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Religious Antiliberalism and the First Amendment

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Article

Religious Antiliberalism and the First Amendment

Richard Schragger[†] and Micah Schwartzman^{††}

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INTRODUCTION

The American law of church and state is in the midst of a significant transformation. In the area of government funding for religious organizations, the Supreme Court has moved from a rule that generally disallowed direct government funding of churches to a rule that requires it in certain circumstances.¹ In relation to government religious expression, the Court has suggested that regulating sectarian speech in public settings might violate free exercise rights when previously it had held that the Establishment Clause limits government speech.² And, in the context of religious accommodations, the Court for the first time extended the right of free exercise to for-profit corporations.³ So, too, the Court for the first time invalidated application of a civil rights law to a for-profit business,⁴ raising significant questions about whether religious exemptions might be used to undermine decades of precedent governing equal access to the market.⁵

The most immediate cause of these legal developments is the changing composition of the Supreme Court.⁶ Coinciding

1. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 723–30 (2002); Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133 (2017); Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost?*, in AM. CONSTITUTION SOC'Y, SUPREME COURT REVIEW 2016–2017, at 131 (2017). Compare *Lemon v. Kurtzman*, 403 U.S. 602, 606–07 (1971) (finding statutes that provide financial support to religious schools unconstitutional), with *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2025 (2017) (allowing a church to receive public benefits).

2. Compare *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019) (holding that using a cross in a WWI memorial on public land is constitutional), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (holding that a town beginning board meetings with a prayer is not a violation of the Constitution), with *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851, 881 (2005) (holding that the display of the Ten Commandments in a courthouse violates the Constitution when the purpose for hanging them is religious).

3. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

4. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

5. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 154 (2018); Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 831–34 (2019); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

6. Justice O'Connor's retirement and replacement by Justice Alito has moved the Court's Religion Clause doctrine visibly to the right. Unlike Justice O'Connor, Justice Alito has never voted to limit government support for religion

with recent judicial appointments, however, is an emerging intellectual and ideological critique of the twentieth century church-state settlement. We call this critique *religious antiliberalism*. We argue that the Court's Religion Clause jurisprudence has begun to reflect certain aspects of this critique, that the twentieth century church-state settlement is unstable, and that antiliberal views are likely to influence the development of legal doctrine going forward.

The history of antiliberalism can be traced to counter-Enlightenment reactions to the emergence of liberal political theory and liberal institutions, especially in the aftermath of the French Revolution.⁷ But the more recent rise of populist and authoritarian regimes worldwide has coincided with renewed criticisms of liberalism, especially from religious conservatives.⁸ To be sure, scholars and partisans on both the left and the right have long

under the Establishment Clause, *see Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring) (rejecting Establishment Clause challenge to legislative prayer practice); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (dismissing case for lack of taxpayer standing to challenge tax credits for violating establishment clause); *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 592–93 (2007) (restricting taxpayer standing to raise Establishment Clause challenges), and, until this Term, he never voted to reject a religious exemption claim, *see Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring) (joining Justice Gorsuch's opinion that would grant free exercise challenge to application of state public accommodations law); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (granting Religious Land Use and Institutionalized Persons Act exemption from prison grooming policy); *Hobby Lobby*, 573 U.S. at 688–91 (granting exemption under the Religious Freedom Restoration Act to for-profit corporation from contraception mandate); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198–99 (2012) (Alito, J., concurring) (grounding the ministerial exception to antidiscrimination law in the Religion Clauses). *But see Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (mem.) (rejecting a Muslim prisoner's Establishment Clause challenge to Alabama's practice of allowing a Christian chaplain to administer last rites within an execution chamber but prohibiting Islamic clergy from doing the same).

Justice Kennedy's retirement and replacement with Justice Kavanaugh will also likely contribute to the growing alignment of Religion Clause doctrine with the views of social conservatives, which has been a long-term goal of a vocal faction within the Republican Party. *See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2544–52 (2015) (discussing political mobilization by religious conservatives within the Republican Party).

7. *See generally* STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* (1993) (discussing the origins and history of antiliberal political thought).

8. *See infra* Part II.

berated liberalism for its supposed failures. For Marxist and socialist critics, classical liberalism stands for the exploitative market economy with its emphasis on individual property rights: the invisible hand of Adam Smith turned into the industrial economy. Its neoliberal variant is criticized for causing massive economic inequality.⁹ For non-Marxist critics, the rise of liberalism is blamed for the decline of religion, the fraying of traditional morality, the rejection of communal ties, the epidemic of social alienation, the obsession with materialism and consumerism, and the rise of modern statism with its inevitable collapse into fascism or communism.¹⁰

Liberalism is often ill-defined. Most critics agree, however, that liberalism is a political, economic, and social theory of personal autonomy, rights (property and otherwise), a distinction between public and private spheres, religious toleration (if not religious neutrality), and the rejection of rule based on inherited authority and tradition. John Locke, Adam Smith, James Madison, Immanuel Kant, and John Stuart Mill feature prominently within the liberal tradition.¹¹ John Rawls is the most important twentieth-century liberal philosopher.¹²

Antiliberalism is a comprehensive critique. It is not restricted to any one area of law, politics, or society. In this Article, however, we examine the confluence of antiliberal thought and the changing face of church-state jurisprudence, where religious

9. See, e.g., WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 28–29 (2015); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 237–70 (Arthur Goldhammer trans., President & Fellows of Harvard Coll. 2014) (2013); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 20–21 (2014).

10. See, e.g., PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018); RYSZARD LEGUTKO, THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES (2016); STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018).

11. See JOHN GRAY, LIBERALISM (1986); ALAN RYAN, THE MAKING OF MODERN LIBERALISM (2012); Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987); Gerald Gaus et al., *Liberalism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 22, 2018), <https://plato.stanford.edu/archives/spr2018/entries/liberalism/> [<https://perma.cc/2VLZ-TAFF>].

12. See Samuel Freeman, *Introduction* to THE CAMBRIDGE COMPANION TO RAWLS 1 (Samuel Freeman ed., 2003); Jon Mandle & David A. Reidy, *Introduction* to A COMPANION TO RAWLS 1 (Jon Mandle & David A. Reidy eds., 2014). See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

antiliberalism might naturally find a home. Antiliberal thought has a long pedigree, and our main purpose here is neither to recover nor to critique it, but rather to show how certain forms of criticism inspired by it might be relied upon to justify shifts in the doctrine of church and state. That doctrine has become more favorable toward religion, especially Christianity, at least with respect to winners and losers in the Supreme Court.

Our focus here is on the revival of non-Marxist, religious antiliberalism. These critics of liberalism tend to use language that suggests that liberalism *acts* as an agent—that it is responsible for bringing about changes in policy and institutions. Antiberals often make causal claims about what liberalism has wrought, but, as Cass Sunstein has recently observed, liberalism is a set of ideas, not an agent.¹³ The same is true of antiliberalism. Thus, our focus is mainly conceptual and normative, rather than causal. Our claim is that certain political and legal changes can be understood in terms of antiliberal ideas, not that those ideas *caused* the relevant changes.

If antiliberal thought does not provide a causal explanation for recent political and legal developments, it can nevertheless serve to justify those developments. In relation to the law of church and state, the new antiliberalism's doctrinal goals are often consistent with the goals of many religious conservatives more generally, including broad autonomy for religious institutions and persons through religious exemptions from general laws; public funding of churches and religious organizations through vouchers or direct grants; acceptance of majoritarian public religious expression and displays, including in some cases, a return to school prayer; and the legitimacy of state-enforced moral codes based on religious principles.¹⁴

Some of these changes in legal doctrine can be interpreted and defended under liberal principles.¹⁵ A liberal political order

13. See Cass R. Sunstein, *Ismism, Or Has Liberalism Ruined Everything?* 6 (Harvard Pub. Law, Working Paper No. 19-19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372364 (“[L]iberalism is not a person or an agent. It is a constellation of ideas.”).

14. See SMITH, *supra* note 10, at 267–82, 304–33; STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 142–58 (2014).

15. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 201–04 (2007) (giving a qualified defense of equal funding of religious organizations under a liberal egalitarian theory); IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, AND*

is compatible with a range of permissible church-state relations, including regimes that provide legal exemptions for conscientious objectors¹⁶ and funding on equal terms for religious groups.¹⁷ For that reason, we expect that church-state adjudication will continue to be dominated by principles of fairness, neutrality, and equality. The current Court has not rejected the language of liberalism, at least not rhetorically.¹⁸

Nevertheless, we argue that the application of liberal principles—including non-discrimination, religious neutrality, and requirements of private choice—is under significant stress. While particular doctrines governing religious exemptions, state funding, or government speech might be justifiable along liberal lines, the overall pattern and trajectory of the emerging church-state legal regime conflicts with liberal values and commitments. There is an inescapable sense that even bedrock principles—that government cannot favor one religion above others, for instance¹⁹—are subject to revision in light of criticisms that arise from a very different intellectual tradition. For that reason, the future of the Court’s church-state jurisprudence is in question. What will the doctrine look like in the coming decades? Re-

RELIGIOUS PEOPLE 54–61 (2014) (justifying the ministerial exception for religious organizations on the basis of the secular state’s incompetence to decide ecclesiastical questions); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 347–49 (1996) (defending religious exemptions and equal funding on grounds of religious neutrality).

16. With respect to religious exemptions, one of us has argued that a regime that also extends exemptions to nonreligious claims of conscience can be defended on liberal grounds. Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099–101 (2014); see also CÉCILE LABORDE, LIBERALISM’S RELIGION 34–35, 203–25 (2017); cf. NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 76–77 (2017) (arguing constitutional law requires, in some situations, religious exemptions to be extended to nonreligious actors to preserve equality). But exemptions for religious and conscientious objectors must be limited so that they do not impose significant burdens on third parties. Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781 (2017–18).

17. See Cécile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 J. POL. PHIL. 67, 67 (2013) (arguing that political liberalism, at least in its received form, is indeterminate about many controversies involving separation and disestablishment).

18. See *infra* Part III.

19. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); see also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1119–20 (2006).

ligious antiliberalism gives us a clue, for it seems to be an ascendant voice, in part because of the Court's increasingly conservative trajectory.

This Article makes three contributions: theoretical, doctrinal, and political. First, it describes four strands of religious antiliberalism. Some versions may be compatible with disestablishment, though others are frank in their advocacy of a religious state. All share a deep distrust of the Court's twentieth century church-state settlement.²⁰ Second, the Article discusses the conceptual incoherence of the Court's contemporary church-state doctrine, with special attention to the Court's recent cases involving the Religion Clauses of the First Amendment. We argue that the critique of liberalism provides resources to a newly conservative court seeking to remake constitutional doctrine. Antiliberal thinkers are explicit about this project, and their critiques are often directed at the Court. Third, the Article considers the future of church-state separation as a matter of political economy. The global critique of liberalism is gaining traction as liberal democratic regimes around the world are under threat from populist and reactionary forces, including in the United States.²¹ We argue that the fact of American religious pluralism—which is commonly invoked as the guarantor of disestablishment—will not halt the political and doctrinal momentum toward Christian preferentialism.

Part I sets the stage by describing the basic contours of a liberal account of church and state. Such an account relies on a distinction between religious and secular law and demands state neutrality among religious denominations and between believers and non-believers. For many readers, these liberal commitments will be familiar, though how they have been applied in specific legal controversies has always been contentious.

Part II then introduces the critics, tracing the antiliberal tradition in church and state, with specific focus on recent commentary pertinent to the law of religious freedom. A recurring theme in antiliberalism's revival is that liberalism is a "religion"

20. See *infra* Part II.

21. See ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018); WILLIAM A. GALSTON, ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY (2018); JAN-WERNER MÜLLER, WHAT IS POPULISM? 50–60 (2016).

that generates its own orthodoxy.²² On this account, disputes over the Religion Clauses do not pit religious traditionalists against a secular state but instead involve a face-off between two religious traditions. Church-state doctrine thus needs to be reimagined. Some argue that, at a minimum, a new bifurcation between church and state has to be constructed based on institutional spheres of authority, with churches as sovereign powers independent of the state.²³ At the more radical extreme, some claim that we should reject the entire idea of church-state separation in favor of an explicitly religious state.²⁴

Part III describes how the Supreme Court has changed the doctrinal valence of liberal principles in church-state jurisprudence over the course of the last quarter century. Recent decisions under the Religion Clauses, including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*²⁵ and *Trump v. Hawaii*,²⁶ recite the themes of “neutrality,” “general applicability,” “equal treatment,” and “animus,” but how those concepts have been applied has shifted significantly over time. Of course, the terminology of fairness and impartiality has always been contested. This is particularly so in Religion Clause jurisprudence, where the Court has sought to maintain neutrality between religious actors and their secular counterparts while

22. See, e.g., SMITH, *supra* note 10, at ix–x; Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism> [<https://perma.cc/9U44-GFMX>] (reviewing LEGUTKO, *supra* note 10).

23. See Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 249, 249–50 (Austin Sarat ed., 2012); see also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008); Paul Horwitz, *Church as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

24. See Thomas Pink, *In Defense of Catholic Integralism*, PUB. DISCOURSE (Aug. 12, 2018), <https://www.thepublicdiscourse.com/2018/08/39362/> [<https://perma.cc/U8NA-KMQJ>]; Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy> [<https://perma.cc/HY34-YD3P>]; see also Graham Walker, *Illusory Pluralism, Inexorable Establishment*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 111, 118–23 (Nancy L. Rosenblum ed., 2000).

25. 138 S. Ct. 1719 (2018).

26. 138 S. Ct. 2392 (2018).

simultaneously preserving religion's favored status.²⁷ The new religious antiliberalism does not solve this dilemma; indeed, it rejects the enterprise altogether.

As doctrine collapses, what takes its place? Part IV addresses the future of church-state jurisprudence in light of the antiliberal ascendance. Here we treat antiliberalism as both an intellectual critique and a political movement. The conventional political economy story suggests that in a religiously pluralistic society where Protestant-Catholic divisions are no longer dominant, the public will support evenhanded funding of religious organizations but not overt government endorsement of religion or religious preferentialism.²⁸ The Court's doctrine, on this view, tends to follow social fault lines.

But this story no longer captures the terrain of the religious culture wars. First, the response to radical Islam and the backlash against Muslim and other forms of ethnic migration has fueled the rise of Christian nationalism across western societies, including in the United States.²⁹ Second, in response to the sexual revolution and the recent recognition of LGBT rights, evangelicals, conservative Catholics, and other religious traditionalists have joined forces to advance a conception of religious liberty that they perceive to be under existential threat.³⁰ These social conditions have created fertile ground for an antiliberal revival. For the first time in more than a half century, it is possible to imagine the Court clearing a doctrinal path and opening the way toward a more robust form of religious—and, more specifically, Christian—preferentialism.

27. There is now a robust literature on the question of whether religion warrants special benefits and special burdens under the First Amendment. Compare, e.g., EISGRUBER AND SAGER, *supra* note 15, and LABORDE, *supra* note 16, and BRIAN LEITER, WHY TOLERATE RELIGION? (2012), and Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012), with, e.g., KATHLEEN BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RE-THINKING RELIGION CLAUSE JURISPRUDENCE (2015), and ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013), and Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017).

28. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282–83 (2001).

29. See *infra* Part IV.B.2.

30. See *infra* Part IV.B.1.

I. LIBERALISM AND CHURCH-STATE SEPARATION

Before discussing religious antiliberalism, we should begin by briefly describing what we take to be the core characteristics of a liberal account of church and state. This will help us understand the various attacks on liberalism and how those attacks implicate legal doctrine.

Though liberalism is a highly contested concept, we understand it at a minimum to require that the state not concern itself with the salvation of its citizens. Following John Locke, the liberal state does not seek to coerce belief.³¹ Religious belief is the domain of individual conscience.³² The liberal state also does not treat citizens differently on account of their religious affiliation or belief. Citizens are equal before the law regardless of their religious practice.³³ This means that the state may not favor some religious believers over others, especially in the distribution of public benefits and burdens.³⁴ And finally in a liberal state, there is a distinction between secular and religious law. The former operates in public and involves state coercion. The latter operates in private and, though it might involve private pressure, it cannot be enforced by the state. The state may not adopt religious law or become an arm of a particular religious denomination.³⁵

31. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 53–56 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689); see also Micah Schwartzman, *The Relevance of Locke's Religious Arguments for Toleration*, 33 POL. THEORY 678, 690–93 (2005) (discussing Locke's claim that sincere religious belief cannot be coerced). For Locke's influence on the American tradition of religious freedom, see DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 89–95 (1986); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 373–78 (2002).

32. See RAWLS, A THEORY OF JUSTICE, *supra* note 12, at 205–16 (arguing for “equal liberty of conscience” and rejecting “[t]he notion of a confessional state”); RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 310–15; see also AMY GUTMANN, IDENTITY IN DEMOCRACY 151–91 (2003); MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 73–106 (1968); JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 62–64 (2011); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19–25 (2008).

33. EISGRUBER & SAGER, *supra* note 15, at 15; TEBBE, *supra* note 16, at 72–73.

34. See RAWLS, A THEORY OF JUSTICE, *supra* note 12, at 212 (“The state can favor no particular religion and no penalties or disabilities may be attached to any religious affiliation or lack thereof.”).

35. See RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 62; JOHN RAWLS,

These basic commitments to the separation of church and state are mainly a product of the Enlightenment. The effort to separate the state and religion was in part a reaction to the European wars of religion between Protestants and Catholics.³⁶ Basic principles of religious toleration, if not full civic equality, found early support in some European states, like the Netherlands.³⁷ And these principles carried over into the nascent United States.³⁸ Although states had established churches well into the nineteenth century, the federal government was founded without an official church.³⁹ The Constitution did not impose any religious test for office or place civil disabilities on individuals on account of their faith.⁴⁰ This national experiment, which promised equal status to all religious believers, whatever their denomination, was unique to the United States.⁴¹

The Idea of Public Reason Revisited, in COLLECTED PAPERS 573, 588–94 (Samuel Freeman ed., 1999) [hereinafter RAWLS, *The Idea of Public Reason Revisited*]; see also ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 31–41 (2000); LABORDE, *supra* note 16, at 117–32; Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 161–65 (2002); Schwartzman, *supra* note 27, at 1401–03.

36. This history has been told many times. See JOHN MARSHALL, JOHN LOCKE, TOLERATION, AND EARLY ENLIGHTENMENT CULTURE 15–194 (2006); TOLERATION IN ENLIGHTENMENT EUROPE (Ole Peter Grell & Roy Porter eds., 2000); PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST (2003). *But cf.* BEYOND THE PERSECUTING SOCIETY: RELIGIOUS TOLERATION BEFORE THE ENLIGHTENMENT (John Christian Laursen & Cary J. Nederman eds., 1998) (detailing the practice of religious toleration in early modern Europe).

37. See Ernestine van der Wall, *Toleration and Enlightenment in the Dutch Republic*, in TOLERATION IN ENLIGHTENMENT EUROPE, *supra* note 36, at 114; CALVINISM AND RELIGIOUS TOLERATION IN THE DUTCH GOLDEN AGE (R. Po-Chia Hsia & Henk van Nierop eds., 2002).

38. See generally THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d ed. 1994).

39. See 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 18–33 (2008) (discussing the history of disestablishment during the Founding era).

40. See ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 29–33 (2005) (discussing the rejection of religious tests in the federal Constitution).

41. Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261, 263 (1996) (“The U.S. Constitution’s prohibition on religious tests for federal officeholders was historically unprecedented.”).

The intellectual roots of church-state liberalism in the United States can be traced to foundational texts like John Locke's *A Letter Concerning Toleration* (1689),⁴² James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785),⁴³ and Thomas Jefferson's *A Bill for Establishing Religious Freedom* (1779), written for Virginia.⁴⁴ But liberalism is a broader philosophical tradition, with roots in the writings of Adam Smith, Immanuel Kant, and John Stuart Mill, among others.⁴⁵ A liberal theory advances a particular kind of relationship between the state and its citizens, one that embraces both popular sovereignty and limited government and further presumes the equal worth of citizens and rejection of the arbitrary exercise of power.⁴⁶ The development of rights-enforcing constitutional democracies can be traced to a liberal theory of the state.⁴⁷

In the twentieth century, religious toleration served as the basis for an expansion of the notion of state neutrality toward a broader range of "conceptions of the good"—to use John Rawls's terminology.⁴⁸ Rawls was a liberal of the late-twentieth century, a century that witnessed the rise of state-supported fascism and communism, a surge of nationalism, as well as the liberatory efforts of racial, ethnic, and religious minorities around the world. Liberalism has been offered as a way to recognize the reasonable demands of those within diverse societies when agreement on fundamentals is impossible and when disagreement has too often led to bloodshed. Rawls's "intuitive idea" was to "generalize

42. LOCKE, *supra* note 31.

43. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 29, 29 (Jack N. Rakove ed., 1999).

44. THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd ed., 1950).

45. See *supra* note 11.

46. See RONALD DWORKIN, A MATTER OF PRINCIPLE 181 (1985); Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21 (Nancy L. Rosenblum ed., 1989); Waldron, *supra* note 11, at 140.

47. See ANDREAS KALYVAS & IRA KATZNELSON, LIBERAL BEGINNINGS: MAKING A REPUBLIC FOR THE MODERNS (2008); RYAN, *supra* note 11, at 38–40; cf. HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY (2018) (providing a history of the development and transformation of liberalism).

48. RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 75. According to Rawls, liberal principles of justice "should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself." *Id.* at 9–10.

the principle of religious toleration to a social form, thereby arriving at equal liberty in public institutions.”⁴⁹

The aim of political liberalism, following Rawls, is to explain how citizens with deeply divergent ethical and religious commitments can nevertheless converge on liberal principles of justice for regulating basic political and economic institutions.⁵⁰ On this account, the liberal state does not endorse or enforce a particular comprehensive worldview—religious or otherwise—but establishes a framework within which individuals are generally free to pursue their own comprehensive ethical, moral, and religious ends.⁵¹ The state is required to treat all its citizens with equal concern and respect, and it does so, in part, by not advancing its own comprehensive religious, philosophical, or ethical agenda.⁵² This gives rise to an important public/private distinction. In a liberal state, the exercise of political power is legitimate only if it can be justified on terms that all citizens can reasonably accept.⁵³ The requirements of “public reason” mean that a state cannot enforce a law if the only justification for the law is based on a specific comprehensive doctrine. A standard example of such a non-public reason is one that relies for its justificatory force on values or modes of reasoning drawn from a particular religious tradition.⁵⁴

Obviously, this formulation of political liberalism is the barest sketch. In the late twentieth and early twenty-first centuries, Rawls has been a lightning rod for liberalism’s critics, so it is important to have a sense of his basic claims. But the scholarly and jurisprudential debates over the Religion Clauses obviously precede Rawls. Rawls himself makes limited appearances in the legal literature of church and state and no appearances, as far

49. LABORDE, *supra* note 16, at 27.

50. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 12, at 134 (developing and defending “the idea of an overlapping consensus”).

51. *Id.* at 226–27; see also JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* 41–44 (2011); Charles Larmore, *Public Reason*, in *THE CAMBRIDGE COMPANION TO RAWLS*, *supra* note 12, at 368, 373–74; Micah Schwartzman, *The Completeness of Public Reason*, 3 *POL. PHIL. & ECON.* 191 (2004).

52. See Schwartzman, *supra* note 51, at 200.

53. Here we are paraphrasing Rawls’s “liberal principle of legitimacy.” See RAWLS, *POLITICAL LIBERALISM*, *supra* note 12, at 217. For elaboration and defense of this principle, see QUONG, *supra* note 51, at 131–35.

54. Though, as Rawls emphasizes, public reason is also distinguished from secular comprehensive ethical and moral doctrines. See RAWLS, *The Idea of Public Reason Revisited*, *supra* note 35, at 583–84.

as we know, in federal court decisions involving matters of religious freedom.⁵⁵

It is also important to observe that, although liberalism and its critics join in battle at the moment of the Enlightenment, modern debates about the Religion Clauses only take shape in the mid-twentieth century, when the Supreme Court applied the First Amendment to the states.⁵⁶ These debates generally presume the outlines of a non-theocratic, democratic state in which citizens are empowered to assert rights against a constitutionally limited government. In other words, the general contours of the liberal state are well-entrenched, even if imperfectly realized, at the moment when the Court first articulates the modern doctrine of church and state.

Nevertheless, Religion Clause conflicts have forced the Court to define the limits of state power to fund or otherwise support religion, to teach religious subjects or promulgate religious principles in schools and other government-run institutions or in public places, to force individuals or groups to engage in or refrain from engaging in religious practices, to provide exemptions to religious persons from laws that burden their religious conscience, or to adjudicate intra-religious disputes in the civil courts.⁵⁷

The appropriate rule in any of these cases has always implicated foundational principles, even as judges and scholars have seemed to share similar background assumptions. One of these shared assumptions is what Cécile Laborde calls a requirement of “minimal secularism.”⁵⁸ This idea is that the liberal state cannot also be a religious state, at least not in the sense of enforcing laws that are justified solely on religious grounds. Religious authorities do not exercise civil authority, and vice versa.⁵⁹ Furthermore, appeals to religious authority—for example, in the

55. A Westlaw search for citations to Rawls’s work in federal courts turns up about a dozen cases, but none of them involve matters of religious freedom.

56. See 2 GREENAWALT, *supra* note 39, at 33–39; Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013).

57. For surveys of Supreme Court doctrine across these various subjects, see 1 KENT GREENAWALT, RELIGIONS AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); 2 GREENAWALT, *supra* note 39.

58. LABORDE, *supra* note 16, at 116.

59. *Id.* at 143 (“It is because minimal secularism is committed to the sub-

form of “because scripture says so”—are not a sufficient basis for legislation or legal decision making.⁶⁰ The doctrinal debates over the Religion Clauses have tended to operate within the terms of these broad principles, even as their application has been contested.

Of course, there have always been those who understand the basic concept of church-state separation as being compatible with a robustly Christian state, either by ignoring the First Amendment or by assimilating it to the idea of a “Christian nation.”⁶¹ The Court has been at the center of battles over school prayer, the teaching of evolution, support for religious instruction, public recognition of majority faiths, and coercive suppression of minority ones.⁶² Religion Clause doctrine is contested, both within the terms of a seemingly shared liberalism and when that liberal project is outright rejected.

In either case, dissatisfaction with and contestation over the requirements of liberalism means that even basic assumptions about the appropriate relationship between church and state cannot be taken for granted. Liberalism and church-state separation are often connected in the minds of both supporters and critics. When liberalism is under sustained attack, the existing terms of church-state separation are also under sustained attack.

stantive ideals of personal liberty that it rejects the enforcement of comprehensive doctrines, such as religious doctrines, by the state.”); *see also* Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 126–27 (1982) (“[T]he core rationale underlying the Establishment Clause is preventing ‘a fusion of governmental and religious functions[.]’ The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.” (citations omitted)).

60. *See* Koppleman, *supra* note 35, at 88.

61. For critical discussions of the claim that the United States is a “Christian nation,” *see*, for example, STEVEN K. GREEN, *INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING* (2015); KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015); DAMON LINKER, *THE THEOCONS: SECULAR AMERICA UNDER SIEGE* (2006); Jared A. Goldstein, *How the Constitution Became Christian*, 68 *HASTINGS L.J.* 259 (2017).

62. For recent historical treatments of the Court’s involvement in these and other controversies over religion freedom, *see* NOAH FELDMAN, *DIVIDED BY GOD* (2005); SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (2010); DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* (2011).

II. THE ANTILIBERAL REVIVAL

Recent expressions of religious antiliberalism are no exception to this pattern, and they track well their historical predecessors. It is now common to hear the claim that liberalism is in crisis, that it has failed, or that it is collapsing into some other regime type, usually authoritarianism of a socialist or fascist variety.⁶³

Antiliberal thought is full of such diagnoses, all of which start with the same premises. According to critics, liberalism is somehow both pervasive and self-defeating, although a positive account of liberalism independent of what it has wrought is difficult to discern. Instead, there is reference to liberalism as “an encompassing political ecosystem in which we have swum, unaware of its existence.”⁶⁴ Liberalism is one of the “three great competitor political ideologies,” along with fascism and communism, but it operates silently.⁶⁵ Professor Patrick Deneen claims that “[i]n contrast to its crueler competitor ideologies, liberalism is more insidious: as an ideology, it pretends to neutrality, claiming no preference and denying any intention of shaping the souls under its rule.”⁶⁶ Moreover, liberalism infects every aspect of our political, social, and personal lives. In all these domains, “liberalism has transformed human institutions in the name of expanding liberty and increasing our mastery and control of our fates. And in each case . . . the vehicles of our liberation have become iron cages of our captivity.”⁶⁷

This type of rhetoric is not new. As Stephen Holmes observes in his *Anatomy of Antiliberalism*, “[t]he disparagement of liberalism is not a passing fashion of the late twentieth century. It is a recurring feature of Western political culture at least since the French revolution. . . . [In] the 1920s and 1930s implacable hostility to liberalism was the one attitude on which extreme rightists and extreme leftists could agree.”⁶⁸ The vehemence of

63. See DENEEN, *supra* note 10; LEGUTKO, *supra* note 10; Adrian Vermeule, *All Human Conflict Is Ultimately Theological*, CHURCH LIFE J. (July 26, 2019), <https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological/> [<https://perma.cc/RW5L-DYLA>].

64. DENEEN, *supra* note 10, at 4–5.

65. *Id.* at 5.

66. *Id.*

67. *Id.* at 6.

68. HOLMES, *supra* note 7, at xi.

those denunciations is continuous with early attacks on the Enlightenment and in particular with the rejection of received moral or religious authority.

The content of the critique is also similar across time. Antiliberals tend to agree that the current social and political rot, whether at the turn of the nineteenth or twentieth centuries, is a function of liberalism's celebration and emancipation of the autonomous or "liberated individual" and, specifically, the "disintegration of society into atomized individuals—selfish, calculating, materialistic."⁶⁹ The core problem is "the calamity of an autonomous, irreligious humanistic consciousness."⁷⁰ Such societies promote "boundless materialism,"⁷¹ sexual licentiousness, and "a nearly universal pursuit of immediate gratification . . . hedonic titillation, visceral crudeness, and distraction, all oriented toward promoting consumption, appetite and detachment."⁷² The mode of antiliberals' thought is similar as well, as Holmes has described: decry the existing political and spiritual decline of Western society, warn of an impending catastrophe, identify the intellectual and historical moment when the West lost its way, and suggest how recovering a lost past might help pull humanity back from the brink.⁷³

How has the antiliberals' tradition approached the core liberal commitment of separation of church and state? Early writers in this tradition bemoaned rising secularism and the reduced power of the Church, rejected out-of-hand the concept of liberal tolerance, and advocated a return to traditional communal and hierarchical moral and sexual norms, if not a return to theocratic governance.⁷⁴ Perhaps unsurprisingly, some contemporary antiliberals have embraced similar views; in Hungary and Poland,

69. *Id.* at 6.

70. *Id.* (quoting ALEKSANDR SOLZHENITSYN, *A WORLD SPLIT APART: COMMENCEMENT ADDRESS DELIVERED AT HARVARD UNIVERSITY JUNE 8, 1978*, at 57 (Irina Ilovayskaya Alberti trans., 1978)).

71. *Id.* (quoting SOLZHENITSYN, *supra* note 70, at 53).

72. DENEEN, *supra* note 10, at 39.

73. HOLMES, *supra* note 7, at 5–7.

74. See, e.g., JOSEPH DE MAISTRE, *CONSIDERATIONS ON FRANCE* (Richard A. Lebrun ed., 1994); see also ISAIAH BERLIN, *Joseph de Maistre and the Origins of Fascism*, in *THE CROOKED TIMBER OF HUMANITY* 91 (Henry Harding ed., 1991); HOLMES, *supra* note 7, at 13–36.

there have been moves toward establishing “illiberal democracy,” defined in terms of conservative Christian nationalism.⁷⁵

Some contemporary antiliberal thinkers, however, seek to make peace with a religiously pluralistic society, while protecting and extending religious institutional, cultural, and political redoubts.⁷⁶ Others seek to capture political hearts and minds, to

75. The Prime Minister of Hungary, Viktor Orbán, has defended the idea of “Christian democracy” as “illiberal.” He recently summarized his view in stark terms:

Let us confidently declare that Christian democracy is not liberal. Liberal democracy is liberal, while Christian democracy is, by definition, not liberal: it is, if you like, illiberal. And we can specifically say this in connection with a few important issues – say, three great issues. Liberal democracy is in favour of multiculturalism, while Christian democracy gives priority to Christian culture; this is an illiberal concept. Liberal democracy is pro-immigration, while Christian democracy is anti-immigration; this is again a genuinely illiberal concept. And liberal democracy sides with adaptable family models, while Christian democracy rests on the foundations of the Christian family model; once more, this is an illiberal concept.

Viktor Orbán, Speech at the 29th Bálványos Summer Open University and Student Camp (July 29, 2018), <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp> [https://perma.cc/Z2WN-CHTW]; see also Zack Beauchamp, *It Happened There: How Democracy Died in Hungary*, VOX (Sept. 13, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump> [https://perma.cc/2N8J-DFMC]; Aleksandra Wróbel, *Orbán Pledges To Keep Hungary Safe and Christian*, POLITICO (May 7, 2018, 3:06 PM), <https://www.politico.eu/article/orban-christian-migrants-pledges-to-keep-hungary-safe> [https://perma.cc/3E8V-NESQ].

Poland has also moved significantly in the direction of illiberal democracy and Christian nationalism. See Volha Charnysh, *The Rise of Poland’s Far Right: How Extremism Is Going Mainstream*, FOREIGN AFF. (Dec. 18, 2017), <https://www.foreignaffairs.com/articles/poland/2017-12-18/rise-polands-far-right> [https://perma.cc/D96J-38X8]; Will Hutton, *Beware the Illiberal Alliance of Poland and Hungary, a Grave Threat to the EU*, GUARDIAN (Jan. 6, 2018, 7:04 PM), <https://www.theguardian.com/commentisfree/2018/jan/07/hungary-poland-had-enough-of-liberal-democracy-eu-must-act> [https://perma.cc/WY5U-YDPG]; Jan-Werner Müller, *The Problem with Poland*, N.Y. REV. BOOKS: NYR DAILY (Feb. 11, 2016, 1:22 PM), <https://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/> [https://perma.cc/G8PH-FDEX] (“[B]oth Poland and Hungary now offer a toxic ideological brew that is reminiscent of interwar Europe: anti-communism and anti-capitalism can be combined and justified in the name of a highly intolerant nationalism based on Christian values that conclusively define who is a true Hungarian or true Pole.”).

76. See *infra* Part II.C.

transform liberal regimes from the inside-out by doing cultural battle.⁷⁷

Common to all these approaches is a broad skepticism of the liberal project. That skepticism takes a variety of forms and generates a range of alternatives. Here, we identify four broad themes—anti-secularism, anti-paganism, organicism, and integralism—that have recently reemerged in the legal literature. The first two—anti-secularism and anti-paganism—are mainly presented as diagnoses of liberalism’s failures and the resulting culture wars in Western democratic societies. The latter two—organicism and integralism—are primarily normative proposals; they provide strategies for responding to the perceived threats and vulnerabilities of liberal regimes. Although some of these proposals are radical, skepticism about liberalism does not necessarily entail the abandonment of the basic idea of church-state separation or liberty of conscience. But as those two ideas could be said to constitute central aspects of liberalism, it is fair to ask whether present-day antiliberals lack the courage of their convictions—and, if they were to follow those convictions, what would be left of religious freedom under the First Amendment.

A. ANTI-SECULARISM

Consider first the claim that Western society is approaching an “existential crisis for secular liberalism.”⁷⁸ This apparent crisis is a central trope in the antiliberal canon. Antiliberals argue that the concept of the “secular” is incoherent and that, in some cases, the secular state is both hostile to religion and amoral. The incoherence of the secular is directly connected with its lack of moral foundations.⁷⁹ According to the critical literature, which emerges on both the political left and the right, our theory of church-state separation, and more specifically, our current Religion Clause doctrine, rests on a contradiction. Modern religious liberty has a religious foundation. Though its basic categories

77. See *infra* Part II.D.

78. Winnifred Fallers Sullivan et al., *Introduction* to AFTER SECULAR LAW 1, 1 (Winnifred Fallers Sullivan et al. eds., 2011).

79. See, e.g., 2 HAROLD J. BERMAN, LAW AND REVOLUTION: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION, at x (2003) (“And today it is not evident what new fundamental beliefs have replaced orthodox religious beliefs as a foundation on which our legal institutions rest. Consequently, our legal discourse, our network of legal values, lacks the power and vitality that it once had.”).

cannot be acknowledged as religious, the political and legal instantiation of those categories forces a psychological and social separatism that is incongruent with how religious people often understand their own beliefs and practices.⁸⁰

This critique of secularism has two main parts. The first is a claim that the bifurcation between secular and religious is itself religious, grounded in a certain form of Christianity. The argument that church-state separation represents a distinctly Protestant theological outlook is now commonplace.⁸¹ Some antiliberals embrace the religious and specifically Christian roots of secularism, but they often bemoan the development of the secular from its Catholic origins toward a privatized conception after the Protestant Reformation.⁸²

The asserted failure of liberalism to understand and make explicit its religious foundations is linked to a second objection. Critics argue that the liberal state wrongly excludes religious reasons as grounds for justifying law-making in a democratic society.⁸³ Liberal theories are often condemned for requiring wide-ranging restrictions on making religious arguments in the public sphere, though standard accounts of public reason, including

80. See WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 1–12 (2005).

81. See, e.g., STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 107–50 (2010); Talal Asad, *Thinking about Religion, Belief and Politics*, in *THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES* 36, 43–45 (Robert A. Orsi ed., 2012); Elizabeth Shakman Hurd, *Believing in Religious Freedom*, in *POLITICS OF RELIGIOUS FREEDOM* 45, 46–49 (Winnifred Fallers Sullivan et al. eds., 2015); Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, 35 *CRITICAL INQUIRY* 836 (2009). But see LABORDE, *supra* note 16, at 32–36 (rejecting what she calls the “Protestant critique”).

82. See BERMAN, *supra* note 79, at 193; BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 365–87 (2012).

83. There is an extensive literature criticizing this view. See, e.g., CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTIONS IN LIBERAL POLITICS* (2002); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); SMITH, *supra* note 81; Michael W. McConnell, *Secular Reason and the Misguided Attempt To Exclude Religious Argument from Democratic Deliberation*, 1 *J.L. PHIL. & CULTURE* 159 (2007); Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in *RELIGION AND CONTEMPORARY LIBERALISM* 162 (Paul Weithman ed., 1997); cf. Jonathan Quong, *Public Reason*, *STAN. ENCYCLOPEDIA PHIL.* (Oct. 24, 2017), <https://plato.stanford.edu/archives/spr2018/entries/public-reason/> [<https://perma.cc/46MU-G6S7>] (surveying literature on objections to public reason, including the exclusion of appeals to religious convictions).

Rawls's, are more nuanced and permissive than many have recognized.⁸⁴ Such accounts are concerned not only about religious reasons, but also reasons drawn from secular comprehensive doctrines, as the state ought to be neutral, so far as possible, among competing conceptions of the good.⁸⁵ Accordingly, citizens can rightly demand that exercises of political power be justified on the basis of public reasons, which can be shared by those with differing conceptions of the good.⁸⁶

The exclusion of religious reasons has long been a source of antiliberal discontent. Richard John Neuhaus's *The Naked Public Square* made this concern widely known in the 1980s.⁸⁷ His complaint, that modern church-state doctrine's restriction of religious voices in public evinces hostility to religion, has become a common criticism among religious conservatives.⁸⁸ Left-leaning theorists also criticize the bifurcation of the political world into public/private, asserting that state power undergirds all supposedly "private" acts. The religious/secular binary is both constructed and oppressive, insofar as it marginalizes religious modes of political life.⁸⁹

84. See Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 394 (2011) ("[T]he wide view of public reason does not prevent citizens and officials from presenting their ethical and religious arguments in public deliberation. Nothing in the principle of sincere public justification precludes supplementing public reasons with arguments based on nonpublic values.").

85. See RAWLS, *The Idea of Public Reason Revisited*, *supra* note 35, at 583–84, 587–88 (comparing religious and "secular reason," and arguing that both are outside the domain of public reason).

86. See *id.* For some recent defenses of this view, see ANDREW LISTER, PUBLIC REASON AND POLITICAL COMMUNITY (2013); LORI WATSON & CHRISTIE HARTLEY, EQUAL CITIZENSHIP AND PUBLIC REASON: A FEMINIST POLITICAL LIBERALISM (2018); Jonathan Quong, *On the Idea of Public Reason*, in A COMPANION TO RAWLS, *supra* note 12, at 265.

87. RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

88. See, e.g., HUGH HECLLO, CHRISTIANITY AND AMERICAN DEMOCRACY 128–32 (2007); SMITH, *supra* note 10, at 334–43; Michael W. McConnell, *Five Reasons To Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639 (1999); Matthew J. Franck, *The Unreasonableness of Secular Public Reason*, PUB. DISCOURSE (Aug. 28, 2015), <https://www.thepublicdiscourse.com/2015/08/14619/> [<https://perma.cc/GJ9W-LD6U>].

89. Consider Craig Calhoun's claim that the "use of the public/private distinction to enforce a kind of secularism is embarrassingly reminiscent of the use of the same distinction to minimize . . . women's political participation." Craig

But the real concern is the disqualification of religious reasons for law-making. Religious antiliberalism is deeply suspicious of any effort to distinguish between religious and secular reasons, policies, or forms of government—indeed, to define “religion” or “religious” in contradistinction to something else called “secular” at all. The inability to settle on a definition—one that does not import substantive judgments about what constitutes reasonable and rational argument and what does not—leads to claims about the “impossibility of religious freedom.”⁹⁰

The deconstruction of the religious/secular divide also leads to difficulties in defining other terms, like “theocracy.” To the extent that the liberal state is, by definition, non-theocratic, the crisis of liberalism opens the door to explicitly theocratic regimes. Of course, if secularism is itself a religion or a theological concept, then we already live in a theocratic regime. Contemporary antiliberals on both the left and the right have invoked Carl Schmitt’s famous claim that “[a]ll significant concepts of the modern theory of the state are secularized theological concepts.”⁹¹ Schmittian “political theology” posits a world in which secularization is the transfer of authority from an omnipotent God to an omnipotent ruler, in which the modern concept of sovereignty is a secularized version of the theological idea of divine authority.⁹²

This notion of the liberal state as displaced theology is a consistent antiliberal trope, shared by antistatist critics on the left who are attracted to the disintegration of the concept of the secular.⁹³ These critics are more concerned about the state’s juridical power to define religion to the exclusion of minority believers

Calhoun, *Secularism, Citizenship, and the Public Sphere*, in *RETHINKING SECULARISM* 77 (Craig Calhoun et al. eds., 2011).

90. SULLIVAN, *supra* note 80, at 1.

91. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab trans., Univ. of Chi. Press 2005) (1922).

92. See HOLMES, *supra* note 7, at 46–47; John P. McCormick, *Review: Political Theory and Political Theology: The Second Wave of Carl Schmitt in English*, 26 *POL. THEORY* 830 (1998).

93. See Banu Bargu, *Stasiology: Political Theology and the Figure of the Sacrificial Enemy*, in *AFTER SECULAR LAW*, *supra* note 78, at 140, 140–55; Craig Calhoun et al., *Introduction to RETHINKING SECULARISM*, *supra* note 89, at 3, 5; Sullivan et al., *supra* note 78, at 1–12.

than they are about the liberal state's inability to rule.⁹⁴ On their view, the secular state is quite powerful already, though it is also vulnerable to religious schism and ethnic violence.⁹⁵ The secular state appears unable to comprehend or address the rising religiosity in its midst. And so, paradoxically, secularism is also quite fragile, so much so that perhaps the whole project should be abandoned.⁹⁶

B. ANTI-PAGANISM

In recent years, especially among religious conservatives, the antiliberal critique of secularism has taken a more distinctive form.⁹⁷ As we have seen, the critique is that liberalism is the product of a particular religious view,⁹⁸ and, as such, it promotes an ethical and moral perspective that can be characterized as religious. But if liberalism is a religion, which religion is it?

According to some antiliberal critics, the answer is that liberalism is a form of paganism. Consider Milton Himmelfarb's assertion, made in the early 1990s, that "[t]he trouble is not that religion in general has too small a role in American public life. The trouble is that a particular religion has too great a role—paganism, the *de facto* established religion."⁹⁹ The target here was and is liberalism:

The Enlightenment's project was liberal—to liberate us for the pursuit of our happiness. But much of what began as liberal has turned libertine, and libertinism has brought not liberation and happiness so much as enslavement and misery: AIDS, kids who have kids, the absent father. First the French Revolution devoured its children, then the Bolshevik Revolution, and now the sexual revolution.¹⁰⁰

A more recent and refined version of this argument can be found in Professor Steven Smith's recent book, *Pagans and*

94. Cf. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 33–35 (1983).

95. See Mark Juergensmeyer, *Rethinking the Secular and Religious Aspects of Violence*, in *RETHINKING SECULARISM*, *supra* note 89, at 185, 196–99.

96. See Sullivan et al., *supra* note 78, at 16.

97. This Part draws on material from Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497 (2019).

98. See, e.g., Sullivan et al., *supra* note 79, at 8. *But see* LABORDE, *supra* note 16, at 6, 32–36 (rejecting Sullivan's critique that liberalism is a form of Protestantism).

99. Milton Himmelfarb, in *AMERICAN JEWS AND THE SEPARATIONIST FAITH* 65, 65 (David G. Dalin ed., 1992).

100. *Id.* at 66.

Christians in the City.¹⁰¹ Smith joins other antiliberals in describing Western cultural conflict as a battle between Christianity and the “modern paganism” of secular liberals.¹⁰² “Christian,” for Smith, is a term for all those who believe in a transcendent God, including orthodox religious believers across faith traditions.¹⁰³ Pagans, by contrast, reject transcendent religion in favor of non-natural but immanent conceptions of the good.¹⁰⁴ Culturally, pagans are the vast majority of secularized Westerners, who are assimilated to the dominant culture: liberalism.¹⁰⁵

Smith’s diagnosis of the culture conflict is not entirely new. Indeed, Smith frames his project as an effort to revive and defend T.S. Eliot’s thesis that Western societies are marked by existential conflict between Christianity and paganism.¹⁰⁶ Writing in the 1930s, Eliot argued that Christianity in the West was under attack by “Liberalism,” which elevated the values of individuality and originality over the traditional morality of the Church.¹⁰⁷ In *The Idea of a Christian Society*, he called for the Christianization of England, which he feared was slouching toward paganism.¹⁰⁸ Eliot’s Christian establishment was intended to reflect, support, and direct a Christian society. The alternative was to “merely sink into an apathetic decline” or become a “totalitarian democracy.”¹⁰⁹ To those “who are . . . repelled by . . . such a prospect,” Eliot responded, “one can assert that the only possibility of control and balance is a religious control and

101. SMITH, *supra* note 10; *see also* Robert P. George, *Foreword to id.*, at ix–xiv (adopting Smith’s claim that liberals and progressives are “neopagans”); John Waters, *Defending the Religious Sense*, FIRST THINGS (Nov. 4, 2019), <https://www.firstthings.com/web-exclusives/2019/11/defending-the-religious-sense> [<https://perma.cc/F4FR-7MDJ>] (same).

102. *See* SMITH, *supra* note 10.

103. *See id.* at 216, 223, 303.

104. *Id.* at 210–12; *cf.* Charles Taylor, *Western Secularity*, in RETHINKING SECULARISM, *supra* note 89, at 31, 33 (claiming that “a broader distinction, that which divided ‘this world,’ or the immanent, from the transcendent . . . has become part of our way of seeing things in the West”).

105. *See* SMITH, *supra* note 10, at 246–48.

106. *Id.* at 8–11, 378–79; *see also* R.R. RENO, RESURRECTING THE IDEA OF A CHRISTIAN SOCIETY (2016).

107. T.S. ELIOT, AFTER STRANGE GODS: A PRIMER OF MODERN HERESY 22–23, 48 (1934).

108. T.S. ELIOT, CHRISTIANITY & CULTURE: THE IDEA OF A CHRISTIAN SOCIETY AND NOTES TOWARDS THE DEFINITION OF CULTURE 16, 20–35 (1949).

109. *Id.* at 18.

balance; that the only hopeful course for a society which would thrive and continue its creative activity in the arts of civilisation, is to become Christian.”¹¹⁰

Eliot, in turn, was reiterating a set of claims already made popular by earlier antiliberal thinkers. The attack on liberalism—or on variations such as “secular humanism”—has been remarkably consistent. Notably, much of that attack, at least in the nineteenth and early twentieth centuries, had a sinister element. It was explicitly anti-Semitic. That anti-Semitism appears in Eliot’s poetry,¹¹¹ but it is also integral to his vision of the Christian Society.¹¹² In a series of lectures collected under the title *After Strange Gods*, he asserted that cultural homogeneity was an essential precondition for such a society.¹¹³ Eliot wrote that “[w]hat is still more important is unity of religious background; and reasons of race and religion combine to make any large number of free-thinking Jews undesirable.”¹¹⁴

The link between “free-thinking Jews” and liberalism is not coincidental.¹¹⁵ In the nineteenth and early twentieth centuries, liberalism meant the rejection of the religious state, recognition of rights of conscience, and, in Europe most consequentially, the political emancipation of the Jews.¹¹⁶ That is why the history of antiliberal thought is suffused with concern with the “Jewish question.”¹¹⁷ For certain critics of liberalism, the problem of the Jews of Europe was that they refused to recognize Christianity and therefore also the Christian foundations of society and the state. There was no way to bring Jews into the fold. As Isaiah Berlin observed in describing this line of thinking: “To tolerate

110. *Id.* at 18–19.

111. See ANTHONY JULIUS, T. S. ELIOT, ANTI-SEMITISM, AND LITERARY FORM (2d ed. 2003); CHRISTOPHER B. RICKS, T. S. ELIOT AND PREJUDICE 50 (1988); Walter A. Strauss, *The Merchant of Venom? T. S. Eliot and Anti-Semitism*, 14 S. CENT. REV. 31 (1997); Louis Menand, *Eliot and the Jews*, N.Y. REV. BOOKS, (June 6, 1996), <https://www.nybooks.com/articles/1996/06/06/eliot-and-the-jews/> [<https://perma.cc/KG4E-R3LW>] (reviewing JULIUS, *supra*).

112. See Schragger & Schwartzman, *supra* note 97.

113. ELIOT, *supra* note 107.

114. *Id.* at 20.

115. See JULIUS, *supra* note 111, at 157–65.

116. *Id.*

117. Cf. Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (Robert C. Tucker ed., 2d ed. 1978).

[the Jews] as an organized religion is a concession to that liberalism and rationalism that constitutes a denial of what men are for, to serve the true God.”¹¹⁸

Other antiliberal writers in the nineteenth and early-twentieth centuries made the relationship between Jews and liberalism more explicit. Consider such assertions that “liberalism is nothing but secularized Judaism,”¹¹⁹ or that “[e]very Jew is a liberal. He is a liberal by nature.”¹²⁰ To the Christian traditionalist, the modern Jew posed a “double challenge, both to the primary need of culture for religion, and to the subsidiary need for unity of religious background.”¹²¹ That is because modern Jews are “agents both of secularism and heterodoxy.”¹²² Abraham Kuyper, who was prime minister of the Netherlands at the turn of the century and a neo-Calvinist theologian, decried the Jews for spreading the “Jewish spirit” of liberalism and modernism among non-Jews.¹²³ More importantly, the Jew (and the liberal)

118. JULIUS, *supra* note 111, at 159 (quoting ISAIAH BERLIN, *THE MAGUS OF THE NORTH* 52 (1993)).

119. *Id.* at 158 (quoting HUGO VALENTINE, *ANTISEMITISM HISTORICALLY AND CRITICALLY EXAMINED* 62 (1971)).

120. *Id.* at 158 (quoting ERNST NOLTE, *THREE FACES OF FASCISM* 70 (1969)).

121. *Id.* at 165.

122. *Id.* (“Jews appear to contribute to a culture without sharing that culture’s religion; they also have their own culture without benefit of adherence to Judaism. Free-thinking, they are attached neither to the religion of their birth nor to any other religion.”).

123. See Ivo Schöffer, *Abraham Kuyper and the Jews*, in *DUTCH JEWISH HISTORY* 237, 248–50 (Joseph Michman & Tirtsah Levie eds., 1984) (describing Kuyper’s attitude toward Jews and his warnings against a spreading “Jewishness”). Abraham Kuyper’s anti-Semitic tract, *Liberalisten en Joden*, apparently has not been translated into English. This may explain why some American scholars have overlooked his overt religious bigotry. See, e.g., John Witte, Jr., *The Biography and Biology of Liberty: Abraham Kuyper and the American Experiment*, in *RELIGION, PLURALISM, AND PUBLIC LIFE: ABRAHAM KUYPER’S LEGACY FOR THE 21ST CENTURY* 243–62 (Luis E. Lugo ed., 2000). Strangely, Witte cites *Liberalisten en Joden* for the proposition that Kuyper “insisted on the inclusion of Jews within the ambit of religious liberty.” *Id.* at 246 n.10. But there is no mention that from the opening paragraphs of his essay, Kuyper claimed that “[g]radually one comes to realize that under the cloak of Liberalism the Jews have become the lord and master of our continent, and not only control public opinion within most countries, but also the international relations between [them].” A. KUYPER, *LIBERALISTEN EN JODEN* 5 (1878) (unpublished partial translation by Professor Mila Versteeg, Martha Lubin Karsh & Bruce A. Karsh Bicentennial Professor of Law, University of Va.) (on file with authors). It is remarkable that Kuyper’s anti-Semitism has been so long ignored by commentators and scholars in the United States.

posed a challenge to state power—as freedom of conscience served as a limitation on the state—a “liberal erosion of political authority for the sake of personal freedom.”¹²⁴ For Carl Schmitt, the preeminent antiliberal statist of Nazi Germany, “Jewish liberalism” was the disease infecting German culture.¹²⁵

Of course, Steven Smith and other current antiliberal thinkers who embrace the Christian/pagan conflict do not trade in anti-Semitic tropes. But the place of religious minorities—whether Jewish, Muslim, Christian or otherwise—causes serious problems for a revived antiliberal theory that posits only two cultural options: Christianity or paganism, even if the former is understood ecumenically.¹²⁶ Smith’s Christian society embraces transcendent meaning and rejects liberal assimilation and its cultural manifestation, secular humanism.¹²⁷ Some conservative or traditional religious minorities might also find that a “Christian” society better conforms to their cultural and moral views, but there is little, if any, recognition that many religious minorities reject such views without thereby becoming “pagans.”¹²⁸

Eliot had less trouble identifying liberal religious minorities. He saw them as a threat, and partly for that reason, he rejected religious disestablishment.¹²⁹ He also appeared to reject toleration. Cultural homogeneity was a central precondition for the Christian society. Smith and other current-day antiliberals, by contrast, do not generally endorse a Christian state, even if that seems like a natural extension of their arguments.¹³⁰ After

124. HOLMES, *supra* note 7, at 53.

125. *Id.* at 50–51. Schmitt blamed liberalism for the weakness of the German state between the wars: “Perfidious Jewish writers smuggled liberal constitutional principles into Wilhelminian Germany.” *Id.* at 38. As Holmes notes, “cultural antisemitism was integral to [Schmitt’s] thinking.” *Id.* at 50. Those liberal principles—separation of powers, competitive elections, political parties, and the free press—were anathema to Schmitt, who believed that liberal regimes were “fainthearted” and “nonconfrontationalist,” *id.* at 45, and unable to protect themselves when attacked. Schmitt’s authoritarianism is a rejection of “weak” (read: Jewish) liberalism. *See id.* at 44–45.

126. *See* Schragger & Schwartzman, *supra* note 97, at 499–504 (criticizing the “message that [Jews] can be either Christian or pagans”).

127. SMITH, *supra* note 10, at 378–79.

128. *See* Schragger & Schwartzman, *supra* note 97, at 505 (arguing that Smith’s theory postulates “[t]he Good Jews . . . are resisters of paganism” while “the Bad Jews” are “the assimilated, secularized, and paganized Jews”).

129. ELIOT, *supra* note 108, at 20–24.

130. *See* SMITH, *supra* note 10, at 377–79. *But see infra* Part II.B; *cf.* Vermeule, *supra* note 24 (arguing the Church should enter into “flexible alliances

all, why not favor a Christian state if it supports the moral and spiritual goods that are so valuable to meaningful human existence? Why not reject the various forms of paganism, including liberal Protestant or enlightenment beliefs that slouch toward paganism, that undermine those goods? And why not enlist the state's power to spread belief in the source of transcendent meaning, namely, Christianity?

Smith and other modern antiliberals do not readily provide an answer. But the options are limited. If the dangers and depredations of pagan society are so severe, one can either exit or resist. Some antiliberal thinkers have advocated the former in the face of a culturally foreign modernity.¹³¹ Smith advocates the latter, at least implicitly, by throwing in his lot with Eliot. But he provides little, if any, conceptual space for co-existence. Ultimately, one has to choose between one form of religious practice and another—Christianity or paganism. Since it is religion all-the-way down, the state cannot be neutral. It has to choose.

C. ORGANICISM

How to accommodate modern religious pluralism while rejecting liberalism presents a problem. In another line of contemporary antiliberal thought, the solution seems to be some form of “separate spheres,” or divided sovereignty: church on one side, state on the other. Smith invokes ancient Rome and the conflict between early Christians and pagans as the usable historical past that can help explain contemporary church-state doctrine.¹³² But he and other theorists have also recently invoked the medieval conflicts over church power as the appropriate guide for modern church-state relations.¹³³ It is notable that in

of convenience” as a part of a long-term strategy to establish a confessional state).

131. See, e.g., ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* 80 (2017) (questioning where the “erst-while” Christians fit in “the politics of post-Christian America” and answering “[w]e don’t”).

132. See SMITH, *supra* note 10, at 130–92.

133. See Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 20–37 (Micah Schwartzman et al. eds., 2016); Richard W. Garnett, “*The Freedom of the Church*”: (*Towards*) an *Exposition, Translation, and Defense*, 21 *J. CONTEMP. LEGAL ISSUES* 33, 52–57 (2013); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 *V.A. L. REV.* 1049, 1052 (2013); Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 *J. CONTEMP. LEGAL ISSUES* 165, 187–

both instances, the historical moment that seems most relevant to the First Amendment's Religion Clauses—the Enlightenment—is elided. Modernity appears to provide no resource for the weary church-state theorist.¹³⁴

The recourse to the medieval is in part a function of dissatisfaction with liberalism's individualism. Liberalism and individualism are conflated in the minds of many antiliberals, who challenge liberal thought on the ground that it underappreciates the role of community, church, family, group, and association in constituting, guiding, and constraining human agency. Liberalism is faulted for its problematic celebration and reification of the freely-choosing, autonomous, "unencumbered" self, a construct that does not comport with the experience of those who exist within particular cultural traditions, histories, and contexts.¹³⁵

An attractive alternative for some church-state scholars is the idea of an organic social order, in which churches and other collective bodies constitute pre-legal, natural features of the social landscape.¹³⁶ This view arises out of medieval theological concepts, in particular a commitment to the unified personality

89 (2013). *See generally* THE CONSCIENCE OF THE INSTITUTION (Helen Alvare ed., 2014) (collecting essays discussing perceived threats to religious institutions and advocating greater protection and autonomy for them).

134. We have criticized the selective use of (medieval) history to justify contemporary claims of "freedom of the church." *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 932–39 (2013) [hereinafter Schragger & Schwartzman, *Against Religious Institutionalism*]; Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES 15, 16 (2013) [hereinafter Schragger & Schwartzman, *Lost in Translation*]; *see also* Frederick Mark Gedicks, *True Lies: Canossa as Myth*, 21 J. CONTEMP. LEGAL ISSUES 133, 135 (2013); Andrew Koppelman, "Freedom of the Church" and Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 146 (2013).

135. These criticisms are familiar from the communitarian critiques of liberalism that were prominent in the 1980s and 1990s. *See generally* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (1996); COMMUNITARIANISM AND INDIVIDUALISM (Shlomi Avineri & Avner de-Shalit eds., 1992) (especially essays by Michael Sandel, Charles Taylor, Alasdair MacIntyre, and Michael Walzer).

136. *See generally* WALTER ULLMANN, THE GROWTH OF THE PAPAL GOVERNMENT IN THE MIDDLE AGES: A STUDY IN THE IDEOLOGICAL RELATION OF CLERICAL TO LAY POWER 358–81 (3d ed. 1970) (discussing "jurisitic theology" based on "medieval canon law . . . as a universal law . . . to which . . . all other legal systems became subsidiary").

of the Church. Influenced heavily by Otto von Gierke's interpretation and adaptation of medieval political theory,¹³⁷ which emphasized the personality of corporate bodies, and taken up later by the early-twentieth century British Pluralists,¹³⁸ the idea of an organic order is deployed to give heft to the church's claim for independence from the state.¹³⁹ Consider John Neville Figgis, asserting in 1913, in *Churches and the Modern State*:

Now the State did not create the family, nor did it create the Churches; nor even in any real sense can it be said to have created the club or the trades union; nor in the Middle Ages the guild or the religious order, hardly even the universities . . . they have all arisen out of the natural associative instincts of mankind, and should all be treated . . . as having a life original and guaranteed, to be controlled and directed like persons . . .¹⁴⁰

The embrace of "natural" and organic sovereign institutions as checks on the impersonal state seems to evoke Ferdinand Tönnies's distinction between community and society, *Gemeinschaft* and *Gesellschaft*.¹⁴¹ Implicit in this argument is the notion that the church, along with the family, the guild, the commune, and the university, gains its authority by acting as a counter-weight to the ever-expanding regulatory state. These forms of association are personal and communal; members are

137. See OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman ed. & trans., 1977); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Frederic William Maitland trans., 1900).

138. See CÉCILE LABORDE, PLURALIST THOUGHT AND THE STATE IN BRITAIN AND FRANCE, 1900–25, at 13 (2000) ("Real group persons had to be both unified and vital, like a true organism, and true organicism was only to be found in the political thought of the middle ages."); DAVID RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE 46 (2005) (defining the "organic" account of associations as views that held association to "emerge[] naturally out of social life" and as unable to be "reduced to individual components").

139. See Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 133, at 349–50, 358 ("The claim that associations are pre-legal, natural features of the social landscape is indebted to medieval theological concepts, especially the unified personality of the church.").

140. JOHN NEVILLE FIGGIS, CHURCHES IN THE MODERN STATE 47 (2d ed. 1914).

141. See FERDINAND TÖNNIES, COMMUNITY AND CIVIL SOCIETY 22, 52 (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887) (defining "*Gemeinschaft*" as human wills that are related to each other by descent and kinship, or become so out of necessity, and "*Gesellschaft*" as a group of people who live peacefully alongside one another but without being essentially united).

bound by affective ties and self-regulated by common mores. In these communities, individual members are more oriented to the collective than to their own self-interest.¹⁴² The state, by contrast, is characterized by the proliferation of formal, rational, impersonal ties and organizations.¹⁴³ Moreover, it is destructive of local associational life, thus necessitating limits on its authority.¹⁴⁴ The conflict between *Gemeinschaft* and *Gesellschaft* is an abiding concern of those who worry about the rationalization and materialism of the modern world. A central theme in antiliberal literature (and its cousin, romanticism) is the alienation of modern individuals—from nature, from community, and from themselves.¹⁴⁵

How do these concepts find their way into the modern law and theory of church and state? The concept of the organic church responds to two concerns about the nature of liberal rights. The first is that liberalism erases the distinction between religious bodies and other forms of association by treating all organizations as if they are voluntary associations or clubs.¹⁴⁶ If

142. Cf. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 149 (2000) (“The church is usually viewed as a kind of unified whole, different from the sum of its parts. The glue that holds it together is not contractual The church is thought to be something real with a good of its own, not a procedural device for advancing members’ interests.”).

143. Cf. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181–82 (Talcott Parsons trans., Charles Scribner’s Sons 1958) (1905) (discussing the development of the rational, mechanical relationships of a capitalistic society).

144. Cf. Cover, *supra* note 94, at 32–34 (discussing the impact of “[t]he state’s explicit or implicit acknowledgment of a limited sphere of autonomy” on the associational autonomy of groups with established normative value systems external to the state).

145. See, e.g., CHARLES J. CHAPUT, STRANGERS IN A STRANGE LAND: LIVING THE CATHOLIC FAITH IN A POST-CHRISTIAN WORLD 4–5 (2017) (“To protect the sovereignty of individuals, democracy separates them from one another. And to achieve that, the state sooner or later seeks to break down any relationship or entity that stands in its way.”); DENEEN, *supra* note 10, at 60 (discussing the substitution of the state for “traditional human communities and institutions”); see also HOLMES, *supra* note 7, at 231 (“Antiliberals ordinarily vilify rights as atomizing and alienating.”); cf. NANCY L. ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 63 (1987) (discussing liberalism’s collapse of the public and private spheres and how that contributes to the alienation of the individual).

146. See Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J.L. COMMENT. 515 (2007) (discussing

that is so, then it is difficult to justify the special, unique, and protected status of churches and religious believers. The second and related concern is that liberalism demands that the state protect individuals from being coerced by non-state groups or institutions.¹⁴⁷ This demand can be threatening to the institutional authority of the church. When critics raise alarm about the overweening state and assert that the government's regulatory power needs to be constrained, they are most centrally worried about the state's interference in religious bodies.¹⁴⁸

If churches are natural, pre-legal, and pre-political bodies, they have a special claim to govern in their sphere. Separate spheres theory generates a space for churches, treats them as unique as compared to nonreligious groups, and offers an account of church-state separation that emphasizes institutional autonomy, not individual conscience.¹⁴⁹

An example of a sovereignty-based conception of church-state relations is the Catholic concept of *libertas ecclesiae*, or "freedom of the church," which has become newly popular among a group of conservative church-state scholars.¹⁵⁰ Freedom of the church made its appearance during the Investiture controversy at the end of the eleventh century, when Pope Gregory VII sought to revoke the authority of temporal rulers to select and govern clergy in their territories.¹⁵¹ The result was the Wars of Investiture, a fifty-year conflict over the relative powers of church and crown.¹⁵²

whether "religious associations" are different from associations such as the Boy Scouts "so far as the constitution is concerned").

147. See Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 134, at 957–62 (arguing that voluntarism is a necessary condition for church autonomy).

148. See sources cited *supra* note 133.

149. See Schragger & Schwartzman, *Lost in Translation*, *supra* note 134, at 16 (arguing that theories of "freedom of the church" are committed to "three theses—involving the *sovereignty*, *specialness*, and *singularity* of religious institutions").

150. See, e.g., Garnett, *The Freedom of the Church*, *supra* note 133, at 61 ("[T]he *libertas ecclesiae* principle could be helpful, if not essential, to an understanding of . . . the religious freedom protected by the First Amendment of our Constitution."); Smith, *supra* note 133, at 19–37 (arguing "the jurisdictional conception of church autonomy . . . is consistent with the constitutional scheme and supportable on a contemporary . . . approach to governmental authority").

151. BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050–1300*, at 45 (1988).

152. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF*

Some have declared freedom of the church to be the true origin of church-state separation in the West, arguing that the current doctrinal and theoretical focus on individual rights of conscience should be replaced with a new emphasis on institutional power and authority.¹⁵³ On this anti-rights account, the church is analogized to a foreign sovereign, and the question is how to divide power between church and state. The church is not merely a voluntary association; instead it possesses and exercises jurisdictional sovereignty.¹⁵⁴

Of course, the sovereign church is an anachronism outside the Middle Ages, in a time when there is not just one church but many.¹⁵⁵ Pluralism causes difficulties for a sovereignty-based account. While the one true church may have had a special status in medieval society, it cannot be said to maintain that status today.¹⁵⁶ Indeed, the medieval notion of church freedom has little to do with freedom of conscience, which did not exist as a concept until much later.¹⁵⁷ That innovation, which followed the Protestant Reformation and the development of “rights of man” thereafter, serves as the basis for the modern commitment to disestablishment and free exercise.¹⁵⁸

THE WESTERN LEGAL TRADITION 87 (1983) (“Civil war between the papal and imperial parties raged sporadically throughout Europe until 1122”); TIERNEY, *supra* note 151, at 45–73 (discussing the various conflicts of Pope Gregory VII’s reign, specifically with King Henry IV of Germany). *See generally* R.W. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES* 100–04 (1970) (situating Pope Gregory VII within papal history); ULLMANN, *supra* note 136, at 148–72 (listing and expanding on the conflicts of the Gregorian papacy of the eleventh century).

153. *See* Smith, *supra* note 23, at 250 (“The Constitution could be understood—and would be improved by being understood—as mandating distinctive treatment not of *religion*, but of *the church*.”).

154. *Id.* at 268–69 (analogizing the Church to a foreign embassy with “ambassadors of the kingdom of God within the secular domain”).

155. *See* Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 134, at 933–37 (elaborating this charge of anachronism).

156. *Id.* at 936.

157. *See* Anna Su, *Catholic Constitutionalism from the Americanist Controversy to Dignitatis Humanae*, 91 NOTRE DAME L. REV. 1445, 1446–47 (2016) (noting the development of “freedom of conscience” during the twentieth century as part of John Courtney Murray S.J.’s writings).

158. On this point, proponents of “freedom of the church” may agree, even if they lament this development. *See* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1876–78 (2009) (“[T]he

Corporatism or separate spheres, which can be understood as a kind of communitarianism or “soft” antiliberalism,¹⁵⁹ cannot readily generate the individual rights necessary to protect religious dissenters, even if it might protect their communities.¹⁶⁰ The emphasis on organic groups and the importance of mediating institutions is a form of anti-statism, or perhaps a gesture toward legal pluralism. But if such groups exercise real coercive or sovereign power, beyond what is contemplated by conventional rights of association, then what makes them different from the overweening state? The original freedom of the church meant the papal exercise of state authority. In the feudal system of eleventh century Europe, bishops were not only spiritual leaders but also royal officials, exercising vast coercive power.¹⁶¹ A proliferation of sovereigns, exercising coercive power within their spheres, seems only to multiply the potential restrictions on individual liberty.

Some antiliberals advocate recourse to communal settings—counter-cultural, intentional communities—presumably more organic and authentic ways of living with one another.¹⁶² But why these communities would not be as, or more, oppressive

Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state.”).

159. Cf. HOLMES, *supra* note 7, at 88 (distinguishing between “soft antiliberals,” who, “when faced with practical choices, reveal a surprising fondness for liberal protections,” and “hard antiliberals,” who “dare to draw . . . shocking political consequences,” including “conformist bigotry”).

160. See B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 133, at 419–40 (“If the church is exempted from the requirement of complying with federal civil rights laws, then its members—or some of them—are left unprotected.”); Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 134, at 948–49, 960–62 (discussing the “competing individual rights” of members of the church and nonmembers).

161. See generally WALTER ULLMANN, THE GROWTH OF THE PAPAL GOVERNMENT IN THE MIDDLE AGES: A STUDY IN THE IDEOLOGICAL RELATION OF CLERICAL TO LAY POWER 7–8, 132–33, 139, 281 (3d ed. 1970) (discussing the role and power of bishops in papal government and drawing analogies between clerical positions and state positions, i.e. “the archbishops correspond to the kings”).

162. See DENEEN, *supra* note 10, at 192–97 (advocating for counter-cultural communities that “must be born out of voluntarist intentions, plans, and actions”); DREHER, *supra* note 131, at 122–44 (discussing tactics to promote the idea of a “Christian village” to raise children, inspired by the proverb: “It takes a village to raise a child”).

than the liberal state is unclear. Separate spheres, church sovereignty, or intentional communities—these may replace one oppressor with another.¹⁶³

D. INTEGRALISM

One could instead reject the religiously pluralistic state altogether. For a small but vocal number, the antiliberal lessons that Eliot and others teach should be taken to heart. Liberalism has failed; the religiously pluralistic society is impossible, and its replacement should be an explicitly Christian—and, more specifically, Roman Catholic—nation.¹⁶⁴

This version of antiliberalism is known as Catholic integralism, which arose in the nineteenth century as an explicit reaction to modernism. A founding text is Pope Pius IX's 1864 *Syllabus of Errors*,¹⁶⁵ which “rejected everything from rationalism and liberalism, to the principles of Church-state separation and religious freedom.”¹⁶⁶ A revived integralism is an outlier in Cath-

163. This, again, is a familiar criticism from earlier liberal-communitarian debates. See, e.g., Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 318–20 (1985) (explaining how communitarian politics, touted as an alternative to liberalism, would continue to oppress individuals); see also Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 134, at 945–49 (criticizing religious institutionalism for lacking a clear limit to church power).

164. See, e.g., Gladden Pappin, *Toward a Party of the State*, AM. AFF., Spring 2019, at 149, 153–56, <https://americanaffairsjournal.org/2019/02/toward-a-party-of-the-state/> [<https://perma.cc/U8BC-Q9ZE>]; Adrian Vermeule, *Integration from Within*, AM. AFF., Spring 2018, at 208, <https://americanaffairsjournal.org/2018/02/integration-from-within/> [<https://perma.cc/GRS6-S924>] (reviewing DENEEN, *supra* note 10); Edmund Waldstein, *An Integralist Manifesto*, FIRST THINGS (Oct. 2017), <https://www.firstthings.com/article/2017/10/an-integralist-manifesto> [<https://perma.cc/L3X4-9ATH>] (reviewing ANDREW WILLARD JONES, *BEFORE CHURCH AND STATE: A STUDY OF SOCIAL ORDER IN THE SACRAMENTAL KINGDOM OF ST. LOUIS IX* (2017)).

165. Pope Pius IX, *Syllabus of Errors* (1864), <http://www.papalencyclicals.net/pius09/p9syll.htm> [<https://perma.cc/PS7E-JZT7>].

166. Sarah Shortall, *When Catholicism Embraced Modernity*, BOS. REV. (Aug. 10, 2018), <http://bostonreview.net/philosophy-religion/sarah-shortall-when-catholicism-embraced-modernity> [<https://perma.cc/GG5M-77MX>] (reviewing JAMES CHAPPEL, *CATHOLIC MODERN: THE CHALLENGE OF TOTALITARIANISM AND THE REMAKING OF THE CHURCH* (2018)).

olic doctrine, especially after the Second Vatican Council endorsed freedom of conscience in the 1960s.¹⁶⁷ But antiliberalism's resurgence has been accompanied by the reassertion of radical, and reactionary, theological views.¹⁶⁸

Catholic integralism calls for the establishment of a confessional state.¹⁶⁹ Advocates are unabashed about rejecting religious disestablishment. Consider Patrick Brennan, a law professor contemplating what a Christian constitution in a predominantly Christian nation might look like. The “defining mark of a Christian Commonwealth” is that

it submits to Christ the King as the supreme lawgiver. This is traditional Catholic doctrine. A true Christian constitution would take as its alpha and its omega Christ the King and, at His command, His Church, and this plainly is not the stuff of garden-variety contemporary political thrust and parry. On the contrary, it is as obvious as the North Star on a clear night that contemporary conservatives and neocons alike are no more likely than today's liberals or libertarians to affirm or even good-naturedly to entertain the thesis I shall defend: The ultimate end of the project of Christian constitutionalism is to lead human persons to the supernatural common good, the God of Christian revelation, but first, in service of that ultimate end, to lead human persons proximately to the natural common good, ‘the virtuous life of the whole,’ through subordination to the divine law¹⁷⁰

167. Pope Paul VI, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html [<https://perma.cc/SU6W-7GV3>] (“Conscience is the most secret core and sanctuary of man.”).

168. See, e.g., Ash Milton, *After Freedom: Catholic Political Theology in the Age of Liberal Crisis*, PALLADIUM: GOVERNANCE FUTURISM (Dec. 26, 2018), <https://palladiummag.com/2018/12/26/after-freedom-catholic-political-theology-in-the-age-of-liberal-crisis/> [<https://perma.cc/2XB9-7YNZ>]; Gladden J. Pappin, *Liberalism Against the Church*, FIRST THINGS (Feb. 2019), <https://www.firstthings.com/article/2019/02/liberalism-against-the-church> [<https://perma.cc/95FH-3DUU>] (reviewing ROSENBLATT, *supra* note 47); Joseph G. Trabbic, *The Catholic Church, the State, and Liberalism*, PUB. DISCOURSE (May 2, 2018), <https://www.thepublicdiscourse.com/2018/05/21405/> [<https://perma.cc/KZD2-PCBJ>].

169. See Pink, *supra* note 24 (“Integralism—the need for a confessional Catholic state—is part of Catholic teaching about grace.”); see also Edmund Waldstein, *Integralism in Three Sentences*, JOSIAS (Oct. 17, 2016), <https://thejosias.com/2016/10/17/integralism-in-three-sentences/> [<https://perma.cc/JX6W-MX6V>] (advocating “man’s temporal end is subordinated to his eternal end” and, thus, “the temporal power must be subordinated to the spiritual power”).

170. Patrick McKinley Brennan, *An Essay on Christian Constitutionalism*:

Brennan is a minority voice—few American Catholics advocate for a confessional state. And yet the antiliberal revival has generated a serious debate among conservative Catholics about the reach of the antiliberal critique.¹⁷¹ This is a narrow debate, to be sure, since all believe that core aspects of actually-existing liberalism are irredeemable. But some imagine a kind of tense standoff with the liberal state that retains some core liberal commitments, such as rights of conscience.¹⁷²

Others see an inevitable clash between civilizations, not unlike Eliot's description of conflict between Christians and pagans. Adrian Vermeule, a Harvard law professor with Schmittian sympathies, has emerged as a leading proponent of this view. Placing himself explicitly within the antiliberal tradition,¹⁷³ Vermeule claims that liberalism is a religion. The "main tradition of liberalism," he argues, "is in fact a liturgy, centred on a sacramental celebration of the progressive overcoming of the darkness of bigotry and unreason."¹⁷⁴ Vermeule is not unique here. This language could come from Schmitt, Eliot, Smith, or Himmelfarb. It is a trope of the antiliberal canon to decry "the secularized soteriology of the Enlightenment, the narrative of Progress."¹⁷⁵

Building in the Divine Style, for the Common Good(s), 16 RUTGERS J.L. & RELIGION 478, 482 (2015).

171. See Adrian Vermeule, *As Secular Liberalism Attacks the Church, Catholics Can't Afford To Be Nostalgic*, CATH. HERALD (Jan. 5, 2018), <https://catholicherald.co.uk/commentandblogs/2018/01/05/as-secular-liberalism-attacks-the-church-catholics-cant-afford-to-be-nostalgic/> [<https://perma.cc/VE33-B9FC>] (criticizing Catholic traditionalists for rejecting integralism and for failing to see that "[t]here is no reason to think that a stable, long-term rapprochement between Catholicism and the liberal state is realistically feasible"); Edmund Waldstein, *Gelasian Dyarchy at Notre Dame*, JOSIAS (Nov. 4, 2018), <https://thejosias.com/2018/11/04/gelasian-dyarchy-at-notre-dame/> [<https://perma.cc/495S-CVYM>] (discussing a debate at Notre Dame between Catholic integralists and "Whig Thomist" liberals about the proper response to the American experiment in religious freedom).

172. Cf. Vincent Phillip Muñoz, *Defending American Classical Liberalism*, NAT'L REV. (June 11, 2018, 6:30 AM), <https://www.nationalreview.com/2018/06/american-classical-liberalism-response-to-radical-catholics/> [<https://perma.cc/UBN8-VCEE>] (rejecting "radical Catholic" critiques of American liberalism advanced by Deneen, Vermeule, Dreher, and others).

173. See Vermeule, *supra* note 63 ("[T]he relentless dynamic of liberalism tends to undermine the 'peace, security and order' that liberalism itself promises.").

174. Vermeule, *supra* note 171.

175. Vermuele, *supra* note 22.

Another standard antiliberal argument is that liberalism and communism are the twin offspring of the Enlightenment.¹⁷⁶ Vermeule follows this script as well, arguing that both ideologies were “children of the Enlightenment, raised in the same nursery of the Revolution . . . [with] the same inner logic, the same intellectual structure, and the same dynamics over time.”¹⁷⁷ He rejects, as does the antiliberal tradition, any real distinction between the liberal and communist state. The professed commitment to the freedom of thought and belief that supposedly distinguishes liberal states from communist ones is a chimaera. The insidiousness of liberal society is that while it “celebrates toleration, diversity, and free inquiry . . . in practice it features a spreading social, cultural, and ideological conformity.”¹⁷⁸

Liberal individuals are, as is common in this genre, lonely, desiccated, detached, and searching for meaning in a world that liberalism has created. “Because liberalism tends to dissolve intermediate institutions and traditional groupings—family, community, church—liberal man craves belonging and membership.”¹⁷⁹ Moreover, intellectuals—“freethinkers”¹⁸⁰—are misled. They are liberals “due not just to fear of social reprisals and shaming, but also to self-deception and the lack of any other comprehensive view that would give them the self-confidence to think and speak against liberalism.”¹⁸¹

What is to be done about liberalism and the liberal state? Vermeule rejects those traditionalist conservatives who “hope for a truce” between Christianity and aggressive liberalism.¹⁸² Instead, like Eliot before him, Vermeule advocates a Christian society—a Catholic state—and he reproaches those antiliberals who are insufficiently committed to realizing such a new order.

176. See LEGUTKO, *supra* note 10, at 155–75 (critiquing the Enlightenment driven development of liberal and communist criticisms of Christianity); CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* 34–39 (G.L. Ulmen trans. & ann., Praeger 1996) (1923) (discussing the development of liberalism and communism following the Enlightenment and positioning both as enemies of Roman Catholicism).

177. Vermeule, *supra* note 22.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Vermeule, *supra* note 171.

One cannot compromise when salvation is at stake. The “forces of secular progressive liberalism” are too dangerous and too powerful.¹⁸³

But how does such a state come about? Here, Vermeule flirts with the Christian nationalist movements in Poland and Hungary.¹⁸⁴ And programmatically, borrowing from Schmitt, Vermeule suggests that Catholics engage in “flexible collaboration” with “pagan kings and powers”—to use whatever tactics and make whatever political alliances are necessary to achieve their aims.¹⁸⁵ He urges Christians to engage in politics, but always on the understanding that “[n]o one temporal ideology, no set political program, can limit the freedom of the Church. As the inheritor and baptizer of the universal pretensions of the Roman Empire, the Church acts in all lands under an infinite variety of political conditions.”¹⁸⁶ What is important is the long-term goal: “to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth.”¹⁸⁷

183. *Id.* Liberalism is even responsible for the Catholic Church’s epidemic of child sex abuse in the twentieth century. The implicit suggestion is that liberalism has corrupted the Church hierarchy; the Church would be better positioned to prevent child sex abuse in a Catholic state. Responding to the claim that integralists must account for the Catholic Church’s conduct in child abuse cases, Vermeule writes that “[t]he necessary comparison involves (1) liberal authorities under liberalism; (2) Church authorities under liberalism; and (3) Church authorities under integralism. Abuses in Boston in the 1970s (e.g.) tell us something about (2), but little about (3) and nothing at all about (1).” Adrian Vermeule (@Vermeullarmine), TWITTER (Jan. 11, 2018, 5:02 PM), <https://twitter.com/Vermeullarmine/status/951590066337480736> [<https://perma.cc/8H8J-2QPG>]. He also claims that “the Church under integralism has accountability mechanisms it actually lacks under liberalism.” Adrian Vermeule (@Vermeullarmine), TWITTER (Jan. 11, 2018, 5:09 PM), <https://twitter.com/Vermeullarmine/status/951591842021339138> [<https://perma.cc/NY6S-JZ8M>].

184. See Adrian Vermeule, *Liberalism’s Fear*, JOSIAS (May 9, 2018), <https://thejosias.com/2018/05/09/liberalisms-fear/> [<https://perma.cc/37LE-AWUS>] (questioning liberal criticism of Poland and Hungary’s new political regimes); cf. Rick Hills, *Adrian Vermeule’s Anti-Liberal Chic?*, PRAWFSBLAWG (May 11, 2018), <https://prawfsblawg.blogs.com/prawfsblawg/2018/05/adrian-vermeules-anti-liberal-chic.html> [<https://perma.cc/CRN5-ZRJU>] (suggesting that Vermeule’s comments may be aimed at simply riling up liberalism’s advocates, not an actual viewpoint).

185. Vermeule, *supra* note 24; see also Adrian Vermeule, *The Ark of Tradition*, RUSSELL KIRK CTR.: U. BOOKMAN (Nov. 19, 2017), <https://kirkcenter.org/reviews/the-ark-of-tradition/> [<https://perma.cc/93HA-4UZR>] (reviewing SCHMITT, *supra* note 176).

186. Vermeule, *supra* note 24.

187. *Id.*

In this, Vermeule again echoes Eliot and the long tradition of religious antiliberalism. Liberalism—whether in the guise of “modern paganism,” humanism, or secularism—is described as an ideology as powerful and as all-encompassing as communism or fascism.¹⁸⁸ What follows is that liberalism has to be defeated at all costs. This view is not appreciably different from the nineteenth century Church’s position under Pope Pius IX. Contemporary integralism is continuous with a long line of anti-modern thought within the Catholic Church. What is striking is the revival of integralism in the first third of the twenty-first century, after an over 250-year American history of religious pluralism and the instantiation of disestablishment and free exercise under the First Amendment.

There is no originalist claim here. Antiliberals are content to criticize the “Godless” Constitution brought into being by a group of Enlightenment Founders who rejected church hierarchy and were skeptical of inherited authority.¹⁸⁹ The antiliberal tradition is consciously committed to a longer-term project. Antiliberals tend to measure time in millennia as opposed to centuries, though often they identify the current moment as a profound turning point and use the existing political regime as an example of how Western liberal society has lost its way.¹⁹⁰

In the present time, the asserted collapse of religious liberty in the West is the harbinger of liberalism’s corruption. According to this line of thought, liberals are oppressing Christians and other orthodox believers, specifically through laws that require equal treatment of gays and lesbians, the provision of contraceptives and other health care to female employees and their dependents, and the recognition of same-sex marriage.¹⁹¹ The liberal state’s hostility to Christians is a matter of fact for religious antiliberal writers. They write as if Christians are being directly and purposefully targeted by the regulatory state. For some antiliberals, it would be enough if Christians could be left alone—freed from the requirements of civil law in a significant range of cases. But for integralists like Vermeule, the conflict between

188. See Vermeule, *supra* note 22 (“The eschaton of radical freedom for all is inevitable . . . and *therefore* it is essential that every good citizen accept liberalism (communism) in his heart . . .”).

189. See Brennan, *supra* note 170, at 528.

190. See Vermeule, *supra* note 173 (discussing liberalism’s attempts to change “settled *mores* of millennia”).

191. See SMITH, *supra* note 10, at 282–300.

Christians and liberals is world-historic, inevitable, and ongoing. And it can only end with a Christian state.¹⁹²

III. THE COLLAPSE OF CHURCH-STATE DOCTRINE

The antiliberal revival surveyed above is, in large part, a reflection and response to the sense of present-day cultural siege on the part of religious conservatives. But it has deeper roots. Reactionary thought is embedded in the Western political and philosophical tradition.¹⁹³ It would be a mistake to dismiss contemporary radical antiliberal diatribes as politically and academically fringe, even if they are not often asserted in polite company. Liberalism's discontents are a varied and vocal group. And the asserted crisis of liberalism is not taking place only in academic settings or in the pages (or websites) of religiously conservative periodicals.

For our purposes, the antiliberal revival is important because it is quietly making inroads into constitutional discourse. There is rarely a directly observable relationship between theory and practice, but modes of thought can provide justifications for doctrinal shifts or rationalize them after the fact. Religious antiliberalism is part of a broader discourse that often focuses on the Supreme Court's hostility to religion or disregard for religious sensibilities. Antiliberal thought asserts that liberalism oppresses across all domains of thought and action—in the family, the market, and the state.¹⁹⁴ Constitutional doctrine as it has enforced liberal separationism is a species of that oppression. Antiliberal critiques thus provide normative and justificatory support for courts already suspicious of existing separationism.

There is no question that the Supreme Court's Religion Clause doctrine has moved sharply against separationism over the last two decades.¹⁹⁵ The general doctrinal pattern has been

192. For further discussion, see generally Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, SAN DIEGO L. REV. (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Paper Series No. 2019-43, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436376 (surveying and criticizing integralist views).

193. See generally HOLMES, *supra* note 7 (tracing and discussing the roots of antiliberalism in Western thought).

194. Schwartzman & Wilson, *supra* note 192, at 14 (discussing “a ‘post-liberal’ or integralist view in which liberalism is seen as a relentless, oppressive, and theological enemy”).

195. See Richard Schragger & Micah Schwartzman, *Establishment Clause*

a narrowing of the Establishment Clause and a broadening of free exercise. With respect to the Establishment Clause, in *American Legion v. American Humanist Ass'n*, the Court recently held that state sponsorship of a forty-foot Latin cross did not constitute an impermissible endorsement of Christianity.¹⁹⁶ The Court further held that long-standing religious monuments and practices enjoy a presumption of constitutionality.¹⁹⁷ Similarly, in *Town of Greece v. Galloway*, the Court rejected an Establishment Clause challenge to a town's practice of opening board meetings with explicitly sectarian and mainly Christian prayers.¹⁹⁸ In *Trinity Lutheran Church of Columbia v. Comer*, the Court held that the government must fund a church playground resurfacing project on equal terms as nonreligious schools,¹⁹⁹ raising the possibility of mandatory funding for religious schools' core mission.²⁰⁰

On the free exercise side, by contrast, the doctrine has been expansionist. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court invalidated application of Colorado's antidiscrimination law to a Christian baker who denied service to a gay couple,²⁰¹ opening the door to the possibility of broader religious exemptions from civil rights law. In *Burwell v. Hobby*

Inversion and the Bladensburg Cross Case, in AM. CONSTITUTION SOC'Y, SUPREME COURT REVIEW 2018–2019, at 21, 24 (2019).

196. 139 S. Ct. 2067 (2019).

197. *Id.* at 2085.

198. 572 U.S. 565 (2014).

199. 137 S. Ct. 2012 (2017).

200. The Court's recent certiorari decisions suggest that some members may be ready to expand this precedent. In one case, the Montana Supreme Court struck down a state law requiring tax credits for religious education because it violated the state's constitution. The Court granted certiorari for an appeal claiming that the decision violates the Free Exercise Clause by excluding religious education. *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019). In another case, the Court denied certiorari from a New Jersey Supreme Court decision upholding a historic preservation program that excluded religious buildings. Justice Kavanaugh, joined by Justices Alito and Gorsuch, wrote a statement agreeing with the denial on procedural grounds, but indicated his view that the state's actions violated the Free Exercise Clause. *Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 909 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (mem.) ("In my view, the decision of the New Jersey Supreme Court is in serious tension with this Court's religious equality precedents.").

201. 138 S. Ct. 1719 (2018).

Lobby Stores, Inc., the Court applied the Religious Freedom Restoration Act (RFRA) to a for-profit corporation and granted a religious exemption from federal regulations mandating coverage of contraception in health insurance policies for employees.²⁰² And in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the Court held that churches are immune from employment discrimination suits by “ministers” and that the category of minister should be construed broadly to include a teacher of mostly secular subjects.²⁰³

Despite the Court’s supposed hostility toward religion, the “pro-religion” party has been on the winning side of almost all of the First Amendment and statutory free exercise cases that the Court has heard in the last decade. A glaring exception is *Trump v. Hawaii*,²⁰⁴ the travel ban case, which rejected an Establishment Clause challenge to an immigration ban motivated by the President’s explicit animus toward Muslims.²⁰⁵

We are not suggesting that each of these cases taken individually represents a break with liberal principles. These cases have been decided for the most part within the terms of liberal discourse. The Court recites and applies the procedural principles of neutrality, nondiscrimination, and private choice.²⁰⁶ But that discourse is clearly under strain, creating inconsistencies that suggest a larger cultural or attitudinal shift rather than a principled application of settled principles. The Court’s willingness to remake church-state jurisprudence reflects a broader critique of liberal separationism. The role of that critique in the political economy of the Religion Clauses is addressed below in Part IV. But before turning to the future of church-state jurisprudence, we first identify the doctrinal tensions that suggest its more recent collapse.

A. RELIGION’S SPECIALNESS

We start with a basic anomaly. The Supreme Court’s Religion Clause decisions are conflicted over whether religious people, organizations, and activities must be accorded the same

202. 573 U.S. 682 (2014).

203. 565 U.S. 171 (2012).

204. 138 S. Ct. 2392 (2018).

205. See Kendrick & Schwartzman, *supra* note 5, at 168–69.

206. See *infra* Part IV.D.

treatment as their nonreligious analogs, or whether those activities, organizations, and people are meant to receive special treatment. Whether religion is “special” shows up doctrinally in a number of ways.²⁰⁷ The *funding* cases ask whether religious activities can or must receive funding from the government on equal terms with equivalent secular activities.²⁰⁸ The *exemptions* cases ask whether religiously motivated actors are entitled to receive exemptions from general laws that nonreligious individuals do not receive.²⁰⁹ And the *government speech* cases ask whether the government can make religious statements or give religious reasons for laws on the same basis as it makes nonreligious statements or gives secular reasons for laws.²¹⁰ Religion is special to the extent it receives either better or worse treatment compared to its secular analog.²¹¹ In the past, the Establishment Clause has been read to disallow significant government funding of religious activities,²¹² to limit government religious speech,²¹³ and to prohibit laws that lack a predominant secular purpose.²¹⁴ The Free Exercise Clause has been read to permit²¹⁵ and sometimes to require religious exemptions from laws that otherwise

207. See Schwartzman, *supra* note 27, at 1353–55.

208. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010); *Locke v. Davey*, 540 U.S. 712 (2004); see also 2 GREENAWALT, *supra* note 39, at 194–206 (discussing cases regarding equal access to public facilities for religious activities); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

209. Compare *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (applying RFRA to require a religious exemption from the contraception mandate for a religious for-profit corporation), with *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.C. Cir. 2015) (applying the Equal Protection Clause to require an exemption from the contraception mandate for a secular nonprofit).

210. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Stone v. Graham*, 449 U.S. 39 (1980).

211. See Schwartzman, *supra* note 27, at 1353.

212. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating state law that provided government funding to reimburse private religious schools for textbooks and teacher salaries).

213. See, e.g., *Santa Fe*, 530 U.S. at 317 (upholding Establishment Clause challenge to public school’s prayer practice at high school football games).

214. See, e.g., *McCreary County*, 545 U.S. at 881 (declaring that the practice of displaying the Ten Commandments in county courthouses was unconstitutional because it lacked a secular purpose).

215. See *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872

bind nonreligious actors.²¹⁶ Religion is thus specially disabled, but also specially protected.²¹⁷

This regime, however, has been collapsing for some time under pressure from a general nondiscrimination principle.²¹⁸ Most recently in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court struck down a state law that prevented government funding of religious enterprises in the context of playground resurfacing.²¹⁹ *Trinity Lutheran* follows a line of cases in the 1990s, culminating in *Zelman v. Simmons-Harris*,²²⁰ that permitted but did not require indirect state funding of religious schools through a school voucher program.²²¹ *Zelman* rejected the reasoning of a previous line of cases holding that funding religious schools, except under narrow circumstances, violated the Establishment Clause.²²² *Trinity Lutheran* is three steps removed from those precedents. The Court has moved from a regime that disallowed most kinds of direct funding to a regime that permitted indirect funding and now to a regime that requires direct funding. And

(1990) (holding that the Free Exercise Clause allows but does not require religious exemptions from neutral and generally applicable laws). Although the Court's decision in *Smith* did not give especially favorable treatment to religion, it left in place earlier lines of cases that provided exemptions and permitted the development of federal statutes that have granted significant special protections for religious free exercise, even at the cost of significant harms to third parties. See *infra* notes 315–16 and accompanying text; see also NeJaime & Siegel, *supra* note 6, at 2562–67; Sepper, *supra* note 5, at 1505–07. And even so, there has been constant pressure from religious conservatives in recent years to overturn *Smith*. See Kendrick & Schwartzman, *supra* note 5, at 162–63 (discussing efforts to overrule *Smith*).

216. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (recognizing ministerial exception in part under the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting religious exemption from compulsory school attendance law); *Sherbert v. Verner*, 374 U.S. 398 (1963) (granting religious exemption for unemployment compensation benefits).

217. See Schwartzman, *supra* note 27, at 1356–58.

218. This doctrinal trajectory was noticed already more than a decade ago. See Feldman, *supra* note 1, at 676.

219. 137 S. Ct. 2012 (2017).

220. 536 U.S. 639 (2002).

221. See 2 GREENAWALT, *supra* note 39, at 405–14 (surveying the permissive funding cases leading up to the Court's decision in *Zelman*).

222. See Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919 (2003) (“*Zelman* represents the most recent and dramatic move away from Separationism.”).

though the Court put to the side whether such funding is required outside the context of playground resurfacing,²²³ the direction of the doctrine is clear.²²⁴

The funding cases are driven by a seemingly compelling antidiscrimination norm, according to which religious organizations that look just like secular ones should not be penalized by restrictions on government funding. Religious traditionalists and conservatives have long chafed against funding restrictions, especially with regards to private religious schools.²²⁵ They have asserted, now with some success, that a basic equal protection theory should apply to such discriminations.²²⁶

Similarly, some have argued that religious reasons should be treated the same as secular reasons in providing legitimate grounds for justifying law.²²⁷ Here we can see an application of the antiliberal critique of the secular/religious divide. If religious argument is no different from other kinds of ideological argument, then it should be included on the same terms in the political domain. The rejection of the secular/religious distinction—a staple of liberal thought—means that if the state can rely on secular values, whether in justifying laws or in expressing those justifications through government speech, it should be able to appeal to religious convictions as well.

This equal treatment regime, however, does not seem to hold when it comes to government regulation of religion. When laws burden religion, as opposed to funding or promoting it, a different set of concerns emerge. Religious belief is treated as unique and uniquely vulnerable to government repression. Arguments are often made that religious claims are special because

223. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (“This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”).

224. See Laycock, *supra* note 1, at 137–42.

225. See FELDMAN, *supra* note 62, at 215; Jeffries & Ryan, *supra* note 28, at 328–52.

226. See, e.g., Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 358–62 (1986).

227. See, e.g., McConnell, *supra* note 88, at 655–56; Wolterstorff, *supra* note 83, at 180.

religious persons are responding to a higher law.²²⁸ Religious accommodationists assert that conflicts between secular and religious laws are especially and uniquely painful for them.²²⁹ They also claim that religious institutions, unlike secular analogs, have a particular and special status, legally and normatively.²³⁰ Under liberal theory, churches are voluntary associations, like other associations. But under institutionalist or corporatist theories, churches are much more than that.²³¹

While religion is not special for purposes of funding, government speech, or justifying legislation, it does appear to be special for purposes of religious exemptions.²³² For example, in holding that religious organizations are exempt from antidiscrimination laws when making employment decisions about ministers, the Supreme Court declared that “the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations”²³³—a clear nod to religious institutionalism.²³⁴ The

228. See, e.g., Thomas C. Berg, “Secular Purpose,” *Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24, 36–37 (2013); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 28–30 (2000); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1611 (1997); Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, 36 WAKE FOREST L. REV. 535, 555 (2001).

229. GARVEY, *supra* note 142, at 54.

230. See BRADY, *supra* note 27, at 321–24; Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 777 n.34 (2013) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012)).

231. See *supra* Part II.C.

232. One of us has described this combination of views under the label of “inclusive accommodation.” Schwartzman, *supra* note 27, at 1359. According to this view, religion is not to be treated specially for purposes of the political process. It must be included like any other nonreligious ethical or philosophical view. But religion warrants special treatment with respect to granting accommodations. At the core of this view is a deep asymmetry in the treatment of religion—sometimes religion is special, and sometimes it is not. And the question always for inclusive accommodationists is whether asymmetry can be justified. See *id.* at 1378–85 (arguing that none of the arguments offered for inclusive accommodation “seem capable of resolving this underlying theoretical inconsistency”).

233. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

234. Religious institutionalists welcomed *Hosanna-Tabor* as confirming that their views now have a firmer foothold within constitutional doctrine. See, e.g.,

Court has also applied RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) to protect the rights of religious believers, holding that “[r]eligious accommodations . . . need not ‘come packaged with benefits to secular entities.’”²³⁵ The Court has found no difficulty extending religious exemptions to large for-profit corporations, with the result that the religious owners of Hobby Lobby can opt-out of complying with a federal health care mandate.²³⁶ Companies and persons with equivalent secular conscientious objections, however, generally do not receive such beneficial treatment under RFRA, RLUIPA, or the First Amendment.²³⁷

By contrast with the emerging regime, the separationist church-state settlement maintained a balance in treating religion distinctively. It disallowed government support for religious activities, but it also required exemptions for religious dissenters.²³⁸ Religion was exceptional in two ways. Religiously motivated activities were burdened to the extent that the government could not directly support them, either through funding or through the enactment of laws directed to advance religious purposes. At the same time, certain regulations that burdened religious conscientious objectors were lifted.

The language of equal treatment, however, has now been put to one-sided use, most obviously in the funding context. Equal treatment arguments fit comfortably in a liberal antidiscrimination schema; government should treat religious and non-religious citizens with equal regard.²³⁹ But this one-sided equal

Richard W. Garnett, *The Worms and the Octopus: Religious Freedom, Pluralism, and Conservatism*, in *NOMOS LVI: AMERICAN CONSERVATISM* 160, 175–76 (Sanford V. Levinson et al. eds., 2016).

235. See *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

236. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

237. See, e.g., *Real Alternatives, Inc. v. Sec. Dep’t Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017) (rejecting statutory and constitutional claims for exemption from the federal contraception mandate for secular, non-profit, anti-abortion organizations).

238. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L.J.* 1611, 1633–39 (1993); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. CHI. L. REV.* 195, 222 (1992). *But see* Schwartzman, *supra* note 27, at 1390–94 (criticizing this symmetrical or balancing view under the label of “exclusive accommodation”).

239. See *EISGRUBER & SAGER*, *supra* note 15, at 28–31; *TEBBE*, *supra* note 16, at 71–73.

treatment raises a concern that what is really happening is something else: that religious citizens receive more favorable treatment across the scope of government activities than do non-religious citizens.

Moreover, the asymmetrical application of the equal treatment principle is difficult if not impossible to defend on the basis of liberal principles.²⁴⁰ What differentiates religious conscientious objectors from nonreligious ones, who may have equally deeply felt objections to a coercive law? Is there not an equal protection problem when the religious owners of Hobby Lobby can be exempted from the requirement to provide contraception coverage to their employees, but the nonreligious owners of a company who have secular conscientious objections to the same law cannot?²⁴¹ If it is suspect for government to distribute benefits and burdens based on a citizen's source of belief, why does that suspicion only apply to laws that disfavor religious persons?

This lack of symmetry has been defended by some on the grounds that religion is so important that religious actors should be supported by the state as well as exempted from the state's laws.²⁴² Religious believers can encourage the government to adopt religiously motivated laws, to provide monies to religious persons and organizations, and to express or endorse religious convictions in public just as they might express or endorse non-religious views. At the same time, they are entitled to be exempt from government regulation in many cases. Within the discourse of equal treatment, however, this dual treatment of religious believers is puzzling. One needs a theory of religion and its privileged place to justify treating citizens so differently on account of the nature of their beliefs. A liberal account—whatever the rhetoric of equal treatment—has (and should have) difficulty doing so. The demands of equality are too obvious.

A regime of equal treatment is available. It is contained in the human rights doctrines that demand respect for rights of

240. See Schwartzman, *supra* note 27, at 1377–401.

241. Compare, e.g., *Real Alternatives*, 867 F.3d at 348–53 (denying an Equal Protection Clause challenge for an exemption from the contraception mandate for a secular nonprofit), with *March for Life v. Burwell*, 128 F. Supp. 3d 116, 126–28 (D.C. Cir. 2015) (applying the Equal Protection Clause to require an exemption from the contraception mandate for a secular nonprofit).

242. See Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors*, 2017–2018 CATO SUP. CT. REV. 139, 165–66 (2018).

conscience, whether religious in nature or otherwise.²⁴³ In the context of American constitutional law, Christopher Eisgruber and Larry Sager have promoted a liberal theory of equal concern and respect for all citizens regardless of the nature of their deeply held convictions.²⁴⁴ It is symmetrical insofar as it treats religious and nonreligious claims equally for purposes of both free exercise and disestablishment.²⁴⁵ Eisgruber and Sager are persuasive that religious asymmetry is indefensible. They and others have urged treating religious claims like other comparable ethical claims in evaluating whether the government is required or permitted to provide support, endorsement, or exemptions. Secular and religious claims alike would be tested against the same criteria.²⁴⁶

The doctrine is moving away from such symmetry, however. With respect to exemptions, the doctrine *had* been moving toward regulatory equality. In *Employment Division, Department of Human Resources of Oregon v. Smith*,²⁴⁷ decided almost thirty years ago, the Court limited the special treatment of religious believers under the First Amendment when it held that the Free Exercise Clause does not require exemptions when a law is neutral and generally applicable. Since *Smith* was decided, however, it has been roundly criticized, and mostly replaced by statutory protections for religious believers.²⁴⁸ The Court has also found its own ways around *Smith*. *Hosanna-Tabor* barely engaged with *Smith*'s reasoning even as the ministerial exception limits

243. See MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM 84–85 (2017) (arguing for a human right of “moral freedom” that would extend a regime of religious exemptions to those with nonreligious claims of conscience); Schwartzman, *Religion as a Legal Proxy*, *supra* note 16, at 1099–101.

244. EISGRUBER & SAGER, *supra* note 15, at 18–20.

245. Schwartzman, *supra* note 27, at 1374–77 (discussing Eisgruber and Sager's theory as a version of “inclusive nonaccommodation,” which “takes as its fundamental premise the equality of religious and secular moral views”).

246. Which is not to say that we agree entirely with Eisgruber and Sager's view, only that we share their basic premise about the need for equal treatment of religious and nonreligious ethical and philosophical doctrines. See Schwartzman, *supra* note 27, at 1395–401 (arguing for an alternative to Eisgruber and Sager's account because of concerns about the inclusion of religious convictions as grounds for legal decision making).

247. 494 U.S. 872 (1990).

248. On the rise and fall and rise again of religious accommodations, see Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 35 (2014).

Smith's central holding.²⁴⁹ As noted above, the Court in *Hosanna-Tabor* seemed to endorse an institutionalist conception of religious freedom. Also, in *Masterpiece Cakeshop*, which invalidated the application of a neutral and generally applicable public accommodations law, the Court avoided *Smith* by holding that the civil rights law had not been applied neutrally.²⁵⁰

Smith is in decline if not dead.²⁵¹ But while *Smith* collapses, equal treatment arguments have gained traction in the funding area. In other words, the equal treatment principle is being deployed in cases that benefit religious actors, but not where it works against them.

A liberal account of the Religion Clauses does not readily permit this double-standard.²⁵² But as we have already described, antiliberal thought draws a relevant distinction between transcendent religiosity, which characterizes the beliefs of “Christians” and other “devout” believers, and secularized “pagans,” or those who accept immanent conceptions of value.²⁵³ It is permissible, under this view, to treat the former more favorably than the latter, as their commitments are of a different kind. There is no inconsistency on this account, as the principle of equality simply does not apply as between the two groups.

In addition, antiliberal theories provide a justification for religious favoritism, in part as compensation for a background

249. See Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 951, 954–56 (2012) (criticizing the Court's attempt to distinguish *Smith*); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1292 (2017) (describing the Court's treatment of *Smith* as a “woefully inadequate explanation of why *Smith* is not fatal to the ministerial exception”).

250. See Kendrick & Schwartzman, *supra* note 5, at 138–45, 154–57 (criticizing the Court's holding that the state failed to apply its public accommodations law in a manner consistent with religious neutrality).

251. See *id.* at 162 (noting that in *Masterpiece Cakeshop*, Justice Gorsuch and Justice Alito signaled their interest in reversing *Smith*). And just in case the signal in *Masterpiece Cakeshop* was not received, less than a year later, Justice Alito—this time joined by Justices Thomas, Gorsuch, and Kavanaugh—issued another statement effectively inviting challenges to *Smith*. See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring).

252. See *supra* Part I.

253. See *supra* Part II.B.

liberal regime that is purportedly biased against religious believers.²⁵⁴ The antiliberal critique sets the stage for a regime of separate spheres or institutional sovereignty. Once one embraces the idea that liberalism is a religion, one can treat the liberal state and the church as akin to competing religious sovereigns. The liberal regime of equal treatment is replaced with, or subordinated to, an antiliberal regime of church freedom.

B. NEUTRALITY

The problem of religion's specialness is related to the question of what constitutes government "neutrality" concerning religion. The Court's Religion Clause decisions are written in terms of liberal principles, with religious neutrality perhaps foremost among them. But the meaning of neutrality has been a moving target, similar to the ways that equal treatment has been inconsistently applied. Here again, "neutrality" is being deployed to instantiate a religion-favoring regime, one that undercuts liberal premises rather than enforces them.

First, consider the requirements for neutrality recently debated in *Masterpiece Cakeshop*.²⁵⁵ Under *Smith*, neutral laws of general applicability do not give rise to a free exercise claim for an exemption.²⁵⁶ One would have thought that a public accommodations law that applied to gays and lesbians would be such a law. Civil rights laws are general and apply to religious as well as nonreligious parties; on their face, there is no targeting of a particular religion or religion in general.²⁵⁷

254. See *supra* Part II.A.

255. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

256. *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 878 (1990).

257. Writing for the Court, Justice Kennedy affirmed that the state's public accommodation is facially neutral and generally applicable. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727 ("[I]t is a general rule that such [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." (emphasis added)); see also Kendrick & Schwartzman, *supra* note 5, at 154–57 (defending the neutrality of Colorado's public accommodations law, both facially and as applied in *Masterpiece Cakeshop*).

Nevertheless, in considering the baker's claim for a religious exemption, the Court accepted that the state's public accommodations law had not been applied neutrally.²⁵⁸ Jack Phillips, the baker who refused to bake a cake for a gay couple's wedding, argued that the state had discriminated against him and expressed hostility toward his religious convictions. That was, in part, because the Colorado Civil Rights Division rejected a religious discrimination claim brought by another baker—William Jack—who had asked three different bakers to make cakes with anti-gay marriage expressions. Phillips claimed that forcing him to bake a cake celebrating a gay marriage but not forcing other bakers to bake cakes denigrating such marriage was disparate treatment.²⁵⁹

What version of neutrality does this violate? The Court's free speech doctrine holds that the government cannot favor some messages over others. If Colorado were regulating bakers' messages, permitting bakers to deny service for anti-gay messages, but not the opposite, would violate a neutrality principle.²⁶⁰ But Colorado's Anti-Discrimination Act regulates the grounds for denial of service, not speech.²⁶¹ Private parties are not barred from denying service on the basis of message; what they are not allowed to do is deny service based on a protected class.²⁶² Phillips denied service based on the protected status of his customers; Jack was denied service based on the otherwise unprotected content of his requested expression.²⁶³

That the Court accepted Phillips's disparate treatment claim, however, suggests the increasing malleability of neutrality. Civil rights law could not exist if it could not differentiate

258. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

259. Brief for Petitioners at 39–44, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

260. *Masterpiece Cakeshop*, 138 S. Ct. at 1733–34.

261. Kendrick & Schwartzman, *supra* note 5, at 143–45.

262. See *id.* at 154–55 (“[Civil rights laws] apply only to denial of service on the basis of certain protected characteristics, such as race, ethnicity, religion, and sexual orientation. They do not prohibit a baker from refusing to make a cake on grounds of politics (for example, Nazi cakes), vulgarity (penis-shaped cakes), or aesthetics (red velvet armadillo cakes).” (citation omitted)).

263. *Id.*

between permissible grounds for denials of service and impermissible ones.²⁶⁴ The state can presumably choose to use its public accommodation laws to protect gays and lesbians but not protect Nazis, Republicans, vegans, nudists, or haters of LGBT people. If neutrality requires that all group identities that might be associated with a particular product or service (a gay cake, a Nazi cake, a vegan cake) be protected equally, it will be quite difficult to adopt any civil rights laws at all. Neutrality would require that Nazis cannot be refused service if African-Americans cannot be refused service. This result follows from importing speech doctrine's viewpoint neutrality into public accommodations law.

Neutrality, improperly conceived or applied, can be a destroyer of law. We witnessed this effect during the *Lochner* era when the Court required economic legislation to be evenhanded.²⁶⁵ Free speech law also contains within it the means of law's destruction. Most action involves speech, and so most legal regulation can be reimagined as the regulation of speech.²⁶⁶ The demand that the state be viewpoint neutral when it regulates acts that are infused with speech can lead to law's demise.²⁶⁷

Demands for free exercise neutrality exhibit a similar power. If every legal regulation impinges on a religious or ideological belief, then no regulation is evenhanded. The law will affect some kinds of believers more than others. Civil rights laws protecting African-Americans will be non-neutral with regards

264. *Id.* at 145 ("If distinguishing between lawful denials of service and unlawful discrimination is impermissible, then the Supreme Court has destroyed civil rights law sub silentio.").

265. See *Lochner v. New York*, 198 U.S. 45, 60–62 (1905); see also 2 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY* 404–12 (2016).

266. See Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech,"* 116 MICH. L. REV. 667, 675–76 (2018) (noting the inexorable expansion of activities that courts and litigants have found to implicate speech).

267. This phenomenon, sometimes described as free speech or First Amendment *Lochnerism*, has been much discussed and heavily criticized in recent years. See, e.g., Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1212–18 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 176–91 (2016); Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 439–56 (2006).

to Christians who believe in white supremacy unless religious white supremacists also receive protection.²⁶⁸ We have fallen into Wechsler's *Brown v. Board of Education*-destroying "neutral principles" trap.²⁶⁹

Another meaning of religious neutrality will also be offended by most law. If the state cannot influence the religious choices of its citizens, even incidentally, then any funding or regulatory choice that has the effect of favoring a particular ideology or religious doctrine will be non-neutral. For example, religious traditionalists have long argued that public funding of secular schools disfavors those who prefer or require that their children receive a religious education.²⁷⁰ Secularists receive an education paid for by the state, while the devout are required to pay for private schools. According to the demands of this account of neutrality, the public school system is non-neutral with regards to religion, and certainly so if one considers a secular education to be religious.²⁷¹ Indeed, any other funding or regulatory choice that might influence or coerce religiously inspired action will be non-neutral. Since any and all human activities can be undertaken for religious reasons, the state's regulation of any activity can be reframed as disparate treatment. This form of neutrality,

268. The Court rejected this possibility in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (denying as "patently frivolous" a free exercise challenge brought by a restaurant owner who refused service to African Americans).

269. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Our response, perhaps unsurprisingly, follows Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); see also Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 172 (2019) (defending the religious neutrality of public accommodation laws by developing Black's response to Wechsler in the context of *Masterpiece Cakeshop*).

270. See, e.g., *Mozert v. Bd. of Educ.*, 827 F.2d 1058, 1058–59 (6th Cir. 1987) (holding that public schools can require religious students to read materials that offend those students or their parents' religious beliefs); FELDMAN, *supra* note 62, at 90–92; Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 589–609 (1993).

271. See, e.g., Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FL. L. REV. 909, 1047–59 (2013) (arguing states violate the First and Fourteenth Amendments by discriminating on the basis of religion in operating secular public schools as taxpayer-funded monopolies).

sometimes described as “neutrality of effect,”²⁷² again vitiates law.

Hobby Lobby provides a further example of how the principle of neutrality can be manipulated to undermine legal regulation. Consider the argument that the contraception mandate was not a neutral and generally applicable law under *Smith* and should therefore have triggered strict scrutiny under the Free Exercise Clause. Like many employment regulations, the contraception mandate applied differently to large and small employers.²⁷³ The regulations also contained provisions that required implementation over time, exempting employers with grandfathered plans from the mandate.²⁷⁴ *Hobby Lobby* argued that the law was not neutral or generally applicable because it contained such exceptions, even though these exceptions had nothing to do with religion.²⁷⁵ Douglas Laycock and others have argued that a law is non-neutral with respect to religion if it contains even a single secular exception that undermines the purpose of the law.²⁷⁶ This is an almost insurmountable barrier to regulation.²⁷⁷

If deregulation is the goal, then neutrality’s severe demands can be deployed to accomplish it. But here again, neutrality is being used selectively. Neutrality is much less demanding when the Court considers government religious speech under the Establishment Clause. In both *Town of Greece* and *American Legion* the Court held that specifically Christian government

272. See RAWLS, POLITICAL LIBERALISM, *supra* note 12, at 191–94 (distinguishing between neutrality of aim and neutrality of effect and rejecting the latter).

273. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (describing exempt and non-exempt employers for the contraception mandate).

274. *Id.* at 2764.

275. See *id.* at 2763–64.

276. See Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22–23 (2016) (“The question is whether a single secular analogy is *not* regulated. The right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.”).

277. See Colin Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1352 (2015) (“If religious exemptions must be granted from any law with secular exceptions, they will be granted from nearly every law.”).

speech is permissible.²⁷⁸ Neutrality was no obstacle in those cases to the state's religious preferentialism.²⁷⁹

Antiliberal theories provide a basis for such selectivity. Antiliberals often assert that the state has never been neutral among competing comprehensive doctrines.²⁸⁰ In their view, liberalism and its variants—paganism and secularism—constitute the existing political and religious orthodoxy.²⁸¹ Religious libertarianism in the exemption context is thus an appropriate corrective to an already-existing bias.²⁸²

C. ANIMUS

The basic idea underlying equal treatment, non-discrimination, and neutrality is that the state should not favor one religious denomination over another. This is a central principle of disestablishment: the notion that a citizen's political and economic status is not tied to her religious belief and affiliation or non-belief and non-affiliation.²⁸³

Like all the core concepts of the Court's Religion Clause jurisprudence, this principle is also under strain. Consider Justice Antonin Scalia's stated preference for monotheism.²⁸⁴ Before his death, Justice Scalia promoted a form of religious identity politics, observing that the government could support a monotheistic civic-religious culture.²⁸⁵ This "Judeo-Christian" culture possibly included Muslims as monotheists, though it certainly did not include non-monotheistic religions or nonbelievers.²⁸⁶

278. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2974 (2019); *Town of Greece v. Galloway*, 572 U.S. 565, 585, 591 (2014).

279. See Schragger & Schwartzman, *supra* note 195, at 55 ("[T]he Court's doctrine is paving the way for a certain kind of religious preferentialism.").

280. See *supra* Part II.A.

281. See *supra* Parts II.A–B.

282. See Sepper, *supra* note 5, at 1508–12 (discussing "economic libertarianism in a religious garb").

283. See *Town of Greece*, 572 U.S. at 637–38 (Kagan, J., dissenting) ("[T]hat remarkable guarantee [of the Establishment Clause] means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another."); TEBBE, *supra* note 16, at 99–102.

284. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893–95 (2005) (Scalia, J., dissenting).

285. *Id.*

286. *Id.* at 893 ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment

Justice Scalia appeared quite comfortable with assimilating all religions into a background Christian culture. At one point, he claimed that a cross in the context of a war memorial was a universal symbol for fallen soldiers, including Jewish war dead.²⁸⁷ The Court adopted that same view in its decision in *American Legion*, holding that the Bladensburg Peace Cross was erected as a secular symbol of veterans who died in World War I and not as an endorsement of Christianity.²⁸⁸ In *Town of Greece*, the Court permitted a town to open its council meetings with predominantly sectarian Christian prayers,²⁸⁹ suggesting a tolerance for a certain Christian preferentialism. Echoes of Justice Brewer's 1892 claim that "this is a Christian nation"²⁹⁰ can be heard.²⁹¹

In these recent cases, the Court has rejected application of Justice O'Connor's endorsement test, which had been applied to previous religious display cases.²⁹² Under that test, the state is forbidden "from making adherence to a religion relevant in any

Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

287. At oral argument in *Salazar v. Buono*, 559 U.S. 700 (2010), which involved an Establishment Clause challenge to a Latin cross on federal land, Justice Scalia expressed indignation at the idea that a crucifix does not represent Jewish war dead. In an exchange with Peter Eliasberg, a Jewish lawyer representing the ACLU, Justice Scalia said, "I don't think you can leap . . . to the conclusion that the only war dead that the cross honors are the Christian war dead. I think that's an outrageous conclusion." Transcript of Oral Argument at 39, *Salazar*, 559 U.S. 700 (No. 08-472); see Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 200-02 (2017) (using Justice Scalia's comments during the *Salazar* oral argument to demonstrate Christian privilege).

288. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

289. *Town of Greece v. Galloway*, 572 U.S. 565, 570, 585 (2014).

290. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

291. Cf. Mark Tushnet, *Religion and the Roberts Court: The Limits of Religious Pluralism in Constitutional Law*, in RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 133, at 465 (arguing that under the "Roberts Court's approach to the Religion Clauses: Christianity is the unmarked religion").

292. See *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring); see also TEBBE, *supra* note 16, at 98-112 (defending a principle of government nonendorsement, including limits on government religious speech); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1545-51 (2000) (interpreting the endorsement test as a prohibition on expressive harms with respect to religious status).

way to a person's standing in the political community."²⁹³ The government violates this doctrine when it "sends a message to nonadherents that they are outsiders, not full members of the political community."²⁹⁴ That principle appears to be moribund after *American Legion* and *Town of Greece*.

So, too, animus doctrine holds that the government cannot engage in acts driven by animus toward a particular religion or religious group.²⁹⁵ A species of equal protection law,²⁹⁶ animus doctrine holds that hostility or prejudice toward a religious denomination or practice cannot serve as an appropriate basis of lawmaking.²⁹⁷ The selective application of animus doctrine, however, suggests that it also is a concept that has lost its conventional meaning.

Consider the inconsistent application of animus in *Trump v. Hawaii*, the travel ban case, when compared to its application in *Masterpiece Cakeshop*, the wedding-vendor case. Along with the dissenters in *Trump v. Hawaii*,²⁹⁸ commentators have repeatedly noted the striking disparity.²⁹⁹ In two cases decided in the same term, the Court was tasked with determining whether a government decision was animated by religious prejudice. In

293. *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring).

294. *Id.* at 625 (O'Connor, J., concurring) (quoting *Lynch*, 466 U.S. at 688).

295. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523–24 (1993).

296. See WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 169 (2017); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183–84.

297. See Kendrick & Schwartzman, *supra* note 5, at 137 ("Lukumi stands for a basic constitutional principle, which is that the government may not act on the basis of animosity toward religion.").

298. *Trump v. Hawaii*, 138 S. Ct. 2392, 2446–47 (2018) (Sotomayor, J., dissenting) ("But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without 'the neutrality that the Free Exercise Clause requires,' the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance." (citation omitted)).

299. See, e.g., Kendrick & Schwartzman, *supra* note 5, at 168–69 (arguing that *Trump v. Hawaii* "undermined the credibility of the principles articulated in *Masterpiece*," prohibiting public officials from acting on the basis of animus and expressing hostility toward religion); Ilya Somin, *The Supreme Court's In-defensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop*, VOX (June 27, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard> [https://perma.cc/34XW-9ZJG].

Trump v. Hawaii, the Court had before it numerous and extensive statements from the President of the United States, who made clear that his executive order banning immigration from Muslim-majority countries was intended to prevent Muslims from entering the United States.³⁰⁰ The President did not hide the fact that the purpose and intent was to enact a “Muslim ban.” As a presidential candidate, he called “for a total and complete shutdown of Muslims entering the United States,”³⁰¹ and after taking office, as Justice Sotomayor correctly concluded, “he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers.”³⁰² The Supreme Court, however, refused to apply animus doctrine to the President’s actions. It simply disregarded the significance of his statements in affirming his use of executive authority to issue the travel ban.³⁰³

In *Masterpiece Cakeshop*, by contrast, the Court went out of its way to find animus toward the Christian baker seeking an exemption from Colorado’s public accommodation laws.³⁰⁴ What did the Court point to as evidence of religious hostility? Justice Kennedy’s majority opinion cites two instances of individual Colorado Civil Rights Commissioners opining about how religious belief intersects with public law.³⁰⁵ In the first, a Commissioner observed that businesses open to the public need to “compromise.”³⁰⁶ In the second, a Commissioner said that “[f]reedom of

300. See *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 352 (4th Cir. 2018) (Harris, J., concurring) (“This case is remarkable because it features just that: a governmental decisionmaker using his own direct communications with the public to broadcast — repeatedly, and throughout the course of this litigation — an anti-Muslim purpose tied specifically to the challenged action. . . . [T]his is not a case in which we need indulge in ‘judicial psychoanalysis’ of motive. It is all out in the open.” (citations omitted)), *vacated and remanded*, 138 S. Ct. 2710 (2018) (mem.).

301. *Trump*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting).

302. *Id.* at 2439.

303. *Id.* at 2418 (majority opinion) (“But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.”).

304. See *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729, 1731–32 (2018).

305. *Id.* at 1729.

306. *Id.*

religion and religion has been used to justify all kinds of discrimination.”³⁰⁷ Combining these statements with the commission’s “disparate treatment” of William Jack, who had requested the anti-gay marriage cakes, the Court concluded that the process of adjudicating the discrimination claim was unconstitutionally tainted by hostility toward religion.³⁰⁸

Masterpiece Cakeshop suggests that even a modicum of religious animus should doom the application of an otherwise facially neutral law.³⁰⁹ In *Masterpiece Cakeshop*, however, the asserted bias of Colorado’s process is hardly convincing. The majority opinion and Justice Gorsuch’s concurrence assert that Christian conservatives were targeted by the Colorado Civil Rights Commission.³¹⁰ But there is no evidence—no legislative statements or statements regarding selective enforcement—that the antidiscrimination law or the Commission’s enforcement of that law were meant to target a specific religious group.³¹¹ The Court’s justification for looking behind the application of an otherwise neutral and general antidiscrimination law is weak. The rationale seems to be that applying the antidiscrimination law to religious traditionalists, and not to those who oppose LGBT discrimination, evidences bad motive or unequal treatment.

But compare Trump’s travel ban, for which the evidence of anti-Muslim animus is overwhelming.³¹² The Court ignores that

307. *Id.*

308. *Id.* at 1731–32.

309. *See id.*

310. *Id.* at 1730–32; *id.* at 1734 (Gorsuch, J., concurring).

311. *See* Kendrick & Schwartzman, *supra* note 5, at 145 (“In holding that the Commission failed to treat Phillips’s claims with neutrality and respect, the Court improperly applied free exercise doctrine to the facts of the case, finding unconstitutional hostility and intolerance where there were none.”); *see also* Bernard Bell, *A Lemon Cake: Ascribing Religious Motivation in Administrative Adjudications—A Comment on Masterpiece Cakeshop (Part II)*, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2018), <http://yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-Masterpiece-cakeshop-part-ii> [<https://perma.cc/CL3B-YQYH>]; Marty Lederman, *State “Hostility” to Religion Without Religious Discrimination?: The Unexpected Free Exercise Issue Lurking in Masterpiece Cakeshop*, BALKINIZATION (Dec. 19, 2017), <https://balkin.blogspot.com/2017/12/state-hostility-to-religion-without.html> [<https://perma.cc/2RXT-BWA>]; Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in Masterpiece Cakeshop*, TAKE CARE (June 19, 2018), <https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-Masterpiece-cakeshop> [<https://perma.cc/HP2N-LW4M>].

312. *See* Kendrick & Schwartzman, *supra* note 5, at 168 (“But if there was a

evidence, instead asserting that because the immigration ban is facially nondiscriminatory, it can pass constitutional muster regardless of the President's statements.³¹³ The Court's main justification is judicial deference; immigration decisions should be made by the President and not by the courts.³¹⁴ But why the principle of religious neutrality should apply only in some spheres and not others is unclear. It is notable that the majority disavows the analogy to the infamous *Korematsu* decision.³¹⁵ The parallels are striking, which may explain the Court's defensiveness. In *Trump*, like *Korematsu*, the evidence of ethnic or religious hostility is overwhelming, the national security justification for the ban is weak, and the need for judicial deference is questionable.³¹⁶

It is not clear how much of the disparate results in *Trump* and *Masterpiece Cakeshop* is unconscious religious favoritism, though it is difficult to imagine an equivalent "Catholic ban" being upheld by a Court populated with a Catholic majority. Perhaps this is too crude. Certainly, the Court has sometimes come to the aid of minority religions. *Church of Lukumi Babalu Aye v. City of Hialeah* protected Santeria practitioners,³¹⁷ and *Holt v. Hobbs* was a victory for a Muslim who wanted to wear a short beard in prison.³¹⁸ But the political valence of recent Establishment Clause decisions like *Town of Greece* and recent RFRA cases like *Hobby Lobby* suggests a rising Christian favoritism.³¹⁹ There is also a developing asymmetry in free exercise exemptions. Legislatures that adopt exemptions for religious traditionalists who object to same-sex marriage are not also protecting

clear case involving religious animus this past Term, it was not *Masterpiece*, but *Trump v. Hawaii* There has never been a case in which the Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker.").

313. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018).

314. *Id.* at 2418–20.

315. *Id.* at 2423.

316. See Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019); Aziz Huq, *The Travel Ban Decision Echoes Some of the Worst Supreme Court Decisions in History*, VOX (June 26, 2018), <https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-internment-camp-supreme-court-korematsu-muslim-history> [<https://perma.cc/5Y79-8UY5>].

317. 508 U.S. 520 (1993).

318. 574 U.S. 352 (2015).

319. Cf. Corbin, *supra* note 287; Tushnet, *supra* note 291, at 475–77.

the views of religious believers who favor equal treatment for those within the LGBT community.³²⁰

A significant shift in the Court's understanding of who counts as a "religious minority" has occurred. First, religious traditionalists, primarily white evangelical Christians, have repositioned themselves as an embattled cultural and political minority. In so doing, they have sought to sensitize the Court to their supposed marginal—even discrete and insular—status.³²¹

Second, religious traditionalists have taken up the language of multiculturalism conventionally used by ethnic and racial minorities.³²² Again, antiliberal theories provide ready sources of normative and legal argument. A standard claim is that liberalism is too individualistic and cannot accommodate cultural or group pluralism.³²³ The liberal state treats all associations as voluntary and puts them on an equal footing.³²⁴ For critics, however, this account of how individuals experience social identity formation is too detached and fails to appreciate diversity, inclusion, and the value of difference.³²⁵ Antiliberal critics complain about cultural flattening and moral conformity, framing their arguments in terms of communal or associational pluralism.³²⁶

The result is that when an LGBT couple files an antidiscrimination complaint against a white evangelical Christian man, the latter assumes the role of the victim. Proponents of religious accommodation assert that the group of business owners that will engage in LGBT discrimination is relatively small. And they

320. See Leslie Griffin, *Marriage Rights and Religious Exemptions in the United States*, OXFORD HANDBOOKS ONLINE 1, 14–15 (2017) (arguing that religious exemptions concerning same-sex marriage "threaten to re-establish religious marriage law by undermining the neutral marriage law that governs everyone equally").

321. See Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 (2018).

322. See *id.*

323. See *supra* Part II.C.

324. See *supra* Part II.C.

325. See *supra* Part II.C.

326. See, e.g., R.R. Reno, *What Liberalism Lacks*, FIRST THINGS (May 31, 2019), <https://www.firstthings.com/web-exclusives/2019/05/what-liberalism-lacks> [<https://perma.cc/C6QZ-LNCV>] (criticizing "liberal monoculture"); cf. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 7 (2016) (advocating for "[c]onfident pluralism [that] allows genuine difference to coexist without suppressing or minimizing our firmly held convictions").

claim that LGBT people should go elsewhere to be served for the sake of allowing an embattled group to preserve its cultural and religious identity.³²⁷

That the actual exercise of social, economic, and political power in many places looks quite different does not seem to matter. Certainly, the triumph of President Trump—with his now fulfilled promise to ban Muslims and his flirtation with white Christian nationalism—should give us pause that we are witnessing the liberal state’s destruction of a quaint and valuable cultural and religious minority.³²⁸

Nevertheless, animus seems to be in the eye of the beholder. It is notable that a doctrine that has generally applied to ethnic, racial, sexual, and religious minorities—African-Americans and Muslims and other traditionally despised religious groups—is deployed by the Court to protect religious conservatives against a state enforcing a liberal norm of equal treatment. Although antidiscrimination laws are laws of general applicability, the Court purports to uncover animus to make an end-run around *Smith*. At the same time, however, *Smith*’s logic of neutrality is still available when the Justices want to enforce general laws that have a disparate religious impact, such as the travel ban, as long as they ignore the obvious religious hostility. When applied to Muslims, it appears that animus will be discounted or avoided, but when applied to traditionalist Christians, it will be magnified and made dispositive.

This inconsistency, too, can be justified by an antiliberal view that requires the state to make a choice between competing religious worldviews. If animus toward religious traditionalists is already built into our liberal foundations—as antiliberal critics contend—animus doctrine itself has no foundation. The state should instead engage in cultural defense, protecting that which

327. See Douglas Laycock & Thomas Berg, *Symposium: Masterpiece Cakeshop — Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), <http://www.scotusblog.com/2018/06/symposium-Masterpiece-cakeshop-not-as-narrow-as-may-first-appear> [https://perma.cc/M3HQ-VZKW] (“Should conscientious objectors to same-sex marriage be protected from participation in same-sex weddings? We still think they should, when the business is small and personal and ample alternative providers exist (as they nearly always do).”).

328. See Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453 (2019).

is valuable and rejecting that which is not. Such a view easily degenerates into a form of Christian preferentialism.

D. PRIVATE CHOICE

In many of the Court's Religion Clause decisions, the principle of government neutrality is accompanied by a principle of individual choice. These are related: government is neutral among religion, and between religion and non-religion, if private actors are free to make choices about how monies are spent or what religious activities to undertake. But, like the concepts of neutrality and equal treatment, the Court's characterization of "private choice" is manipulable. The line between state action and private decision shifts depending on how the Court characterizes the choice architecture of a given program.

Consider four of the cases that we have been discussing: *Zelman v. Simmons-Harris*, *Trinity Lutheran v. Comer*, *Town of Greece v. Galloway*, and *Burwell v. Hobby Lobby*. As already noted, *Zelman* is the Court's central school funding case, which involved a voucher program in Cleveland that included religious schools.³²⁹ The Court held that the program was valid because the vouchers flowed to the parents of the children, and the parents made the choice of where to direct the state funds.³³⁰ Because the money did not flow directly to religious schools, but arrived there only because of the parents' "true private choice[s,]" the program did not run afoul of the Establishment Clause's prohibition of direct funding for religious education.³³¹ Writing in dissent, Justice Souter observed that the parents' "choices" were quite limited.³³² No suburban-area Cleveland schools participated in the program.³³³ Moreover, the voucher amounts were so low that only religious schools in the city were realistic options for the program's low-income students.³³⁴ In other words, despite purportedly applying across public and private schools, the voucher program essentially subsidized only religious education.³³⁵

329. *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–49 (2002).

330. *Id.* at 653–54.

331. *Id.*

332. *Id.* at 698–707 (Souter, J. dissenting).

333. *Id.* at 707.

334. *Id.* at 703–707.

335. *Id.*

Nevertheless, in *Zelman*, “choice” is the “circuit breaker” that turns the state action of government funding into the private action of parental spending.³³⁶ *Trinity Lutheran*, which upheld direct funding of church playground resurfacing, goes further to suggest that all government grant programs that are structured without regard to religion or a specific religious purpose will be deemed neutral.³³⁷ Indeed, *Trinity Lutheran* demands that government programs not make distinctions between religious and nonreligious grantees in distributing public funding, even if that funding will be spent in ways that subsidize church facilities.³³⁸ On this theory, the government is not in the business of “funding” churches, but rather is distributing funds through grantees whose religious identification must be irrelevant as long as those grantees use the public money as authorized.³³⁹ Again, the grantee serves as a circuit breaker between the state and the money spent.

In other words, choice turns state action into private action. Where there is a neutral government program that distributes public money through grantee recipients, the government is not establishing a church even when significant funding flows directly to churches and religious organizations. Rather, the government is funding certain priorities that churches too can pursue—and in some cases, must be allowed to pursue.³⁴⁰

In *Town of Greece*, the Court made a similar move to insulate government religious speech from Establishment Clause scrutiny. Again, choice architecture was central to the outcome in that case, in which an upstate New York town invited religious leaders from the community to offer prayers before the opening of town council meetings.³⁴¹ The vast majority of those prayers were Christian and explicitly sectarian in nature.³⁴² As the dissent observed, “[N]o one can fairly read the prayers from

336. See Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

337. *Trinity Lutheran Church, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

338. *Id.* at 2030 (Sotomayor, J., dissenting).

339. *Id.* at 2024 (majority opinion).

340. See Lupu & Tuttle, *supra* note 222, at 927–29 (discussing application of the “circuit breaker” metaphor in Establishment Clause funding cases).

341. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

342. *Id.* at 1816–17.

Greece's Town meetings as anything other than explicitly Christian—constantly and exclusively so.”³⁴³ The vast majority of prayers offered over a decade invoked “Jesus Christ,” references to Christian scripture, and other sectarian language.³⁴⁴

The Court, however, held that the choice to give such prayers was not attributable to the government, which had merely established the procedure by which local religious leaders were invited to participate.³⁴⁵ That procedure excluded most non-Christian religious groups, a result that Justice Alito dismissed as a mistake attributable to the inexperience of local government officials.³⁴⁶ As long as the procedure for picking religious denominations was “neutral,” the religious leaders themselves could not be told what kinds of prayers to offer.³⁴⁷ Despite the fact that the prayers were given at the invitation of the town, on behalf of the town council, and in public session, the Court treated them as private speech. Indeed, the Court held that the government could not limit the ministers' prayers without likely running afoul of speech and religious freedom guarantees.³⁴⁸ Like the vouchers at issue in *Zelman*, the “public” taint of the prayers was washed clean by the intervention of the religious leaders, who were—according to the Court—speaking for themselves.³⁴⁹

Notably, choice architecture does not work in the opposite direction. In *Hobby Lobby*, the government argued that requiring employers to include contraceptive coverage in their employee health care plans did not implicate those employers, who would not be making the decision whether to use services covered under those plans.³⁵⁰ The employer's role was limited to deciding whether to provide a health plan. If it did so, the health plan had to include certain services, which the employee could

343. *Id.* at 1848 (Kagan, J., dissenting).

344. *Id.*

345. *Id.* at 1821–22 (majority opinion).

346. *Id.* at 1830–31 (Alito, J., concurring).

347. *Id.* at 1822–23 (majority opinion) (“Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.”).

348. *Id.* at 1822.

349. *See id.* at 1821–22, 1826.

350. Brief for the Petitioners at 33–34, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354), 2014 WL 173486, at *33–34 (relying, in part, on *Zelman* to raise an attenuation objection to Hobby Lobby's claim of substantial burden under RFRA).

decide to use or not. The employer was not required to provide the services directly. The insurance plan covered a range of services, and the employee would make the medical purchase.³⁵¹ The employee's spending of money was, therefore, not attributable to the employer. After all, if an employee cashed her weekly paycheck and spent some of it on contraceptives, the employer would not be responsible.³⁵² This is the concept of attenuation.³⁵³

The *Hobby Lobby* Court, however, viewed the mandate as a compulsion and accepted the company's argument that it was morally implicated in its employees' decisions to use contraception—that the company itself was complicit in a religiously objectionable practice.³⁵⁴ Note how the taxpayers in *Zelman* and *Trinity Lutheran* and the citizens in *Town of Greece* are not afforded the same deference. In *Zelman* and *Trinity Lutheran*, taxpayer monies subsidize the church mission, but the fact that the money is being directed by private parties means that the taxpayers cannot complain. So, too, though sectarian prayers are being said at a town council meeting, those prayers are insulated from Establishment Clause scrutiny because they are not attributable to the town or its citizens.

Complicity is a morally and philosophically difficult concept.³⁵⁵ The Court is loath to question the sincerity of religious claimants' asserted beliefs.³⁵⁶ But on the Establishment Clause

351. *Id.*

352. See Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 146 (2017).

353. See Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 133, at 125, 140–41 (criticizing the Court's treatment of the substantial burden issue in *Hobby Lobby* for inadequately responding to the problem of attenuation).

354. *Hobby Lobby*, 573 U.S. at 724–27 (2014) (rejecting the government's attenuation argument against the existence of a substantial burden for purpose of applying RFRA).

355. We recognize, of course, that there are complex questions lurking here about how compelled subsidies, whether through mandates or other forms of regulation and taxation, are related to matters of speech and conscience. See Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317 (2011); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897 (2015); Nomi M. Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727 (2015).

356. See *Hobby Lobby*, 573 U.S. at 717–18.

side, citizens' sincere religious or moral objections to funding churches or government religious speech are given little credence once the formalities of "neutral choice" are in place. On the free exercise side, by contrast, the distance between the religiously objectionable practice and the claimant's participation in that practice does not seem to matter. Government compulsion is always present even if decisions to engage in an objectionable practice are made by intermediaries.

The sensitivity with which the Court approaches complicity claims concerning free exercise is not matched by a similar sensitivity under the Establishment Clause. Procedures that put distance between money or speech through the mechanism of individual choice only function in one direction. State action can be turned into private action, immune from Establishment Clause scrutiny, while private action can be turned into state compulsion, requiring exemptions.

This asymmetry raises a puzzle. Antiliberals regularly criticize the overweening social welfare state, arguing that the post-New Deal state is too controlling, destructive of private individual and associational life. But this anti-statism is selective. While some religious accommodationists refuse both the state's money and its regulation, others seem content to accept the former while rejecting the latter. Freedom-enabling "choice" is the procedural device that justifies this inconsistency, but it imposes no meaningful constraint. Instead, the Court is drawing a public/private distinction that implicates the state only when the state acts in ways contrary to the interests of those seeking government support for religion.

Thus, in the Court's emerging doctrine, individual "choice" becomes a mechanism for promoting religion. At some point, choice becomes so diluted that it ceases to mask the actual ends of the various policies at issue: prayer at town council meetings, deregulatory exemptions for religious employers, funding for religious schools. If the state's preferred religious priorities are always advanced by choice, one has to question what work the concept is doing.

IV. THE FUTURE OF CHURCH AND STATE

When doctrine collapses, what replaces it? Law is not autonomous; it is, in part, the function of social norms and conceptions of what is morally and politically possible. The constitutional doctrine of church and state is particularly fluid, as it seems to reflect, perhaps more than some other doctrinal areas, the political moment in which it is developed.³⁵⁷

Importantly for our purposes is what the present-day confluence of antiliberal theory and antiliberal politics portends for the development of the Court's church-state jurisprudence. As we have argued, equal treatment, neutrality, non-discrimination, animus, and private choice—in short, the language of liberal principles—continue to be dominant in Religion Clause adjudication. That language, however, is losing its meaning at a moment when liberalism is under sustained attack.³⁵⁸

Theory and politics are related. Liberalism's critics are fairly candid about their doctrinal and policy aims. And history teaches that the Court's understanding of principles like neutrality or equal treatment can be understood in political terms. For antiliberals, liberalism's religious nature means that liberal

357. We have arrived at a historical-political moment in which the Court has legitimated the anti-Muslim initiative of a President who has expressed himself through clear and unrelenting tropes of religious and racial bigotry. See Moustafa Bayoumi, *The Muslim Ban Ruling Legitimizes Trump's Bigotry*, GUARDIAN (June 27, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/27/muslim-ban-ruling-trumps-bigotry> [<https://perma.cc/XXW7-L6JR>]; see also Kendrick & Schwartzman, *supra* note 5, at 168 n.215 (collecting judicial opinions describing President Trump's anti-Muslim animus); David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/1410leonhardt-trump-racist.html> [<https://perma.cc/JY67-XBLZ>] (compiling "a definitive list of [Trump's] racist comments – or at least the publicly known ones"). In the same opinion that formally rejected the racism of *Korematsu*, the Court asserted that it could not check the President's action, even if some of the Justices wished that the President would speak in more inclusive and polite tones. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) ("There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects.").

358. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); see also Kendrick & Schwartzman, *supra* note 5, at 143–46.

terminology should and must be reconfigured. We may be witnessing a terminological change akin to the shift from Lochnerian equal treatment to equal protection after *Brown v. Board of Education*.³⁵⁹

The rationale and rhetoric of the new church-state doctrine is already being formulated. It holds both that religion should be specially protected and also that government religious expression and justification is no different from secular expression and justification. It includes the following set of claims:

(1) Religious freedom is the first freedom. Because freedom of religion precedes other freedoms, the protection of religious freedom cannot be weighed against harms from lifting regulatory burdens, even those regulatory burdens that are meant to enforce others' basic rights.³⁶⁰

(2) The state already funds competing conceptions of the good. To be consistent it must fund religious conceptions as well. The refusal to fund pervasively sectarian schools was historically anti-Catholic and continues to be suspect for that reason.³⁶¹

(3) The state already expresses support for competing conceptions of the good. To be consistent, it must be allowed to express support for religious conceptions as well.³⁶²

(4) The state already justifies laws, including coercive regulations, on the basis of controversial secular reasons. To be consistent, it must be allowed to justify laws and to coerce religious minorities and nonbelievers on the basis of controversial religious reasons.³⁶³

359. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

360. See, e.g., Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KY. L.J. 603 (2018).

361. See, e.g., Calabresi & Salander, *supra* note 271, at 1024–25.

362. In recent litigation over the Bladensburg Cross, the petitioners made a version of this argument to the Court. See Brief for the American Legion Petitioners at 14, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717) (“[T]he endorsement test grants a heckler’s veto over speech supportive of religion that does not apply to any other form of government speech. Restricting only religious speech singles out religious speech for discriminatory treatment and burdens that speech based on its content and viewpoint . . .”).

363. See sources cited *supra* notes 83 and 227. While the new church-state doctrine may not go so far as to permit the state to coerce religious practice or ritual, it likely would permit religiously-motivated laws that regulate acts or behaviors that are closely related to one’s philosophical or religious views. With-

What story can we tell about the political circumstances that have given rise to these kinds of claims and the doctrine that follows? One possible narrative asserts that increasing pluralism coupled with rising religious non-affiliation means that a return to a more assertive public cultural Christianity is unlikely.³⁶⁴ Pluralism also means that the Catholic-Protestant conflicts that shaped the no-funding debates in the mid-twentieth century are likely to be less strident, with non-preferential funding of the religious mission becoming less objectionable.³⁶⁵

The terrain of the religious culture wars, however, continues to shift in unexpected directions. First, partly in response to the sexual revolution and the more recent recognition of LGBT rights, evangelicals, conservative Catholics, and other religious traditionalists have joined forces to defend a conception of religious liberty that they perceive to be under existential threat.³⁶⁶ Second, the backlash against Muslim and other forms of ethnic migration has fueled the rise of Christian nationalism across western societies, including in the United States.³⁶⁷ These phenomena have created fertile ground for an antiliberal revival, which in turn sets up the jurisprudential and political possibility for a more explicit and systematic regime of religious preferentialism. Instead of dampening the aggressive assertion of Christian nationalism in the United States, pluralism may in fact be inducing it. We may be entering a reactionary period in the Court's church-state jurisprudence.

A. THE POLITICAL ECONOMY OF THE RELIGION CLAUSES

In thinking about the future trajectory of Religion Clause doctrine, we should start briefly by restating the standard account of its recent past. In their *Political History of the Establishment Clause*, John Jeffries and James Ryan describe a coalitional shift beginning in the 1970s and 1980s.³⁶⁸ That shift changed the jurisprudential politics of state support for religion, particularly in the education context where battles between

out a secular purpose requirement, which has been heavily criticized by religious conservatives, the state would be permitted to adopt coercive laws justified solely on religious grounds.

364. See *infra* Part IV.A.

365. See Jeffries & Ryan, *supra* note 28, at 367–68.

366. See *infra* Part IV.B.1.

367. See *infra* Part IV.B.2.

368. See Jeffries & Ryan, *supra* note 28, at 327–52.

Catholics and Protestants had been most protracted.³⁶⁹ Previously, Protestants of all denominations were wary of state support because they opposed aid to Catholic parochial schools. The Court's no-aid decisions, which began with *Everson v. Board of Education* in 1947 (the first modern Establishment Clause case) reflected this dominant view.³⁷⁰ The no-aid principle roughly coexisted with a movement to eliminate religious observance in the public schools, which was embraced by the Court in the school prayer decisions of the early 1960s.³⁷¹ Jews, Catholics, and secularists had been demanding the end to Protestant bible readings in public schools at least since the late 1800's when cities with large Catholic populations eliminated readings from the King James Bible.³⁷²

Jeffries and Ryan argue that two occurrences have led to the withering of the no-aid position, even as the no-prayer consensus remains firm. First, white, southern Protestants, reacting to desegregation mandates following *Brown v. Board of Education*, retreated to private Christian academies as a means of avoiding integration. Their withdrawal from secular public schools and their desire for financial support for their new private schools moved mainly southern Protestants "to rethink their traditional opposition to aid to religious schools."³⁷³ Second, and relatedly, as anti-Catholic animosity faded, American Protestantism became increasingly divided.³⁷⁴ Mainline, northern, and racially progressive Protestantism found itself much more aligned with public secularists, while evangelical, fundamentalist, and mainly southern Protestants found themselves agreeing with conservative Catholics across a range of social issues.³⁷⁵

The evangelicalization of the Republican Party is a crucial part of this story. *Roe v. Wade* was decided in 1973,³⁷⁶ but it was a decision by the IRS in 1975 to deny tax exempt status to racially discriminatory private schools—eventually affirmed by

369. *See id.*

370. 330 U.S. 1, 8–17 (1947).

371. *See* *Abington Sch. Dist. V. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

372. *See* Jeffries & Ryan, *supra* note 28, at 305–27.

373. *Id.* at 283.

374. *Id.* at 282.

375. *Id.*

376. 410 U.S. 113 (1973).

the Court in *Bob Jones University v. United States*³⁷⁷—that accelerated the Christian right’s mobilization.³⁷⁸ In any case, religious conservatives, especially in the South, were already an obvious national political force by Ronald Reagan’s election in 1980.³⁷⁹ They led the political and cultural backlash to abortion, contraception, women’s sexual liberation, and LGBT rights.³⁸⁰ Running against a “liberal” Supreme Court, the Republican Party has repeatedly echoed these concerns.³⁸¹ Since Reagan, it has endorsed the goal of returning prayer to the schools and providing large-scale financial assistance for private religious schools.³⁸² The Court’s recent decisions certainly open the door to the latter. The no-aid principle has moved quickly toward a compulsory aid principle.

Jeffries and Ryan’s narrative focuses on Establishment Clause cases, especially as related to schools.³⁸³ They have less to say about the cultural conflicts over public religious expression or religious exemptions. Both are in significant flux. Disputes over public religious displays outside of schools have been relatively constant since the 1980s. Prior to *Town of Greece*, the most recent decision on public religious expression came in 2005 with a pair of Ten Commandments cases that pointed in the opposite direction—one upholding a public monument and one striking down a government-sponsored display.³⁸⁴

Notably, the religious coalition that found common cause with the Republican Party in the 1960s and 1970s was not par-

377. 461 U.S. 574 (1983).

378. See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 637–39 (2011).

379. See BARRY HANKINS, AMERICAN EVANGELICALS: A CONTEMPORARY HISTORY OF A MAINSTREAM RELIGIOUS MOVEMENT 147–48 (2008); ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON 5 (1988).

380. Schragger, *supra* note 378, at 606–10.

381. See NeJaime & Siegel, *supra* note 6, at 2544–52.

382. See REPUBLICAN NAT’L CONVENTION, REPUBLICAN PLATFORM 2016, at 12, 34 (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/ME25-ZJ43>].

383. See Jeffries & Ryan, *supra* note 28, at 281–84.

384. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding Ten Commandments display); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (rejecting Ten Commandments display).

ticularly interested in free exercise exemptions. *Sherbert v. Verner*,³⁸⁵ the case that first applied heightened review to a generally applicable law burdening religious exercise, was decided in 1963 without much fanfare.³⁸⁶ *Wisconsin v. Yoder*, decided in 1972, held that the Old Order Amish need not comply with a state law that required children below the age of sixteen to attend school.³⁸⁷ *Yoder* remains the high-water mark for judicially mandated religious exemptions under the Free Exercise Clause of the First Amendment.

It was only after the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*³⁸⁸ in 1990 that a broad coalition of liberals and conservatives raised concerns about the judicial approach to free exercise. Justice Scalia's majority opinion in *Smith* was joined by most of his fellow conservatives. Justice Kennedy was in the majority. Justice O'Connor, a relative moderate, dissented from Justice Scalia's reasoning but concurred in the judgment.³⁸⁹ Yet the political response was swift and unified. In a strong showing of bipartisanship, and with near unanimity, Congress passed the Religious Freedom Restoration Act, which President Clinton signed into law in 1993.³⁹⁰ RFRA reinstated the compelling interest test that the Court had applied in *Sherbert* and *Yoder*.³⁹¹ Supported by the ACLU and the Southern Baptist Convention and everyone in-between, it represented a brief moment of political consensus in matters of religious freedom.³⁹²

B. RISE OF ANTILIBERAL POLITICS

Writing in 2001, Jeffries and Ryan predicted the Supreme Court's 2002 decision in *Zelman v. Harris*, though they did not anticipate the Court moving so quickly from a no-aid position to

385. 374 U.S. 398 (1963).

386. See De'Siree N. Reeves, *Missing Link: The Origin of Sherbert and the Irony of Religious Equality*, 15 STAN. J.C.R. & C.L. 201 (2019).

387. 406 U.S. 205 (1972).

388. 494 U.S. 872 (1990).

389. *Id.* at 892–908.

390. See Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 416 (2016); see also Schragger, *supra* note 378, at 608–09.

391. See 42 U.S.C. § 2000bb(b)(1) (2012).

392. See Lupu, *supra* note 248, at 54–55.

compulsory aid in *Trinity Lutheran*.³⁹³ They also predicted that America's increasing religious pluralism would prevent a return to school prayer and the embrace of a more aggressive public Christianity.³⁹⁴

Both of these predictions turn on a similar narrative of religious pluralism, a story of how the Protestant-Catholic tensions of a prior era gave way to a panoply of religious groups—some Christian, some not—seeking and receiving government aid. In a highly pluralistic environment, religious groups receiving government funding might seem no more threatening than when nonreligious groups receive it. At the same time, pluralism works against school prayer or other forms of public religious expression. The multiplicity of religious views in society makes religious preferentialism particularly problematic.

Jeffries and Ryan's story ends a bit too soon, however. Writing today, one would have to place the debate over free exercise exemptions at the center of any account of the political economy of church and state. Moreover, one might not be as certain about the effects of pluralism on judicial decisions regarding school prayer or other forms of public religious expression. Two developments have destabilized church-state politics in the United States since the turn of the twenty-first century. The first is the resurgent conservative backlash against the sexual revolution with its increasingly militant opposition to abortion, contraception, and the LGBT civil rights movement.³⁹⁵ The second is the global response to Islamic fundamentalism, with its concomitant backlash against immigration and the rise of Christian nationalism.³⁹⁶

393. See Jeffries & Ryan, *supra* note 28, at 367.

394. *Id.* at 367–68.

395. See NeJaime & Siegel, *supra* note 6, at 2544–52.

396. See Richard C. Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 CARDOZO L. REV. 2009 (2011).

1. The Sexual Revolution and LGBT Backlash

Abortion politics obviously play a role in Jeffries and Ryan's political economy of the Religion Clauses, but it is a relatively minor one. Their account focuses on the funding of private religious schools. At the time of their writing, the relative solidity of *Roe v. Wade*³⁹⁷ was in some ways taken for granted.

The political union of religious conservatives has only grown stronger in the last two decades, however. One flashpoint has been the inclusion of contraception as part of mandatory health insurance coverage under the Affordable Care Act (ACA).³⁹⁸ The ACA encountered significant political resistance, including from those with traditional religious views. That resistance met with success in the Supreme Court's decision in *Hobby Lobby*, which read RFRA expansively in granting exemptions to large for-profit corporations.³⁹⁹ The Trump administration has granted further exemptions to religious and nonreligious employers who object to providing contraceptive coverage,⁴⁰⁰ as well as to health care workers with conscientious objections to participating in a wide range of medical practices.⁴⁰¹

In addition, the appointment of Justice Kavanaugh to the Supreme Court has given anti-abortion forces greater optimism about overturning *Roe*.⁴⁰² At least nine states have recently adopted laws criminalizing abortion—at least six without a rape

397. 410 U.S. 113 (1973).

398. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

399. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

400. See *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019) (upholding nationwide injunction blocking Trump Administration regulations expanding religious exemptions to the Affordable Care Act); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).

401. Margot Sanger-Katz, *Trump Administration Strengthens "Conscience Rule" for Health Care Providers*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/upshot/conscience-rule-trump-religious-exemption-health-care.html> [<https://perma.cc/489K-7NL6>].

402. See, e.g., David Crary, *States Pushing Near-Bans on Abortion, Targeting Roe v. Wade*, AP NEWS (Apr. 10, 2019), <https://www.apnews.com/3a9b3bc0e14d47aa8691aca84c32f391> [<https://perma.cc/89QP-RV39>]; K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills To Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html> [<https://perma.cc/D9R5-6MXU>].

or incest exception⁴⁰³—in anticipation that the Supreme Court will use such laws as vehicles to reverse decades of precedent.

Increasingly, anti-abortion and anti-contraception politics are linked. A consistent trope of religious antiliberalism is the identification of sexual licentiousness with liberalism.⁴⁰⁴ An example is the association of liberalism with paganism and the association of paganism with the sexual rituals and mores of pagans.⁴⁰⁵ The conservative resistance to sexual liberation has been constant, but its more recent formulations sometimes equate sexual autonomy and reproductive rights with the larger demographic implosion of Western civilization—the problem of low birth rates for “native whites.”⁴⁰⁶

Conservative hostility toward sexual autonomy is also reflected in opposition to the LGBT civil rights struggle. The campaign for LGBT marriage equality, culminating in the Court’s decision in *Obergefell v. Hodges*,⁴⁰⁷ has produced a political backlash from religious traditionalists, further cementing the existing counter-cultural alliance of conservative Catholics, evangelicals, fundamentalist Christians, and other conservative religious denominations. As *Masterpiece Cakeshop* illustrates, the demand for religious exemptions from laws mandating equal treatment of LGBT people has become a central point of conflict.⁴⁰⁸ The response to LGBT rights is shaping, and in many ways distorting, the law of free exercise.⁴⁰⁹ It has engendered a divisive politics very different from the politics that existed when RFRA was passed by a virtually unanimous Congress.

403. See, e.g., Mara Gordon & Alyson Hurt, *Early Abortion Bans: Which States Have Passed Them?*, NPR NEWS (June 5, 2019), <https://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed-them> [https://perma.cc/WKC3-KP2B].

404. See *supra* Part II.

405. See SMITH, *supra* note 10, at 285–89.

406. See, e.g., PATRICK J. BUCHANAN, *THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* (2002).

407. 135 S. Ct. 2584 (2015).

408. See RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019); SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008).

409. See Kendrick & Schwartzman, *supra* note 5, at 146 (arguing that the *Masterpiece* Court distorted animus doctrine in holding that the state violated the principle of religious neutrality).

Obergefell itself rejected a legal disability on LGBT people that could only be justified on the basis of religious beliefs.⁴¹⁰ At the oral argument in the Supreme Court, as in lower courts, the states struggled to justify marriage exclusion in terms that all citizens could reasonably accept.⁴¹¹ Their theory that expanding civil marriage would weaken a conception of marriage linked to procreation, and thereby lead opposite-sex couples to remain unmarried, was nonsensical. In this way, *Obergefell* represents a significant step in the broader liberal project; it rejects reliance on religious reasons for lawmaking, no matter how widely shared.⁴¹² *Obergefell* is also continuous with the general civil rights project, the expansion of equal treatment to once-marginalized persons.

For both these reasons, the counter-cultural reaction to *Obergefell* has been fairly intense, with religious traditionalists arguing that *Obergefell* represents the end of religious freedom, a central effort by the state to stamp out dissenting voices from the liberal orthodoxy. When advocates of LGBT rights counter that appeals to rights of religious conscience were also used to justify racial segregation and discrimination, those seeking religious exemptions to equal treatment guarantees insist that LGBT rights differ from African-American civil rights.⁴¹³ Most

410. See Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Obergefell and the End of Religious Reasons for Lawmaking*, RELIGION & POL. (June 29, 2015), <https://religionandpolitics.org/2015/06/29/obergefell-and-the-end-of-religious-reasons-for-lawmaking/> [<https://perma.cc/DQ8D-NTKV>].

411. *Id.*

412. *But see* Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631 (2018) (arguing that while *Obergefell* rejected appeals to religious reasons, it nevertheless relied improperly on secular nonpublic reasons in violation of the demands of a liberal principle of legitimacy).

413. Douglas Laycock, *The Campaign Against Religious Liberty*, in RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 133, at 231, 252; Steven D. Smith, *Against "Civil Rights" Simplism: How Not To Accommodate Compelling Legal Commitments*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 408, at 233; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 408, at 77, 101. *But see* Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J.C.R. & ECON. DEV. 233, 239–42 (2018) (“[T]here is no good reason, in the context of LGBT issues, to depart in significant ways from how anti-discrimination law has in the past accommodated religious dissenters in the context of race and gender.”); Kendrick & Schwartzman, *supra* note 5, at 160–61 (criticizing rejections of the race analogy in the context of religious exemptions).

concede that racial discrimination is beyond the pale no matter its religious provenance. But some argue that opposition to same-sex marriage is both a religious belief that is worthy of respect and a legitimate basis for denying LGBT persons equal treatment.⁴¹⁴ The latter move undercuts the equal rights project itself, for it permits public-facing discrimination despite the serious harm it causes: the elimination of equal citizenship rights that are the basis for LGBT participation in the political and economic life of the nation.⁴¹⁵

The backlash to *Obergefell* raises some questions about the application of the pluralist account of twentieth century church-state politics. Protestant-Catholic conflict characterized the mid-twentieth century church-state equilibrium. But in the twenty-first century, the conflict is between religious traditionalists and progressives, both secular or religious. Religious traditionalists reject the notion that same-sex marriage does not implicate their way of life. They argue that *Obergefell* represents a liberal conception of family, marriage, sex, procreation, and sexuality that is imposed directly upon them and in ways they cannot avoid.

For LGBT persons seeking equal rights, meanwhile, pluralism is only plausible on equal terms. Lending judicial legitimacy to the refusal to provide equal services in the marketplace marks LGBT people as permanently second-class. Religious pluralism does not solve this seeming zero-sum battle. Multiplicity—religious, ethnic, sexual or otherwise—cannot mute the on-going fight for recognition. It is partly for this reason that the political consensus that led to RFRA's passage has fragmented and cannot be recovered today.

2. Islamophobia

A similar zero-sum fight seems to characterize the Western reaction to fundamentalist Islam—the second feature of twenty-first century church-state politics. Global church-state politics has had an increasingly ethno-religious cast. Consider European countries that have banned the hijab or the building of minarets

414. See Laycock, *supra* note 413, at 242–46.

415. See Kendrick & Schwartzman, *supra* note 5, at 158–60 (criticizing the claim advanced by the plaintiff in *Masterpiece* that dignitary harms are not compelling interests for purposes of upholding civil rights laws against free exercise challenge); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 214–15 (2018); Sager & Tebbe, *supra* note 269.

or have reasserted the need and value of Christian symbols, like the cross, in public places.⁴¹⁶ Consider, more pointedly, countries like Hungary and Poland that are promoting the practices and institutions of an ethno-religious state. There, opposition to Islam has become a defining characteristic of religious, ethnic, and political identity. Islamophobia has been accompanied by a resurgence of Christian nativism.⁴¹⁷

Left- and right-leaning commentators point to the rising tide of nationalist and reactionary politics as an indication of the crisis of liberalism.⁴¹⁸ Some argue that the failure of Western religious toleration suggests a serious blindness at the center of the liberal project. That blindness manifests as an inability to come to terms with illiberal religions in general and especially with Islam as it is practiced in the West. On the left, critics point out the hypocrisy of Western nations that preach toleration but adopt policies of exclusion and denigration.⁴¹⁹ On the right, mass Muslim immigration to the West is used to justify support for more robust Christian societies, with conservatives and antiliberals arguing that Christian national identity must be asserted more forcefully to counter the rise of Islam.⁴²⁰

This latter impulse suggests how the Jeffries and Ryan pluralism thesis might be mistaken. Indeed, it suggests how an increase in Western religious pluralism might lead to more public

416. See CÉCILE LABORDE, *CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY* (2008); David Miller, *Majorities and Minorities: Religious Freedom and Public Space*, 46 *BRIT. J. POL. SCI.* 437 (2016).

417. See *supra* note 75 and accompanying text.

418. *But cf.* Samuel Scheffler, *The Rawlsian Diagnosis of Donald Trump*, *BOS. REV.* (2019) <http://bostonreview.net/politics-philosophy-religion/samuel-scheffler-rawlsian-diagnosis-donald-trump> [<https://perma.cc/S8QU-4NNX>] (arguing that “Trump’s success vindicates rather than undermines liberal theory”).

419. See Susanna Mancini, *The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism*, in *CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL* 111–35 (Susanna Mancini & Michel Rosenfeld eds., 2014).

420. See, e.g., CHRISTOPHER CALDWELL, *REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST* (2009); DOUGLAS MURRAY, *THE STRANGE DEATH OF EUROPE: IMMIGRATION, IDENTITY, ISLAM* 1, 3 (2018) (claiming that Europe is “committing suicide” through mass migration and has lost faith in “its beliefs, traditions, and legitimacy”); see also Robert Duncan, *Limiting Muslims Is Patriotic, U.S. Cardinal Says*, *NAT’L CATH. REP.* (May 20, 2019), <https://www.ncronline.org/news/politics/limiting-muslim-immigration-patriotic-us-cardinal-says> [<https://perma.cc/DJY7-9UQP>].

religiosity and private suppression rather than less. The perceived Islamic threat leads to calls to ban religious sites, outlaw Islamic law, enforce restrictions on religious dress, or require outward assertions of fealty to Christian symbols.⁴²¹ Instead of resulting in less public support for official displays of Christianity, existing forms of pluralism have produced a popular backlash in the form of a more full-throated defense of Christian (or “Judeo-Christian”) values and a concomitant reassertion of those values in public, up to and including coercing compliance with traditionalist norms.

President Trump’s Muslim ban represents this assertion of Christian nationalism,⁴²² in parallel with the practices of right-wing parties throughout Europe to restrict or eliminate immigration from the Middle East and to shut the door to Muslim refugees and asylum seekers. Controlling entry is a way of short-circuiting ethnic and religious pluralism and is part of a larger explicit agenda—now fully embraced by the Republican Party—of preserving an imagined American identity in the face of perceived ethnic and religious attack.

Anti-immigrant nativism has a long history, in the United States as elsewhere. In a previous century, it was mainly anti-Catholic but also anti-Jewish.⁴²³ Jeffries and Ryan are correct that the Protestant reaction to Catholicism and to desegregation played an important role in the Supreme Court’s approach to the Establishment Clause. In the twenty-first century, we are already witnessing the effect of anti-Islamic nativism in shaping church-state doctrine at the Court.⁴²⁴

421. See, e.g., Nick Cumming-Bruce & Steven Erlanger, *Swiss Ban Building of Minarets on Mosques*, N.Y. TIMES (Nov. 29, 2009), <https://www.nytimes.com/2009/11/30/world/europe/30swiss.html> [<https://perma.cc/34PY-LXDB>]; Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states> [<https://perma.cc/VAX2-G3Y3>]; Liam Stack, *Burqa Bans: Which Countries Outlaw Face Coverings?*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/world/europe/quebec-burqa-ban-europe.html> [<https://perma.cc/R5AR-YKDQ>].

422. See Corbin, *supra* note 328, at 472–73.

423. Jeffries & Ryan, *supra* note 28, at 281–82.

424. In addition to the Muslim ban, consider the Court’s recent rejection of an Islamic prisoner’s Establishment Clause challenge to Alabama’s practice of allowing only Christian clergy to administer last rites within an execution chamber. See *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.) (vacating stay of execution despite prisoner’s claim that the state had violated his First Amendment

C. THE COLLAPSE OF SEPARATIONISM

What is the relationship between antiliberal theory and il-liberal politics? Religious antiliberals need not embrace nativism or Trumpian populism. Indeed, antiliberals often blame liberalism for the rise of authoritarian regimes. Whether antiliberal theory nevertheless exhibits an historical affinity with authoritarianism or has the capacity to counter authoritarian regimes are questions that we cannot address here.⁴²⁵

What we can say is that in the context of American church-state politics, left and right antiliberal theories point away from the mid-twentieth century separationist settlement.⁴²⁶ Moreover, as exhibited in the United States, religious antiliberalism tends to be socially conservative.⁴²⁷ Much of the new antiliberalism advocates a church-state doctrine that involves: (1) broad autonomy for religious institutions and persons through robust religious exemptions from general laws; (2) public funding of churches and religious organizations through vouchers or direct grants on par with secular institutions; (3) acceptance of majoritarian public religious expression and displays, including in some cases, a return to school prayer; and (4) the legitimacy of state-enforced moral codes based on religious principles.⁴²⁸

This set of commitments reflects a socially conservative political program. To the extent critiques of liberalism are associated with a certain form of mid-twentieth century church-state separationism, this program is also a challenge to liberalism. Antiliberal theory is a resource and justification for rejecting core aspects of Religion Clause jurisprudence.

The doctrine has already shifted, as we have argued. And the composition of the Supreme Court matters. Justices Alito and Gorsuch are undoubtedly aware of the deep critiques of liberalism; they have been a staple of conservative intellectual discourse for a generation. And with the addition of Justice Kavanaugh, it seems likely there will be five votes for an expansive

rights by excluding Muslim clergy).

425. *But see* HOLMES, *supra* note 7, at 18–21; ZEEV STERNHELL ET AL., *THE BIRTH OF FASCIST IDEOLOGY* (David Maisel trans., Princeton Univ. Press 1994) (1989).

426. *See supra* Part II.

427. *Supra* Parts II.B–D.

428. *See supra* note 14 and accompanying text.

reading of RFRA and *Masterpiece Cakeshop*'s free exercise holding. Under either theory, religious individuals, groups, and corporations will be entitled to exemptions from a whole panoply of federal and state laws, including civil rights laws. It also seems likely that *Trinity Lutheran* will be applied to many other forms of government funding, thus embedding a doctrinal principle of compulsory aid to churches and religious organizations on equal terms with secular equivalents.⁴²⁹

And finally, it seems likely that restrictions on government expressions of sectarian religiosity in the public sphere will be relaxed.⁴³⁰ A number of Justices have already signaled their rejection of the endorsement test, with some favoring a coercion-based approach instead.⁴³¹ On that account, any symbolic activity of government, as long as it falls short of coercing religious practice, or perhaps proselytizing, would not constitute an Establishment Clause violation. Some versions of a coercion test would permit compulsory school prayer, perhaps with an opt-out for dissenters. With a doctrinal path cleared for state-sponsored religious exercise, changes in public culture under such a test could be profound.⁴³²

D. THE COMING INTRA-CONSERVATIVE DEBATE

On a majority conservative Court, the debate over church and state will be intramural. Rhetorically, liberalism will continue to prevail. The language of neutrality, non-discrimination, equal treatment, and animus will be deployed by the Justices despite the increasing incoherence of those terms. The question for the Justices is whether they can construct workable alternatives to the application of these liberal principles, which religious antiliberals argue have been corrupt since their inception. As power shifts rightward on the Court, the question is how far the Court will go in dismantling the separationist regime.

429. See *Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); *Espinoza v. Mont. Dept. of Revenue*, 435 P.3d 603 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019).

430. Cf. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2076 (2019).

431. See *id.* at 2098–103 (Gorsuch, J., concurring).

432. See Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 42 (2007) (“[C]itizens would have to accept certain fundamental changes in the nature of the American political system.”).

An emerging debate on the political right is between those who would retain some features of a basic liberal regime and those who would jettison liberalism altogether. Those who seek to retain a basic neutrality principle, no matter how weakly enforced, are not yet prepared to embrace a religious state, though they sometimes will argue that such a state can meet the minimal requirements of liberal legitimacy.⁴³³ Others are not at all concerned with liberal pieties. For antiliberals like Smith and Vermeule, liberalism, secularism, and paganism are all opposed to Christianity. For these thinkers, transcendent authority and moral truth are embodied in the traditions of the Church (or, perhaps, churches) and are respected and sustained in the religious culture of a Christian society and, if possible, a Christian state.⁴³⁴ Liberalism is not a framework for fair competition, but rather a totalizing value system that requires conformity with its own ethics, liturgy, and rituals. The answer to liberalism is not to demand a more modest version of it, but to uproot it entirely, or as much as possible, in favor of a perfectionist religious society, governed by a religiously-integrated state.⁴³⁵

This intra-conservative debate has only recently broken through to popular conservative media, in which religious antiliberals, or those sympathetic to them, have attacked more mainstream religious conservatives for their continued adherence to the basic tenets of liberal democracy.⁴³⁶ An authoritarian

433. See, e.g., Muñoz, *supra* note 172; cf. Richard W. Garnett, *Mild and Equitable Establishments*, FIRST THINGS (Apr. 2019), <https://www.firstthings.com/article/2019/04/mild-and-equitable-establishments> [<https://perma.cc/BCQ5-3Q8D>].

434. See *supra* Parts II.B, II.D.

435. See Schwartzman & Wilson, *supra* note 192.

436. See Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism> [<https://perma.cc/PT29-2Z3N>]. Ahmari initiated a round of conservative infighting when he criticized David French, a conservative Christian writer at the *National Review*, for operating within the confines of a liberal democratic order that purports to “accommodate both traditional Christianity and the libertine ways and paganized ideology of the other side.” *Id.* Invoking antiliberal tropes—note his use of the Christian/pagan dichotomy—Ahmari called on conservative Christians to treat “[c]ivility and decency [as] secondary values” that should be “use[d] . . . to enforce our order and our orthodoxy, not [to] pretend that they could ever be neutral.” *Id.* French responded by defending a fusion of classical liberalism and “fundamentally Christian and Burkean conservative principles,” calling for “neutral spaces where Christians and pagans can work side by side.” David French, *What Sohrab Ahmari Gets Wrong*, NAT’L

Christian state, following the rise of “illiberal democracy” in Hungary and Poland, seems to be the preferred model.⁴³⁷

The judicial debate will undoubtedly be more muted and less radical. The disestablishment norm is simply too well entrenched. But what about a kind of quasi-Christian or “Judeo-Christian” preferentialism coupled with relatively favorable treatment of traditionalist Christians and relatively unfavorable treatment of religious minorities, in particular, Muslims? We are witnessing such regimes already.

There is no reason to believe that the United States is immune from the political forces that have put pressure on liberal regimes around the world. The backlash against religious toleration and multiculturalism, along with the assertion of religious and ethnic chauvinism, is apparent throughout Europe, in the Islamic world, and elsewhere. A Court that has released the brakes on such expressions may encourage such illiberal movements. It has been a challenge to protect and defend the institu-

REV. (May 30, 2019), <https://www.nationalreview.com/2019/05/david-french-response-sohrab-ahmari/> [<https://perma.cc/JMQ5-GD2B>].

The dispute between Ahmari and French represents the public emergence of a conflict between mainstream American conservatives, who are committed to at least some central features of liberalism (including the protection of basic civil liberties), and religious antiliberals who favor an “illiberal democracy” or an ethno-religious state. For a range of reactions to the Ahmari-French controversy, see Ross Douthat, *What Are Conservatives Actually Debating?*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/opinion/conservatives-david-french-trump.html> [<https://perma.cc/G9BF-CTA5>]; Alan Jacobs, *What a Clash Between Conservatives Reveals*, ATLANTIC (June 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/conservative-christians-need-stay-civil/590866/> [<https://perma.cc/3VVG-CTEV>]; Adam Serwer, *The Illiberal Right Throws a Tantrum*, ATLANTIC (June 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/ahmari-french-orban/591697/> [<https://perma.cc/UDW5-S83M>]; Stephanie Slade, *The New Theocrats Are Neither Conservative nor Christian*, REASON (June 3, 2019), <https://reason.com/2019/06/03/the-new-theocrats-are-neither-conservative-nor-christian/> [<https://perma.cc/4HAQ-QKFR>].

437. See Aris Roussinos, *America’s Illiberal Pretenders and Europe’s Post-Liberal States*, TABLET (June 7, 2019), <https://www.tabletmag.com/scroll/286052/americas-illiberal-pretenders-and-europes-post-liberal-states> [<https://perma.cc/K4SD-PY4C>] (“America’s right wing dissidents have constructed . . . legalistic and moral theories of the ‘rightly ordered’ societies they hope to build. But where the intellectuals in the U.S. have theorized a future post-liberal political order, European politicians have constructed actually existing non-liberal and increasingly illiberal states. On one side of the Atlantic, the state is built; on the other, the justifying theory.”); Serwer, *supra* note 436.

tions of political liberalism at the turn of the twenty-first century. But with the revival of religious antiliberalism, and especially virulent forms of it, liberalism will also need renewed philosophical and theoretical support as well.

V. CONCLUSION

Contemporary religious antiliberalism targets the whole of the liberal tradition. But it has particular resonance in the arena of church and state. Antiberals argue that the secular/religious divide is a false one, like the public/private distinction, and that both are intended to and have the effect of marginalizing religious believers. Religious antiberals contend that privatization of religion is a distinctly Protestant imposition and that the demands of public reason alienate and discriminate against religious believers. They further argue that society is split between two cultural forces that are equally “religious”—Christians and pagans. Despite assertions to the contrary, they claim liberalism imposes a suffocating uniformity of thought and belief, forcing ever-more narrowly constrained liberties for those who reject liberal values.

Framed as a response to liberal repression, antiberalism comes in various forms. For some, the answer is localism, or perhaps retreat into utopian enclaves.⁴³⁸ And for others, the proper response to liberalism must be the resurrection of a Christian society and the establishment of a state subordinate to the Church.⁴³⁹ These antiberational strategies are being promulgated by philosophers, political theorists, and legal scholars. And they are being debated at a moment when the doctrine of church and state is in considerable flux. It is in flux politically as the Court’s composition shifts, and it is in flux conceptually as the doctrinal tools that serve to justify case outcomes are losing their elasticity.

The Court will not explicitly embrace antiberational rhetoric. But it may be influenced by the core claims made by religious antiberals, who expand the range of thinkable political and legal possibilities. Either way, it is important to observe the simultaneous reemergence of an antiberational intellectual movement and the rise of illiberal political regimes. The latter is already reflected in the Court’s jurisprudence of church and state, and it

438. *See supra* Part II.C.

439. *See supra* Part II.D.

will likely be justified by the former, even while being clothed in the language of liberal principles. We are at a moment of inflection. An emerging conservative Supreme Court arrives when Western liberalism has shown itself to be vulnerable to populist and authoritarian forces. Religious antiliberalism is encouraging a cultural and political movement toward Christian preferentialism. And the constitutional doctrine of church and state in the United States is beginning to follow.