

2 Ronald Dworkin, Taking Rights Seriously 149 (1977). For Vermeule's heavy reliance on Dworkin, *see, e.g.,* Adrian Vermeule, Common Good Constitutionalism 5-6, 95-97, 188-89 nn.11-14 (2022). I say only "perhaps" because Vermeule is, alas, notoriously resistant to clarifying his position in response to critics, so the precise extent to which he follows Dworkin, or might even agree with *Fisher,* is unclear.

3 *United States v. Fisher,* 6 U.S. (2 Cranch) 358 (1805).

4 2 Ann. Cong. 1946 (1791) ("Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.").

5 1 William Blackstone, Commentaries *91 (Sharswood ed., 1893) ("[A]cts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with respect to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of constitution that is vested with authority to control it. . . . Thus if an act of parliament give a man power to try all causes, that arise out of his manor of Dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. [Footnote to 8 Rep. 118, i.e., *Bonham's Case.*] But, if we could conceive it possible for parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave

This essay defends *Fisher* as consistent with history and with a textualist form of originalism that takes the meaning expressed by the text in its original context, if sufficiently clear, as binding. As befits a contribution to a volume in the *Journal of Christian Legal Thought*, it also defends *Fisher's* consistency with the biblical account of a human nature that is the same over time and everywhere on earth. Christians think that God "made from one man every nation of mankind to live on all the face of the earth"[6] and has "fixed a day on which he will judge the world in righteousness,"[7] and that those from every nation and every generation contemplate that future judgment in light of "the work of the law [that] is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them."[8] Accordingly, Christians should be hostile to regional or temporal ethical parochialism. People today—whatever their theology or lack of one—share the same human moral faculties possessed by those who wrote the Constitution. We should, therefore, be morally charitable in reading statutes or constitutions. Other things being equal, morality is a defeasible guide to their original meaning.

United States v. Fisher, sometimes cited as *Fisher v. Blight,* grew out of a 1797 statute that appeared at first glance—and to the Supreme Court at the end of the day—to give the federal government priority over other creditors in state bankruptcy proceedings. If someone owing money to the federal government becomes insolvent, "the debt due to the United States shall be first satisfied."[9] Peter Blight, who became insolvent, owed money to both Fisher and the federal government, and Fisher and the United States disagreed about whose debt should be satisfied first. Fisher claimed that the 1797 statute only put the United States on the same footing as other creditors, but the Court read the statute's requirement as unconditional.[10] In addition to arguments based on the context of earlier federal statutes, Fisher relied on the title of the 1797 statute—"An Act to Provide for the Settlement of Accounts between the United States, and Receivers of Public Money"—as well as worries about the injustice of creditors finding themselves unfairly surprised because another creditor had transferred a debt to the United States. Justice Bushrod Washington disagreed with the Court's conclusion, though not on the basic principles involved.

Alexander Dallas, U.S. Attorney for the Eastern District of Pennsylvania and the former reporter for the Supreme Court before William Cranch took over under Marshall's chief justiceship, sought the benefit of the plain text of the statute but still acknowledged the interpretive relevance of pragmatic considerations: "[I]f the words of the law are clear and positive, it cannot be altered by the consideration of its inconvenience."[11] He argued similarly in his rebuttal: "The inconvenience or impolicy of a law are not arguments to a judicial tribunal, if the words of the law are plain and express."[12]

---

no doubt whether it was the intent of the legislature or no."). Cambridge professor Edward Christian's commentary on Blackstone at this point is also worth quoting:

> If the expression will admit of doubt, it will not then be presumed that that construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable; but where the signification of a statute is manifest, no authority less than that of parliament can restrain its operation.

Id.

6 *Acts* 17:26 (ESV).

7 *Acts* 17:31.

8 *Romans* 2:15.

9 Act of March 3, 1797, § 5, 1 Stat. 512, 515.

10 *Fisher*, 6 U.S. (2 Cranch) at 367 ("If then the United States are to be considered as a common, and not as a privileged creditor, the voluntary assignments made by Blight before the bankrupt law, would bar the United States as well as any other creditor"). The different readings of the priority statute were thus similar to the different readings given to the Free Exercise Clause in cases like *Employment Div. v. Smith*, 494 U.S. 872 (1990) and *Fulton v. Philadelphia,* 141 S. Ct. 1868 (2021).

11 *Fisher,* 6 U.S. (2 Cranch) at 366.

12 *Id.* at 383.

Fisher's attorneys were top advocates: first Senator Robert Harper, until Harper was called away to serve as Justice Samuel Chase's counsel at his impeachment trial, and then Jared Ingersoll, who a few years later would succeed Dallas as U.S. Attorney. Harper and Ingersoll relied on the idea of statutory "spirit" that had been expounded most prominently in Edmund Plowden's 1574 note in *Eyston v. Studd*, which distinguished the textual "shell" of a statute from the "kernel" of its meaning. Harper put it this way: "The general words of the act extend to all cases; but we contend that those general words are restricted by the spirit of the act, and by the intention of the legislature."[13] Ingersoll explicitly invoked *Eyston's* "shell" and "kernel" metaphors: "Every statute consists of the letter and the spirit; or, in the quaint but strong language of ancient law writers, of the *shell* and the *kernel*; and, by comparing the different parts with each other, from the title to the last sentence, it is found to be its own best expositor."[14] His argument from the statute's title was very limited: "We admit that neither a title nor preamble can control the express words of the enacting clauses; but if these are ambiguous, you may resort to the title or preamble to elucidate them."[15] Likewise, Ingersoll's argument from injustice was limited to clarification: "We do not contend that the title can controul the plain words of the enacting clause; but where a construction of an enacting clause would lead to unjust, oppressive, and iniquitous consequences, which will be avoided by a construction consistent with the title, a strong argument arises in favour of the latter interpretation."[16] Later Ingersoll put it this way: "Unless such a construction be absolutely necessary, the inconveniences attending it will undoubtedly prevent its adoption."[17]

The Court held that the title of the statute was, like a preamble, relevant evidence on the meaning of the operative provision, but not enough to overcome the operative provision's straightforward meaning. Arguments from the inconvenience, injustice, or unfair surprise were likewise interpretively relevant but, given the clarity of the text and the relatively minor moral con-

---

13 *Id* at 367. Here is more context from Plowden's comments on *Eyston:*

> [T]he law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only on the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.

Eyston v. Studd, 75 Eng. Rep. 688, 695 (1574). Plowden followed Aristotle in arguing that a lawmaker cannot foresee every case, and therefore must take certain exceptions as implicit. *Id*. For more on the consistency of Aristotle and Plowden's views of language with the insights of linguists today, see my *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const'l L. & Pub. Pol'y 167, 171-74 (2017).

Justice Scalia and Bryan Garner have argued that *Eyston* is inapplicable to today's world because legislative power is exercised by groups, rather than a single monarch, and thus that Plowden's standard for equitable interpretation—what the lawmaker would say if able to be asked about a specific application—cannot work. *See* Antonin Scalia & Bryan A. Garner, Reading Law § 60, at 349 (2012) ("[T]oday . . . the question 'How would you intend your words to apply to the facts of the case?' is meaningless when applied to a full legislature[.]"). However, hypothetical conversations with groups—asking what a group would do if asked about a particular application—seems no less philosophically sensible than a hypothetical conversation with an individual. *See* Christian List & Philip Petit, Group Agency 159 (2011) (explaining how groups can make judgments over normative propositions just as individuals can). Even in the sixteenth century, moreover, parliament acted as a group and jointly with the king in passing statutes, so Plowden's use of a single-lawmaker model should be taken as group personification, rather than only applying to a monarch expressing an individual will.

14 *Fisher*, 6 U.S. (2 Cranch) at 372.

15 *Id.* at 368. The very small difference in attitude in *Fisher* toward the interpretive relevance of preambles is familiar to students of *District of Columbia v. Heller,* 554 U.S. 570 (2008). *Compare id.* at 578 n. 4 ("a prologue can be used only to clarify an ambiguous operative provision"), *with id*. at 643 n. 7 (Stevens, J., dissenting) ("the preamble cannot control the enacting part of the statute *in cases where the enacting part is expressed in clear, unambiguous terms*" (emphasis in original) (quoting 2A N. Singer, Sutherland on Statutory Construction §47.04, p. 146 (rev. 5th ed. 1992)).

16 *Fisher*, 6 U.S. (2 Cranch) at 374.

17 *Id.* at 378.

siderations, not enough. Marshall summarized the two points this way early in the opinion:

> It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature is to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.[18]

Marshall then commented on the agreement among the parties: "On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself."[19] Returning to the small distance between the parties' positions on the title and preamble, Marshall explained,

> On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may remove ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.[20]

Despite the relevance of the title in supporting a more limited scope for the statute, Marshall thought the text was just too clear: "[I]t appears, to the majority of the court, to be too explicit to require the application of those principles which are useful in doubtful cases."[21]

Marshall then returned to the idea that pragmatic or ethical considerations should affect the Court's reading, giving his classic statement of the relationship between ethics and interpretation:

> The mischiefs to result from the construction on which the United States insist, have been stated as strong motives for overruling that construction. That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative determination must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.— But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.[22]

---

18 *Id.* at 386.

19 *Id.* On the distinction between general principles and particular applications, *see Euclid v. Ambler Realty,* 272 U.S. 365, 387 (1926); *see also* Christopher R. Green, *Originalism and the Sense-Reference Distinction,* 50 St. Louis U. L.J. 555 (2006).

20 *Fisher*, 6 U.S. (2 Cranch) at 386.

21 *Id.* at 389.

22 *Id.* at 389-90.

Note the particular normative ideas here that Marshall allowed to be interpretively relevant: "consequences," "rights," "fundamental principles," and the "general system of laws," as opposed to mere "inconvenien[ce]." Note as well the different epistemic notions of how much clarity would be required: "irresistible clearness," on the one hand and, on the other, "sufficiently intelligible to leave no doubt in the mind" about what the legislature "probably" thought about costs and benefits.

After then considering in detail the statutory background of the 1797 act, Marshall briefly rejected Fisher's argument that bankruptcy priority for claims of the United States did not fall under the necessary-and-proper power. A rule that Congress's chosen means must be "indispensably necessary" would, Marshall said, "produce endless difficulties." "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."[23]

Justice Bushrod Washington dissented, offering his perspective despite claiming to "take no part in the decision of this cause,"[24] because his decision as circuit justice for Pennsylvania's federal trial courts was under review. Washington distinguished "literal interpretation" from "the obvious meaning of the legislature."[25] He elaborated in terms very similar to the chief justice:

> Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. But if, from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature.[26]

He went on with respect to normative considerations: "[I]f the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done."[27] He took the same approach to prefatory material as the Court and the litigants:

> The preamble of an act of parliament is said to be a key to the knowledge of it, and to open the intent of the law-makers: and so I say as to the title of a law of congress, which being the deliberate act of those who make the law, is not less to be respected as an expression of their intention, than if it preceded the enacting clause in the form of a preamble. But neither the title or preamble can be resorted to for purpose of controuling the enacting clauses, except in cases of ambiguity, or where general expressions are used inconsistent or unconnected with the scope and purview of the whole law.[28]

After reviewing some of the statutory context, Washington then explained his policy objection to the Court's reading:

> I do not think that congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a

23 *Id.* at 396; *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-23 (1819). Marshall's failure in *McCulloch* to cite *Fisher* despite the similarity of his two opinions is striking. His love of a return to first principles made him look like more of an innovator than he would have seemed if he had relied more on precedent, even his own.

24 *Fisher,* 6 U.S. (2 Cranch) at 397. Washington (but not Chase, busy with his impeachment trial) was, however, listed as "present" among the justices hearing the case. *See id.* at 358 n*.

25 *Id.* at 399.

26 *Id.*

27 *Id.* at 400.

28 *Id.*

> different intent; and secondly, because it would not only be productive of the most cruel injustice to individuals, but would tend to destroy more than any other act I can imagine all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man cannot guard himself. . . . But if this preference exists in every possible case of contracts between the United States and an individual, there is no means by which any man can be apprized of his danger, in dealing with the same person.[29]

Is *Fisher* consistent with originalism? Yes. In its textualist form, as explained by Lawrence Solum, originalism is a combination of three ideas: the *fixation thesis* that the meaning of a text does not change over time; the *constraint thesis* that the original meaning ought to constrain constitutional practice; and the distinction between interpretation and construction, which allows that if meaning is insufficiently clear, principles of construction may contribute to constitutional practice. In sum, originalist textualism is the idea that *original meaning is binding if sufficiently clear:* "To the extent that the constitutional text is clear, originalists believe that it is binding: we owe a duty of fidelity to the original meaning of the Constitution."[30]

The "sufficiently clear" codicil leaves open three issues: how often original meaning *is* clear, *how* clear original meaning must be, and what sort of evidence might *make* original meaning clear. None of these are embedded in the thesis of originalism itself. *Fisher* shows how normative considerations can help resolve the second and third of these issues. The more morally problematic an interpretation, the clearer original meaning must be in order to establish it as binding, and the consistency of an interpretation with moral principles or normative considerations can be one way to make it clear.

The latter, very explicit embrace of the bindingness of original meaning by Chief Justice Marshall and James Madison, who argued that consequences were interpretively relevant when the text itself was imperfectly clear, shows how *Fisher* and originalism can fit together. Marshall said in his opinion in *Ogden v. Saunders*,

> Much . . . has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject . . . the Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be gathered from its words, that its words are to be understood in the sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has already been said more at large, and is all that can be necessary.[31]

Later on Marshall appealed to natural law for confirmation of his reading of the language of the Contracts Clause: "This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with pro-

---

29 *Id*. at 402-03.

30 *See* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 7 (April 13, 2018) (unpublished article), https://ssrn.com/paper=2940215. For statements of this idea at the Supreme Court, *see, e.g., McDonald v. Chicago,* 561 U.S. 742, 859-60 (2010) (Stevens, J., dissenting) ("[T]he original meaning of the [Privileges or Immunities] Clause is not . . . nearly as clear as it would need to be to dislodge 137 years of precedent"); *Euclid,* 272 U.S. at 387 (1926) ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.").

31 *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

found respect by the wisest men of the present, and of past ages."[32]

Madison famously wrote to Henry Lee in 1824,

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.[33]

But in the preceding sentence, Madison described how normative considerations were relevant to how the Constitution is to be interpreted:

> There is nevertheless sufficient scope for combating the spirit of party, as far as it may not be necessary to fan the flame of liberty, in efforts to divert it from the more noxious channels; to moderate its violence, especially in the ascendant party; to elucidate the policy which harmonizes jealous interests; and particularly to give to the Constitution that just construction, which with the aid of time and habit, may put an end to the more dangerous schisms otherwise growing out of it.[34]

Construing the Constitution in line with the normative goal of moderating factions was, for Madison, consistent with viewing its original meaning as binding.

The use of *Fisher* by Frederick Douglass in his emphatically textualist explanation of the Constitution in his famous Glasgow speech of 1860 illustrates the same point. Douglass insisted that "the mere text, and only the text . . . was adopted as the Constitution of the United States. . . . [T]he paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution."[35] But Douglass quoted *Fisher* in support of reading Article IV, section 2, clause 3 to apply only to indentured servants who were "held to service or labour" pursuant to a contract.[36]

It is thus unsurprising that a *Fisher* presumption in favor of conformity with ethical reality has proven popular today among others who emphatically reject the reduction of constitutional interpretation with simple policy analysis. Judge Leslie Southwick of the Fifth Circuit, for instance, notes that *Fisher's* use of "everything from which aid can be derived" in order to determine meaning represents the approach of "the majority of appellate judges."[37] Likewise, Will Baude and Michael Stokes Paulsen, discussing Section Three of the Fourteenth Amendment,[38] and Stephen Sachs commenting on the views of Judge Stephen Williams,[39] all tout *Fisher* and Madison's bank-debate speech as consistent with originalism.

Does *Fisher* make sense of how language works? David Lewis has compellingly explained linguistic conventions as mechanisms for solving social coordination problems; languages exist because of the need for humans to work together for common purposes.[40] Language, like the law, is a means of promoting the common good. Within

32 *Id.* at 347.

33 James Madison to Henry Lee (June 25, 1824), 3 Papers of James Madison 338 (Mattern *et al.* eds., 2016).

34 *Id.*

35 Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? 6 (1860).

36 *Id.* at 12.

37 8 Encyclopedia of Mississippi Law § 68:50 (2d ed. 2023).

38 William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 1, 47 (2024).

39 Stephen E. Sachs, *Law Within Limits: Judge Williams and the Constitution*, 16 N.Y.U. J. L. & Liberty 110, 122-23 (2022).

40 David Lewis, Convention: A Philosophical Study (1969).

a given society with common moral understandings, interpreters have some reason—defeasible, to be sure—to interpret language to conform to those norms.

Do we, however, inhabit the same moral universe as the one of the American Founding? One reason to doubt interpretive ideas like those in *Fisher* is the worry that the writers of the Constitution, or of old statutes, were just too different from us, ethically and morally speaking, for our own moral reactions to be of any value as a guide to theirs. Different accounts of the nature of morality will make moral charity in interpretation more or less reasonable. The biblical picture is that there is only one moral universe, and we have access to it by means of an unchanging moral faculty. Human moral instincts are not so plastic that our moral reactions are irrelevant to the meaning expressed under linguistic conventions of earlier generations. Because human consciences are not the product merely of chance and have not changed easily in the past, we have reason to think they will not change very quickly in the future. Our consciences reflect an ingrained, universal human expectation that our misbehavior deserves judgment. Even Thomas Jefferson, for all his moral failures and unorthodoxy, understood that God's justice could not sleep forever.[41]

Paul told the men of the Aeropagus that the people of all nations had a common origin and a common destiny. "[H]e made from one man every nation of mankind to live on all the face of the earth, having determined allotted periods and the boundaries of their dwelling place."[42] Paul added that God had fixed a particular day in which he would "judge the world in righteousness."[43]

Though some in Paul's audience mocked his claim that Jesus rose from the dead and so made clear that he was the universal final judge, Paul assumed that the Greeks could grasp the basic nature of righteousness itself and the need for a coming judgment, without special revelation. When Paul wrote to the Romans, he made this same point at greater length:

> [W]hen Gentiles, who do not have the law, by nature do what the law requires, they are a law to themselves, even though they do not have the law. They show that the work of the law is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them on that day when, according to my gospel, God judges the secrets of men by Christ Jesus.[44]

---

41 Thomas Jefferson, Notes on the State of Virginia 272 (London, J. Stockdale 1787).

42 *Acts* 17:26. The King James Version here has "hath made of one blood" and was very widely quoted throughout the nineteenth century and beyond by critics of race-based slavery or second-class citizenship. *See, e.g.,* An Address to the Inhabitants of Charleston, South Carolina 4 (1805); William Wilberforce, A Letter on the Abolition of the Slave Trade, title page (1807); *Constitution of the Colored Anti-Slavery Society of Newark* (May 9, 1834), *in* 3 The Black Abolitionist Papers 132 (C. Peter Ripley ed., 1991); Letters and Addresses by George Thompson During His Mission to the United States 49 (1835); Declaration of Rights, Both of the People and Chiefs, The First Constitution of Hawaii, Granted by Kamahameha III (October 8, 1840); John Flude Johnson, Proceedings of the General Anti-Slavery Convention, Called by the Committee of the British and Foreign Anti-Slavery Society iii (1843); Elihu Burritt, *One Blood and One Brotherhood, in* 6 Advocate of Peace 121 (1845); Annual Report of the American and Foreign Anti-Slavery Society 83 (1849) (quoting Society's constitution); Address of the Yearly Meeting of the Religious Society of Friends 6 (1852); *The Negro Our Brother Man*, *in* Five Hundred Thousand Strokes for Freedom: A Series of Anti-Slavery Tracts (1853) (Leeds Anti-slavery Series, no. 13); Carter G. Woodson, The Negro in Our History 319 (1927) (quoting beginning of 1855 charter of Berea College); William Wells Brown, The Negro in the American Rebellion: His Heroism and His Fidelity 251 (1867) (quoting petition from African-American soldier); Charles Stearns, The Black Man of the South, and the Rebels 396 (1872); Henry Wilson, History of the Rise and Fall of the Slave Power in America 227 (1872) (recounting 1832 argument by Rev. Moses Thatcher); William Wells Brown, The Rising Son: The Antecedents and Advancement of the colored Race 46 (1874); James B. Angell, *Patriotism and International Brotherhood,* 5 Mich. L.J. 245, 253 (1896); Norman B. Wood, The White Side of a Black Subject 11 (1897); Harry S. Truman, *Radio Remarks on the Occasion of the Lighting of the Community Christmas Tree on the White House Grounds*, 1948 Pub. Papers of the Presidents of the United States 968 (citing Acts 17:26 for Christianity's "fundamental teaching that all men are brothers").

43 *Acts* 17:31.

44 *Romans* 2:14-16.

The Gospel particulars related to Christ's death are, Paul says, necessary to understand the way out of our guilty predicament but not the nature of right and wrong themselves. *Everybody* knows that, at least in outline.

Of course, the human moral instinct, while universal, is not infallible. Paul's explanation of the conscience in reminding everyone of a future judgment comes shortly after he explains how all people suppress the truth: "Though they know God's righteous decree that those who practice such things deserve to die, they not only do them but give approval to those who practice them."[45] We can, therefore, expect human moral pronouncements to be predicably inconsistent.

The way that the book of Genesis treats right and wrong makes clear that human beings are all morally accountable even though they have not received particular commands of the sort that would be delivered from Mount Sinai.[46] Misdeeds are sometimes *malum in se*, not merely *malum prohibitum*: wrong in themselves, not merely because God has given a positive command.[47]

Cain, Lamech, Noah, Esau, Simeon and Levi, and Joseph's other brothers all knew murder was wrong even without the sixth commandment.[48] Pharaoh, the men of Sodom, Lot, Abimelech, Shechem, Reuben, Judah, and Joseph all knew various sorts of sexual misbehavior were wrong even without the seventh commandment.[49] Abimelech, Isaac, Rachel, and Simeon and Levi all knew stealing was wrong even without the eighth commandment.[50] Abraham, Sarah, Isaac, Rebekah, Jacob, Laban, the sons of Jacob, and Joseph all knew lying was wrong even without the ninth commandment.' Abraham knew, like everyone, that the judge of all the earth must do what is just. [52]

In short, the biblical picture of human knowledge of right and wrong is hostile to moral parochialism with respect to space or time. Those in various parts of the globe are all capable of grasping basic elements of right and wrong. Those confronting problems centuries ago were people of the same nature-and the same moral instincts-we have today. Accordingly, the *Fisher* presumption, and moral charity in interpretation more generally, make empirical sense.

---

45 *Romans* 1:32.

46 *See, e.g., Exodus* 20:13-16 ("You shall not murder. You shall not commit adultery. You shall not steal. You shall not bear false witness against your neighbor.").

47 Brief explanations of this distinction appear in both True Grit (2010) ("[LaBoeuf:] You could argue that the shooting of the dog was merely an instance of malum prohibitum, but the shooting of a senator is indubitably an instance of malum in se. . . . [Mattie:] The distinction is between an act that is wrong in itself, and an act that is wrong only according to our customs and mores. It is Latin."); and Legally Blonde (2001) ("[Professor:] Would you rather have a client who committed a crime malum in se or malum prohibitum? . . . [Elle:] I would rather have a client that's innocent. . . . [Vivian:] Malum prohibitum, because then the client would have committed a regulatory infraction as opposed to a dangerous crime. . . . [Elle:] I'll take the dangerous one, because I'm not afraid of a challenge.").

48 *See Genesis* 4:8-10 & 23, 6:11, 27:41, 34:25-26, 37:18, 42:21-22, 49:5-7.

49 *See Genesis* 12:17, 13:13, 19:5 & 31-36, 20:2-3, 34:2, 35:22, 38:24, 39:9, 49:4.

50 *See Genesis* 21:25-26, 26:20, 31:34, 34:27.

51 *See Genesis* 12:18-19, 18:15, 20:2, 26:9, 27:10 & 19, 29:25, 34:13, 37:31-32, 42:9, 44:15.

52 *Genesis* 18:25.

A New Great Awakening of Religious Freedom in America

*by John Witte, Jr.**

Introduction

Religious freedom has reawakened in America over the past decade, and the loudest wake-up call has come from the United States Supreme Court. Only a dozen years ago, American religious freedom was in trouble in several states and federal circuits. Old religious monuments were targeted for removal as badges of bigotry and religious favoritism.[1] Religious parties were excluded from state scholarships and other public programs and benefits.[2] State civil rights commissions penalized conscientiously opposed vendors for not servicing same-sex weddings,[3] religious pharmacists for not filling prescriptions for abortifacients,[4] religious schools for not teaching inclusive sexual ethics, and religious charities for discriminating in their delivery of services.[5] Some critics and legislators called for religious communities to be stripped of their tax exemptions, marital solemnization rights, teaching licenses, and social service contracts.[6] Several states enacted new anti-Sharia measures.[7] The Supreme Court, throughout the 1990s and 2000s, enforced religious freedom provisions relatively weakly, leaving most religious freedom questions for states and legislatures to work out in accordance with the Court's new devotion to federalism and separation of powers.

There were many likely reasons for this turn against religion and religious freedom: worries about militant Islamism after 9/11; the exposures of massive sex scandals and cover-ups within some churches; new media exposés on the luxurious lifestyles of some religious leaders occupying large tax-exempt institutions; and transparent political gamesmanship by some religious groups.[8] A stronger reason still was that some faith communities opposed the emerging constitutional rights of same-sex equality and marriage, and some also opposed constitutional rights to contraception and abortion.[9] Strong critics in the academy and the media now brand-

* John Witte, Jr., JD (Harvard), Dr. Theol h.c. (Heidelberg) is the Robert W. Woodruff University Professor of Law, the McDonald Distinguished Professor of Religion, and the faculty director of the Center for the Study of Law and Religion at Emory University. Portions of this text are drawn from John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom*, 74 Hastings L. J. 1813 (2023) and John Witte, Jr., Joel A. Nichols & Richard W. Garnett, Religion and the American Experiment (5th ed. 2022). Another version of this lecture was published in *Law & Justice* (2023): 119-137 and is used herein with permission. The content of this article was delivered on January 26, 2024, at the National Press Club in Washington, D.C., as part of the *John Witte, Jr. Lecture Series on Christianity & Law.*

1 *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074-79 (2019).

2 *See e.g., Locke v. Davey*, 540 U.S. 712, 715-17 (2004); *Christian Legal Soc'y v. Martinez,* 561 U.S. 661, 672-73, 683 (2010).

3 *See, e.g., State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209, 1237 (Wash. 2019) (holding that a wedding florist's refusal to service a same-sex couple violated the Washington Law Against Discrimination), *cert. denied*, 141 S. Ct. 2884 (2021); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58 (N.M. 2013) (holding that a photographer's refusal to serve a gay couple violated the New Mexico Human Rights Act).

4 *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

5 *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–76 (2021).

6 *See, e.g.,* John Witte, Jr., The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition 196-226 (2021).

7 *See, e.g.,* John Witte, Jr. & Joel A. Nichols, *Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions*, 4 Faulkner L. Rev. 321 (2013).

8 *See* John Witte, Jr. & Joel A. Nichols, *"Come Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 Notre Dame L. Rev. 427 (2016).

ed religion as an enemy of liberty, and decried religious freedom as a dangerous and outdated constitutional luxury.[10]

All that has changed dramatically in the past decade. While loud criticisms of religion continue to clatter in the media and the law reviews, the U.S. Supreme Court has led a great awakening of American religious freedom. In more than two dozen cases since 2011, the Court has used both the First Amendment and federal statutes to strengthen the rights of religious organizations to make their own internal decisions about employment and employee benefits.[11] The Court has held that some forms of government aid to religion and religious education are not only permissible under the Establishment Clause, but also required under the Free Exercise and Free Speech Clauses.[12] The Court has used the Free Exercise Clause to enjoin several public regulations and policies that discriminated against religion, that penalized parties for taking religious stands, or that coerced parties to act contrary to their conscience.[13] The Court has strengthened both the First Amendment and statutory claims of religious individuals and groups to gain exemptions from general laws that substantially burdened their conscience.[14] The Court has used religious freedom statutes to give new protections to Muslim prisoners[15] and insisted that death row inmates have access to their chaplains to the very end.[16] The Court has even allowed the collection of money damages from government officials who violated individuals' statutory protections of religious freedom.[17]

These two dozen recent cases signal a marked return to America's founding axiom that religious freedom is the first freedom of our constitutional order, not a second class right. The eighteenth-century founders' vision was that religion is more than simply another form of expression and association; it deserves separate and special constitutional treatment. The founders thus placed the guarantee of freedom of religion before the freedoms of speech, press, and assembly in the First Amendment. That gave both religious individuals and groups special protections for their faith claims. All peaceable exercises of religion, whether individual or corporate, private or public, traditional or new, popular or reviled, properly deserve the protection

9 *See* Thomas C. Berg, Religious Liberty in a Polarized Age (2022); Religious Freedom, LGBT Rights, and the Prospects for Common Ground (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018); Frank Ravitch, Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America (2016).

10 For several examples, see Witte & Nichols, *supra* note 8.

11 *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688-91 (2014); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020). See also discussion in text as notes 60-61 below.

12 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). See also discussion of these cases in text at notes 38-42 below.

13 See cases in note 12 and *Fulton*, 141 S. Ct. at 1881-82.

14 *Hobby Lobby*, 573 U.S. at 688-91; *Little Sisters of the Poor*, 140 S. Ct. at 2373; *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2307-08, 2312-13 (2023) (holding that the First Amendment prohibits a state from coercing a website designer to create a wedding website for same-sex couples contrary to her religious beliefs in heterosexual monogamous marriage only); *Groff v. DeJoy*, 143 S. Ct. 2279 (2023) (upholding the Title VII religious discrimination claim of a Sunday worker who was not accommodated); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (upholding a Title VII disparate treatment case for a Muslim job applicant who wore a headscarf for religious reasons).

15 *See Holt v. Hobbs*, 574 U.S. 352 (2015) (holding that a state's beard-grooming policy substantially burdened a Muslim inmate's religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5).

16 *Ramirez v. Collier*, 142 S. Ct. 1264, 1272, 1277-81 (2022) (holding that a death row inmate was likely to succeed on his claims that Texas's refusal to permit his pastor to "lay hands on him and pray over him" violated his rights under RLUIPA); *cf. Dunn v. Smith*, 141 S. Ct. 725, 725-26 (2021) (Kagan, J., concurring) (finding that Alabama's "exclusion of all clergy members from the execution chamber" violated RLUIPA because it substantially burdened a claimant's exercise of religion and failed strict scrutiny).

17 *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

of the First Amendment.[18] The current Supreme Court has seized on this traditional teaching with new alacrity.

The current Court has also increasingly embraced the traditional view that the First Amendment provides an interlocking and integrated shield of religious liberties and rights for all. The First Amendment Free Exercise Clause outlaws government proscriptions of religion—government policies or actions that unduly burden the conscience, unduly restrict religious exercise, discriminate against religion, or invade the autonomy of churches and other religious bodies. The First Amendment Establishment Clause, in turn, outlaws government prescriptions of religion—government actions that unduly coerce the conscience, mandate forms of exercise, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. The First Amendment thereby provided complementary protections to the foundational principles of the American experiment—liberty of conscience, free exercise, religious equality, religious pluralism, separation of church and state, and no governmental establishment of religion.[19] In the 1940s, the Supreme Court had confirmed all these principles when it opened the modern era of religious freedom case law. But in the 1980s and 1990s, the Court gradually reduced the First Amendment to a mere guarantee of state neutrality toward religion.[20] That provided some protection but not much. Today, the Court provides far more multi-principled and robust protection of religious freedom.

The Court's recent cases not only revive the founders' vision. They also offer fresh insights and accents that provide a more integrative approach toward religious freedom protection going forward. Five distinct teachings are worth highlighting.

Respecting Historical Democratic Decisions

One teaching of the Court's recent cases is that a regime of religious liberty must respect historical democratic judgments about religion. In *Town of Greece v. Galloway* (2014), the Court used this argument to uphold a local community's decades-long practice of offering prayers by sundry invited local clergy to open its town council meetings. A local taxpayer thought this constituted an establishment of religion. The Court disagreed. The First Amendment "must be interpreted by reference to historical practices and understandings," Justice Kennedy wrote for the Court, particularly those that have "withstood the critical scrutiny of time and political change." "A test that would sweep away what has so long been settled" and accepted the community "would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[21]

The 2019 case of *American Legion v. American Humanist Association* used similar logic. That case featured a large Latin cross that had been privately erected in 1925 as a memorial for local soldiers who had died in World War I. But it now stood at a prominent intersection of two major public roads that had grown up around the monument in the intervening decades. The American Humanist Association thought this major Christian symbol constituted an establishment of religion and should come down. A 7-2 Court, led by Justice Alito, rejected this claim. The Court agreed that a cross is a poignant Christian symbol. But this Latin cross, Alito wrote, in place for nearly a century, had taken on independent value as an "embedded feature of the community's landscape and identity." For some, this cross was "a symbolic resting place for ancestors who never returned home." "For others, it [was] a place

18 *See* John Witte, Jr., Joel A. Nichols & Richard W. Garnett, Religion and the American Experiment 35-128 (5th ed. 2022).

19 *See id.* at 59-92, 109-28.

20 *Id.* at 171-77, 217-27 (discussing the development of the neutrality test prescribed for Free Exercise cases in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79, 890 (1990) and for Establishment Clause cases in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)).

21 *Town of Greece v. Galloway*, 572 U.S. 565, 576-77 (2014).

for the community to gather and honor all veterans and their sacrifices for our Nation. For still others, it [was] a familiar historical landmark." When the passage of time "imbues a religiously expressive monument, symbol, or practice" with "familiarity and historical significance," the *American Legion* Court concluded, that "gives rise to a strong presumption of constitutionality."[22]

The upshot of these and other recent cases is that the First Amendment does not give a disgruntled taxpayer a heckler's veto over the longstanding democratic decisions the local community took to create and maintain a religious symbol or ceremony. Change might come, but that must be done by legislation not adjudication.

This argument is strong enough to support the continuation of chaplains and chapels in legislatures, military bases, state prisons, public hospitals, or embassies; old Decalogues, menorahs, creches, and ceremonial Indian mounds in state parks; religious figures, verses, and sayings on public monuments and documents; memorial crosses, stars, and other religious symbols in state cemeteries; ceremonial recitations of oaths, proclamations, and pledges that invoke the name of God and other religious language. So long as private parties are not coerced into participating in or endorsing this religious iconography, and so long as government strives to be inclusive in its depictions and representations, there is nothing wrong with a democratic government reflecting and representing the traditional religious values and beliefs of its people.

Yes, some old traditions, no matter how venerated, eventually do have to go when they no longer represent a community's values—as the nation has seen with removal of confederate flags from southern capitol buildings or the renaming of structures built on the backs of slaves and named for their abusive masters. But many old, innocuous, and avoidable religious symbols and practices can and should stay.

No Religious Coercion

A second key corollary teaching of the Court's recent cases is that government may not coerce parties into supporting or participating in religion—even old and venerable religious traditions and practices that may have won widespread democratic approval.

This is, in part, a time-honored First Amendment teaching. The law is "absolute" in forestalling "compulsion by law of the acceptance of any creed or the practice of any form of worship," Justice Roberts wrote in *Cantwell v. Connecticut*, the 1940 case that inaugurated the modern era of religious freedom.[23] Later Free Exercise cases thus struck down compulsory flag salutes, mandatory recitations of the Pledge of Allegiance, and state-administered test oaths as forms of religious coercion.[24] Later Free Speech cases held repeatedly that government cannot induce or coerce private parties to express themselves contrary to their (religious) beliefs.[25] That proposition informed the Court's most recent Free Speech case of *303 Creative LLC v. Elenis* (2023), which protected a website designer from having to post information about same-sex weddings to which she was conscientiously opposed. Even a party who operates in the stream of commerce cannot be forced to say or display something that violates their religious beliefs.[26]

---

22 *American Legion*, 139 S. Ct. at 2084-85, 2090.

23 *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

24 *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding compulsory flag salutes and pledges to violate the First Amendment); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (finding a religious test for public office violated the "appellant's freedom of belief and religion"); *First Unitarian Church v. Cnty. of Los Angeles*, 357 U.S. 545, 546–47 (1958) (finding that government may not require a party who is conscientiously opposed to swear a loyalty oath as a condition for receiving tax exemption).

25 *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977); *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.").

26 *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

Later Establishment Clause cases insisted that young, impressionable (state) public-school students who are required to attend school could not be coerced to participate in religious classes, prayers, Bible readings, religious symbols, or daily moments of silence as part of their classroom and curricular experience.[27] Even a one-time invocation at a public middle school graduation ceremony was judged to be coercive to a graduating student.[28]

The Court's recent cases have confirmed this prohibition on religious coercion. But the Court has also raised the threshold on when freedom from religious coercion can be successfully claimed under the Establishment Clause. In *Town of Greece*, the Court made clear that the "brief, solemn, and respectful prayer" offered by an array of local pastors before the town council began its meeting was not religious coercion. It was, the Court said, simply a way "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." No citizens were coerced or compelled "to engage in a religious observance." They could readily skip the brief prayer before entering the meeting or simply ignore any prayer they may have heard with impunity.[29]

Yes, some secular citizens might be offended by the very presence of these old religious ceremonies, Justice Kennedy continued for the *Town of Greece* Court, just as some religious citizens might be offended by new secular and sometimes anti-religious messages. Enduring blasphemies of various sorts is the cost we must all bear for robust protections of freedom of speech. But, the Court continued, offense "does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views."[30]

Five years later, Justice Gorsuch made a similar argument in his lengthy concurrence in *American Legion*. Indeed, he argued that, without proof of actually being religiously coerced, "offended bystanders" should not even have standing to press Establishment Clause cases against government actions or expressions that offend them. "In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends somebody. No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility," an "offended viewer" may "avert his eyes," cover her ears, or "pursue a political option."[31]

In his concurring opinions both in *Town of Greece* and later in *American Legion*, Justice Thomas went still further and called for proof of "actual legal coercion" to press a prima facie case under the Establishment Clause. By that he meant the "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*" The "characteristics of an establishment as understood at the founding," he wrote, were that "attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church." For Justice Thomas, *that* was the actual legal coercion that the Establishment Clause was created to prevent, and it should be the standard used by courts today. Merely opening legislative sessions with prayers that can be skipped, or having crosses on public land that can be ignored, does not reflect "the historical characteristics of an establishment of religion."[32]

---

27 See cases discussed in Witte, Nichols & Garnett, *supra* note 18, at 232-42.

28 *Lee v. Weisman*, 505 U.S. 577 (1992).

29 *Town of Greece*, 572 U.S. at 588 ("The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.").

30 *Id.* at 589.

31 *American Legion*, 139 S. Ct. at 2067, 2102-03 (2019) (Gorsuch, J., concurring) (internal citations omitted).

32 *Town of Greece*, 572 U.S. at 608, 610 (Thomas, J., concurring); *American Legion*, 139 S. Ct. at 2095-96 (Thomas, J., concurring).

Justice Kavanaugh's concurring opinion in *American Legion* proposed a new test as a way of combining the Court's twin concerns of respecting democratic traditions and preventing coercion:

> If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[33]

It is unclear from these recent cases whether religious coercion—hard or soft, alone or with other factors—will become the Court's preferred test for future Establishment Clause cases or simply part of the "injury in fact" proof needed to gain standing to press such cases. It is also unclear how claims of religious coercion might be treated if pled under the Free Exercise Clause instead. As we'll see in a moment, recent Free Exercise cases now require only minimal proof of unequal treatment or government hostility to religion to trigger strict scrutiny analysis—a much easier threshold to meet than the harder coercion requirement of recent Establishment Clause cases.[34] This suggests that victims of government coercion of religion might well fare better today if they sue under the Free Exercise Clause (or a religious freedom statute) rather than under the Establishment Clause.

Equality Not Just Neutrality

A third key teaching of the Court's recent cases is that religion deserves not just state neutrality, but also equal treatment and protection by government. The Court has not formally rejected the free exercise test required by the 1990 case of *Employment Division v. Smith*: that neutral, generally applicable laws are constitutional no matter how heavy a burden they impose on religion. But the Court now judges differential treatment of religion as fatal religious discrimination under the Free Exercise Clause or fatal viewpoint discrimination under the Free Speech Clause. And the Court has repeatedly rejected government's argument that differential treatment of religion is needed to avoid establishing religion. Disfavorable treatment of religion by government is unconstitutional discrimination—full stop.

State Aid to Religious Education: This focus on equality over neutrality is clearest in recent Supreme Court cases on state aid to religious education. Such aid has long been a vexed topic. Before 1940, 35 of the then 48 states had passed state constitutional prohibitions on government funding of religious education.[35] After 1940, when the Supreme Court began applying the First Amendment to state and local governments, it struck down many forms of direct and indirect state aid to religious schools, parents, and children as violations of the Establishment Clause.[36]

That has changed dramatically in the most recent cases. The Court now holds that state aid to religious education is not only *permissible* under the Establishment Clause but sometimes *required* by the Free Exercise Clause to ensure equal treatment of religion. *Trinity Lutheran Church v. Comer* (2017) was the first of a trio of cases to open this new regime. There, the State of Missouri excluded a church school from a state program that reimbursed schools for the costs of resurfacing their playgrounds with a new rubber surface supplied by the state's recyclers. The church school applied on time and easily qualified for the funds, but the state denied them funds because its state constitution prohibited funding religious education. That had long been the standard response to religious schools that sought government funding. The church

33 *American Legion*, 139 S. Ct. at 2093 (Kavanagh, J., concurring).

34 *See* Eric Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, Emory L. J. 72, 2023, 723, 729–51 & tbl. 1 (2023) (discussing the different types of "substantial burdens" as well as discriminatory treatment against religion that triggers strict scrutiny).

35 *See* John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment (4th ed. 2016) (Appendix 2 lists all the relevant state statutes prohibiting state aid to religion).

36 See cases in Witte, Nichols & Garnett, *supra* note 18, at 261-67.

school sued, claiming religious discrimination in violation of the Free Exercise Clause. The *Trinity Lutheran* Court agreed. Writing for a 7–2 majority, Chief Justice Roberts concluded that the church school "was denied a grant simply because of what it is—a church." State laws that impose "special disabilities on the basis of . . . religious status" alone are permissible only if the state has a "compelling interest" for doing so. A general concern about violating state or federal prohibitions on religious establishment was not compelling enough.[37]

Similarly, in *Espinoza v. Montana Department of Revenue* (2020), Montana offered its citizens state tax credits for donations to nonprofit organizations that awarded scholarships for private school tuition. But Montana would not allow these scholarships to go to religious-school students, for that would violate the state constitutional prohibition on state aid to religious education. Parents whose children could not get scholarships to attend a Christian school filed suit under the Free Exercise Clause, claiming religious discrimination. The *Espinoza* Court agreed. This program "bars religious schools from public benefits solely because of the religious character of the schools," and such discrimination cannot be justified by the state's "interest in separating church and State 'more fiercely' than the Federal Constitution."[38]

Carson v. Makin (2022) repeated this demand for equality. Maine allowed parents who lived in thinly populated rural school districts without their own public high school to use public funds to attend a public or private school of their choice, including schools outside Maine. However, the state would provide this assistance only if the chosen school was not "sectarian" based on the state's review of the school's curriculum, practices, character, and mission. The Court struck down this policy too. These private schools were disqualified from state public funds "solely because they are religious," Chief Justice Roberts again wrote, and this was unconstitutional religious discrimination. The state may not "exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[39]

Free Speech and Equality: The recent Court has also used the equality principle in Free Speech cases. In *Reed v. Town of Gilbert* (2015), the Court struck down a town ordinance that placed stricter time, place, and manner regulations on directional signs to a church service than on various "political" or "ideological" signs. A unanimous Court, led by Justice Thomas, held that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional," and that violation was easy to find there.[40] In the 2022 case of *Shurtleff v. City of Boston*, municipal authorities had allowed nearly 300 private groups over the prior 15 years to gather in the City Hall Plaza for their own events and to fly their own flags on one of the city flag poles during these events. When Shurtleff and his Christian group sought to use the plaza, however, the city refused to allow them to fly their Christian flag for fear of violating the Establishment Clause. Shurtleff claimed religious discrimination under the Free Speech Clause. Another unanimous Court, now led by Justice Breyer, agreed that Boston had committed viewpoint discrimination against religion.[41]

Covid Regulations and Equality: The Court's insistence on equality has also guided its review of free exercise challenges to COVID-19 regulations. Beginning in the spring of 2020, numerous new state and local public health laws placed restrictions on public gatherings, movements, and activities, including those of religious groups. The Court upheld the restrictions when they fell equally on religious and nonreligious parties but enjoined them when religion was treated differently.

In *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020), for example, Catholic and Jewish groups challenged a New York state executive or-

37 *Trinity Lutheran*, 137 S. Ct. at 2012, 2017-18, 2021-24.

38 *Espinoza*, 140 S. Ct. at 2246, 2251-55, 2262-63.

39 *Carson*, 142 S. Ct. at 1987, 1993-94, 1997-98, 2000-02.

40 *Reed v. Town of Gilbert*, 576 U.S. 155, 159, 163-65, 171 (2015).

41 *Shurtleff*, 142 S. Ct. at 1583, 1588-89, 1593.

der that created different tiers of restrictions on public gatherings, depending on local pandemic levels. "Red zones" restricted religious worship gatherings to ten persons; "orange zones" set the capacity limit at twenty-five. The plaintiffs argued that the Governor and other state officials had made disparaging remarks about Orthodox Jewish communities, and that they had gerrymandered the restrictive zones to ensure that they covered those religious communities. Moreover, these regulations placed no capacity limits on purportedly "essential" businesses, which explicitly included acupuncture facilities, campgrounds, garages, transportation facilities, and manufacturing plants, among other businesses. In a per curiam 5–4 opinion, the Court concluded that this law "single[d] out houses of worship for especially harsh treatment" that could not be justified and thus issued an injunction.[42]

Similarly, *Tandon v. Newsom* (2021) involved state and county orders that effectively prevented more than three households from gathering for prayer and Bible study, even though they allowed larger gatherings for business and other secular purposes. House-church worshippers challenged the orders. Writing for a 5–4 majority, Justice Gorsuch applied what he now called "the clear" rule that "government regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise." Because California imposed a flat limit on religious gatherings but allowed for "myriad exceptions and accommodations for comparable activities," the Court enjoined its regulations.[43]

No Government Hostility Against Religion: With equal treatment as a centerpiece of its Free Exercise jurisprudence, the Court has been especially sensitive to state hostility against religion. For example, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018), Jack Phillips, a cakeshop owner, refused to bake a wedding cake for a same-sex couple on the grounds that doing so violated his religious beliefs. As a result, the Colorado Civil Rights Commission found that Phillips violated the state's anti-discrimination law and sanctioned him. In a public hearing, one commissioner characterized the baker's views as "one of the most despicable pieces of rhetoric that people can use" and compared it to past uses of religion and religious freedom "to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust." The baker claimed violations of his free exercise rights.[44]

A 7–2 Court agreed, led by Justice Kennedy, who had authored several of the Court's opinions supporting same-sex equality and marriage. The Free Exercise Clause outlaws "religious hostility on the part of the State itself," he wrote, and here the Commission portrayed "clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips's] objection." Such hostile remarks in an adjudicatory proceeding "may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion." Moreover, the Commission "sen[t] a signal of official disapproval of Phillips's religious beliefs" by favorably treating bakers who refused to bake cakes with messages that the Commission deemed offensive. This animus against Phillips, together with the unequal treatment of discrimination claims brought against other bakers, violated the Free Exercise Clause.[45]

Concern for animus against religion also informed the Court's opinion in *Kennedy v. Bremerton School District* (2022). In that case, a public high school coach was fired for offering private prayers after the school's football game, even though every other form of speech was allowed, not least loud whooping and hollering in support of the winning team. The coach claimed religious discrimination in violation of the Free Exercise Clause, and the Court found in his favor. Justice Gorsuch wrote for the Court:

42 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65-66 (2020) (per curiam).

43 *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021) (per curiam).

44 *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1723-29 (2018).

45 *Id.* at 1724, 1729-31.

> Respect for religious expression is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[46]

Exemptions for Religion

A fourth teaching of these cases is that sometimes equality is not good enough to guarantee religious freedom. In those cases, both legislative and judicial exemptions from compliance with general laws are needed.

This too was traditional constitutional lore. Already the eighteenth-century founders recognized that exemptions provided parties who had religious scruples with an oasis of nonconformity—a space to follow the dictates of their conscience or the commandments of their faith community. The founders thus granted religious parties exemptions from religious taxes, religious incorporation requirements, oath swearing, and military service.[47] These exemptions continued in both state and federal statutes through the nineteenth and twentieth centuries—statutes which the courts tended to enforce generously for religious claimants.

In the 1963 case of *Sherbert v. Verner*, the Court went further to create judicial exemptions to relieve religious parties from substantial burdens on their faith imposed by otherwise appropriate statutes. In that case, a Seventh-day Adventist was fired from her private job for refusing to work on Saturday, her sabbath. The state denied her unemployment compensation benefits because the applicable statute allowed no benefits for applicants who were fired for cause. Sherbert sued under the Free Exercise Clause, arguing that this ruling forced her to choose between her state benefits and her religious observance. The *Sherbert* Court agreed and granted her a judicial exemption from this specific rule, even while leaving the unemployment statute in place.[48] The Court thereafter gave judicial exemptions from general laws to Saturday sabbatarians, Amish ascetic parents, Jehovah's Witness pacificists, and similar minority parties whom the legislatures had not accommodated.[49]

The 1990 *Smith* neutrality test largely closed the door to these judicial exemptions. That triggered an explosion of hundreds of federal and state statutes and amendments providing exemptions for religious parties.[50] The recent Court has interpreted these statutes broadly to grant relief and exemptions to both religious individuals and groups. Most notably, in the 2014 case of *Burwell v. Hobby Lobby*, the Court used the federal Religious Freedom Restoration Act (RFRA) to grant a closely held private business corporation an exemption from full compliance with the Affordable Health Care Act that mandated employee insurance that covered abortifacients. Because this was contrary to the owners' religious beliefs about the sanctity of life, the corporation was exempted from full compliance with the statute.[51] Similarly, the Court interpreted the federal Religious Land Use and

46 *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415-16, 2432-33 (2022).

47 *See* Witte, Nichols & Garnett, *supra* note 18, at 60-66, 104-09.

48 *Sherbert v. Verner*, 374 U.S. 398, 401-06 (1963).

49 *See* Witte, Nichols & Garnett, *supra* note 18, at 161-68.

50 *See, e.g.*, James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Virginia L. Rev. 1407, 1445 (1992) (estimating more than 2,000 religious exemptions in state and federal statutes); Douglas Laycock, 3 Religious Liberty: Religious Freedom Restoration Acts, Same-Sex Marriage, and the Culture Wars (2018); Douglas Laycock, 4 Religious Liberty: Federal Legislation After the Religious Freedom Restoration Acts, with More on the Culture Wars (2018).

Institutional Persons Act (RLUIPA) generously to exempt Muslim prisoners from grooming requirements that burdened their religion[52] and to permit chaplains to lay hands on death row prisoners at the time of their execution contrary to the usual rules.[53] The Court has further used Civil Rights Act prohibitions on religious discrimination to protect a Muslim job applicant from prejudicial hiring practice[54] and a Sunday sabbatarian from retaliatory firing for refusing to work on the Sabbath.[55] And in its most recent cases, the Court has again resumed the practice of granting judicial exemptions to general statutes.

In a world of growing religious pluralism and anti-religious animus, exemptions are important tools for the protection of religious freedom. They have long been controversial, however, because they seem to favor religion over non-religion in defiance of the Court's principled insistence on equality, protecting religious individuals or groups more than their secular counterparts. What has made them more controversial of late is when majority faiths seek judicial exemption rather than legislative exemptions. Judicial exemptions used to be justified as a suitable refuge for religious minorities from the tyranny of the legislative majority. What has also made them more controversial is that some exemptions can force third parties to forgo services they find important to access whether website designs or wedding cakes for same-sex weddings or medical procedures for artificial reproduction, contraception, abortion, or sexual transition. Those controversies are mitigated when alternative and equally priced service providers are easily at hand. But they become more acute when there are no easy alternative service providers at hand or no time or funds to access them. They become even more acute when the exempt service provider has government licensing or funding.

Separation of Church and State

A final teaching of the Court's recent cases is that the principle of separation of church and state is no longer the secular be-all and end-all of the First Amendment as it had become in the last half of the twentieth century. Separation of church and state is an ancient principle of religious freedom.[56] It needs to be retained, particularly for its enduring insight of protecting religious communities and organizations from political intrusion and interference. Today, as much as in the past, governmental officials have no constitutional business interfering in the internal polity and property of religious bodies, determining its membership and leadership, or dictating its doctrines and liturgies.

The Court embraced this view of separation of church and state firmly in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012). In that case, a Lutheran church school had dismissed a "called religious teacher" from her employment because her conduct defied the church's internal procedures of dispute resolution. The teacher claimed this was a retaliatory firing. The Court rejected her claim. Adducing the historical principle and precedents of separation of church and state, going back to Magna Carta, Chief Justice Roberts wrote for the Court: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[57] Later Free Exercise and RFRA cases have fleshed out this separatist principle in other religious employment cases.[58]

But the recent Court has retreated from its earlier insistence on maintaining "a high and

51 *Hobby Lobby*, 134 S. Ct. at 2751, 2779; *see also Little Sisters of the Poor*, 140 S. Ct. at 2384 (holding that federal agencies properly promulgated religious and moral exemptions for health plans that include contraceptive coverage under the Affordable Care Act).

52 *Holt*, 574 U.S. at 352.

53 *Ramirez*, 142 S. Ct. at 1264.

54 *Abercrombie & Fitch*, 575 U.S. at 768.

55 *Groff*, 143 S. Ct. at 2279.

56 John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. Church & St. 15 (2006).

57 *Hosanna-Tabor*, 565 U.S. at 182-84.

58 *See, e.g., Our Lady of Guadalupe*, 140 S. Ct. at 2060 ("[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.") (internal quotation marks omitted).

impregnable wall of separation between church and state," whose "slightest breach" was said to trigger an establishment clause violation.[59] Not only was this earlier teaching based on selective history and suspect jurisprudence that has now been thoroughly debunked by the majority of the justices. But absolute separation of church and state is impossible to put in practice today.

Ours is not a distant "night watchman" state, content to limit its activities to defense, policing, postal service, and road maintenance. Today's modern welfare state is an intensely active and ambitious sovereign from whom complete separation is impossible for any religion that forms even the smallest community. Today's governments not only enact and enforce thousands of laws, but they also make grants, extend loans, confer licenses, enter contracts, and control access to the civic and economic arenas. And so, both confrontation and cooperation with the modern welfare state are almost inevitable for any organized religion. When a state's regulation imposes too heavy a burden on a particular religion, the Free Exercise Clause should provide a pathway to relief. When a state's appropriation imparts too generous a benefit to religion alone, the Establishment Clause should provide a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, and when governments cooperate with religious agencies to accomplish secular purposes and promote the common good, Establishment Clause objections are unavailing, and Free Exercise rights are vindicated.

Conclusion

"Constitutions work like clock[s]," American founder John Adams reminds us. To operate properly, their "pendulums must swing back and forth."[60] We have certainly witnessed wide pendular swings in First Amendment religious freedom jurisprudence over the past century. But the Supreme Court has quietly ended the long constitutional swing of cases away from religious liberty protection from 1985 to 2010 and is now leading a strong pendular swing back. Since 2010, almost every one of the two dozen Supreme Court cases on point have advanced the cause of religious freedom, and those cases have been echoed, elaborated, and sometimes extended in scores of lower federal court cases. The Court has not always produced clean, clear, clockwork logic, nor settled on a grand unified theory that some justices and academics have advocated. But it has produced a hard swing in favor of religious freedom, even if sometimes wobbly.

This has been a good movement. Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down. And religious freedom litigation is too critical a forum for social stability to be scorned or ignored. In centuries past—and in many regions of the world still today—disputes over religion and religious freedom have often led to violence, and sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process.

As this process continues to unfold, it is essential, in my view, that the full range of founding religious freedom principles remain in operation—liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion by law. Religious freedom norms should not be reduced to neutrality or equality norms alone and should not be weakened by too low a standard of review or too high a law of standing.

It is essential that America addresses the glaring blind spots in our religious liberty jurisprudence—particularly the long and shameful treatment of Native American Indian claims.[61] It is essential that we show our traditional hospi-

59 *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

60 Letter to William Pym (Jan. 27, 1766), *in* The Political Writings of John Adams 644, 647 (George W. Carey ed., 2000).

tality and charity to the "sojourner[s] who [are] within [our] gates"[62]—migrants, refugees, asylum seekers, and others—and desist from some of the outrageous nativism and xenophobia that have marked too much of our popular and political speech of late. It is essential that religious freedom advocates show compassion for other freedom claimants, including those pressing for various sexual freedoms, and find responsible ways of living together with all our neighbors, remembering that sometimes "good fences make good neighbors."

It is essential that we Christians today, who have won most of the recent cases, remain gracious in victory, especially to those who do not share our faith. This is not only the heart of the Golden Rule. But sociological studies make clear that Christians who have long enjoyed majority status will soon be in the minority even in the United States.[63] Religious freedom may be rising, but Christian allegiance is falling rapidly, much as it has fallen in Europe. We need to remember that the precedents and policies that we craft now for religious and cultural minorities are the rules that will govern the religious liberty of our grandchildren. Doing unto others what is loving and just is not only right, but expedient.

It is essential that Christians today treat religious freedom as a precious gift of God to protect, not a prerogative of one political party to brandish. "Put not your faith in princes,"[64] the Bible tells us, and by extension do not let religious freedom become a political plaything.

Finally, and related, it is essential that we Christians use our religious freedom to discharge our most cardinal callings of preaching the word, administering the sacraments, catechizing the young, caring for the poor and needy, and prophesying against injustice. Like all other human institutions, many American Christian churches have been devastated by human sinfulness. Think of the clerical abuse of minors. The embezzlement of tithes and gifts. The degradation and mistreatment of women. Indifference to the poor and needy. A lack of compassion in matters of sexual orientation. Racially and economically segregated congregations. Inhospitality toward immigrants and foreigners. Naked political pandering. Our failure as Christians to live up to our own truths and values not only undercuts our moral authority and spiritual efficacy in the eyes of others. It also weakens the case for religious freedom for all faiths including our own.

Martin Luther King, Jr., once said that the church "is not the master or the servant of the state, but rather the conscience of the state."[65] When their own houses are in good order, churches are still well situated to play this important role, even in our late modern intensely pluralistic societies. To quote Dr. King again:

> If the church will free itself from the shackles of a deadening status quo, and, recovering its great historic mission, will speak and act fearlessly and insistently in terms of justice and peace, it will enkindle the imagination of mankind and fire the souls of men, imbuing them with a glowing and ardent love for truth, justice, and peace. Men far and near will know the church as a great fellowship of love that provides light and bread for lonely travellers at midnight.[66]

---

61 See case analysis at *Religious Freedom for Native Americans*, Harv. Univ. (last visited March 12, 2024), https://pluralism.org/religious-freedom-for-native-americans; Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 Am. Indian L. Rev. 253 (2012).

62 *Exodus* 20:10.

63 *See Modeling the Future of Religion in America*, Pew Research (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/; Robert P. Jones, The End of White Christian America (2016).

64 *Psalm* 146:3.

65 Martin Luther King, Jr., *A Knock at Midnight*, *in* A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 501 (James M. Washington ed., 1986).

66 *Id.*

STUDENT NOTE

Rejecting Common Good Constitutionalism: A Primer on Natural Law & the Common Good

*Falco A. Muscante II**

I. Introduction

Natural law is timeless—rooted in eternal law. It provides an objective framework for interpreting law, practicing law, and treating people well. Recently, however, Professor Adrian Vermeule at Harvard University has been gaining traction with his common good constitutionalism ("CGC") that proposes a new way to infuse the natural law with American law. This article will define the common good and then offer a critique of CGC in four areas: its definition of the common good, its use of the administrative state, its positivist tendencies, and its rejection of originalism.

As this article will argue, CGC gets it wrong because it does not start with the Constitution and the traditional natural law notion of the "common good." Rather, Vermeule would have judges "read into" the text the moral principles that they believe "conduce to the common good" based on their own subjective view of the natural law.[1] This subjectivity is nothing more than judicial activism and, partnered with Vermeule's strong-arm enforcement principles, turns the legal system into a purely positivist system where law becomes what a subset of people say it is and enforced by threat of sanction.[2] A better way for implementing principles of natural law in the American legal system is preserving the system of government the founders created and pursuing Truth through classical argument.[3] Protecting the "marketplace of ideas" in American society to encourage unfettered discourse and unstifled debate is the best way for others to ultimately come to know principles of objective morality inherent in the natural law.[4] Vermeule's theory does not advocate pursuing truth with reason; it advocates

* Falco Anthony Muscante II earned his J.D. in 2023 from Duquesne University School of Law, where he served on the executive boards for the law review and moot court. Currently, he is a litigation associate at a big law firm in Pittsburgh, Pennsylvania. Falco would like to thank Bruce Ledewitz (Adrian Van Kaam Endowed Chair in Scholarly Excellence and Professor of Law at Duquesne University) for his constructive feedback on earlier drafts of this article. Falco would also like to thank his wife and family. The views expressed in this article are solely those of the author, as are any errors or omissions.

1 Adrian Vermeule, *Beyond Originalism*, The Atlantic (March 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [hereinafter *Beyond Originalism*]; *see also* William H. Pryor Jr., *Against Living Common Goodism*, Federalist Soc'y (Apr. 5, 2022), https://fedsoc.org/commentary/publications/against-living-common-goodism [hereinafter *Against Living Common Goodism*].

2 *See infra* text accompanying notes 27-30.

3 *See* Aristotle, Rhetoric (4th century BCE).

4 *See, e.g.,* Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution 233 (2019) (noting that natural law contains "external" guides that are "external because natural law norms are not chose by individual humans or a community of humans"); Falco A. Muscante II, *Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, But Universities Are Not Listening*, 61 Duquesne L. Rev. 124, 161 (2023) (arguing that universities should cultivate a marketplace of ideas by eliminating compelled student activity fees and promoting the free flow of ideas); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]").

defining and imposing an individualistic conception of "truth" on others.[5]

II. The Common Good: Understanding the Development of Classical Natural Law

Classical natural law, as set forth by thinkers like Marcus Tullius Cicero (106 BC–43 BC), St. Thomas Aquinas (1225–1274), Lon Fuller (1902–1978), John Finnis (b. 1940), and Robert P. George (b. 1955),[6] is the notion that (1) law is rooted in transcendent, objective standards of right and wrong[7] that can be known to anyone by reason, and (2) that pursuing these objective standards, the common good, is the highest good.[8] Although often adopted by Christian legal thinkers, thinkers of diverse cultures and religious beliefs have also embraced natural law.[9]

Cicero, an influential politician in the waning days of the Roman Republic, believed that positive law must be informed by natural law. In *De Legibus*, he described the Greek Stoic idea of a moral natural law—the supreme law—that preexisted any established law or government.[10] Cicero argued that if a written law (positive law) does not conform with the natural law, the written law cannot truly be law because law is, by definition, "right reason in harmony with nature."[11] Government exists, according to Cicero, to enforce only the positive law that is in harmony with the natural law—and to do so by reason rather than force.[12] Cicero was the first to recognize the principle that government exists, in large part, to protect the private property rights of those it serves.[13]

In *Summa Theologica*, St. Thomas Aquinas offered the first systematic, self-reflective work on what *is* law. Questions 90 through 108 lay the foundation for classical natural law theory, where law is rooted in objective standards that can be known to man by reason.[14] Fundamentally, these objective standards spring from the notion that "good is to be done and evil is to be avoided."[15] According to Aquinas, law is "an ordinance of reason for the common good, made

5 *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); Glory Dy, *What Is the Difference Between 'Your Truth' and The Truth?*, Christianity Today (July 15, 2021), https://www.christianity.com/wiki/christian-life/what-is-the-difference-between-your-truth-and-the-truth.html; J. Budziszewski, Natural Law For Lawyers 105 (Jeffery J. Ventrella ed., 2006) ("The problem of with contemporary rights talk is that it denies the necessity of [grounding rights on an objective order of right and wrong]; rights seem to float in midair.").

6 There are others, including Catholic Christians, Greek pre-Christian thinkers, and medieval Jewish philosophers, e.g., Plato (424 BC–348 BC), Aristotle (384 BC–322 BC), St. Augustine (354–430), Thomas Hobbes (1588–1679), John Locke (1632–1704), Moses Mendelssohn (1729–1786), Martin Luther King, Jr. (1929–1968).

7 Budziszewski, *supra* note 5, at 27-28; Michael Pack & Mark Paoletta, Created Equal: Clarence Thomas in His Own Words 134 (2022). Christians would attribute those objective standards to God. *See, e.g., Romans* 2:15 (ESV) ("[T]he work of the law is written on their hearts, while their conscience also bears witness."); *Psalm* 19:7-10 ("The law of the Lord is perfect . . . the rules of the Lord are true, and righteous altogether. More to be desired are they than gold[.]").

8 *See* Andrew T. Walker, *The Gospel and the Natural Law,* First Things (Dec. 8, 2020), https://www.firstthings.com/web-exclusives/2020/12/the-gospel-and-the-natural-law.

9 Samuel Gregg, The Essential Natural Law 2 (2021); Pack & Paoletta, *supra* note 7, at 133 ("I was looking for a way of thinking, a set of ideals that fundamentally, at its core, said slavery is wrong, at its core—which natural law, or course, does. The second thing was: What would be a coherent and cohesive policy, or a set of ideals, that pull these disparate groups in our country together? . . . That's what I was looking for.").

10 Jim Powell, *Marcus Tullius Cicero, Who Gave Natural Law to the Modern World*, Found. for Econ. Educ. (Jan. 1, 1997), https://fee.org/articles/marcus-tullius-cicero-who-gave-natural-law-to-the-modern-world/ (citing Marcus Tullius Cicero, De Legibus 52 BC).

11 Paul Meany, *The Ancient Roman Cicero's Idea of Natural Law Has Much to Teach Us About the Evolution of Liberty*, Libertarianism.org (Aug. 31, 2018), https://www.libertarianism.org/columns/ciceros-natural-law-political-philosophy (quoting Marcus Tullius Cicero, De Re Publica 3.33 (51 BC)).

12 *Id.* (quoting Marcus Tullius Cicero, De Re Publica 3.22 (51 BC)).

13 *Id.*

14 Budziszewski, *supra* note 5, at 69-70.

15 Gregg, *supra* note 9, at 14; *see also* Strang, *supra* note 4, at 190.

by him who has care for the community, and promulgated."[16] The natural law both commands certain actions and forbids other actions. A law can be known to man *by* reason not only because it is rooted in God, but because it is self-evidently good and worthy of pursuit.[17]

Positive law—or human law, according to Aquinas—ought to be the application of natural law, which is "devised by human reason . . . provided the other essential conditions of law be observed."[18] Law is meant to direct men and women toward the good. Positive laws, according to Aquinas, "are either just or unjust."[19] Only just laws promoting the common good, which are *de facto* derived from the eternal law, are binding on the conscience.

Lon Fuller takes a secular, procedural, and functionalist approach to natural law. Under Fuller's approach, law must *actually* be capable of guiding human behavior.[20] In many ways, Fuller agrees with the precepts laid out by Cicero, Aquinas, and, later, Finnis but provides practical principles for implementing natural law and handling unjust laws. Fuller posits that a law is more than just a command.[21] Rather, there is an "inner morality of law" that embraces a morality of duty—the basic requirements of society in our interactions as human beings—and the aspiration to lead a good and virtuous life. When lawmakers recognize principles of natural law in the positive law, it is important for those principles to be implemented in a way that is clear, consistent, and coherent. Fuller focuses on those internal requirements of the legal system itself that lawmakers achieve by following the eight qualifications of law Fuller identifies through his "King Rex" paradigm in *The Morality of Law*.[22] Any lawmaker who fails to meet any of these eight qualifications promulgates what St. Augustine would call an "unjust law," or no law.[23]

Another modern theorist, John Finnis, illuminates some basic human goods: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.[24] He breaks down practicable reasonableness into nine distinct requirements, which have important implications for morality in law.[25] According to Finnis, it is through the combination of the seven basic goods and the nine requirements of practical reasonableness that one comes to know the universal and immutable principles of natural law. The principal jurisprudential concern, therefore, is the ability to determine both the limits of law and how just laws are derived from the objective principles identified above.[26]

Finnis also discusses how injustice affects the obligation of a person to obey the law. A person could be bound to comply with an unjust law by the threat of some sort of sanction in the event of non-compliance.[27] Legal positivists

16 St. Thomas Aquinas, *Summa Theologica*, *in* Readings in the Philosophy of Law 30 (Keith C. Culver & Michael Giudice eds., 3d ed. 2017) [hereinafter Readings], *quoted in* Adrian Vermeule, Common Good Constitutionalism 3 (2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 Harv. J.L. & Pub. Pol'y 103, 108 (2022).

17 Aquinas, *in* Readings, *supra* note 16, at 30-32.

18 *Id.* at 33.

19 *Id.* at 40.

20 Lon L. Fuller, The Morality of Law 106 (2d ed. 1969); *see also* Gregg, *supra* note 9, at 2.

21 *Contra* sources cited *infra* note 28.

22 Fuller, *supra* note 20, at 33-39.

23 *Id.* (outlining eight ways to fail to make law: (1) failure to achieve rules at all, (2) failure to publicize, (3) abuse of retroactive legislation, (4) failure to make rules understandable, (5) enactment of contradictory rules, (6) rules that require conduct beyond the powers of the affected party, (7) too frequently changing the law, and (8) a failure of congruence between the rules as announced and as administered).

24 Other basic human goods include leisure, friendship, beauty, and justice. Strang, *supra* note 4, at 231.

25 These nine requirements are: (1) rational plan of life, (2) non-arbitrariness in the preference among values, (3) non-arbitrariness among persons, (4) detachment, (5) commitment, (6) limited relevance of consequences, (7) equal value to all the basic goods, (8) favoring and fostering the common good of one's communities, and (9) following one's conscience. John Finnis, *Natural Law and Natural Rights*, *in* Readings 46–55 (Keith C. Culver & Michael Giudice eds., 3d ed. 2017).

26 Finnis, *in* Readings, *supra* note 25, at 55.

like Friedrich Nietzsche, H.L.A. Hart, and John Austin would contend that a law is a law simply because it is backed by a threat.[28] Legal positivism views law as exclusively posited by the state rather than being derived from any higher-order principles.[29] Natural law theorists would disagree and instead ask whether there is legal obligation in the moral sense, which would precede "legal obligation in the intra-systemic or legal sense."[30] Those in authority have force in creating law, but not unrestrained authority in making laws that are contrary to the common good.[31]

When a ruler makes a law contrary to the common good, that law is functionally no law. To clarify and protect against anarchy, Finnis recognizes that citizens must accept positive laws generally as not to weaken the accepted authority of the ruler and weaken the general respect of the citizens. This "collateral obligation" protects against rendering "ineffective the *just* parts of the legal system."[32] Nonetheless, as Finnis would say, it is still a function of the ruler to eventually repeal an unjust law. The question still remains: Which unjust laws ought to be observed for the sake of keeping the order in society and which are too egregious to obey? Finnis does not ultimately provide a compelling answer or substantial defense.

Robert P. George, the preeminent contemporary new natural law theorist, frames *reason* as the cornerstone for providing sound judgment about the basic goods of human nature that people should pursue.[33] George argues that humans are distinct from other non-human animals, which enables them to pursue certain ends that are both intrinsically valuable and choice worthy—"rights people possess simply by virtue of their humanity."[34] The natural law has enough breadth and depth to accommodate people from any background, so long as they are willing to adopt principles of moral reasoning.[35] Although George's natural law understanding is not formed from or hinged on religion, it is directly complementary to a particular account of human dignity—one understood from the theistic view that man is made in the image of God (*imago Dei*).[36] Regarding the interaction of the law and the common good, George wrote:

> The justifying point of law is to serve the common good by protecting the goods of persons . . . . Where the laws are just and effective, political authorities fulfill their obligations to the communities they exist to serve. To the extent that the laws are unjust or ineffective, they fail in their mission to serve the common good.[37]

Both George and Finnis view the common good for a community as an instrumental way to allow individuals and families to pursue basic goods.[38] George makes another helpful distinction between two types of just law that can be derived from natural law: (1) "law that directly forbids or

---

27 *Id.* at 56.

28 *See, e.g.*, Philippe Nonett, *What is Positive Law?*, 100 Yale L.J. 667, 669 (1990) (noting that, according to Nietzche, the thinker and prophet of legal positivism, it "designates not a philosophical or legal doctrine, but the historic movement by which the power of command rises to the rank of supreme source of law"); H.L.A. Hart, *Positivism and the Separation of Law and Morals, in* Readings 90 (Keith C. Culver & Michael Giudice eds., 3d ed. 2017); John Austin, *The Province of Jurisprudence Determined, in* Readings 68–70 (Keith C. Culver & Michael Giudice eds., 3d ed. 2017).

29 *See, e.g.*, Gregg, *supra* note 9, at 6.

30 Finnis, *in* Readings, *supra* note 25, at 56.

31 *Id.* at 60.

32 *Id.* at 60-61 (emphasis added).

33 Robert P. George, *Natural Law*, 31 Harv. L.J. 171, 173 (2008).

34 *Id.* at 172.

35 *See, e.g.*, Gregg, *supra* note 9, at 6.

36 *Id.* at 176; *Genesis* 1:27 ("So God created man in his own image, in the image of God he created him; male and female he created them.").

37 George, *supra* note 33, at 187.

38 Casey & Vermeule, *supra* note 16, at 112.

requires what morality itself forbids or requires," and (2) laws of coordination aimed at the common good of the community, which George calls *determinatio*.[39] The first simply makes explicit natural law by codifying it as positive law. The second is the practical manner by which positive law implements natural law.[40] For example, traffic regulations coordinate driving to better serve the common good (and the laws of physics that state that two cars cannot occupy the same space at the same time).[41] There is nothing intrinsically moral about driving on the right side of the road, but there must be some established system in place to avoid accidents.

According to George, both Aquinas and Finnis recognize that human positive law creates "a moral duty of obedience."[42] Even so, positive laws that contradict the natural law are unjust and ought only be obeyed if disobeying them would weaken the entire system of law. Unjust positive laws, George would posit, lack the force of law because they are more akin to acts of violence—they go against natural law and reason.[43]

In America, the founders of our constitutional republic infused the principles of natural law discussed above into the fabric of government.[44] The Declaration of Independence recognizes "certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[45] The Constitution that sets up the structure enacting positive laws to "form a more perfect Union, establish Justice, . . . promote the general Welfare, and secure the Blessings of Liberty."[46] And the Bill of Rights recognizes that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[47] At every step of the founders' structure of government, natural law is an underlying principle.

III. Common Good Constitutionalism: Adrian Vermeule's Approach

At the height of the COVID pandemic, Harvard professor Adrian Vermeule published a piece in *The Atlantic* entitled *Beyond Originalism*, which first brought to bear a new constitutional interpretive approach designed to replace originalism known as common good constitutionalism.[48] CGC, according to Vermeule, is at least in part based on a Thomistic understanding of classical natural law.[49] In his piece, Vermeule defines it as a "robust, substantively conservative approach to constitutional law and interpretation," which "should be based on the principles that government helps direct persons, associations, and society generally toward the common good."[50] Vermeule reiterates and expands the same basic formulation in his book.

---

39 George, *supra* note 33, at 189.

40 Strang, *supra* note 4, at 231.

41 *Id.* at 236.

42 George, *supra* note 33, at 193.

43 *Id.* at 194.

44 *See, e.g.*, Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269, 2282 (2001) [hereinafter *Theory and Practice*]; *Against Living Common Goodism*, *supra* note 1; The Honorable William H. Pryor Jr., Politics and the Rule of Law, Heritage (Oct. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law.

45 The Declaration of Independence para. 2 (U.S. 1776); *see also* Pack & Paoletta, *supra* note 7, at 134 ("'All men are created equal.' The idea is that it's in the nature of man.").

46 U.S. Const. pmbl.

47 U.S. Const. amend. IX.

48 *Beyond Originalism*, *supra* note 1.

49 Vermeule, *supra* note 16, at 3; Casey & Vermeule, *supra* note 16, at 108.

50 *Beyond Originalism*, *supra* note 1.

1. CGC and "Defining" the Common Good

Vermeule attempts to define the common good but never provides an entirely clear definition. Vermeule points to Aquinas—at least on paper, but even to those with an understanding of classical natural law, Vermeule's meaning of "common good" is obscure.[51] In the book, he defines it as "the flourishing of a well-ordered political community."[52] He references the *ragion di stato* (reason of state, which is the survival of the state at any cost) to give some principles that make up part of the common good: peace, justice, abundance, health, safety, and economic security.[53] Vermeule's goal has not been to provide a treatise—or even a blueprint—on CGC and the common good, but rather a framework for moving forward.[54] But what does that mean?

For Vermeule, law is "intrinsically reasoned and also purposive, ordered to the common good of the whole polity and that of mankind."[55] The common good, he says, represents the "flourishing of a well-ordered political community" and is the "highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community."[56] On first read, this formulation seems to invoke the utilitarian philosophy of thinkers like Jeremy Bentham and John Stuart Mill, but Vermeule is careful to refute that later in the book.[57] CGC is methodologically Dworkinian, in that both Vermeule and Dworkin advocate for a "moral reading" of the Constitution.[58] Vermeule, however, rejects Dworkin's left-liberal set of substantive moral commitments and priorities and replaces it with a right-conservative set.[59]

Vermeule's focus on prior generations' commitment to natural rights and natural law is proper, but he misses the mark by applying those principles retrospectively to fit his new theory.[60] Some scholars, like Patrick Deneen, sing the praise of CGC as a "new and better path" forward.[61] The majority of scholars, however—from both sides of the political aisle—are critical of the approach. Vermeule's broad and largely undefined "common good" is not the same as what classical natural law thinkers have proposed and is too pie-in-the-sky for any principled application.

2. CGC and the Administrative State

The notion of CGC only works when the "ruler has the power needed to rule well."[62] CGC "will favor a powerful presidency ruling over a powerful bureaucracy."[63] Empowering the ruler is the main aim of CGC.[64] As is apparent, this is very different from classical liberalism, libertarianism, and Fuller's "King Rex" paradigm for understanding law.[65] Whereas natural law is voluntary, the "*participation* of the eternal law in the ratio-

51 *See id.* at 3, 44-46.

52 *Id.* at 7; *see also* Casey & Vermeule, *supra* note 16, at 110.

53 Vermeule, *supra* note 16, at 7, 31; *Beyond Originalism, supra* note 1.

54 Vermeule, *supra* note 16, at 25, 36; *see also id.* at 20 (writing that, as Richard Helmholz has noted, partial indeterminacy is true of all fundamental statements of law—natural law doesn't provide definitive answers to most legal questions; it provides general principles).

55 *Id.* at 3.

56 *Id.* at 7.

57 *See id.* at 14.

58 *Beyond Originalism, supra* note 1; Vermeule, *supra* note 16, at 5-6, 69.

59 *Beyond Originalism, supra* note 1; Vermeule, *supra* note 16, at 6.

60 *See* William Baude & Stephen E. Sachs, *The "Common Good" Manifesto: Common Good Constitutionalism*, 136 Harv. L. Rev. 861, 889 (2023); Bruce P. Frohnen, *Common Good Constitutionalism and the Problem of Administrative Absolutism*, 27 Cath. Soc. Sci. Rev. 81 (2022).

61 Vermeule, *supra* note 16, at i; *see also* Casey & Vermeule, *supra* note 16.

62 *Beyond Originalism, supr*a note 1.

63 *Id.*

64 Vermeule, *supra* note 16, at 37.

65 *Beyond Originalism, supra* note 1; Fuller, *supra* note 20, at 33-39 (outlining eight ways to fail to make law).

nal creature,"[66] CGC is paternalistic in its aim to be an "inculcator of good habits."[67] Vermeule grounds the strong rule necessary for CGC to work in both the General Welfare Clause of the Constitution, which gives Congress the "power to . . . provide for the common Defense and general Welfare of the United States," and the Preamble to the Constitution, which lays out the basic principles on which the Constitution was built.[68]

CGC promotes a system of government antithetical to the democratic republic the founders envisioned as a protector of individual liberties. Two prominent critics of CGC argue that Vermeule redefines "liberty" in such a way that it eliminates the very thing that systems like "slavery, totalitarianism, and far less extreme systems of coercion all lack"—liberty itself.[69] Another critic wrote that CGC is a "prescription for dictatorship" that is "not remotely consistent with a democratic republic or individual liberty."[70]

Vermeule, in the final (and most confusing) chapter in his book, applies CGC.[71] His application, according to critics, "is what modern scholars call the 'administrative state.'"[72] The administrative state is the "fourth carriage" of government, which is divorced from typical checks and balances that prohibit one branch from usurping the role of another or infringing on the right recognized by the Constitution.[73] Vermeule offers no reprieve from essentially throwing gasoline onto the administrative fire: "In this system what, if anything, ensures that agencies act for the common good? Nothing[.]"[74] If government is set up to promote and protect the "common good"—at least as defined above[75]—Vermeule's methodology draws out human depravity and is antithetical to promoting and protecting the "common good."[76] This formulation sounds in legal positivism and the command theory of law.[77]

3. CGC and Legal Positivism

Vermeule makes clear that courts do not have to be the ones to define the common good, but that begs the question, then who?[78] In *Freedom's Law: The Moral Reading of the American Constitution*, Dworkin argues that everyone interprets and applies the vague language of the Constitution through their own moral lens on political decency and justice.[79] This viewpoint is rooted in existentialism and, taken to its extreme, is more akin to Jean-Paul Sartre's notion that, because existence precedes essence, individuals must create their own meaning.[80] For Dworkin, "any system of government that makes [morality] part of its law must decide whose interpretation and understanding will be authoritative."[81] By divorcing the words of the Constitution from their textual placement and original public meaning, as Vermeule advocates with CGC, the same question arises: Whose interpretation and understanding

66 Aquinas, *in* Readings, *supra* note 16, at 32 (emphasis added).

67 *Beyond Originalism, supra* note 1.

68 Vermeule, *supra* note 16, at 38-39 (quoting U.S. Const. art. I, § 8, cl. 1); *Beyond Originalism, supra* note 1.

69 Baude & Sachs, *supra* note 60, at 901.

70 Peter J. Wallison, *Review: Common Good Constitutionalism*, Am. Enter. Inst. (Dec. 1, 2022), https://www.aei.org/articles/review-common-good-constitutionalism/.

71 Vermeule, *supra* note 16, at 134-78.

72 Wallison, *supra* note 70.

73 *Id.*; *see generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

74 Wallison, *supra* note 70 (quoting Vermeule, *supra* note 16, at 138).

75 *See supra* Part II.

76 *See, e.g.*, Wallison, *supra* note 70.

77 *See* sources cited *supra* note 28.

78 Vermeule, *supra* note 16, at 12.

79 *See generally* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996).

80 Jean-Paul Sartre, Existentialism Is a Humanism (1946); *see also* Martin Heidegger, Being and Time (1927).

81 Dworkin, *supra* note 79, at 2.

will be authoritative? The answer is "whomever is in authority," which is a frightening response.

Vermeule ardently rejects any contention that CGC is akin to legal positivism.[82] Whereas legal positivism is tied to civil law and the will of the legislators who create it, CGC, according to Vermeule, "draws upon an immemorial tradition" including *ius gentium* (i.e., law of the nations)[83] and an objective natural morality, which again harkens to Fuller's functionalist approach that there must be an inner logic to law so that it is actually capable of guiding human behavior.[84] According to Vermeule, *Planned Parenthood v. Casey*'s enigmatic call for individuals to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," cannot survive under CGC.[85] Nor can the notion that "one man's vulgarity is another's lyric," or any libertarian notions of property and economic rights.[86]

4. CGC and Originalism

A central theme of Vermeule's scholarship in the area of CGC is his relentless tirade against originalism.[87] Vermeule defines originalism as "the view that the constitutional meaning was fixed at the time of the Constitution's enactment," but remarks that it has "outlived its utility."[88] In his view, conservatives have made ardent strides using originalism, but now that they have secured the judiciary, it is time for them to stop playing defense and go on the offensive by employing a judicial philosophy that allows them to dial back the "relentless expansion of individual autonomy" in favor of substantive moral principles based on the common good.[89] Vermeule, once again, agrees with Dworkin; specifically, he agrees with Dworkin's contention that "public meaning" in an originalist framework is ambiguous.[90] "Originalism has done useful work," Vermeule concludes in *The Atlantic* piece, but it "can now give way to a new confidence in authoritative rule for the common good."[91]

Originalism is a better alternative to CGC because it protects the Constitution from encroachment by individual morals, views, and beliefs. Employing originalism does not mean that every judge will reach the same conclusion; it simply means that judges will begin at the same starting point by arguing over original understanding. Because the Constitution was built around the natural law, the best way to promote common good in the American legal system is not to force everyone to subscribe to the views of individual, activist judges (as CGC would prescribe), but to protect the structure of government that allows for human flourishing and the pursuit of the common good. Originalism, properly applied, achieves those goals.[92]

Contrary to Vermeule's unsupported critique that originalism originated in the 1970s with Justice Scalia,[93] the principle of seeking to understand the text and the original meaning of law at the time it was enacted is as old as democracy itself.[94] Justice Scalia and Bryan Garner note that "'[i]n the English-speaking nations, the ear-

82 Vermeule, *supra* note 16, at 7.

83 *Beyond Originalism*, *supra* note 1; Vermeule, *supra* note 16, at 3. This is similar to biblical customary law described in both Deuteronomy and in Ruth.

84 *Beyond Originalism, supra* note 1 (citing Fuller, *supra* note 20); *see infra* Part II.

85 Vermeule, *supra* note 16, at 41-42; *Beyond Originalism, supra* note 1 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)); *see also* Budziszewski, *supra* note 5, at 104-05.

86 Vermeule, *supra* note 16, at 42; *Beyond Originalism, supra* note 1 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

87 *See, e.g., Beyond Originalism, supra* note 1 (the name of the article suggests as much); Vermeule, *supra* note 16, at 91-116; Casey & Vermeule, *supra* note 16, at 128-32.

88 *Beyond Originalism, supra* note 1.

89 *Id.*; Vermeule, *supra* note 16, at 36.

90 Vermeule, *supra* note 16, at 95, 207 n. 190, 211 n. 249 (citing Ronald Dworkin, *Comment, in* Antonin Scalia, A Matter of Interpretation 115 (1997)).

91 *Beyond Originalism, supra* note 1.

92 Strang, *supra* note 4, at 229-36.

93 *Beyond Originalism, supra* note 1.

liest statute directed to statutory interpretation,' enacted by the Scottish Parliament in 1427, 'made it a punishable offense for counsel to argue anything other than original understanding.'"[95] As one historian wrote, the "Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[96]

CGC, in contrast to originalism, does not proceed from a set of objective principles. It holds the text and original public meaning secondary to principles of the "common good," whatever those may be. As others have pointed out,[97] CGC is really nothing more than judges deciding cases, not on the law, but on abstract and undefined moral principles more akin to living constitutionalism, such as Justice Brennan's "approach whose results aligned with his personal moral vision . . . to 'striv[e] toward th[e] goal' of 'human dignity.'"[98] The goal of human dignity, for Justice Brennan, is not tied to an objective morality in the same way as it is in the natural law tradition, but instead to society's changing values and needs.[99]

According to the chief judge of the U.S. Court of Appeals for the Eleventh Circuit, William Pryor Jr., "[r]eplace 'common good' with 'human dignity' and Vermeule's living common goodism sounds a lot like Brennan's living constitutionalism. Indeed, the difference between Brennan's living constitutionalism and Vermeule's living common goodism consists mainly in their differing substantive moral beliefs; in practice, the methodologies are the same."[100]

But the Constitution does not give judges the ability to add or subtract their own set of moral principles—or any set of moral principles—into their decision making. That type of judicial activism actually impinges on foundational principles of natural law "by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government," as Robert P. George wrote.[101]

Conclusion

Practicing law and interpreting the Constitution well does not mean forcing specific views—religious or otherwise—on others, as CGC would suggest. Rather, it means upholding and affirming the constitutional structure of government that preserves and protects the natural rights of *all* who are governed under the U.S. Constitution. CGC upends that goal, which is why it should be rejected outright.

---

94 *See, e.g.*, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012); *Against Living Common Goodism, supra* note 1.

95 *See* Scalia & Garner, *supra* note 94, at 79 (quoted in *Against Living Common Goodism, supra* note 1).

96 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 903 (1985).

97 *See, e.g.*, Baude & Sachs, *supra* note 60, at 862.

98 *See Against Living Common Goodism, supra* note 1 (quoting William J. Brennan, Jr., Speech to the Text and Teaching Symposium, *in* Originalism: A Quarter-Century of Debate 55, 61 (Steven G. Calabresi ed., 2007)).

99 *See, e.g.*, Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. Penn. L. Rev. 1319, 1319 (1991) ("Justice William J. Brennan emphasized that the Constitution is a living document subject to 'contemporary ratification' and that the judiciary must interpret the text to promote human dignity in light of society's changing values and needs.").

100 *Against Living Common Goodism, supra* note 1.

101 *Theory and Practice, supra* note 44, at 2282; *see also Against Living Common Goodism, supra* note 1.

DIALOGUE

All the Kingdoms of the World

A Conversation with Kevin Vallier on Catholic Integralism, Coercion, and Constitutional Order*

Interviewer: Anton Sorkin

Q. Kevin, thank you so much for agreeing to take part in this conversation with me. My first question is an easy one: Why did you decide to write a book about integralism?

A. I have a long-standing fascination with the relationship between Christianity and the liberal tradition. Can Christians, real Christians, adopt liberalism as a political philosophy? For me, the variations of liberalism and Christianity changed with time, but the question of coherence remained the same. I told myself that when I turned 40, I was going to turn to work on the project full-time, which required me to start writing essays in what we might call analytic political theology. In this field, we ask the great questions of political philosophy with the tools of Anglo-American philosophy and the presumption that religion (in this Christianity) is true. The goal was to start at 35 and build up to my positive view. But word got around about my interests, and one day, Oxford UP's political editor got wind of it. He'd been looking to commission a book on Catholic integralism, one of the political theologies I wanted to contrast my view with. And so, he invited me to do the book. And I agreed.

Q. I know you've been debating a lot of integralists this fall semester in the wake of your book's release. You note in the early pages that a part of this project is the question of whether conversation is possible. The integralist camp is notorious for their "block parties" on Twitter (i.e., I am personally blocked by Adrian Vermeule/@Vermeullarmine, C.C. Pecknold/@ccpecknold, and Sohrab Ahmari/@SohrabAhmari for offering mild critiques). How has your experience been arguing with them about all this? Is conversation possible?

A. I distinguish between groups of integralists. The theorists, as I call them in the book, such as Thomas Pink, love to talk. But the people you mention are not interested in honest debate, I fear.

Q. Can you elaborate on these two groups (theorists versus strategists) for me and how the two might operate in the contested public square?

A. The strategists have focused mostly on movement building, so they create and run new Substacks (like *Postliberal Order, The New Digest*) and write essays for magazines they ran or influenced (like *Compact* and *American Affairs*). They schedule lectures, often closed-door to everyone but their supporters. They also try to meet with politicians that might be at least a bit sympathetic. They had a friendship with Ohio Senator J.D. Vance. But they don't talk theory openly anymore. The theorists, by contrast, focus only on theory and have no political ambitions at all. They're still publishing interesting things, especially Thomas Pink.

Q. What is your working definition of integralism, dyarchy, and how common good constitutionalism fits into all this? Who are the main players we should watch for?

A. I take integralism to be a claim about ideal church-state relations within Catholicism. It

* Kevin Vallier is an Associate Professor of Philosophy at Bowling Green State University, where he directs their program in Philosophy, Politics, Economics, and Law. His interests lie primarily in political philosophy, ethics, philosophy of religion, and philosophy, politics, and economics (PPE).

begins with the commonplace claims that God authorizes the state to promote the earthly common good and authorizes the Church to encourage the spiritual common good (corporate salvation in Christ). But rather than argue that church and state should be separated, integralists claim that they should be integrated—a *dyarchy* if you will. In particular, there's a partial subordination of the state to the Church because the Church has a nobler purpose—salvation. The state focuses only on earthly things. But in cases where the Church cannot achieve its aims through spiritual punishments like excommunication, it can authorize and, in some cases, require the state to back its punishments with civil punishments. For instance, if the Church excommunicates a heretic, and the heretic does not repent, the state might impose civil punishments to turn the heretic back from perdition.

Common good constitutionalism is a vague doctrine. Still, we can understand it here as the view that what justifies constitutions and the guide for interpreting constitutions is a robust conception of the common human good that cannot be reduced to the good of individuals. Here, it is not as though judges should ignore that written text of the constitutions, but rather, in cases where the standard originalist or textualist methodology falls short, judges should feel free to consult the common good in how they rule. If constitutions aim to advance the common good, then judges should feel free in some instances to help conform the constitutions and constitutional law to the common good.

The leading player in both camps is Harvard Law Professor Adrian Vermeule. Vermeule converted to Catholicism and integralism around 2016 and began to develop the doctrine of common good constitutionalism (which I'll call "CGC") in 2020, leading to his 2022 book. As for other integralist thinkers, one should look in particular to Thomas Pink (as already mentioned), an Emeritus Professor of Philosophy at King's College London, who is in many ways the intellectual father of the movement. Other essential thinkers include Alan Fimister, Fr. Thomas Crean, and Fr. Edmund Waldstein. Vermeule also has some American allies who pursue his theological and political agenda in the U.S. and increasingly in Hungary. These include Chad Pecknold, Gladden Pappin, Sohrab Ahmari, and, increasingly, Patrick Deneen.

Q. You just noted that you had a chance to debate this issue with Thomas Pink. Early on in your book, you make it a point to separate his reading of *Dignitatis Humanae* in relation to how Catholic integralists extend authority over the baptized verses unbaptized. Can you explain these related dynamics?

A. The standard reading of Vatican II's beautiful statement on religious liberty, *Dignitatis Humanae (DH)*, is that the human person *as such* has a universal right to religious freedom owing to their dignity as made in God's image. As a result, they should be immune from coercion by individuals, groups, or any human power. That strongly suggests that integralism is false and that the Church means to reject it permanently. But Pink, around 15 years ago, began developing and defending an alternative reading of it. In his view, *DH* was only meant to establish universal religious freedom of the individual against the state and not against the Church. Of course, baptized members of the Church are subject to spiritual coercion by the Church because they can be subjected to spiritual punishments, like excommunication. But then Pink makes an innovative move: if *DH* was silent on the powers of the Church, it was *also* silent about whether the Church could authorize the state to serve it once again. So, *DH* established a universal right against states, except for Christian states, who have agreed to serve as deputies to the Church's spiritual agenda. The Church could, in principle, establish integralism again, although that is not Church policy.

One implication of Pink's view is that, in an integralist state, the Church could direct the state to use civil coercion against the baptized. But the unbaptized are to be immune from such coercion. Because they are not under the Church's jurisdiction, they cannot also be under the jurisdiction of state power in those cases where the state exercises its power on behalf of the Church's spiritual mission.

Q. I want to follow-up on coercion. In your book, you have this quote: "if the state gives us medicine (grace) to cure a disease (sin), it should help us take this medicine," coupled with your description of a Vermeulean protector exercising

"hard power." What are we talking about here when we talk about coercion (e.g., Twitter censorship, monetary fines, jail time, bodily harm)?

A. I think, primarily, Vermeule wants to avoid coercion and use persuasion and soft power to establish an integralist state. However, Vermeule casts liberals as dangerous fanatics, and so I think it is unlikely, in his view, that liberals will themselves stick to persuasion and soft power. Liberals will use violence, an implication of Vermeule's view, and I don't see how integralism can succeed unless they fight fire with fire. But in transitional matters, I don't know if any specific form of hard power is required. It is a different matter when it comes to stabilizing an integralist state, as this might include traditional punishments like imprisonments, fines, etc.

Q. As a follow-up to that, there is a quote from Cardinal Bellarmine that the Church "ought to have every power necessary to attain its end." It appears Vermuele is taking this seriously with his focus on the judicial system (CGC) and the administrative state (*Law's Abnegation*) in his other writings for this very purpose. Can you talk about the extent an integralist system would use the state to achieve its aims?

A. For Vermeule, in my view, the state and the Church both need strong administrative powers, and they should work together to strengthen one another's ability to control the populace to lead the promotion of the common good. I think Vermeule thinks most of what the administrative state does now would be legitimate in an integralist state, along with some of the forms of coercion I indicate above.

Q. What about the Establishment Clause? You suggest one integralist path might require its repeal! Can you explain what you mean and how this would work?

A. I have no idea how they could pull that off in the United States, even in a century. The best I could see was limiting the Establishment Clause to the federal government, but that would involve uprooting the Fourteenth Amendment, as far as I can tell. But if they're able to somehow build support for removing the Establishment Clause and establishing the Catholic Church instead, I suppose that's what they would want. And one integralist has told me as much. You just try until you succeed.

Q. One important concept you introduce is the thesis-hypothesis distinction. How does this relate to your [Vermeule's] transition theory when it comes to implementing integralism?

A. Most reviewers have missed the importance of this distinction for the arguments of my book, which is critical. Following the controversial promulgation of Pope Pius IX's encyclical, *Quanta Cura*, several Catholic bishops were worried that secular governments could use this fiercely anti-liberal document to justify smashing the Church, for one can read *Quanta Cura* as saying that ordinary Catholics must regard more modern, secular states as illegitimate. To avoid this appearance, Archbishop Doupanloup in Quebec argued that Pius IX was only speaking about the political ideal, which is illiberal, but not that current, real-world regimes lose their legitimacy if they're, say, liberal regimes. The ideal he called *thesis* and the non-ideal *hypothesis*. Pius IX begrudgingly accepted the distinction. So it entered Catholic social thought for about 100 years until the Church seems to have abandoned it in the run-up to Vatican II.

The thesis-hypothesis distinction is fascinating. Jacques Maritain and John Courtney Murray argued against integralism by arguing not that integralism was false so much as that it wasn't a trans-historical political ideal. And that's because they thought Catholic social thought should contain no thesis ideal at all. Catholic political thought is all *hypothesis*, as we theorize for a fallen world. Current Catholic social thought seems to agree that hypothesis-only theorizing is the order of the day.

But essential to integralism is that it is a story about the best regime, the transhistorical best relationship between church and state. Thus we can critique integralism as *thesis*, as an ideal, which means I can apply many of the tools from political philosophy used against ideal theory to assess integralism. One of those critiques concerns questions of feasibility. If an ideal is not feasible, or if reaching it is infeasible, those factors are often taken to count against an ideal. They risk refuting the ideal. Something similar happens to integralism when we ask how to reach it (the question of

transition) and whether it is stable (the question of stability). My assessment of Vermeule's transition theory is to show that integralism is today *morally* infeasible. This is to say that integralism is feasible, but only if transitioner groups are prepared to violate Catholic moral teaching. Today, transition will require killing innocents by the thousands. And so, if one wants to pursue integralism, one cannot do so and remain a faithful Catholic. That means integralism is a bad, gravely flawed ideal, as it tempts people to sin.

Q. There is another major figure in your fascinating historical section of this movement that I was hoping to introduce here who seemingly applies a milder form of integralism. Can you discuss the views of Leo XIII on temporal versus spiritual powers and whether I am wrong to consider him a milder version, compared to his predecessors like Boniface VIII and Pius IX?

A. I do see Leo XIII as drawing on the thoughts of previous popes in his political theology. Leo XIII follows the traditional distinct jurisdictions of church and state and the superiority of the Church over the state in terms of their respective ends. I also think he sees, as a general matter, that the Church and the state can have a symbiotic relationship. So yes, I think your general impression is fair. Well, with the partial exception that I think Leo XIII was the first pope to think that integralism was really, truly infeasible.

Q. I was struck in your book that Vermuele criticizes Deneen's "excessive localism." However, considering the thesis-hypothesis distinction, it seems a lot more plausible for Vermuele to take the Benedict Option approach and try to create integralist communities across the nation, starting first at the local level. I sense a fascinating tension here with Catholic history being predominantly top-down, Vermeuele's cynicism that local communities would withstand liberal state pressure, and maybe some portion of laziness given the arduous work that comes with grassroots movements. What you think about all this?

A. At the end of my book, I suggest that religious anti-liberals need not just micro-communities but micro-polities in order to live out their visions of the good life. I also don't see why states are anymore inimical to small independent polities than an integralist takeover of the liberal state. I don't see why Vermeule is more realistic than Deneen.

Q. Staying with our friend, you have an interesting phrase toward the middle of your book noting that Vermeule's integralism has an "apocalyptic dimension." Can you elaborate on what you mean by this?

A. A common view among American integralists is that liberalism is intrinsically unstable and is likely to collapse. Vermeule has a number of essays outlining some informal models of liberalism's instabilities. But I find the models far too simple, as I do Deneen's general predictions. I don't see these as fundamentally social scientific claims but predictions about social upheaval through broad historical forces leading to a grant outcome.

Q. Your last chapter is an interesting one since you take this into the realm of Confucian and Islamic anti-liberalism. What was the thought process in extending this topic to account for other religions?

A. I wanted to show that there's a framework of arguments that one can use to communicate with religious anti-liberals broadly. The idea was always to create lines of communication between worldviews that seem irreconcilable with liberal institutions.

Q. You've got a section in the book called the "allure of integralism." Can you talk to me about why some young Christians (or perhaps "counterrevolutionaries") today are enamored with integralism and, by extension, disgusted by liberalism?

A. I think a general mass psychological phenomenon in the U.S. manifests itself as falling trust in institutions and society combined with an ever-more nasty degree of political polarization. Young people today grow up less trusting and more polarized than in generations past. This changes their outlook on the world, including their politics. They no longer see the other side as adversaries to be democratically defeated but dangerous, fearsome enemies that must be crushed. This is true on the young, anti-liberal left as much as the young, anti-liberal right. But on the right, the fear is that American liberal or-

der has gotten to the point of making Catholics second-class citizens for their beliefs on sexual issues, like same-sex marriage and transgender ideology. The worry is that American liberalism was always going to end up imposing an anti-Christian worldview, including views about sex and gender, on Christians. Thus, Christians must pursue a very different approach to political life, up to and including integralism in some cases. Integralism is 200-proof anti-liberalism, and so is the hip and exciting way to be transgressive for many young Catholics. It is also a counsel of hope because integralists encourage their young followers to believe, as they say, that "another world is possible." That's the sense in which the leading integralists are not conservatives. They want a new, or rather quite old, political order to replace our current order.

Q. In light of the 2024 election and the escalating loss in institutional trust across almost all sectors, there is an interesting opportunity perhaps for integralism to fill a vacuum by way of offering stability without justice. You talk about these two concepts throughout your book and perhaps the challenge for integralism to achieve both. Do you think a second Trump term will provide that opportunity for integralists?

A. It depends on the American integralists's ambitions. One serious problem is that they've made no progress within the Catholic Church, but they have built up a bit of influence in New Right politics and with right-leaning law students. A second Trump term might energize the New Right again and those interested in what the New Right has to say. Maybe the integralists will reinvent themselves in such an era or find an appointment or two in government, much as Gladden Pappin now has a position in the Hungarian government.

Hadley Arkes, Mere Natural Law: Originalism and the Anchoring Truths of the Constitution (Regnery Gateway, 2023). 352 pp.

*Book Review by Karen Taliaferro**

Longtime readers of Hadley Arkes' voluminous, thoughtful writings will surely find *Mere Natural Law: Originalism and the Anchoring Truths of the Constitution* as a continuation of his earlier works, from *First Things* to his 2010 distillation, "The Natural Law—Again, Ever," in *Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law*. Such readers will not find any surprises here; that Arkes is insisting on the use of natural law in the courts, up to and including the United States Supreme Court, is a variant of his signature. And, as is characteristic of Arkes' writing, *Mere Natural Law* reads easily and with charm; one senses that the "ordinary man on the street" of Arkes' chapter three, whom Arkes invokes as knowledgeable of the natural law, may well find it edifying as well as agreeable.

The book's 11 chapters, which weave through a range of illustrations and instantiations of his topic, are united by a concern to show both the need for and the existing presence, whether recognized or not, of moral judgment in the law and, perhaps secondarily, to argue that natural law provides the best basis for that moral judgment. In chapter five ("Are There Natural Rights?") for instance, Arkes describes the non-positivist bases of such cherished freedoms as those of speech and religion; the Constitution, he writes, is "grounded in principles that were already there" (84) before it was written, principles Arkes identifies with the natural law, which, to him, gives rise to natural rights.

Arkes is aware, however, of the danger inherent in claiming a pre-existing or "higher" set of principles or law outside of the Constitution, viz., that one man's natural law is another man's moral intuition. Conservatives, he writes, "have recoiled from the spectacle of liberal judges casually invoking a higher law as they blithely install as law the policies that have won the hearts of progressives" (59). The fear of such conservatives amounts to the following: if courts follow Arkes' prescribed practice of using natural law reasoning as partial justifications of their judgments, abstract and vague conceptions of a "higher law" will simply be cemented on the left as entirely legitimate sources of judicial rulings; Kennedy's elastic "mystery of human life"[1] will become an acceptable moral justification for activist judges to smuggle in their own ideals of morality.

Indeed, one senses in this latest book a message for just such conservatives, as Arkes expresses a frustration with what he sees as originalist preoccupation with process paired with a refusal to engage the moral questions involved in cases on which justices rule. Arkes points out that the (perhaps somewhat caricatured) version of originalism, in which every possible element of the ruling's meaning is found in the literal text of the law, is impossible for any judge. Judges, he points out, "persistently have to move beyond the text of the Constitution in drawing on the principles that explain their judgments" (60). This being the case, he writes, the "only question is whether it will be done well or badly" (60).

What, then, does Arkes envision for doing such legal interpretation well? To understand this, it is vital for readers to understand, first, what Arkes understands natural law to be, which is a very thin version of the term. Arkes often refers to natural law as effectively "what we can't not know," to borrow from J. Budziszewski: basic

* Assistant Professor in the School of Civic and Economic Thought and Leadership (Arizona State University); Affiliate Faculty, Center for the Study of Religion and Conflict (Arizona State University). Karen and Hadley are featured on Episodes #133 and #159 of the *Cross & Gavel* podcast (respectively). See inside back cover for QR code.

1 See Anthony Kennedy's opinion in *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

moral principles that are so engrained in us we don't realize that we are operating on them. His central claim is that "the very ground of Natural Law . . . can be drawn from precisely the same common sense that is accessible to children and to ordinary folk" (33). There is, therefore, no need to fear judges pulling the wool over the eyes of the populace in the name of a recondite "higher law," in Arkes' version of natural law jurisprudence, for such a jurisprudence would be able to justify itself in basic principles accessible to all.

The natural objection to this—at least, this writer's natural objection to this—is that such principles are, yes, very often reflective of the natural law (a basic injunction against stealing, for instance, such as when children automatically recognize that something that is theirs should not be taken away from them), but they can reflect other things, too (a basic desire for revenge, say, such as when children lash out when things that are not theirs but that they want are taken away from them). In other words, that ordinary folk and children very often hold truths of the natural law does not make their judgment reliable as consistent expressions of the same.

But to stop at this partial critique would be unfair and misleading, for, to Arkes, there is a second component of doing interpretive work *well.* Natural law jurisprudence is not merely a replacement of textualism with moral intuition; rather, it amounts to legal interpretation according to strictly logical reasoning from a few very basic moral suppositions. An illustration from chapter three ("The Ploughman and the Professor") is worth quoting at length:

> If we begin by respecting that difference between innocence and guilt, we insist that the evidence for guilt should be tested, in a demanding way, with the canons of reason…And as we follow that logic further down the line, we draw the inference that people accused of crimes should have access to the evidence and witnesses against them for the sake of rebutting them…*By this moral logic*, a person does indeed have a right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him"—he would have that right in principle *even if it had not been set down in the Sixth Amendment* (emphasis original; 47-48).

In other words, ordinary moral reasoning—"that common sense of Natural Law that is accessible to us ordinary human beings…[that is] readily—and instantly—understood" (19)—can take one from fundamental moral insights (viz., there is a difference between innocence and guilt) to such cherished constitutional rights as that to a fair trial, including what such a fair trial entails.

Arkes is persuasive in tracing this tight logical process from a basic insight to a civil right. However, again, that one can arrive at constitutional rights via natural law reasoning does not ensure that one always *does so*, given the challenging philosophical issues involved. Chapter four ("On Aquinas and That Other First Principle of Moral Judgment") illustrates this point. Arkes compares *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), which held that baker Jack Phillips could not be compelled to bake a cake for a same-sex wedding (though, importantly, it did so on narrow grounds) with *Loving v. Virginia* (1976), which ruled that state laws banning interracial marriage were unconstitutional. To Arkes, the only ultimate reason why someone can, according to the Colorado statute in question in *Masterpiece Cakeshop*, be compelled to bake a cake for a same-sex wedding but cannot be barred from interracial marriage is "the fact that we have come to understand racial discrimination as deeply wrong, but many of us have not been persuaded that there is something truly wrong, in the same way, in the laws that confine marriage to the coupling of one man and one woman" (76). This may well be correct. To Arkes, this means that judges simply cannot avoid the difficult work of making moral judgments—those on the morality of interracial and same-sex marriages.

It strikes this reader that there is something slippery in this last step, for while moral judgments are indeed necessary—and that point can hardly be adequately stressed—it is not clear why it must be the (unelected) judiciary making them

2 *See* J. Budziszewski, What We Can't Not Know: A Guide (2011).

rather than the (elected) legislators, who are responsible for the written laws being challenged in the courts in the first place. The problem, at heart, is that issues of morality and justice, while admittedly simple at the level of first principle, become increasingly complex and therefore contentious as they move up from that level; book I of Plato's *Republic* handily dispels the notion that justice is easily understood. In a liberal democracy, moreover, despite the power of natural law reasoning, it simply cannot be expected that a diverse people will not come to different conclusions of what constitutes justice and morality—this is why the Colorado statute in question came into being in the first place. This being the case, it strikes this reader as wiser that those deploying natural law reasoning be the elected ones—the legislators, who are charged with the task of deliberation, argumentation, and persuasion—rather than the unelected members of the judiciary, who are charged with authoritative interpretation and judgment.

The difficulties involved in entrusting the judiciary with the power to pronounce according to the natural law becomes yet more salient in chapter nine ("Recasting Religious Freedom"). Arkes here suggests that the test for whether a given practice should be protected should not be whether a religion has required it, but whether the natural law has mandated it. To Arkes, the recourse to religious beliefs for exemption for obeying a law smacks of relativism: "religion itself has been relativized until it is detached from any notion of God and the laws springing from that God" (180). Such religion is "divorced from any claims of truth" (180)—and it is, by extension, the judges' roles to discover truth. Arkes laments that even conservative judges have seemingly concluded, in his words, "it is probably best that we hold back from a reasoning overly strenuous as we judge various religious teachings as legitimate or illegitimate, defensible or indefensible" (186). No, Arkes argues; we must judge such religious teachings as legitimate or illegitimate, defensible or indefensible—and we have the standard of reason, ensconced in the natural law to do so.

Arkes' concern is a good one, for we can easily see the difficulty with carving out exemption after exemption based on one religious claim or another; the Church of the Flying Spaghetti Monster has disabused us of the notion that one can simply shout "religious belief!" and be excused from otherwise legitimate laws. Arkes' answer to this problem is, then, to ground religious freedom itself in natural law. It is not *any* religious claim or belief that merits freedom but only those that comport with natural law, at least, mere natural law.

Having written my own book on the need to ground religious freedom in natural law, I am hardly in a position to disagree wholesale with this conclusion. That said, there are real difficulties with using natural law, rather than written law, as the standard by which to measure citizens' acts at the level of the courts. The entire reason that courts have made such settlements as granting exemptions for sincerely held beliefs rather than scrutinizing claimants' religious beliefs as true or not true is that to do so would require judges to act as, minimally, philosophers and possibly as something resembling priests. Again, moral simplicity exists at the level of first principles and less often at the level of complexity involving legal challenges to religious practice.

Arkes' response to claims such as mine is to point to *Reynolds v. United States* (1879), which ruled that religious belief was not a sufficient reason to practice polygamy. To Arkes, this is proof that the Supreme Court has, and could again, make not just textualist but *moral* judgments, using the everyday morality that is, to Arkes, natural law. But there are two problems with this. First, while the reasoning in *Reynolds* did indicate clear disapproval of polygamy, the ruling is more accurately characterized as holding that religious belief was not a sufficient reason to break *positive law* more generally; the holding was not one characterized by discourse on the morality of polygamy. Its reasoning went back not to creation and natural law but to English common law as the basis of the United States' positive law.

Beyond that, if the Court *had* done what Arkes proposes for it, i.e., if it had made moral judgments based on the natural law and measured religious belief and practice against it, it is not clear that the issues he would like to avoid would indeed be avoided. For one thing, polygamy may not be as obviously against the natural law as Arkes supposes: C.S. Lewis, whose Tao of *The Abolition of Man* strikingly resembles Arkes' version of natural law, admitted in *Mere Christianity* that "Men have differed as to whether you should have one wife or four. But they have al-

ways agreed that you must not simply have any woman you liked,"[3] and Aquinas himself only went so far as to say that "plurality of wives is in a way against the law of nature, and in a way not against it."[4] In short, the positive law provided a *stronger* case against polygamy than the natural law may have done.

More germane to modern concerns, however, we can imagine that the law being violated was not an anti-bigamy law but a law requiring employers to provide contraceptives, and the religious belief in question was that contraception violates God's intent for sexuality as well as God's authorship of life. To make the case for a religious exemption is straightforward and empirical: the Catholic Church forbids the use of contraception, so to require a practicing Catholic employer (or anyone else with related religious beliefs) to provide it is to coerce a practicing Catholic to violate her conscience, which runs easily afoul of the (positive) First Amendment and/or (also positive) RFRA. This is straightforward and requires only interpretation of the case and statutory laws involved—a task judges are well-equipped to do. (As it happens, this reasoning was acknowledged as valid in the *Little Sisters of the Poor* holding.) To make the case from natural law, on the contrary, requires a great deal of moral philosophical reasoning, which is *not* so straightforward, and which is more likely to end in such argumentation as Justice Kennedy's much-lampooned position in *Casey* than Arkes would, undoubtedly, like.

All of that said, it must be acknowledged that the law is and must ever be a moral thing, and Arkes rightly reminds us well that we are never far from morality even when we are interpreting positive law. What counts as offensive speech, what constitutes a compelling state interest, etc.—these all involve moral judgments, and moral judgments should, indeed, be grounded in the natural law rather than in, say, intuition, feelings, or popular opinion. But once we enter into the task of discovering what the natural law has to say on a given matter, it becomes clear that this task is not straightforward, either; there is no way to ensure that Amy Coney Barrett and Sonia Sotomayor will come to any closer agreement about the natural law than they will on the meaning of the Constitution. Indeed, there may be reason to suspect otherwise. (There is, of course, no guarantee that legislators will either, but they are elected and accountable to the "ordinary folk" in a way that life term-serving judges are not.)

Ultimately, this book provides an eloquent, powerful reminder of the ever-present morality behind legal and constitutional interpretation. Yet until we occupy the realm of the philosopher-king, it seems that the advantages of natural law reasoning are better felt in the arguments of legislators than in those of judges.

---

3 C.S. Lewis, Mere Christianity 6 (2001).

4 Thomas Aquinas, Summa Theologiae pt. III, q. 65, art. 1 co.

Wendell Bird, Religious Speech and the Quest for Freedoms in the Anglo-American World (Cambridge University Press, 2023). 350 PP.

*Book Review by Anton Sorkin**

Introduction

Many of us who hold to a Christian faith find ourselves in constant need to understand the changing perceptions of our beliefs in popular culture. From the "Golden Age" described by Alexis de Tocqueville in his *Democracy in America*—rich with visions of the architecture of associational life and religious conviction that too often marginalized non-Protestant convictions. To the roaring 1950s under Dwight D. Eisenhower that ushered in the decade of civil religion marked by a sense of optimism and displays of pietism that may have been more flash than substance.[1] To the heyday of the Religious Right's success under Ronald Regan in assuming the levers of political power that has become the quintessential cliché for intolerance and Christian overreach. To the recent expansion of protections for religion by the Supreme Court that ushered in the "new fourth era of American religious freedom" and a characteristic backlash defined by terms like "most favored nation," "structural preferentialism," or something more colorful like the Faustian portrayal of the Court selling its soul to the Christian Right.[2]

Whatever decade you pick in the history of American religion in the last hundred years, it is likely that you pick a time defined by both a renewal of religious speech in public life and a concomitant level of disdain from those who would rather keep religion private and personal. In the words of the great sociologist Robert Wuthnow, "[w]hether we are among those who think democracy was founded on religious principles, or are convinced that reasonable people would be better off putting religious convictions aside, the reality is that millions of Americans practice religion in one form or another."[3]

For my part, I hold closer to the former position: our democracy was indeed a product of the culmination of brilliant religious thinkers putting to paper and practice the vagaries of their religious convictions that they've unearthed in the study of Scripture and the application of reason to daily life. I believe that our constitutional republic and our human rights framework can never make sense without the contribution of Christian thinkers who have wrestled with the doctrines of justice from the moment of our rebellion in the garden to the faithful martyrs of Revelations 12. That is not an invitation to presume that our country is a Christian nation, but instead an invitation to explore with others how our nation was founded on the principles of faith in the theatre

* Director of Law Student Ministries, Christian Legal Society; Affiliate Professor, Trinity Law School.

1 *See* Martin E. Marty, The New Shape of American Religion (1958); *see also* William I. Hitchcock, The Age of Eisenhower: America and the World in the 1950s (2018) (good overview of the decade).

2 *See* John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom,* 74 U.C. Hastings L.J. 1813 (August 2023); Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty,* 108 Iowa L. Rev. 2237 (2023); Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion,* 91 U. Chi. L. Rev. (forthcoming 2024); Jay Michaelson, *The Supreme Court Sold Its Soul to the Christian Right,* Rolling Stone (June 30, 2023), https://www.rollingstone.com/politics/politicalcommentary/supreme-court-affirmative-action-abortion-lgbtqu-religious-right-1234781941/.

3 Robert Wuthnow, *Religious Diversity's Benefit for Democracy,* Canopy Forum (October 2022), https://canopyforum.org/2022/10/31/religious-diversitys-benefit-for-democracy/.

of political will and necessity.[4] The preeminent historian of law and religion, John Witte, Jr., recently noted that the very framework for our American constitutional order is greatly indebted to the work of religious thinkers, writing that by 1650, almost every right that would appear in the United States Bill of Rights had already been defined, defended, and died for by Calvinists.[5] His work in, e.g., *The Reformation of Rights*, has been instrumental in tracing this audacious claim, but now comes a volume from Wendell Bird that offers a definitive account of the contribution of Christian thinkers on the development of our most cherished liberties.

The Quest for Freedoms

For those who have never heard of Wendell Bird, he is one of the premier scholars on the history of the First Amendment, focusing much of his recent work on the revolution in freedoms of press and speech with volumes such as the *Press and Speech Under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign against Dissent* (2016) and *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act* (2020). With his new book, Bird delves deeper into the developments of our most cherished liberties by honing in on the history of the Christian church and its contribution to the Bill of Rights. In his owns words, *Religious Speech and the Quest for Freedoms in the Anglo-American World* [hereinafter "*Religious Speech*"] is an exercise in remembering "the vital role of Judeo-Christian religion in history . . . and particular its crucial role in the quest for freedom" (1).

The book is focused on six freedoms: freedom of speech and press, freedoms of the accused, freedom of higher education, and freedoms from slavery and discrimination. Each one enjoys its respective chapter and contains a catalog of primary sources used by Bird to trace the development of said freedom into modern times. Important concepts are introduced to lay a strong foundation for the origins of thought rooted in the Bible. For example, one key term Bird introduces to the reader is the use of *parrhesia* throughout chapter one covering the freedom of speech. As Bird explains, this Greek term is defined by a 1612 dictionary as "courage or liberty of speech" and later as "liberty or boldness of speaking" (24). Its importance is rooted in the biblical use of said term in, e.g., Paul's proclamation of the need to exercise a "boldness of speech,"[6] which the Reformers in England borrowed to assert their right to speak in opposition to the monarch's attempt to marginalize speech as a matter of "Grace rather than right" (29).

Along with key terms that galvanize the imagination, *Religious Speech* is a chronicle of devout people who advanced basic freedoms through their writing. In his chapter on the freedom of the press and the critical periods of instability, Bird introduces us to such characters as John Milton—typically known for his *Paradise Lost* and not his advocacy in the *Areopagitica*. Combatting the zeal of apologists for censorship who held dearly to the notion that a written work can lead astray the reader by putting "mischief into their heart" unto violence (63), Milton, writing in 1644, became "the first major advocate of freedom of press." Taking the (above) concept of *parrhesia*, Milton sought to extend the concept from "utterances to publications" (73). Listen to his language in the *Areopagitica:* "Let her and Fals[e]hood grapple; who ever knew Truth put to the wors[e], in a free and open encounter," "[g]ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties," and finally "hee who destroys a good Booke, kills reason it selfe." In Milton's advocacy we find the amalgamation of the privilege to speak with words of boldness to the corollary right to put those words in print.

And while Bird introduces us to the good in Milton, he also introduces us to the bad by way of the many censorship laws in England and to antagonists like William Laud, Thomas Hobbes, and the lesser known figure of Thomas Edward

4 *See, e.g.,* Kody W. Cooper & Justin Buckley Dyer, The Classical and Christian Origins of American Politics (2022); Christianity and Constitutionalism (Nicholas Aroney & Ian Leigh eds., 2022); The Oxford Handbook of Christianity and Law (John Witte, Jr. & Rafael Domingo eds., 2023).

5 John Witte, Jr., *The Protestant Reformation of Constitutionalism, in* Christianity and Constitutionalism 146 (Nicholas Aroney & Ian Leigh eds., 2022).

6 *See 2 Corinthians* 7:4; *Acts* 4:31 (ESV).

whose 1646 bestseller argued not only against the toleration of error, but called it the "grand designe of the Devil, his masterpiece & chief engine" (97). Like speech, Bird closes his chapter with the reminder that the freedom of the press throughout this time continued to have primarily a religious basis (115).

Interestingly, Bird also focuses on not just the intellectual history and the development of certain rights but on the application of deeply held convictions that demand formalization within the legal process. Most notable is the chapter on the criminally accused that focuses extensively on the role of John Lilburne and the Levellers in bringing popular demand and legal recognition for criminal defendants in their appeal to the broad majority of those rights enshrined in the Fourth through the Eighth Amendments (172). This theme also carries forth in the chapters on slavery and discrimination as Bird outlines the evidence showing not only the contribution of religious speech to the abolitionist movement led by the Quakers and Evangelicals in the eighteenth century, but also the role of religious speech in the twentieth century's Civil Rights Movement, this time led predominantly by the Black church in America. Seeing the contribution of the American church movement within the context of the entire book's focus on the major movements in England to advance the basic freedoms of speech, press, and criminal defense is an incredible journey, capped off by one more chapter on the role played by Christians to advance higher education.

In Bird's chapter on higher education, we see the creation of campuses from Oxford to Williamsburg in a refreshing narrative of the importance of religion to the foundation and nourishment of the western world (174). Here we see the indispensable role of the Catholic Church in advancing this movement in England focused primarily on the curriculum of theology and law (179). In America, too, we find the first three colleges (Harvard, William & Mary, Yale) rooted in a mission to be theological institutions in order to advance religion and learning. As evidence of this, Bird notes the "shocking" discovery that Yale was not only developed with an eye toward God, but also because the founders of Yale believed that Harvard had grown too tepid in its orthodoxy (200). This pattern continued into the other Ivy Leagues, with one small concession in the creation of the University of Pennsylvania because of the influence of Benjamin Franklin (211-12). As Bird summarizes at the end of the chapter, for 250 years after America's first college was established, "the predominant institution of higher learning in North America" was a "church-related institution" with Judeo-Christian elements. That predominance only began to change in the "last quarter of the last century" (214).

Conclusion

In *Religious Speech*, we see a book of record, tracing a direct line from the inspiration of Scripture to the language of the Bill of Rights. Bird has done his homework, and he has not aspired to hide that fact from his readers—filling the pages with not only historical and biographical material, but also an entirely separate and perhaps more indispensable body of references in his footnotes. In writing this book, Bird puts to shame those who would sever the American intellectual founding from the influences of Christianity—offering to posterity a rich, new landscape for the work that remains.

It was the poet H.W. Longfellow who once wrote that the work of the great and the small have its part. That "nothing useless is, or low, each thing in its place is best; and what seems but idle show, strengthens and supports the rest."[7] In the body of work that Bird provides, we see yet another layer of foundation undergirding the development of an artifice begun by Harold J. Berman and continued today by countless scholars who, not unlike the scientists of the Middle Ages, are driven by a deep commitment and a yearning to understand and share in the work that God is doing in the world. And while your part in all this might seem useless or low, rejoice in the fact that your Father who sees in secret will reward you.[8]

---

7 Henry Wadsworth Longfellow, *The Builders, in* Favorite Poems of Henry Wadsworth Longfellow 1 (1947).

8 *Matthew* 6:4.

Generous support for the
Journal of Christian Legal Thought
is provided by

PEPPERDINE UNIVERSITY
School of Law
Herbert & Elinor Nootbaar Institute
on Law, Religion, and Ethics

HANDONG INTERNATIONAL LAW SCHOOL

TLS TRINITY LAW SCHOOL
TRINITY INTERNATIONAL UNIVERSITY
CENTER FOR HUMAN RIGHTS

FAULKNER UNIVERSITY

The *Journal of Christian Legal Thought*
is a publication of Christian Legal Society.

CHRISTIAN LEGAL SOCIETY

ChristianLegalSociety.org

Special thanks to Ashley and Nick Barnett
for their generosity in making this *Journal* possible.