

Brennan and Brewbaker's Christian Legal Thought: Providing the Foundations for Establishment Clause Understanding

Angela C. Carmella

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcls>



Part of the [Constitutional Law Commons](#), and the [Legal Education Commons](#)

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Catholic Legal Studies by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

BRENNAN AND BREWBAKER'S CHRISTIAN LEGAL THOUGHT: PROVIDING THE FOUNDATIONS FOR ESTABLISHMENT CLAUSE UNDERSTANDING

ANGELA C. CARMELLA[†]

INTRODUCTION

Catholic and Evangelical Protestant institutions have very little use for the Establishment Clause of the First Amendment. Of course, they appreciate the clause when it bolsters the Free Exercise Clause to limit government entanglement in church institutions, to protect church autonomy, and to prohibit preference of one religion over another.¹ But they tend to reject the notion that the Establishment Clause plays a role in limiting religious exercise. As to government messages and government money, these Christian communities take a decidedly narrow view of the clause.² They favor civic acknowledgement of the nation's Judeo-Christian heritage as well as financial support for church schools and other religious institutions. On issues of exemptions, they take a broad view of the free exercise right of Christians to be exempt from laws inconsistent with their teachings, whether individual or communal, nonprofit or for-profit; and they reject the notion that disruptions or burdens to third parties resulting from exemptions implicate the Establishment Clause.³

[†] Professor of Law, Seton Hall University School of Law

¹ See generally Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1 (2017).

² See generally Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001).

³ The Supreme Court has been asked to grant or uphold exemptions to religious institutions in a number of cases. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989);

Under this approach—which clearly prioritizes the protection of religious exercise as well as the religious messages of cultural and political institutions—it appears that the Establishment Clause plays little or no role independent of the Free Exercise Clause. My question, then, is whether Christian legal thought compels us, or at least supports, such a reading of the Establishment Clause. In other words, does this lack of concern for non-establishment norms inhere in Christian legal and political thought? I look to Patrick Brennan and William Brewbaker’s casebook—*Christian Legal Thought: Materials and Cases* (“CLT”)⁴—in search of a framework for exploration. And I am not disappointed. The book provides a treasure of excerpts, commentary, and questions that can enlighten our understanding of Christian perspectives on Establishment Clause interpretation and on notions of non-establishment more generally. While only a small part of the book explicitly addresses modern notions of “church and state” and establishment,⁵ CLT provides a comprehensive review of each of the major traditions within Christianity (Catholic, Lutheran, Anabaptist, Calvinist, and Reformed) and develops multiple, interconnected concepts—the nature of church, society, state, authority, culture, and the purpose of law—all of which are implicated in Establishment Clause interpretation. In some senses, the entire book helps us explore the question I pose. But I refer more specifically to those concepts that inform our understanding in the specific American legal context. Indeed, CLT shows us how integral Christian concepts are to the way we think and speak about law, and the way we are politically and socially organized. It implicitly criticizes the task of some Establishment Clause interpretations to “separate out” what is religious. On the other hand, it recognizes the modern conditions and challenges of religious pluralism within a secular state. CLT provides students and scholars with the intellectual resources to consider the meaning of non-establishment in a holistic and nuanced way.⁶

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

⁴ PATRICK MCKINLEY BRENNAN & WILLIAM S. BREWBAKER III, *CHRISTIAN LEGAL THOUGHT: MATERIALS AND CASES* (2017) [hereinafter CLT].

⁵ *Id.* at 467–97.

⁶ One caveat to the reader: my deep interest in Catholicism has meant that my attention has been drawn primarily to Catholic materials within the book.

I. THE SUPREME COURT'S USE OF CHURCH-STATE HISTORY FOR INTERPRETING THE ESTABLISHMENT CLAUSE

Before describing the contribution of CLT to understanding the Establishment Clause, I would like to set out some relevant considerations of current Establishment Clause interpretation. Political and lawmaking authority come through the “state” in liberalism. The clause focuses on the secularity of the state, both as to the nature of the political and legal acts it may take and as a way of distinguishing itself from the religious nature of churches. In relation to religious people and institutions, the state can protect religious exercise as a civil right. The state is distinct from religious communities and, while it can relate to them, cannot delegate governmental powers to them and cannot interfere with or usurp their religious functions or decisions. It can give benefits to religious institutions as long as those benefits are not distributed on religious criteria and are the result of private decision, and it can recognize the secular aspects of religious symbols and celebrations. The state cannot influence private religious decisions and cannot itself make religious decisions. It cannot endorse or disapprove of religion by making religion relevant to a citizen's standing in the political community. It cannot coerce religious observance, even if no legal penalty is involved.

It is true that in the past the Establishment Clause has been interpreted both more narrowly (to forbid fewer forms of government support to religion, as in the pre-1947 period) and more broadly (to forbid many more forms of government support to religion, as in the era of the heightened *Lemon* test⁷). But there has been a consistent understanding that state and church should not be confused or conflated, that institutional boundaries should be respected, and that symbolic government-religion relationships should be ordered toward civic as opposed to confessional ends.

To reinforce the state's secularity, the Supreme Court has on occasion given historical context to the Establishment Clause. In its early modern jurisprudence, starting with *Everson v. Board of Education* in 1947, the Court appeared to be answering the question of whether the clause was designed to protect non-preferential assistance to various churches, or whether it was

⁷ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

designed to bar all assistance to churches.⁸ It first answered with an absolutist historical account, justifying a separationist prohibition on assistance to any and all religion.⁹ In this account, Madison and Jefferson, as authoritative interpreters of the First Amendment, are staunch supporters of the separation of church and state; the Virginia disestablishment experience becomes normative for interpreting the clause. Madison's *Memorial and Remonstrance* makes a theological case for leaving Christianity alone on the grounds that to fund it is to destroy it.¹⁰ This pietistic separationism (going hand-in-hand with enlightenment separationism) is both described and criticized in CLT. The book discusses both the Baptist rejection of government support of Christianity (and the emphasis on soul liberty)¹¹ and the conservative critics who think these Christians were misguided and indeed duped by secular separationists.¹²

To counter this historical narrative, Catholics (and later Evangelical Protestants) offered an accommodationist account, pointing to the many cooperative church-state relationships and pervasive Christian symbols and practices in the founding period and embracing Washington and others who thought the support of religion and morality was critical to developing the virtuous citizenry necessary to self-government.¹³ Jesuit theologian and public philosopher John Courtney Murray, S.J. rejected the separationist narrative as one that embraced a Madisonian

⁸ See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁹ See *id.* at 11–16; see also *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948); *Engel v. Vitale*, 370 U.S. 421, 428–30 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 214 (1963) (citing *Everson* and declaring “the views of Madison and Jefferson . . . came to be incorporated not only in the Federal Constitution but likewise in those of most of our States”).

¹⁰ James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 6 (1785).

¹¹ Timothy L. Hall, “*Incendiaries of Commonwealths*”: *Baptists and Law*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 340–53 (Michael W. McConnell et al. eds., 2001), as reprinted in CLT, *supra* note 4, at 276–78.

¹² OLIVER O'DONOVAN, *DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* 244, 246–47, 249 (1996), as reprinted in CLT, *supra* note 4, at 471–72.

¹³ See, e.g., ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950); CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964) (scholarship regarding the non-preferential accommodation of religion in the founding period).

theology—one of privatized religion.¹⁴ The religion clauses were “articles of peace,” not “of faith,” he contended.¹⁵ The accommodationist narrative that he and other Catholics helped to craft was consistently presented to the Supreme Court; it made its way into several opinions,¹⁶ and pieces of it have been influential in various cases. CLT helps us to understand why Catholics would be adamant about state accommodation of religion, given the Church’s long theological understanding of law as the province of both church and state, and particularly the interconnectedness of divine, natural, and human law.

The separationist and accommodationist narratives, as used by the Supreme Court, provide justification for their decisions; and though they glean some significant theological and philosophical ideas of the founding period, they give us a rather thin conception of the nature of non-establishment. In the last thirty years the Court has rarely noted historical or intellectual foundations at all. These histories give us a sense of separate jurisdictions and the need for care in the church-state relationship, but the fact that they are employed inconsistently and primarily to justify a particular outcome leaves us in search of a principle. Up until now, the principle has been defined in a variety of ways: psychological tests concerning “endorsement”¹⁷ and “coercion,”¹⁸ wildly varied applications of *Lemon*, vague notions of neutrality,¹⁹ concern over judicial legitimacy,²⁰ and formalism.²¹ Can we do better? Yes. We can try to retrieve some Christian legal concepts to get a more expansive understanding of the nature of political authority and law. If the Establishment Clause is about the secularity of politics and law and the

¹⁴ Frederick G. Lawrence, *John Courtney Murray and the Ambiguities of Liberalism*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION 41, 50–51 (Leon Hooper, S.J. & Todd David Whitmore eds., 1996), as reprinted in CLT, *supra* note 4, at 491–92.

¹⁵ JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 68 (2005).

¹⁶ *Lynch v. Donnelly*, 465 U.S. 668, 673–78 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

¹⁷ *Lynch*, 465 U.S. at 687, 690 (O’Connor, J., concurring).

¹⁸ *Lee v. Weisman*, 505 U.S. 577, 585, 592 (1992).

¹⁹ *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1842–43 (2014) (Kagan, J., dissenting).

²⁰ *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

²¹ *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010).

flourishing of pluralism, then CLT can help us understand the Christian roots of modern secularity as well as the Christian engagement with pluralism.²²

II. THE MEDIEVAL CHURCH AS STATE WITH POLITICAL AND LAWMAKING AUTHORITY

Christianity, unlike Judaism and Islam, does not have a revealed legal code for living in society. Christianity became institutionalized as a legal and political system through the repeated controversies between popes and kings, in which they competed for power and jurisdiction. CLT provides excellent historical background to illustrate these developments. Pope Gelasius, in the fifth century, noted the spiritual and temporal jurisdictions, and claimed for the Church “genuine ruling authority . . . on at least a par with that exercised by the state.”²³ And in the Papal Revolution of the 11th and 12th centuries, the Church took on a corporate legal existence and claimed independence on ecclesiastical and some political matters.²⁴ As the excerpts from Harold Berman’s work in CLT make clear, the Papal Revolution not only forged the “freedom of the Church” but gave birth to the modern state of the West—with the Church itself *the first state*.²⁵ As a state, the Church *through law* sought to “reform the world in order to save souls.”²⁶ As a law-making and law-enforcing authority, it competed with the secular authorities for power and “claimed a right to exercise coercive jurisdiction through law.”²⁷ In this way, Christianity became institutionalized through law.²⁸ Later, during the Protestant Reformation and the rise of various theories that reinforced the notion of distinct jurisdictions (for example, Luther’s Two Kingdoms, Calvin’s Spiritual and Civil Government), “spiritual authority and spiritual responsibilities” were transferred to

²² See *infra* Part III.

²³ CLT, *supra* note 4, at 475 (discussing Letter from Pope Gelasius I to Emperor Anastasius (494)).

²⁴ *Id.* at 222.

²⁵ HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 113 (1983), as reprinted in CLT, *supra* note 4, at 223.

²⁶ *Id.* at 222 (casebook authors summarizing Berman’s account).

²⁷ *Id.* at 223.

²⁸ *Id.* at 222.

secular leaders.²⁹ Sometimes church and state had separate jurisdictions; on some matters, they shared concurrent jurisdiction. But the “dualism of spiritual and secular jurisdictions” persisted.³⁰ As Berman notes:

The idea of the secular state, which was implicit in the Papal Revolution from its inception, and the reality of the secular state, which emerged out of the historical struggle between ecclesiastical and secular forces that constituted the Papal Revolution, were in essence the idea and the reality of a state ruled by law This meant, first, that the respective heads of each body, the ecclesiastical and the secular, would introduce and maintain their own legal systems. . . . Second, it meant that the respective heads of each department would be bound by the law which they themselves had enacted It meant, third, that each jurisdiction would also be lawful; each state existed within a system of plural jurisdictions. . . . If the church was to have inviolable legal rights, the state had to accept those rights as a lawful limitation upon its own supremacy. Similarly, the rights of the state constituted a lawful limitation upon the supremacy of the church. The two powers could only coexist peacefully through a shared recognition of the rule of law, its supremacy over each.³¹

Thus, even without revealed law within the Christian Scriptures or tradition, the Church came to be fully entrenched in a legal system. Thomas Aquinas, 13th century theologian, philosopher, and jurist, has been immensely influential in framing a Christian theory of law. His works figure prominently in CLT.

Aquinas grounds law in reason. He notes that the providence of God orders all things to their ends, so that nothing is irrational; there is divine order in all creation.³² This divine governance then takes the form of law, “eternal, divine, natural, and human.”³³ As Pope Benedict XVI has noted, “nature and

²⁹ HAROLD BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003), *as reprinted in* CLT, *supra* note 4, at 224.

³⁰ *Id.*

³¹ *Id.* at 227.

³² CLT, *supra* note 4, at 379.

³³ *Id.* at 380.

reason [are] the true sources of law.”³⁴ According to Aquinas, law is “an ordinance of reason for the common good, made by him who has care of the community.”³⁵

The Aquinas excerpts in CLT demonstrate his integrated, rational approach. The purpose of human law for Aquinas is to make people virtuous, at least gradually, by making them less vicious.³⁶ People are capable of virtue, but those predisposed to evil can only be made better by coercive law. Even custom can be treated as law.³⁷ While human law could not and should not replicate all of higher law, human law is derived from natural law: “[A] thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature [So law] is derived from the law of nature. . . . [I]f in any point it deflects from the law of nature, it is no longer a law but a perversion of law.”³⁸ Contemporary Catholic teaching continues to hold that a law that is “at variance with reason” is unjust and “is an act of violence.”³⁹ Natural law theorists note that many kinds of human law can be considered reasonable in general, but that only by specific and prudent elaboration by judges and legislators can we know if a law comports with this standard.⁴⁰ Obviously, Thomas’ teachings are interconnected in many ways. CLT provides complementary materials. For instance, it explores the relationship between law and culture—law leads a person to virtue, culture leads a person to the natural common good.⁴¹

The Thomistic view of law’s moral purpose is named legal moralism. Aquinas gave the Church a worldview of harmony in which conflict over the substantive definition and application of

³⁴ *Id.* at 493 (quoting BENEDICT XVI, APOSTOLIC JOURNEY TO GERMANY ADDRESS AT BUNDESTAG (Sept. 22, 2011)).

³⁵ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 90.4, as reprinted in CLT, *supra* note 4, at 385.

³⁶ CLT, *supra* note 4, at 429.

³⁷ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 97.3, as reprinted in CLT, *supra* note 4, at 191.

³⁸ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 95.2, as reprinted in CLT, *supra* note 4, at 435.

³⁹ JOHN XXIII, *PACEM IN TERRIS*, ¶ 51 (1963), as reprinted in CLT, *supra* note 4, at 80, 84.

⁴⁰ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011), as reprinted in CLT, *supra* note 4, at 436–37; RÉMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* (2008), quoted in CLT, *supra* note 4, at 437.

⁴¹ CLT, *supra* note 4, at 182.

virtue is absent. CLT provides examples of both contemporary proponents and critics of the moral purpose of law. Pope Benedict XVI noted “the harmony of objective and subjective reason,”⁴² while Protestant theologian Reinhold Niebuhr observed that Aquinas’ natural law—as the part of the eternal or divine law manifested in a “universal” human reason—obscured historical variation in reason and made a pretentious claim to certainty on moral issues.⁴³ It is good to hear many Christian voices weighing in on these matters.

For Aquinas, all of human law had to comport with universal reason in accordance with Christian moral teaching. This unity again emphasizes a harmonious sense of law and political authority rather than a conflicted or adversarial system (even while great church-state power struggles are under way). As Berman noted in the language quoted above, both ecclesiastical and state authorities had to recognize the separate jurisdictions of each but also had to recognize the supremacy of the rule of law over both. The Church obviously had much to say about what was moral, and thus to judge whether law was a perversion or a proper way toward virtue.

Church teaching on political authority envisioned the unity of law under a comprehensive moral vision. The state was viewed as a “perfect society” with “supreme power” subject to the natural limits of other spheres, like family and Church—the latter being considered a perfect society as well, with the pope having supreme power in the religious realm.⁴⁴ Reinforcing this sense of unity was a theological, as opposed to natural law, doctrine, the Kingship of Christ, in which Christ as King has supreme authority over all of government and society.⁴⁵ His Kingship was consistent with the separate jurisdictions of church and state, since their responsibilities differ (mirroring Christ’s priestly and royal roles); His Church has genuine ruling authority “on at least a par with that exercised by the state.”⁴⁶

⁴² BENEDICT XVI, APOSTOLIC JOURNEY TO GERMANY ADDRESS AT BUNDESTAG (Sept. 22, 2011), as reprinted in CLT, *supra* note 4, at 493.

⁴³ REINHOLD NIEBUHR, 2 THE NATURE AND DESTINY OF MAN 252–53 (1943), as reprinted in CLT, *supra* note 4, at 410–11.

⁴⁴ HEINRICH ROMMEN, THE STATE IN CATHOLIC SOCIAL THOUGHT 397–98, 400–01 (1947), as reprinted in CLT, *supra* note 4, at 478–79.

⁴⁵ PIUS XI, ENCYCLICAL LETTER QUAS PRIMAS (1925), as reprinted in CLT, *supra* note 4, at 484.

⁴⁶ CLT, *supra* note 4, at 475.

CLT offers a fascinating description of Christendom and the Kingship of Christ, noting its expression as late as 1925 in the encyclical *Quas Primas*.⁴⁷

In *Quas Primas*, the fact that Christ is a law-giver means that secular leaders are invested with religious significance and should be obeyed.⁴⁸ The document assumes benevolent rulers who understand when “they rule, not by their own right, but by the mandate and in the place of the Divine King, they will exercise their authority piously and wisely” in accord with “common good” and “human dignity.”⁴⁹ Indeed, to the critical eye of Catholic intellectual Jacques Maritain, such thinking reflected a long history that justified “absolute sovereignty on the basis of a theological myth, the divine right of kings” and on the notion of “‘substantialism’—the ‘myth that the state is the people personified.’”⁵⁰

The dangers of sacralizing existing political authority are immediately apparent, which may explain why the Kingship of Christ has fallen out of use in Catholic social thought. But CLT shows the power of the concept when it is used to condemn, rather than support, existing authority. Dietrich Bonhoeffer used the Kingship of Christ in a prophetic way to criticize the Nazi regime and to remind the Lutheran Church that the church’s role is to “bring[] government to an understanding of itself.”⁵¹ Given the state’s divine origin, it must obey Jesus.⁵² By this, Bonhoeffer does not mean that government is supposed to enact Christian law and policy. Rather, government is to be a “true government in accordance with its own special task[s].”⁵³ The Church claims institutional protection for itself and its

⁴⁷ See generally *QUAS PRIMAS*, *supra* note 45, as reprinted in CLT, *supra* note 4, at 484–85.

⁴⁸ *Id.*

⁴⁹ *Id.* at 485.

⁵⁰ Russell Hittinger, *Reasons for a Civil Society*, in *REASSESSING THE LIBERAL STATE* 11, 23 (Timothy Fuller & John P. Hittinger eds., 2001), as reprinted in CLT, *supra* note 4, at 487 (reviewing Maritain’s *Man and the State*).

⁵¹ DIETRICH BONHOEFFER, *ETHICS* 342 (1955), as reprinted in CLT, *supra* note 4, at 482, 483.

⁵² See *id.*

⁵³ *Id.*

proclamation, and for Christians to live in obedience to Jesus.⁵⁴ Bonhoeffer says government cannot be grounded in natural law—only in Christ.⁵⁵

III. THE MODERN ERA: THE DESACRALIZED STATE IN CHRISTIAN LEGAL THOUGHT

In contrast to the traditional Catholic doctrine of sovereignty, in the last century and a half, “Catholic thought has been liberated from any temptation to sacralize or substantialize the state” that the traditional doctrine had implied.⁵⁶ Catholic intellectuals Jacques Maritain and John Courtney Murray, S.J., who were influenced profoundly by the U.S. Constitution, developed an “instrumentalist concept” of the state, with law serving rights and liberties of various social groups that together cannot be equated with the state.⁵⁷ This transition to the instrumental state is a dramatic and difficult one for the Catholic tradition. As is seen above in Part II, the tradition’s anthropological, social, political, and legal concepts create a fully harmonious vision of the person, the society, the state, and the legal system, each sharing compatible moral standards and purposes. Modern Church social teachings do not abandon this harmony; but now the teachings must engage a new reality in which church and state no longer share the norms of a common culture. We see the recognition of this new reality with particular intensity in the documents of the Second Vatican Council, 1962–1965, and in some of the current ambivalence toward the secular state voiced in litigation and lobbying positions.

In my view, six relevant themes emerge from the wealth of materials in CLT to help us explore the notion of the instrumental state and the non-establishment norms that define some of the limits to its political and legal authority. First, there is the theme of *subsidiarity*. In addition to legal theory, Christians have developed related social theories. No longer fixated exclusively on the relationship between ecclesiastical and governmental bodies, they have begun to think more broadly about limiting political authority to allow human persons and

⁵⁴ See *id.* at 482–83.

⁵⁵ See *id.*

⁵⁶ Hittinger, *supra* note 50, at 488.

⁵⁷ *Id.* at 487–88.

social groups in society to flourish. Second, there is the theme of *constitutional government*. As the brutality of secular, totalitarian governments became more intense, Christian intellectuals have come to emphasize constitutionally-guaranteed rights. The earlier expectation of a benevolent, divinely-ordained ruler who promulgated moral laws has ceased to be a motivating vision. Third, there is the theme of *human rights*. The leading proponents of the movement to define universal human rights in the post-war period were Christians steeped in the rich intellectual tradition of the faith that recognized inherent limits on governmental authority. Fourth, there is the theme of the *limits of legal moralism*. The Thomistic notion of the moral purposes of law has come under scrutiny, especially by Protestant Christians, and a reconsideration in the context of pluralism has begun. Fifth, there is the theme of *pluralism*. The rise of a pluralistic, secular culture has made Christians think more deliberately about the proper relationship between law and culture, and the state's role in that relationship. Finally, there is the theme of *justice for the poor*. The Christian obligation to love and care for the poor, the stranger, the widow, and the orphan has placed modern Christians at the center of many controversies over social and economic justice, which both limits and makes demands on the instrumental state. These six threads receive extensive treatment in CLT and can help create a framework for piecing together an approach to Christian norms of non-establishment.

A. *Subsidiarity*

CLT provides excellent materials to describe the concept of subsidiarity. Both Catholics and Protestants developed social theories that limit government. Abraham Kuyper, a Calvinist intellectual writing at the turn of the 20th century, developed a theory of "sphere sovereignty."⁵⁸ Catholic social thought, beginning at the end of the 19th century, developed a theory of "subsidiarity."⁵⁹ Both theories protect the individual and those groups that are not derived from the state: the family, church, business, unions, the arts, science, professional and civic groups,

⁵⁸ See generally Abraham Kuyper, *Calvinism and Politics*, in LECTURES ON CALVANISM (1931), as reprinted in CLT, *supra* note 4, at 320–34.

⁵⁹ MICHAEL GERSON, HEROIC CONSERVATISM (2008), as reprinted in CLT, *supra* note 4, at 77, 78.

charitable groups, and even the international community.⁶⁰ The overarching principle is that these groups are ordered toward the common good.⁶¹ Higher authorities should not usurp the roles of lower groups unless necessary to address deficiencies in carrying out those roles; resources from higher authorities can be provided to enable lower groups to do what they do best.⁶² Gerson's piece on subsidiarity is especially interesting, noting that the doctrine is consistent with American philosophy: "The founders were well aware of the central paradox of democracy: the strength of liberal political institutions—institutions characterized by autonomy and free choice—depend on the health of illiberal social institutions—communities that teach moral rules and obedience."⁶³ The instrumental state is limited in its ability to control those social institutions.

B. Constitutional Government

Christian thinkers like Maritain and Murray were convinced that there needed to be constitutional guarantees in order to protect individuals, churches, and other groups. Murray was the primary drafter of *Dignitatis Humanae*, a document of the Second Vatican Council, which grounded the right to religious freedom in the dignity of the human person.⁶⁴ The document was a clear recognition of the need for constitutional guarantees of the free exercise of religion by *all* persons and religious institutions, without regard to the truth of the beliefs and practices. The instrumental nature of the state leaves quite a bit of room open for the leavening of moral and spiritual values. Pope John Paul II, in *Centesimus Annus*, wrote that "[a]uthentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person."⁶⁵ Yet because

⁶⁰ See HEINRICH ROMMEN, *THE STATE IN CATHOLIC SOCIAL THOUGHT* (1947), as reprinted in CLT, *supra* note 4, at 479.

⁶¹ See Michael P. Moreland, *The Pre-History of Subsidiarity in Leo XIII* in this volume, at 63. See also Elizabeth F. DeFeis, *Religious Liberty and Protections in Europe*, 45 J. CATH. LEGAL STUD. 73 (2006) (noting influence of Catholic subsidiarity).

⁶² See PIUS XI, *ENCYCLICAL LETTER QUADRAGESIMO ANNO* ¶ 80 (1931), as reprinted in CLT, *supra* note 4, at 480.

⁶³ GERSON, *supra* note 59, at 78.

⁶⁴ See SECOND VATICAN ECUMENICAL COUNCIL, *DECLARATION ON RELIGIOUS LIBERTY DIGNITATIS HUMANAЕ* ¶ 2 (1965), as reprinted in CLT, *supra* note 4, at 475.

⁶⁵ Russell Hittinger, *Introduction to THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* (John Witte Jr. & Frank S. Alexander eds.,

there is no such consensus on a correct conception, Maritain and Murray say this must be achieved “indirectly, through evangelization and education of society itself [rather than through exercises of jurisdiction, either direct or indirect, of an established Church].”⁶⁶

The recognition of a secular, instrumental state is part of the teaching, despite the fact that some of the language in *Dignitatis Humanae* signals a limited acceptance of legal and cultural establishment.⁶⁷ The issue of a “Catholic establishment” has to be placed in the context of the larger debate within Catholicism as to whether the modern documents, including those of the Second Vatican Council, represent a rejection of prior teaching, or whether they maintain continuity with prior teaching. Of course, there is much continuity: Pope John XXIII in *Pacem in Terris* makes clear that the purpose of political authority is to attain the common good;⁶⁸ government authority is a natural part of the moral order and derives from God;⁶⁹ and laws that contravene the moral order are not binding.⁷⁰ The debate surrounding discontinuity and continuity is quite nuanced,⁷¹ but it is significant because it gets to the core question of the extent of religious freedom urged by *Dignitatis Humanae*. At the time of the Council, it was certainly clear that the Church had rejected

2006), as reprinted in CLT, *supra* note 4, at 491 (quoting JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* (1991)).

⁶⁶ *Id.* (alteration in original).

⁶⁷ *Dignitatis Humanae* accepts establishments that exist under unique historical circumstances. *DIGNITATIS HUMANAЕ*, ¶ 6, *supra* note 64, as reprinted in CLT, *supra* note 4, at 490. It further retains “freedom of the Church” language, asserting the Church’s freedom “as a spiritual authority established by Christ the Lord, upon which there rests, by divine mandate, the duty of going out into the whole world and preaching the Gospel to every creature. The Church also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith.” *Id.* ¶ 13.

⁶⁸ See JOHN XXIII, ENCYCLICAL LETTER *PACEM IN TERRIS* ¶ 54 (1963), as reprinted in CLT, *supra* note 4, at 80, 85.

⁶⁹ See *id.* ¶ 46.

⁷⁰ See *id.* ¶ 51. But the teaching saw a new emphasis on the people’s ability to choose their rulers and type of government, as well as the emphasis on multi-branch government. *Id.* ¶ 52.

⁷¹ See, e.g., Joseph A. Komonchak, *Novelty in Continuity: Pope Benedict’s Interpretation of Vatican II*, AMERICA (Feb. 2, 2009), <https://www.americamagazine.org/issue/684/article/novelty-continuity>.

its previous teaching that “error has no rights.” Yet CLT points to the ambiguity regarding the acceptance and definition of establishment.⁷²

C. Human Rights

The Catholic acknowledgement that rights must be constitutionally guaranteed is not limited to religious exercise, nor to the domestic realm. There is an entire body of civil, political, social, and economic rights, and they are universal. The Catholic intellectual contribution to the human rights discourse, ultimately embodied in the Universal Declaration of Human Rights, was substantial.⁷³ Jacques Maritain, a major contributor to its drafting, noted its traditional roots: “How could we understand human rights if we had not a sufficiently adequate notion of natural law? The same natural law which lays down our most fundamental duties . . . is the very law which assigns to us our fundamental rights.”⁷⁴ Despite criticism from Protestant intellectuals like Reinhold Niebuhr, who thought the natural law was a “dead end” without “the enlightenment, strength and perfection of Divine Law,”⁷⁵ the language of universal human rights and the institutionalization of the commitment to human rights (in governments and non-governmental organizations worldwide) is undoubtedly a major contribution of Christian legal thought.⁷⁶ Human rights abuses that involve established religions can help identify those limits to religious freedom that thwart the common good.

⁷² CLT, *supra* note 4, at 490. For the view that *Dignitatis Humanae* did not change the traditional teaching on church-state relations, see Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165, 170–74 (2013).

⁷³ CLT, *supra* note 4, at 462–63.

⁷⁴ JACQUES MARITAIN, *MAN AND THE STATE* (1951), as reprinted in CLT, *supra* note 4, at 457.

⁷⁵ CLT, *supra* note 4, at 449 (quoting Brian McCall, *Consulting the Architect When Problems Arise—The Divine Law*, 9 GEO. J. L. PUB. POL’Y 103, 117, 129 (2010)).

⁷⁶ See, e.g., C.M.A. McCauliff, *Cognition and Consensus in the Natural Law Tradition and Neuroscience: Jacques Maritain and the Universal Declaration of Human Rights*, 54 VILL. L. REV. 435, 461–77 (2009); C.M.A. McCauliff, *Union in Europe: Constitutional Philosophy and the Schuman Declaration, May 9, 1950*, 18 COLUM. J. EUR. L. 441, 460–72 (2012).

D. Limits to Legal Moralism

The Thomistic notion that law can make persons better, more virtuous, has come under intense scrutiny from Protestant Christians, and the debates are nicely presented in CLT. Niebuhr spoke of the law of love, which would replace rigid moral norms:

[T]he law, however conceived, accepts and regulates self-interest and prohibits only the most excessive forms of it. It does not command that we love the neighbor but only that we not take his life or property. It does not command that we seek our neighbor's good but that we respect his rights. Broadly speaking, the end of the law is justice. But we have already seen that justice is related to love. . . . The law seeks for a tolerable harmony of life with life, sin presupposed. It is, therefore, an approximation of the law of love on the one hand and an instrument of love on the other hand. . . . [D]istinction between law and love is less absolute and more dialectical than conceived in either Catholic or Reformation thought. . . . [Those two] are too certain about the fixities of the norms of law. All law . . . is more tentative and less independent of its authority [than these suppose].⁷⁷

Christian legal scholars David Skeel and the late Bill Stuntz argue that since law cannot save souls, legal moralism is “nearly always counterproductive” and “deeply wrong.”⁷⁸ They point to great social dangers of trying to equate the immoral with the illegal as well as the dangers to faith communities.⁷⁹ When faith is made into a moral code, Christians focus on obeying rules and not on moral discernment, and churches become pharisaical.⁸⁰ Others challenge the Thomistic emphasis on the moral purposes of law by noting that “[a]s a coercive force, law cannot effect change from the inside. Standing alone, it cannot change the internal dispositions and attitudes of the human person.”⁸¹

⁷⁷ REINHOLD NIEBUHR, *CHRISTIAN REALISM AND POLITICAL PROBLEMS* (1953), as reprinted in CLT, *supra* note 4, at 444. Note also that Wolterstorff and Barth would say that if the church understands its own nature, it would not say government has the authority to do what Aquinas (and Calvin) say it should do. CLT, *supra* note 4, at 486.

⁷⁸ David Skeel & William Stuntz, *Christianity and the Modest Rule of Law*, 8 U. PA. J. CONST. L. 809, 838 (2006), as reprinted in CLT, *supra* note 4, at 433.

⁷⁹ *See id.*

⁸⁰ *See id.* at 432–33.

⁸¹ John M. Breen, *John Paul II, The Structures of Sin and the Limits of Law*, 52 ST. LOUIS U.L.J. 317 (2008), as reprinted in CLT, *supra* note 4, at 94.

Gregory Kalscheur, S.J. argues that Catholic teaching itself—in *Dignitatis Humanae*—“limits the moral aspirations of the law” in connection with morals legislation.⁸² On the other hand, by breaking out of the narrow focus on sexuality, which has consumed so much Christian thinking on legal moralism, we might be able to see that what we think of as rights-based law can be reframed as an updated version of legal moralism. For instance, laws governing how employers and employees treat one another in terms of sexuality or race are usually cast as prohibitions on discrimination. Yet many committed to a secular state would agree that the law teaches people how to treat one another with dignity and respect, which indeed seems designed (if not in purpose, then in effect) to make people more virtuous.

E. Pluralism

Christendom has ended. But culture continues, and obviously continues to be influenced by Christianity. Humans are “world-makers” through their art, music, literature, commerce, law, relationships, and sovereign and subsidiary institutions,⁸³ and culture is normative way of “being.”⁸⁴ Culture is “made manifest in speech, laws, and routine practices of some self-monitoring and self-perpetuating group.”⁸⁵ It has become necessary to explore the link between culture and law, and CLT notes a variety of Christian thought on the matter, with some arguing that law leads persons “to the natural common good” and others arguing that “[l]aws cannot generate values, or instill values, or settle the conflict over values.”⁸⁶ Obviously, culture that is religiously pluralistic and secular poses a challenge for Christians, potentially creating an emphasis on a church’s own rights rather than on its contribution to culture. But the materials in CLT invite consideration of what a pluralistic

⁸² CLT, *supra* note 4, at 445 (emphasis in original) (citing Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1 (2006)).

⁸³ JAMES DAVISON HUNTER, *TO CHANGE THE WORLD* 3–4 (2010), as reprinted in CLT, *supra* note 4, at 179.

⁸⁴ JOHN PAUL II, *ADDRESS TO UNESCO* (June 2, 1980), as reprinted in CLT, *supra* note 4, at 180–81.

⁸⁵ RICHARD SHWEDER, *WHY DO MEN BARBECUE? RECIPES FOR CULTURAL PSYCHOLOGY* 11 (2003), as reprinted in CLT, *supra* note 4, at 179.

⁸⁶ CLT, *supra* note 4, at 182 (quoting Patrick McKinley Brennan and James Davison Hunter, respectively).

culture means to a tradition that has known many ways of living in culture: as a suffering minority group, as a free and self-governing group among multiple cultures, and as the group with authority over all. The materials on the five main strands of Christianity—Catholic, Lutheran, Anabaptist, Calvinist, and Reformed—are particularly rich resources.

F. Justice for the Poor

The final modern theme gleaned from CLT in an exploration of non-establishment norms of a secular state is the commitment to social and economic justice for the poor. Of course, this commitment is not new, but its urgency has grown as suffering has increased. The Gerson excerpts emphasize Catholic thinking about solidarity with the vulnerable and oppressed,⁸⁷ and Keller writes of the radical nature of the concern for the poor as a political concept in both Judaism and Christianity.⁸⁸ The concern is also connected deeply to the ancient commitment to the common good. But the common good is a problematic concept for the liberal state, since most governments rely on a utilitarian-welfare rationale like the public or national interest.⁸⁹ Alasdair MacIntyre also speaks of how impossible it is for governments to conceptualize the common good when their distribution of goods is based on power and wealth.⁹⁰ Despite these discouragements, Christians have continued to work tirelessly for the improvement of the lives of others, and their constant service and advocacy is perhaps the greatest Christian contribution to political thought.⁹¹ Even the work of political theorist John Rawls has been influenced by the Christian outreach to the vulnerable: given the unfair distribution of benefits and burdens, he built his theory of justice on a conception that does not permit rulemaking from the vantage point of privilege.⁹² The instrumental state simply cannot be conceptualized without taking into account both the economic successes and the economic inequities of its citizens.

⁸⁷ See GERSON, *supra* note 59, at 79.

⁸⁸ See TIMOTHY KELLER, *GENEROUS JUSTICE: HOW GOD'S GRACE MAKES US JUST* (2010), as reprinted in CLT, *supra* note 4, at 364.

⁸⁹ CLT, *supra* note 4, at 492.

⁹⁰ See *id.* at 489.

⁹¹ See GERSON, *supra* note 59, at 79.

⁹² JOHN RAWLS, *A THEORY OF JUSTICE* (1971), as reprinted in CLT, *supra* note 4, at 376.

IV. A FRESH LOOK AT THE ESTABLISHMENT CLAUSE

I now return to the observations set out at the start of this paper. Catholic and Evangelical Protestant institutions have very little use for the Establishment Clause when it is not playing a role that is redundant to the Free Exercise Clause. In other words, these religious communities see little need for setting “outer bounds” of religious freedom—at least not by way of non-establishment norms. They accept in general the “public order” limits to religious freedom, but the task of defining those limits in particular circumstances is always a challenge. Indeed, those public order limits may overlap with non-establishment limits. My inquiry is this: whether Christian legal thought compels, or at least supports, an interpretation of the Establishment Clause marked by a lack of concern for non-establishment norms that place boundaries on religious exercise. In my reading of CLT, I have found ample material to enlighten our understanding of Christian perspectives on notions of “establishment” and to provide a six-point framework for further exploration. Christian legal thought is not uniform; and given the significant threads that critique and moderate Christian claims to political and legal authority, Christians can claim no single interpretation of the Establishment Clause. Yet there remains a powerful strand of Christian thought that is committed to the witness of the church alone, radically separate from the state. Catholic institutions remain wedded to an accommodationist approach to the clause because it is most consistent with the harmonious vision of church-state cooperation visible in its social teachings. But this harmonious vision is an obstacle to thinking comprehensively about non-establishment norms. The Establishment Clause is not premised on harmony but on conflict. The worry is not only that the state could manipulate and destroy the church, but that a church could gain civil power over the state and its citizens.

Christian legal thought has a complicated relationship to the secular, liberal state. Catholic teaching is that the state is properly secular. Indeed, the current Catholic teaching is for the constitutional guarantee of religious liberty,⁹³ along with other civil, political, social, and economic rights. Yet traditionalists appear to voice great nostalgia for Christendom, when the

⁹³ CLT, *supra* note 4, at 489–90.

Kingship of Christ over all political authority was taught. Indeed, Oliver O'Donovan points to the Religion Clauses as “the symbolic end of Christendom,”⁹⁴ and laments the fact that the very notion of government and society being under Christ’s rule is nearly impossible to conceive of once the liberal state and religious pluralism are accepted.⁹⁵ Christendom has ended: the state does not have to obey Christ and cannot privilege and financially support the Church’s mission; further, the Christian definition of the “moral” good of the state and society no longer governs, leading to what he calls a “demoralized conception of society.”⁹⁶

But the secular, liberal state is what we have, and it cannot choose a religion for itself. This is the most basic of non-establishment norms. In a pluralistic society marked by religious equality and constitutionally guaranteed protections for religious freedom, government protects the religious exercise of all. Under these conditions, government has no capacity to give religious preference. Maritain believed that establishment violated human equality.⁹⁷ Indeed, the accommodationist narrative offered by Catholics during the mid-20th century to justify aid to parochial schools, described in Part I above, was grounded in the concept of “non-preferentialism”—aid given to religious groups evenhandedly. Churches in litigation argue for accommodation, not for “denominational preference.” All have accepted the notion of equal treatment.

CLT raises some very provocative questions that challenge the liberalism of the state: What would it look like if the magisterium returned to the 1925 *Quas Primas* and again called for the Kingship of Christ for part of its social teaching, “to regard their elected officials as viceregents of Christ the king?”⁹⁸ Imagine the U.S. Conference of Catholic Bishops describing Jesus as King over American society, with elected officials His earthly agents. What kind of political discourse would result from such a claim? Would it prompt government officials to consider the common good beyond local or national self-interest? How might this change our law-making? The *Lemon* test, though

⁹⁴ O'DONOVAN, *supra* note 12, as reprinted in CLT, *supra* note 4, at 471.

⁹⁵ *See id.*

⁹⁶ *Id.* at 472.

⁹⁷ *See* CLT, *supra* note 4, at 490.

⁹⁸ *Id.* at 485.

much reviled, states a long-standing principle of political liberalism: law must have a secular purpose. Would recognizing the Kingship of Christ allow lawmakers to enact “Christian” laws? What would they look like? Would they have secular purposes? Would these laws be different from the Thomistic laws with “moral” purposes? Presumably, laws with moral purposes can be articulated in non-religious terms. But would the Kingship of Christ prompt something different? Would it be more like a situation in which legislators enacted sharia law? Or is Christian lawmaking saved by the fact that law is not “revealed” but comes from “nature and reason”?

In addition to elected officials, CLT also raises the possibility of judges explicitly doing God’s will. CLT authors asked:

Does the historical shift away from a Christian worldview in which divine law is always already present and widely acknowledged, to a worldview in which what power there is above human law is “from the people,” undermine Christian (and other) arguments in favor of a judicial power to answer to the divine law directly?⁹⁹

Using the example of a court that permits a suit for wrongful death of a fetus when the state law did not provide for such a cause of action, CLT asks whether courts can give legal, that is, coercive effect “to *obligations* grounded in divine law, natural or revealed.”¹⁰⁰ Yet courts often find duties in equity that are not based in text or precedent, but instead reason from analogy, inference, and ethical principles of justice. Is it necessary for a court to claim that it is doing God’s will? How can such a claim be measured or tested?

I found these examples startling, because they ask us to consider situations that step beyond those outer bounds to religious freedom that I had supposed were set by the non-establishment norms. Of course, any church can frame in its own religious terms the way it thinks about elected officials and the way judges ought to rule. But for the public actors themselves, we typically think about shared rules of engagement and the norms set for those groups: elected officials and judges owe duties to the Constitution; the stability of law and political-legal institutions is an important value among other values; judges are

⁹⁹ *Id.* at 449.

¹⁰⁰ *Id.* at 428 (emphasis in original).

held to particular standards of impartiality. Moreover, and perhaps most importantly, there is already tremendous latitude in politics and law to “do” natural law because, as John Courtney Murray noted, we *all* are natural lawyers.¹⁰¹ Must politicians and judges make the claim that they are legislating and adjudicating based on divine and natural law? How are such claims possible in a religiously plural society with secular rules of engagement?

CLT thus raises some central questions about the interplay of Christian legal thought and the liberal state and highlights concepts that both shape and detract from law in that politically and religiously pluralistic context. In particular, CLT describes the modern experience, noted above in Part III, which helps mediate the theological concepts and commitments that can set limits to (and define obligations of) the instrumental state: subsidiarity, constitutional government, universal human rights, limited legal moralism, pluralism, and justice for the poor. There is a recognition that “creation, providence, the Fall, redemption, the divine law, natural law and much more” are no longer part of current jurisprudence, so that Christian legal thought influences lawmaking in “subtle and unexpected ways.”¹⁰² I note, for instance, that Kuyperian sphere sovereignty and Catholic social thought on subsidiarity influenced the Bush administration (2001–2009) in the design of its “faith-based initiatives” program to fund religious social services at the local level.¹⁰³ Christian concepts like these, which provide a coherent moral vision and make political sense in the instrumental state, can help not only to conceptualize “the common good” but actually contribute to it as well. This Christian influence by way of leavening the political and legal culture may turn out to be a significant contribution in the modern period.

In addition to the six themes I identified for exploring Christian understandings of non-establishment norms, I would add yet another category: the recognition of the dialogue between notions of power and powerlessness, so central to Christian theology and yet largely unexplored in Christian political and legal thought. In connection with interpretations of the

¹⁰¹ Murray, *supra* note 15, at 54.

¹⁰² CLT, *supra* note 4, at 426–27.

¹⁰³ Lew Daly, *European Dream: The Political Theology of George W. Bush's Faith-Based Initiative*, 115 THEORIA: J. SOC. AND POL. THEORY 32, 33 (2008).

Establishment Clause, I noted at the outset that the case law tends to fall in the area of government messages and government money. The pietistic separationists, coming out of the Anabaptist tradition (the soul-liberty Baptists of the founding era), wanted nothing from government except freedom. But Catholics and Evangelical Protestants are more likely to be concerned that a heavy-handed Establishment Clause “weaken[s] the Church’s place in society.”¹⁰⁴ Perhaps it is because so much of the Christian tradition is immersed in questions of political and legal power and authority—as is thoroughly documented in CLT—that Christians worry about their “place” in society if they do not have political and legal affirmation. But the Establishment Clause *disempowers* in particular ways all religious groups in connection with state political authority and law-making authority.¹⁰⁵ Christian notions of powerlessness can be found in abundance in the Anabaptist tradition, but also within the Catholic monastic and contemplative traditions. Despite the wealth of contemplative thought and liturgical practice that revolves around the notion of Jesus’ “power through powerlessness,” there seems to be little, if any, attention paid to its possible civic-political meaning. Perhaps a retrieval of these sources on power and powerlessness and some reframing of the questions will also assist with the exploration of what Christianity has to say about non-establishment norms and, per Niebuhr, the law of love.¹⁰⁶

¹⁰⁴ CLT, *supra* note 4, at 490.

¹⁰⁵ See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994); Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 126–27 (1982).

¹⁰⁶ See Niebuhr, *supra* note 77, at 444 and accompanying text. See also AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW? (eds. Robert F. Cochran, Jr., and Zachary Calo) (2017).