

CONTINGENCY AND CONTESTATION IN CHRISTIANITY AND LIBERALISM

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What is the relationship of Christianity to liberalism? Answers include: Liberalism is a product of the moral legacy of Christianity, such as the dignity of individual human persons, equality, rights, perhaps even some forms of democratic institutionalism. Or liberalism is a hostile reaction against Christianity by way of an autonomous individualism set against divinely ordained creatureliness and dependence, democracy against authority, egalitarianism against hierarchy. Or liberalism is in a *modus vivendi* relationship with Christianity and vice versa. Or perhaps there is something true about each of these answers.

Critiques of liberalism in law and politics come in waves. The liberal-communitarian debate of the 1980s marked by Robert Bellah's *Habits of the Heart*,¹ Alasdair MacIntyre's *After Virtue*,² and Michael Walzer's *Spheres of Justice*³ has given way to the current spate of anti- or postliberalism in Patrick Deneen's *Why Liberalism Failed*⁴ and the writings of Adrian Vermeule.⁵ Some of these critiques of liberalism have been expressly anchored in Christian or other theological perspectives and some in a more secular vein. Debates about liberalism have an ineliminable theological dimension, as noted by Ronald Beiner. "It is hard to appreciate the full contours of the [liberal-communitarian]

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1 ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (updated ed. 1996).

2 ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007).

3 MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

4 PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018).

5 *E.g.*, ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION* (2022).

debate,” Beiner writes, “without being aware of the degree to which it involves a Jewish-Catholic challenge to the ‘Protestantism’ of contemporary Kantianism (even if some of the spearheads of this Kantian revival are themselves non-Protestant).”⁶ Such critiques of liberalism capture an intellectual and cultural mood. But such debates about liberalism and Christianity have infrequently occurred within legal scholarship as such, so it is especially valuable that the *Notre Dame Law Review* has convened this Symposium of such prominent scholars to shed light on some legal dimensions of these debates.

The essays in this Symposium engage in recurring sets of issues, and here I wish to highlight four of them: (1) the relationship between liberalism and theological traditions; (2) the historically contingent and contested accounts of how liberalism and Christianity have developed over centuries in a relationship that has varied from conciliatory to hostile and what implications that account has for the history of ideas; (3) debates in legal scholarship that are illuminated by posing broader questions about liberalism, Christianity, and constitutionalism, and in particular the relationship of liberalism to different social forms, including religious institutions; and (4) the renewed interest in the relationship between liberalism and Christianity in light of a new generation of critics of liberalism, whether Catholic integralists or other types of anti-liberalism, and the question—posed forcefully at the end of Steven Smith’s paper—of if not liberalism, then what else?⁷

Several of the essays offer a welcome engagement with particular theological traditions. Much of the discussion of religion in political theory and in law deals in abstractions, treating religion as a black box of more or less obscure and unreasonable beliefs. Some of that abstraction about religion in law is well-founded in a reluctance by courts, for example, when adjudicating religious free exercise claims to engage in scrutiny of religious belief. Even if that reluctance leads to a theologically dissatisfying category of “religion,” judges (at least in American constitutional law) are in a poor position to do any more. The essays in this Symposium, however, consider theological concepts such as eschatology, sin, providence, and redemption and thereby offer a corrective to such abstract regard for religion generically.

The essays that do offer such an engagement with theology vary in their ecclesial perspectives and in the range of questions opened up by their foray into theological terrain. Kathleen Brady’s essay uses modern Catholic social thought to offer a criticism of Catholic integralism, though much remains to be said about how to read the various sources

6 RONALD BEINER, WHAT’S THE MATTER WITH LIBERALISM? 16 n.2 (1992).

7 Steven D. Smith, *Christians and/as Liberals?*, 98 NOTRE DAME L. REV. 1497, 1518–22 (2023).

in Catholic political thought.⁸ In Brady's essay, we see an example of how those sources can be read in liberal or conservative ways. One reading emphasizes the "dynamic" (in Brady's term) evolution of Catholic social doctrine in the twentieth century to embrace liberal democracy and the pluralism of modernity with a concomitant commitment to religious freedom in the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis Humanae*.⁹ A competing reading of those sources, though, emphasizes the steady commitment of the Catholic social tradition to the authority of the Church and a suspicion—most prominent in the nineteenth century and in the wake of the French Revolution, but still present in modern Catholicism—of forms of liberalism that are hostile to Catholicism's claims about human persons and communities.¹⁰

To take just one theme in that discussion, a significant aspect of the current debates about liberalism and Christianity is how best to understand the common good. Indeed, Adrian Vermeule's most prominent contribution to the current debate is a book entitled *Common Good Constitutionalism*.¹¹ So also Patrick Deneen's critique of liberalism invokes common good–related considerations about community, family, religion, and economics.¹² Brady's essay responds by offering a more liberal understanding of the common good based in modern Catholic social teaching, an understanding that places more emphasis on how the common good can be squared with democracy, human rights, pluralism, a free market economy, and religious neutrality.¹³ So also Melissa Moschella's essay draws on Catholic social thought and the so-called "new natural law" account of the political common good and subsidiarity to argue both for a commitment to a limited state (defending something close, although I think not identical, to the limited constitutional state of liberalism) and for the rights of parents to direct the upbringing of their children.¹⁴

The essay by Brandon Paradise and Fr. Sergey Trostyanskiy expands the range of ecclesial perspectives to include Orthodox

8 See Kathleen A. Brady, *Catholic Liberalism and the Liberal Tradition*, 98 NOTRE DAME L. REV. 1469 (2023).

9 *Id.* at 1479–80 (discussing SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ: DECLARATION ON RELIGIOUS LIBERTY (1965), reprinted in I VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 799 (Austin Flannery ed., 1975)).

10 *Id.* at 1480–91.

11 VERMEULE, *supra* note 5.

12 DENEEN, *supra* note 4, at 17, 34, 40–41, 58, 76, 82.

13 Brady, *supra* note 8, at 1487–91.

14 Melissa Moschella, *Natural Law, Parental Rights, and the Defense of "Liberal" Limits on Government: An Analysis of the Mortara Case and Its Contemporary Parallels*, 98 NOTRE DAME L. REV. 1559 (2023).

Christianity.¹⁵ Paradise and Trostyanskiy helpfully call attention to the implicit eschatological claims of liberalism in some forms and show how that vision is similar in some respects and quite distinct in others from Orthodoxy.¹⁶ In addition to the 2007 collection of essays on Orthodox Christianity edited by John Witte and Frank Alexander,¹⁷ one hopes that Paradise and Trostyanskiy's contribution to this Symposium will encourage further work at the intersection of Orthodoxy and legal scholarship. In particular, a deeply contested issue beyond the relationship of liberalism to Orthodoxy that Paradise and Trostyanskiy's essay opens up to is the relationship among nationalism, liberalism, and Orthodox Christianity across different settings in which Orthodox Christians are a significant percentage of the population and those settings (such as the United States) where Orthodox Christians are a small minority.¹⁸

Several of the essays show how debates in contemporary legal scholarship in law and religion or other fields can be enriched and informed by considering broader questions about liberalism. Amy Sepinwall's essay on complicity and compelled speech claims,¹⁹ Nathan Chapman's essay on constitutional rights,²⁰ and Melissa Moschella's essay on parental rights²¹ all take up current constitutional disputes. These essays also prompt a set of questions about liberalism and different constitutional forms. Modern liberalism manifested itself in political forms that were often individualistic based in self-determination and autonomy: rights, equality, freedom of thought, religious freedom, and later a right to vote.²² But modern liberty is also about institutional limits on the state, as we see with some early uses of liberty that were primarily institutional, such as liberty of the church, liberty of Parliament, and the liberty of the university.²³

Nathan Chapman persuasively argues that however much we might imagine that legal discourse and constitutional interpretation proceed through secular forms, there is an abiding American civil

15 Brandon Paradise & Sergey Trostyanskiy, *Liberalism and Orthodoxy: A Search for Mutual Apprehension*, 98 NOTRE DAME L. REV. 1657 (2023).

16 *Id.* at 1670–95.

17 THE TEACHINGS OF MODERN ORTHODOX CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (John Witte Jr. & Frank S. Alexander eds., 2007).

18 See Paradise & Trostyanskiy, *supra* note 16, at 1692.

19 Amy J. Sepinwall, *Tender and Taint: Money and Complicity in Entanglement Jurisprudence*, 98 NOTRE DAME L. REV. 1623 (2023).

20 Nathan S. Chapman, "The Arc of the Moral Universe": *Christian Eschatology and U.S. Constitutionalism*, 98 NOTRE DAME L. REV. 1439 (2023).

21 Moschella, *supra* note 15.

22 See Smith, *supra* note 7, at 1502–04.

23 See Richard W. Garnett, "The Freedom of the Church": (*Towards*) an *Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

religion that also informs such topics.²⁴ In his example, the “moral destiny” of America to achieve ever-increasing forms of justice, equality, and liberty shaped a good deal of the mid- to late-twentieth century expansion of constitutional rights.²⁵ Based on a moral reading of the Declaration of Independence and the Constitution, the Warren Court (and particularly Justice Brennan, who made the argument for such a moral reading most extensively) issued landmark decisions on racial equality (most importantly *Brown v. Board of Education*²⁶) and incorporated the provisions of the Bill of Rights against the states.²⁷ In Chapman’s telling, this effort went beyond mere constitutional adjudication to a set of claims that were based in Liberal Protestantism’s sense of moral urgency and idealism.²⁸

A question that Chapman’s essay suggests is how many other such examples of his eschatological civil religion we might find in other periods of American history and the ways it has played out in such familiar examples as Abraham Lincoln’s Second Inaugural Message.²⁹ Alexis de Tocqueville famously observed that in the Americans there was a love of the spirit of liberty and the spirit of religion.³⁰ Chapman’s provocative argument in this Symposium invites us to ponder the sources of those twin loves and the legal implications that flow from them. One also wonders how secularizing trends will shape the next generation of constitutional discourse. Chapman notes earlier versions of this secular civil religion (in the writings of John Dewey, for example),³¹ but the sharp decline in affiliation to the Mainline Protestant churches has already had profound implications for the shape of American religion and politics.³² Chapman’s essay prompts us to ask about the implications of that shift for American constitutional law as well.³³

Amy Sepinwall’s essay on complicity claims grapples with fundamental questions about why such claims are sometimes successful and why claims based on forced payment or subsidies are especially

24 See Chapman, *supra* note 21.

25 See *id.* at 1440, 1451–53, 1465–66.

26 347 U.S. 483 (1954).

27 See Chapman, *supra* note 21, at 1447–48.

28 See *id.*

29 See *id.* at 1441 n.4, 1451–53.

30 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 25 (Henry Reeve trans., New York, Adlard & Saunders 1838).

31 Chapman, *supra* note 21, at 1460–61.

32 See Gene Zubovich, *Liberal Protestants and the Polarization of the U.S.*, RELIGION & POL. (Apr. 19, 2022), <https://religionandpolitics.org/2022/04/19/liberal-protestants-and-the-polarization-of-the-us/> [https://perma.cc/7RN6-ZFNX].

33 See Chapman, *supra* note 21, at 1463–68.

strong.³⁴ On this question, there are resources in Christian theology, such as the rich tradition in Catholic moral theology exploring the metes and bounds of cooperation.³⁵ In that tradition, cooperation is broadly divided between formal cooperation, in which an agent shares in the intention of some wrongdoing, and material cooperation, in which an agent (merely) provides assistance (financial or otherwise) to a wrongdoer.³⁶ Formal cooperation—precisely because it shares in the aim of bringing about some evil—is always morally impermissible, while material cooperation may be tolerable where the assistance to wrongdoing is remote.³⁷ Much of the discussion about cooperation in Catholic moral theology seeks to parse when material cooperation is sufficiently remote that one may be absolved of wrongdoing and when it is too proximate or direct.³⁸ Justice Alito’s opinion in *Burwell v. Hobby Lobby* cited to works on cooperation in support of the claim by the owners of Hobby Lobby that paying for health insurance that subsidized the costs of methods of contraception to which they had sincere objections sufficiently implicated them in the wrongdoing.³⁹ One way of taking the argument in Sepinwall’s essay further would be to explore to what extent the literature on cooperation maps onto complicity or compelled speech claims.

Andrew Koppelman’s essay is an extended rejoinder to the post-liberals, particularly Patrick Deneen.⁴⁰ In Koppelman’s telling, Deneen misunderstands liberalism as a matter of history, politics, and economics. Koppelman prefers an account of liberalism that is more historically contingent, based, as he puts it borrowing from Edmund Fawcett, in political practice more than in political theory.⁴¹ He also draws on the writings of Catholics sympathetic to liberalism—notably Michael Novak—to make a case for liberalism even from within Catholicism.⁴² Here, as already noted about Kathleen Brady’s argument against Catholic integralism, one suspects that the antiliberals will not be persuaded, for much of their argument is directed against the views

34 See Sepinwall, *supra* note 20.

35 See CATECHISM OF THE CATHOLIC CHURCH para. 1868 (2d ed. 2000).

36 See HENRY DAVIS, MORAL AND PASTORAL THEOLOGY: A SUMMARY 36 (1952).

37 *Id.*

38 *Id.*

39 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 n.34 (2014) (first citing David S. Oderberg, *The Ethics of Co-operation in Wrongdoing*, in MODERN MORAL PHILOSOPHY 203, 203–28 (Anthony O’Hear ed., 2004); then citing THOMAS J. HIGGINS, MAN AS MAN: THE SCIENCE AND ART OF ETHICS 353, 355 (1949); and then citing DAVIS, *supra* note 38, at 341).

40 Andrew Koppelman, “*It Is Tash Whom He Serves*”: Deneen and Vermeule on Liberalism, 98 NOTRE DAME L. REV. 1525 (2023).

41 *Id.* at 1530–32.

42 *Id.* at 1534.

of Novak (or John Courtney Murray or Richard John Neuhaus)⁴³ that liberalism and Catholicism can be so readily reconciled.⁴⁴

Koppelman's essay prompts further questions or observations about intellectual history and the relationship of liberalism to moral formation. In the discussion in some of the papers of how liberalism came about and how that genealogical story is set within, against, or alongside Christianity, it strikes me that there are potential extremes (into which none of the authors fall, I should add) of what we might term materialism and idealism in intellectual history and in the relation of theory to practice and history to philosophy. Some of the challenge in writing clearly and persuasively about such topics is the sheer diffusion of different academic disciplines and expertise in play. The danger with an overly material story is to render ideas merely epiphenomenal, while the real "facts" to consider are economic or other cultural and political forces. The danger with idealism, by contrast, is to treat the classical sources of liberalism as if they were texts that fell out of the sky, a revolutionary injection of new ideas about consent and authority by, say, Thomas Hobbes or John Locke that were unrelated or peripheral to the political and social life of seventeenth-century England. Koppelman's engagement with Deneen puts these issues before the reader and encourages us to perceive rightly (using a quote from Iris Murdoch on that point) the reality around us, but here liberals such as Koppelman and antiliberals such as Deneen will once again have sharp disagreements about just what that reality tells us.⁴⁵

Furthermore, it seems to me that a challenge for Koppelman's account is the ready assertion of freely choosing agents who, thanks to the blessings of liberalism, can decide about matters of family, sexuality, religion, and much else without the encumbrances of political or religious authority. But to that view the critics of liberalism might ask whether the political and cultural forces necessary for the fostering of such agents will inevitably undermine traditional forms of community, including religious communities. For example, the argument by the Old Order Amish in *Wisconsin v. Yoder* against a Wisconsin mandatory-schooling law was that compliance with that requirement would jeopardize the ability of the Amish to sustain the type of community that their religion required.⁴⁶ The Court agreed with their argument in an opinion that made much of the particular characteristics of the

43 See JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960); Richard John Neuhaus, *The Liberalism of John Paul II*, FIRST THINGS, May 1997, at 16.

44 See *supra* text accompanying notes 8–11.

45 Koppelman, *supra* note 42, at 1526, 1526–36 (quoting IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 57 (Routledge 2014) (1970)).

46 406 U.S. 205, 209–12 (1972).

Amish,⁴⁷ but there has been a long line of liberal discomfort (beginning with Justice Douglas's lone dissent) about the holding in *Yoder* and wishing to cabin its implications for religious and family authority.⁴⁸ Here, Melissa Moschella's contribution about parental rights seems a necessary complement to Koppelman's valorization of autonomous and free-choosing individuals.⁴⁹

Paul Billingham's essay provides a rich account of how one might approach the relationship of liberalism and Christianity not by way of abstract considerations about each term but rather by way of two concrete examples to fill out what is meant by offering "accessible" reasons.⁵⁰ Moving past the now-somewhat-sterile debate about "public reason" launched primarily by publication of John Rawls's *Political Liberalism*, Billingham seeks to show how both secular and religious participants in the public square could engage in persuasion and argument.⁵¹ His examples of euthanasia and usury combine moral arguments that are distinctively theological as well as arguments that are accessible to those outside of a religious tradition.⁵² Such use of particular examples is a worthy corrective to the tendency to argue at a high level of political theorizing in discussing the relationship between liberalism and Christianity. A question for another day is how paradigmatic the examples Billingham uses are. There is also the often-noted phenomenon of deep political division in many contemporary liberal democracies, a divisiveness that may be leading ever more to failures of the ability of citizens to persuade one another through public argument but instead through the assertion of brute power.⁵³ As Alasdair MacIntyre argued over forty years ago, the shrillness of much of modern political debate is a product of the incommensurable premises that participants bring to such debate.⁵⁴ Billingham's confidence that there can be on contested issues a mutual respect and tolerance across different ideological and religious divides is admirably hopeful, though one worries if unrealistically so.⁵⁵

Finally, Steven Smith's essay poses most sharply the question that, if liberalism and Christianity are in fact in opposition or if liberalism has in some sense failed, then what?⁵⁶ But before he gets to that

47 *E.g., id.* at 222, 224–26, 234.

48 *See, e.g., id.* at 241–49 (Douglas, J., dissenting in part).

49 *See supra* text accompanying note 15.

50 Paul Billingham, *Religious Political Arguments, Accessibility, and Democratic Deliberation*, 98 NOTRE DAME L. REV. 1595, 1600 (2023).

51 *See id.* at 1597.

52 *See id.* at 1604–17.

53 *See, e.g.,* MACINTYRE, *supra* note 2, at 244–55.

54 *See id.*

55 *See id.* at 252.

56 *See* Smith, *supra* note 7, at 1518–22.

question, Smith's essay—like much of his earlier work in such books as *The Disenchantment of Secular Discourse*;⁵⁷ *The Rise and Decline of American Religious Freedom*;⁵⁸ *Pagans and Christians in the City*;⁵⁹ and *Fiction, Lies, and the Authority of Law*⁶⁰—combines a genealogical account of a set of contemporary political and legal forms with a critical suspicion of conventional wisdom about them.⁶¹ Smith helpfully distinguishes liberalism from modernity and then notes the harmonies, divergences, and conflicts between Christianity and liberalism.⁶²

In his discussion of divergences, Smith suggests an irenic way of understanding competing understandings of the church. From the perspective of liberalism, churches are a voluntary association of believers alongside any other such social form of association.⁶³ For many religious believers, however, their commitments to a particular religious community are not on a par with, say, joining a book club and are instead a response to a call from God and an experience of radical conversion (although in fairness, the likely view even among religious believers in contemporary America is that membership in a church or other religious community is primarily a matter of voluntary choice). But Smith writes that notwithstanding this divergent understanding of the church, Christians need not find the liberal view “objectionable or unavailable for Christian use.”⁶⁴

But Smith's essay and my response to the Symposium end with the looming question of what the alternatives are to liberalism if it has failed or is finally irreconcilable with Christianity.⁶⁵ The answers to that question surveyed by Smith (medieval Christendom, for example) all seem implausible.⁶⁶ And here I return again to the significance of historical contingency and practice for understanding the relationship between liberalism and Christianity. As argued by Charles Taylor in *Sources of the Self*⁶⁷ and *A Secular Age*,⁶⁸ Christianity set the stage for liberalism and modernity, and liberalism and modernity are a dialectical response to Christianity amid which we are still living.

57 STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

58 STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014).

59 STEVEN D. SMITH, *PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* (2018).

60 STEVEN D. SMITH, *FICTIONS, LIES, AND THE AUTHORITY OF LAW* (2021).

61 See Smith, *supra* note 7, at 1500–1508.

62 *Id.* at 1508–18.

63 *Id.* at 1512.

64 *Id.* at 1513.

65 *Id.* at 1522–23.

66 *Id.* at 1518–22.

67 CHARLES TAYLOR, *SOURCES OF THE SELF* (1989).

68 CHARLES TAYLOR, *A SECULAR AGE* (2007).

