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WHY LIBERALISM PERSISTS: THE NEGLECTED LIFE OF THE LAW IN THE STORY OF LIBERALISM'S DECLINE

KENNETH L. TOWNSEND[†]

I. INTRODUCTION

Liberalism is in decline in the West. Past political divides that pitted classically liberal conservatives against moderate to progressive political liberals are giving way to a new landscape in which a liberal consensus simply cannot be assumed. From the left, socialist and identity-based critiques of liberalism have called into question core liberal assumptions regarding procedural justice, the division between public and private realms, and the rights of individuals.¹ From the right, an increasingly vocal group of conservatives is questioning classical liberalism's commitment to limited government, a free market, and individual rights in favor of a vision of political community where the state advances certain religious, traditional, or nationalist views.²

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¹ See, e.g., Nancy Fraser, *From Progressive Neoliberalism to Trump—and Beyond*, AM. AFFS. (Nov. 2017), <https://americanaffairsjournal.org/2017/11/progressive-neoliberalism-trump-beyond/> [<https://perma.cc/U3HK-Y295>]; Francis Wade, "The Liberal Order Is the Incubator for Authoritarianism": A Conversation with Pankaj Mishra, L.A. REV. BOOKS (Nov. 15, 2018), <https://lareviewofbooks.org/article/the-liberal-order-is-the-incubator-for-authoritarianism-a-conversation-with-pankaj-mishra/> [<https://perma.cc/HQ4W-6L23>].

² See, e.g., PATRICK J. DENEEN, WHY LIBERALISM FAILED (2019); Sohrab Ahmari et al., *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus> [<https://perma.cc/8SJ9-ZS52>]; Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy> [<https://perma.cc/N4YA-JWTP>].

Liberalism is in trouble then, but is it dying?³ The answer is yes, according to a number of recent critiques from the so-called “post-fusionist” right—a collection of thinkers who resist the “long ‘fusion’ that has defined conservatism since the Reagan era, between social traditionalists and economic free-marketers.”⁴ Notable among their ranks is Notre Dame political theorist Patrick Deneen, whose postmortem of liberalism, *Why Liberalism Failed*, has captured the energies and anxieties of the age in a manner rare for a work in legal or political theory.⁵

“Liberalism has failed,” according to Deneen, in characteristically dramatic fashion,

not because it fell short, but because it was true to itself. It has failed because it has succeeded. As liberalism has “become more fully itself,” as its inner logic has become more evident and its self-contradictions manifest, it has generated pathologies that are at once deformations of its claims yet realizations of liberal ideology.⁶

³ See Zack Beauchamp, *The Anti-Liberal Moment*, VOX (Sept. 9, 2019, 8:20 AM), <https://www.vox.com/policy-and-politics/2019/9/9/20750160/liberalism-trump-putin-socialism-reactionary> [<https://perma.cc/X7ZX-KX7N>] (offering a helpful primer on the subject of liberalism’s fate).

⁴ Benjamin Wallace-Wells, *David French, Sohrab Ahmari, and the Battle for the Future of Conservatism*, NEW YORKER (Sept. 12, 2019), <https://www.newyorker.com/news/the-political-scene/david-french-sohrab-ahmari-and-the-battle-for-the-future-of-conservatism> [<https://perma.cc/6XLM-K9BT>].

⁵ See generally DENEEN, *supra* note 2. Originally published in 2018 and reprinted in paperback with a new preface in 2019, the book has garnered significant attention—even making President Obama’s recommended books list of 2018—and has been reviewed in at least sixty publications, ranging from *Foreign Affairs* to *First Things*, the *National Review* to the *New York Times*. See Mariana Alfaro, *Obama Says These Were His 29 Favorite Books of 2018*, BUS. INSIDER (Dec. 28, 2018, 3:34 PM), <https://www.businessinsider.com/barack-obama-books-2018-12> [<https://perma.cc/AR2Y-7FE6>]; Christian Alejandro Gonzalez, *We Still Need Liberalism*, NAT’L REV. (June 22, 2018, 6:30 AM), <https://www.nationalreview.com/2018/06/book-review-why-liberalism-failed-patrick-deneen/> [<https://perma.cc/NUG9-4Q84>]; G. John Ikenberry, *Why Liberalism Failed*, FOREIGN AFFS., May–June 2018, at 191 (book review), <https://www.foreignaffairs.com/reviews/capsule-review/2018-04-16/why-liberalism-failed> [<https://perma.cc/2G33-UY9X>]; Peter J. Leithart, *Deneen Among the Liberals*, FIRST THINGS (Nov. 16, 2018), <https://www.firstthings.com/web-exclusives/2018/11/deneen-among-the-liberals> [<https://perma.cc/GR4U-U6A2>]; Jennifer Szalai, *If Liberalism Is Dead, What Comes Next?*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/books/review-why-liberalism-failed-patrick-deneen.html> [<https://perma.cc/6WYN-9FY4>].

⁶ DENEEN, *supra* note 2, at 3.

Deneen insists these “deformations” are reflected both in the right’s liberalism of individualism, as well as in the left’s liberalism of diversity.⁷

Chief among liberalism’s “pathologies” is the “false turn it made in its imposition of an ideological remaking of the world in the image of a false anthropology.”⁸ At an individual level, this “false anthropology” conceives of “increasingly separate, autonomous, nonrelational selves replete with rights and defined by our liberty, but insecure, powerless, afraid, and alone.”⁹

At an institutional level, the “false anthropology” of the individual has coincided with and produced a form of legalism that has supplanted custom and abandoned virtue and the common good in favor of private interest.¹⁰ As the unity of church and state, religion and politics, and law and meaning, has been “disassembl[ed]”¹¹ by a liberalism that privatizes meaning and reinterprets liberty as the absence of any constraints rather than the realization of one’s purposes, law, in turn, has come to be understood as that which facilitates one’s unrestricted movement rather than as a tool for realizing one’s purpose in the context of the relationships and communities that provide meaning to one’s life.¹²

According to this critique, liberalism’s law replaces natural and traditional social connections with artificial and procedural relationships, producing, perversely, “a lawlessness” that “claims to value ‘rule of law’ as it hollow[s] out every social norm and custom in favor of legal codes.”¹³ Rather than conceiving law as an

⁷ *Id.* at 3, 17–18. “Conservatives and progressives alike have advanced liberalism’s project, and neither as constituted today can provide the new way forward that must be discerned outside our rutted path.” *Id.* at 19.

⁸ *Id.* at 3, 19.

⁹ *Id.* at 16, 19.

¹⁰ *Id.* at 83.

¹¹ *Id.* at 27.

¹² *Id.* at 38.

[T]he more completely the sphere of autonomy is secured, the more comprehensive the state must become. Liberty, so defined, requires liberation from all forms of associations and relationships, from family to church, from schools to village and community, that exerted control over behavior through informal and habituated expectations and norms. These controls were largely cultural, not political—law was less extensive and existed largely as a continuation of cultural norms, the informal expectations of behavior learned through family, church, and community. With the liberation of individuals from these associations, there is more need to regulate behavior through the imposition of positive law.

Id.

¹³ *Id.* at 82.

extension of custom and as a tool for cultivating virtue and commending the common good, liberalism decouples law from meaning or purpose, and from character or virtue.¹⁴ The more that human relationships are regulated by this “bad man” theory of law, the weaker natural, organic ties between individuals and each other and their communities.¹⁵ As a result, the law of liberalism—what Deneen calls “legalism”¹⁶—is left with nothing to do or say with respect to personal virtue or the common good. “Delinked from any conception of ‘completion’—telos or flourishing—and disassociated from norms of natural law, legalism results in a widespread effort to pursue desires as fully as possible while minimally observing any legal prohibition.”¹⁷

According to Deneen, then, the problems facing liberal societies, the United States in particular, are twofold: (1) liberalism has created a conception of the person whereby meaning-making in traditional, natural (private) loci is undermined, while (2) also leaving little, if any, space for considerations of the common good or meaning-making in the public sphere.¹⁸ As a result, liberal citizens are alienated, and liberal societies are listless.¹⁹

Americans are, according to these critiques, literally—but not meaningfully—free.²⁰ We have the right, but not the capacity, to

¹⁴ *Id.* at xiii–xiv. According to Deenen, before liberalism, liberty and self-rule were “achieved not primarily by promulgated law—though law had its place—but through extensive social norms in the form of custom. This was so much the case that Thomas Aquinas regarded custom as a form of law, and often superior to formalized law, having the benefit of long-standing consent.” *Id.* at xiii.

¹⁵ *Id.* at 38. See OLIVER WENDELL HOLMES, *THE PATH OF THE LAW* (1897), in *COLLECTED LEGAL PAPERS* 167, 171 (1920) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.”).

¹⁶ *Id.* at 82–83.

¹⁷ *Id.*

¹⁸ *Id.* at 38.

¹⁹ Much of this critique so far will sound somewhat familiar to those who have followed communitarian and so-called “new traditionalist” critiques of liberal democracy. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (Bloomsbury Acad., 3d ed. 2013) (1981).

²⁰ DENEEN, *supra* note 2, at 38. Deneen is channeling the sort of distinction Isaiah Berlin made between “positive” and “negative” liberty as well as Benjamin Constant’s distinction between “liberty of the ancients” and “liberty of the moderns.” See, e.g., ISALAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958), *reprinted in* *THE PROPER STUDY OF MANKIND* 191, 202–04 (Henry Hardy & Roger Hausheer eds., Farrar, Straus & Giroux 2000) (1997); BENJAMIN CONSTANT, *THE LIBERTY OF ANCIENTS COMPARED WITH THAT OF MODERNS* (1816), <https://oll.libertyfund.org/titles/constant-the-liberty-of-ancients-compared-with-that-of-moderns-1819> [<https://perma.cc/R8F8-94XW>].

self-govern.²¹ Meaning is increasingly elusive in the natural relationships of family, faith, and community; but the public realm provides little—if any—basis for promoting virtue or inspiring a commitment to the common good. We consume, but are never sated. We are surrounded by others, yet alone.

Liberalism, in other words, has been one big bait-and-switch.

Using Deneen—as both a conversation partner and point of entry to the post-fusionist critique of liberalism—this Article demonstrates that the *practices* of liberalism, in law especially, are much less vulnerable to the post-fusionist critique than the *theories* of liberalism that Deneen and others target. Reminding ourselves of the meaning-making capacities and the functions of law better enables those invested in the future of the liberal order—whether students, law teachers, legal professionals, or simply citizens—to defend the institutions that order our world.

From American constitutional structure to contemporary corporate law, I argue that law supports meaning-making, virtue, and the common good in two primary ways. First, by securing the conditions for the exercise of individual conscience and associational autonomy in what we often consider the private sphere, the law of liberalism enables individuals and communities to develop, pursue, and share their most deeply held values, and to cultivate the associated virtues in a context of mutual support and shared meaning-making. Second, by supporting norms and adopting policies that guarantee equal citizenship in the public realm, the law of liberalism recognizes the values of solidarity and equality in pointing toward a vision of the common good realized in the public realm. I conclude by calling legal educators and lawyers to recognize our responsibility in acknowledging and recovering law's role in making meaning, cultivating virtue, and supporting the common good.

II. POST-FUSIONISM: SITUATING THE CRITIQUE

Until recently, conservatives in America were reliable liberals.²² They accepted a fundamental commitment to the rule of law, acknowledged a separation between public and private spheres and a consequent limitation on the power and role of government,

²¹ See generally Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693 (2012).

²² Laura K. Field, *Meet the Reocons*, NISKANEN CTR. (Feb. 20, 2020), <https://www.niskanencenter.org/meet-the-reocons/> [https://perma.cc/3KK7-SWTF].

and generally viewed individual rights and individual autonomy as chief objects of concern.²³ Even most traditionalist and religious conservatives, for whom certain liberal values never quite fit, made a bargain of sorts whereby they consented to classically liberal arrangements, as long as the laws of the land provided maximum freedom in the private sphere and perhaps a modicum of influence in public life.²⁴

But this conservative consensus surrounding liberal values is now fraying. Post-fusionists have not only criticized liberalism of the left, which is to be expected, but have also taken direct aim at the very core of liberalism as historically theorized and practiced by the political right in the United States.²⁵ Consider the following examples from 2019.

In March 2019, the prominent Catholic magazine *First Things* published “Against the Dead Consensus,” a missive signed by fifteen prominent conservative thinkers that rejected pre-Trumpian “[c]onsensus conservatism” on the grounds that it was nothing more than a rights-based, free-market form of liberalism characterized by the “fetishizing of [individual] autonomy.”²⁶ In addition to expected references to the “transcendent dignity of the human person” and the “soulless society of individual affluence,” the authors proclaimed, among other things, that they “stand with the American citizen,” “want a country that works for workers,” and “believe home matters.”²⁷ Such calls are recognizably conservative, in a way, but a far cry from the classically liberal conservatism that has been so influential in American politics at least since the 1960s.

In May 2019, Sohrab Ahmari, the op-ed editor of the *New York Post* and one of the signatories of “Against the Dead Consensus” penned a follow-up piece, also in *First Things*, in which he clarified and personified the target of “Against the Dead Consensus.” In

²³ Kay C. James, *Defining the Principles of Conservatism*, HERITAGE FOUND. (Aug. 14, 2019), <https://www.heritage.org/conservatism/commentary/defining-the-principles-conservatism> [<https://perma.cc/CDE3-D7GJ>].

²⁴ This past “consensus” or “fusion” is exactly the sort of compromise that animates the current ire of post-fusionists. Compromised fusionists include the mainstream of the Republican Party and have been the rule, rather than the exception, in the conservative movement, according to post-fusionists.

²⁵ See, e.g., Field, *supra* note 22; Nick Burns, *The New Intellectuals of the American Right*, NEW STATESMAN (Apr. 7, 2020), <https://www.newstatesman.com/world/north-america/2020/04/new-intellectuals-american-right> [<https://perma.cc/9URN-8QZZ>].

²⁶ Ahmari et al., *supra* note 2.

²⁷ *Id.*

“Against David French-ism,” Ahmari points to the “*nice*”ness of French, a constitutional lawyer, as emblematic of a “persuasion or a sensibility” among certain conservatives who mistakenly believe that liberalism’s rule of law remains the best way to advance conservative causes.²⁸ Ahmari rejects what he considers French’s naïve respect for the rule of law.²⁹ He cites drag queen story hours for children at public libraries as definitive proof that the old tools of combat have failed conservatives in their fight against an increasingly assertive and pernicious liberalism.³⁰

In July 2019, the newly established Edmund Burke Foundation organized a “National Conservatism” conference in recognition, and celebration, of declining support for the “rules-based liberal order” that once held sway among the American conservative movement.³¹ The conference, according to its conveners, was designed to “recover and reconsolidate the rich tradition of national conservative thought.”³² According to the conservative *National Review*, the conference outlined a sort of “intellectual Trumpism” for a conservative movement that is less solicitous of the values shared by consensus conservatism regarding the rule of law, limited government, and individual rights.³³

In the face of these and other denouncements of liberalism and its law, the legal academy has been somewhat slow to articulate a

²⁸ 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/UR7R-UFML].

²⁹ *Id.*

³⁰ *Id.*; for French’s initial written response to Ahmari, see David French, *What Sohrab Ahmari Gets Wrong*, NAT’L REV. (May 30, 2019, 6:22 PM), <https://www.nationalreview.com/2019/05/david-french-response-sohrab-ahmari/> [https://perma.cc/2RMR-2VZ2]. Throughout the summer and fall of 2019, conservative publications and venues discussed the merits of Ahmari’s broadside against French. The two even faced off in multiple head-to-head debates at Catholic universities around the nation. Following the debate at Notre Dame, a student publication wrote, “French criticized ‘academic political theorists’ who can get ‘divorced from the real world.’ . . . He prizes the practical approach: [French states,] ‘I’m not liberalism conceived, I’m liberalism applied. That’s what a lawyer does.’” Bea Cuasay, *The Ahmari-French Debate at Notre Dame*, IRISH ROVER (Sept. 26, 2019), <https://irishrover.net/2019/09/the-ahmari-french-debate-at-notre-dame/> [https://perma.cc/DJ45-6754].

³¹ *A Conference in Washington, D.C., July 14–16, 2019: About*, NAT’L CONSERVATISM, <https://nationalconservatism.org/natcon-dc-2019/about> [https://perma.cc/4WTE-79YH] (last visited Dec. 28, 2020).

³² *Id.*

³³ Jimmy Quinn, *At the National Conservatism Conference, an “Intellectual Trumpist” Movement Begins To Take Shape*, NAT’L REV. (July 18, 2019, 6:30 AM), <https://www.nationalreview.com/2019/07/national-conservatism-conference-intellectual-trumpist-movement/> [https://perma.cc/L78J-KWA3].

defense of law's capacity to respond to threats to the liberal order. Even the one law journal that published a symposium issue entitled *The Travails of Liberal Democracy* in late 2019 took only partial advantage of the opportunity to feature voices defending law's role in responding to foundational critiques of liberal democracy.³⁴ Most of the symposium's articles were authored by philosophers, rather than lawyers, and only one addressed the theoretical frontal assault on liberalism that is the focus of this Article.³⁵

The reasons for this oversight in the academy are explicable, even if ultimately misguided. As a practical matter, most of the recent post-fusionist discourse regarding liberalism's decline has taken place in venues infrequently visited by legal academics, such as the pages of quasi-intellectual conservative and religious publications and the debating stages of Catholic universities. Furthermore, lawyers are often instinctively reluctant to consider law's role in making meaning or pursuing virtue. Such considerations, it might be assumed, smack of Sunday School or a philosophy seminar and seem ill-suited to the grounded and procedural work of law. Those interested in the survival of liberalism, either on the political right or left, must be prepared to engage the concepts of purpose, virtue, and the common good that animate critiques of liberalism as well as the contexts in which those critiques are leveled.

As the author of the most complete post-fusionist critique of liberalism so far, Patrick Deneen provides a natural conversation partner for this Article. Deneen is neither a lawyer nor a legal academic; despite this, he garners attention from the legal academy—although not as much as he probably deserves given his influence among popular audiences and adjacent disciplines.³⁶ Harvard Law Professor Adrian Vermeule, a member of the post-fusionist camp and the leading legal theorist of so-called “Catholic integralism,”³⁷ has called *Why Liberalism Failed* a “masterpiece”

³⁴ See 2019 Editors' Symposium: *The Travails of Liberal Democracy*, 56 SAN DIEGO L. REV. 853 (2019).

³⁵ See Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1043 (2019).

³⁶ *About*, PATRICK J. DENEEN, <https://www.patrickdeneen.com/about> [https://perma.cc/Q8QS-S2Y2] (last visited Dec. 28, 2020).

³⁷ Catholic integralism refers to the Catholic political doctrine whereby the separation of church and state is abolished and Catholic principles are “integrated” into the laws governing society in a comprehensive way. It envisions the ultimate

and a “triumph,”³⁸ a commendation which reflects the potentially radical implications of Deneen’s thought. Vermeule’s only critique of Deneen is that his proposed ending, which involves a sort of “Benedict Option”³⁹ whereby communities of virtue remove themselves from the dominant and dying liberal society, seems incongruous with Deneen’s diagnosis of the problem. Vermeule proposes an alternative ending, “a kind of . . . fan fiction” in which “rather than retreating to a nostalgic localism, nonliberal actors strategically locate themselves within liberal institutions and work to undo the liberalism of the state from within.”⁴⁰

Yale Law Professor Samuel Moyn has also offered a somewhat mixed review of Deneen, but for different reasons, praising Deneen’s compelling critique of liberalism insofar as it applies to *libertarian liberalism* or *neoliberalism*.⁴¹ Moyn pushes back, however, on Deneen’s generalizations regarding liberalism’s inevitable decline and insists “that remedies are possible within modern liberalism to bring out its virtues and contain its vices.”⁴² Moyn further identifies the “real task” as “an ideological rescue mission and an institutional reform,” and insists that

[t]he challenge is locating the right institutions, whether inherited from the past or invented afresh. But it is much better to face this challenge than to follow Deneen and Dreher in ruefully counseling people to drop out, or reactionaries like Vermeule in insisting on a full-blown replacement of liberal institutions with an “integralist” order.⁴³

Moyn is right to insist that “fac[ing] this challenge” and addressing the crisis of faith in liberalism requires “locating the

replacement of the institutions of liberal democracy with those of the Catholic Church. See, e.g., Vermeule, *supra* note 2.

³⁸ Adrian Vermeule, *Integration from Within*, AM. AFFS. (Feb. 20, 2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> [<https://perma.cc/BFB8-75SB>] (reviewing PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018)).

³⁹ ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION 2* (2017).

⁴⁰ Vermeule, *supra* note 38. Vermeule has recently elaborated on his dissatisfaction with fellow conservatives and advocated for a “common-good constitutionalism” rooted in his theory of integralism. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/U4VY-DNYN>].

⁴¹ Samuel Moyn, *Neoliberalism, Not Liberalism, Has Failed: A Response to Patrick Deneen*, COMMONWEAL (Dec. 3, 2018), <https://www.commonwealmagazine.org/neoliberalism-not-liberalism-has-failed/> [<https://perma.cc/3CGS-6HMW>].

⁴² *Id.*

⁴³ *Id.*

right institutions,”⁴⁴ but neither Moyn nor anyone else has fully considered the ways that law, as an institution and as a practice, tells a different story about liberalism than the decline narrative, which is so focused on the supposed emptiness of liberalism in all its forms. The reading of liberalism that Deneen and fellow post-fusionists advance is ultimately both too theoretical and too inevitable. Liberalism in a form serviceable to those on the political left and the political right remains alive in part because its logic is not inexorable. Theory is transmitted, in fits and starts, but always imperfectly, through the legal and political institutions of the community. Deneen’s understanding of that institutional mediation is incomplete and, as a result, he and fellow critics are more pessimistic about the viability of liberalism than is warranted.

Liberalism is not in perfect health, but to assess its future, or to defend its existence, the legal academy must look beyond theory on the one hand and putative cultural decline on the other to examine the concrete institutions and practices that order liberal societies. Using Deneen as my interlocutor, this Article demonstrates that narratives of liberalism’s decline have overlooked and misunderstood the role and relevance of law and will draw upon legal norms, practices, and institutions—including legal education and the legal profession itself—in elaborating upon Moyn’s observation “that remedies are possible within modern liberalism to bring out its virtues and contain its vices.”⁴⁵

III. UNITY, DIVERSITY, AND THE AMERICAN FOUNDING

A. *Founding Constraints*⁴⁶

American law’s capacity to support meaning-making, cultivate virtue, and promote the common good is rooted in the history and structure of the Constitution.⁴⁷ In his narrative of inevitable decline, however, Deneen too quickly projects various undesirable features of modern life onto the American founding and onto James Madison, in particular.⁴⁸ Deneen notes at the outset of *Why Liberalism Failed* that “we should rightly wonder whether America is not in the early days of its eternal life but

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ DENEEN, *supra* note 2, at 161.

⁴⁷ *Id.* at 162–65.

⁴⁸ *Id.* at 101.

rather approaching the end of the natural cycle of corruption and decay that limits the lifespan of all human creations.”⁴⁹ He later spends almost an entire chapter tracing the role of the American founding in liberalism’s failure.⁵⁰

Deneen claims that James Madison’s liberal conception of the person at once compromised the viability of communities and associations where meaning-making typically occurs, and simultaneously empowered the national government to take on new, and unjustified, power to itself.⁵¹ Furthermore, according to Deneen, Madison’s celebration of “diversity” undermined the ability of citizens to find any common vision of the public good or a shared understanding of the virtues necessary for self-government.⁵² As a result, the American founding serves as both a cautionary tale and representative example of liberalism’s failures.⁵³

Deneen further argues that the American experiment has been doomed because the “Constitution is the embodiment of a set of modern principles that sought to overturn ancient teachings and shape a distinctly different modern human.”⁵⁴ He directs his ire, in particular, at the false promise of “pluralism” and the dangers of fragmentation.⁵⁵

According to James Madison in *Federalist* 10, the first object of government is the protection of “the diversity in the faculties of men” Government exists to protect the greatest possible sphere of individual liberty, and it does so by encouraging the pursuit of self-interest among both the citizenry and public servants. “Ambition must be made to counteract ambition”: powers must be separate and divided powers to prevent any one person from centralizing and seizing power⁵⁶

Prioritizing “diversity in the faculties of men” and creating an “enlarged orbit” of interests were meant to “inculcate civic indifference and privatism among the citizenry,” according to Deneen.⁵⁷

Madison hoped one consequence of enlarging the orbit would be heightened levels of mutual distrust among a citizenry inclined

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 161–78.

⁵¹ *Id.* at 170.

⁵² *Id.* at 163–64.

⁵³ *See id.* at 165–66.

⁵⁴ *Id.* at 101.

⁵⁵ *Id.* at 102–03.

⁵⁶ *Id.* at 101.

⁵⁷ *Id.* at 163–64.

to advance particular interests, rendering them less likely to combine and communicate

It was Madison's hope that once the populace recognized its relative powerlessness in the public realm, the people would instead focus their attention on achievable private aims and ends.⁵⁸

The result, according to Deneen, is a republic that is constitutively incapable of maintaining itself.⁵⁹ "The system's architects intended to encourage a focus on private concerns among the citizenry—a *res idiotica* that they called a 'republic,' " but "a republic cannot survive in the absence of 'public things.' The belief that liberalism could achieve *modus vivendi* by encouraging privatism has culminated in the nearly complete disassociation of the governing class and a citizenry without a *cives*."⁶⁰ In other words, Deneen argues, the dual process of privatizing purpose while conceiving meaning as nothing more than self-interest has eroded any viable conception of citizenship or the public good.⁶¹

Deneen also criticizes the Founders for adopting a republic—or, as Deneen says, a *res idiotica*—rather than a democracy, on the grounds that the Founders, like liberalism more generally, only feigned interest in the will of the people and erected systems insulated from the will and whims of the people.⁶²

[B]oth classical and progressive liberals are dominated by thinkers who praise the rule of the electorate even as they seek to promote systemic governmental features that will minimize electoral influence in the name of good policy outcomes. . . . The authors and defenders of the Constitution argued on behalf of the basic law by explicitly rejecting the notion that the Constitution would result in a democracy.⁶³

It is not only a bit anachronistic for Deneen to suggest the Founders were insufficiently concerned with democracy—given that the new Constitution, its limitations notwithstanding, was the most democratic of its age—but especially ironic that Deneen

⁵⁸ *Id.* at 164–65.

⁵⁹ *Id.* at 165–66.

⁶⁰ *Id.* at 9.

⁶¹ *Id.*

⁶² *Id.* at 166.

⁶³ *Id.* at 162.

levels this charge only one page after he criticizes the “presentism” of liberals.⁶⁴

In this and other ways, Deneen fundamentally misunderstands the context and purpose of *The Federalist Papers*, the backgrounds of its authors, and the distinctly American iteration of liberal, and republican, political theory the documents reflect. *The Federalist Papers* are sometimes said to represent American political theory at its best,⁶⁵ not because they are the most theoretically rigorous or even consistent texts, but rather because they embody American philosophical and political pragmatism, which has tended to adopt a more inductive approach to political argumentation than the deductive, first-principles method common in liberal political theory.⁶⁶

The Founders acted in a particular context with particular objectives in mind. The Articles of Confederation, under which the states had operated from 1781 to 1787, had failed to provide a mechanism for coordinating the distinct interests of the original states, and as the nation grew and prepared to expand, the challenge of instituting a structure for a successful, large republic took on increasing salience.⁶⁷ *The Federalist Papers*, therefore, must be understood as persuasive political tracts and analyzed for their rhetorical, persuasive appeal as much as, if not more than, any theoretical principles they reflect. The Founders, including the authors of *The Federalist Papers*, were lawyers, statesmen, and rhetoricians and only incidentally, if at all, political theorists in the traditional sense of the term.⁶⁸

Deneen’s misunderstanding of the Founders’ context and purpose leads him to misinterpret key elements of the founding, including the relationship between structure, theory, and virtue, and the role of each in the future of the republic.

⁶⁴ *Id.* at 161–62.

⁶⁵ As Thomas Jefferson noted, “[d]escending from theory to practice, there can be no better book than the Federalist.” GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 25 (paperback reprt. 1999). And as James Madison observed, “[t]heoretical reasoning . . . must be qualified by the lessons of practice,” and also “that the Philadelphia Convention ‘must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.’” *Id.* (second alteration in original).

⁶⁶ See, e.g., Robert G. McCloskey, *American Political Thought and the Study of Politics*, 51 AM. POL. SCI. REV. 115, 115–16 (1957).

⁶⁷ DIETZE, *supra* note 65, at 25.

⁶⁸ *Cf. id.* at 30 n.48 (explaining how the Founders were statesmen in addition to theorists).

Deneen seems to interpret the founding through the lens of contemporary American culture and assumes a direct causal link between theoretical commitments of the Founders and various negative outcomes experienced in twenty-first-century American life.⁶⁹ This interpretive move is unwarranted. To blame Madison's theory of the state for social fragmentation, the decline of virtue, and a loss of public-spiritedness assumes a logical inevitability between theoretical principles and social outcomes that simply does not follow. In so doing, Deneen falls prey to the same critique he levels against liberalism regarding its universalizing logic of inevitability.⁷⁰

B. *E Pluribus Unum*

While the Founders certainly took precautions to protect "diversity in the faculties of men,"⁷¹ they also valued unity, a combination perhaps most clearly reflected in that original national motto of the nation: *E pluribus unum*, "out of many, one."⁷² The sentiment behind this motto, of course, manifested in the constitutional structure where a federal system divided power between national and state governments and also facilitated national unity among states with diverse interests and histories. Consider also the First Amendment's Religion Clauses, which, along with the rest of the Bill of Rights were adopted as part of a compromise between the Federalists who supported the 1787 Constitution and the Anti-Federalists who feared it gave too much power to the new national government.⁷³ The Free Exercise Clause recognizes, and protects, the *many* against a national government that might focus on the *unum* to the detriment of the *pluribus*.⁷⁴ The Establishment Clause, however, reflects the Nation's early

⁶⁹ DENEEN, *supra* note 2, at 1–3.

⁷⁰ *Id.* at 3 ("Liberalism has failed—not because it fell short, but because it was true to itself. It has failed because it has succeeded. As liberalism has 'become more fully itself,' as its inner logic has become more evident and its self-contradictions manifest, it has generated pathologies that are at once deformations of its claims yet realizations of liberal ideology.")

⁷¹ THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

⁷² 22 J. CONT'L CONG., 1774–1789, at 338, 339 (1782) (Gaillard Hunt ed., 1914); 71 CONG. REC. 918 (1929).

⁷³ Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 322–23.

⁷⁴ William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 561 (1983).

commitment to unity amidst the diversity. By forbidding the establishment of religion, the Founders signaled their concern that the public, the *unum*, not be captured by particular religious viewpoints.

By protecting diversity and ensuring religious liberty, while also working toward a common basis for public life, the Founders appealed, implicitly and likely subconsciously, to multiple bases for legitimacy: a neutralist, non-coercion-based legitimacy as well as an expressivist conception of legitimacy. The neutralist theory of legitimacy was given its fullest expression by twentieth-century political theorist John Rawls but is rooted in the philosophy of Enlightenment philosopher Immanuel Kant.⁷⁵ For a legal-political system to be legitimate and “stab[le] for the right reasons,”⁷⁶ laws must be based on reasons that all reasonable citizens can accept, which, in turn, imposes restrictions on the sorts of reasons that are legitimately included in public deliberation, especially on “constitutional essentials and matters of basic justice.”⁷⁷ The Establishment Clause points, albeit inchoately, to this theory of legitimacy by gesturing toward a public realm that is not captured by, or beholden to, particular religious influences.⁷⁸

Expressivist theories of legitimacy, on the other hand, prioritize citizen engagement and expression as much as, if not more than, the content of the deliberation or the reasons invoked. This theory of legitimacy is traceable to Hegel’s critique of Kant’s theory of legal and political community⁷⁹ and has been influential in various critiques of Rawlsian public reason.⁸⁰ Where Kant emphasized the role of reason in securing a stable and predictable conception of law, Hegel drew attention to law’s dynamic features

⁷⁵ IMMANUEL KANT, *On the Relationship of Theory to Practice in Political Right*, in KANT: POLITICAL WRITINGS 73, 79 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (“For if the law is such that a whole people could not *possibly* agree to it . . . , it is unjust; but if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just . . .”).

⁷⁶ See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 459 (expanded ed. 2005).

⁷⁷ *Id.* at 442.

⁷⁸ See U.S. CONST. amend. I.

⁷⁹ See, e.g., G.W.F. HEGEL, PHILOSOPHY OF RIGHT, §§ 183, 260, 267, 274 (T.M. Knox trans., 1942) (1821). Hegel is often regarded as one of the most difficult of all German philosophers to read. For an excellent and eminently readable overview of Hegel’s expressivist critique of Kantian social contractarianism, see JEFFREY STOUT, DEMOCRACY AND TRADITION 77–85 (2004).

⁸⁰ See Sibyl A. Schwarzenbach, *Rawls, Hegel, and Communitarianism*, 19 POL. THEORY 539, 541 (1991).

and capacity.⁸¹ The First Amendment's Free Exercise Clause, again only inchoately, anticipates an expressivist theory of legitimacy by gesturing toward a dynamic, pluralist conception of the public realm where diverse viewpoints are welcomed.

There is, of course, no authoritative "liberal" view regarding the relationship between the state and private associations within a liberal society, but the nation's original motto reflects the Founders' recognition that citizens have dual, and potentially conflicting, obligations, what Stanford Law professor Michael McConnell has called "citizenship ambiguity."⁸²

For one category of liberals—let us call them the *separationists*—religion and state could be, and generally should be, kept separate.⁸³ Religion, according to the separationists, concerns individual belief more than action, and primarily implicates the private realm. Therefore, religion should present few problems for the administration of public matters. This view is most frequently associated with John Locke's *A Letter Concerning Toleration*, in which he outlined a theory of religion focused on its internal features, voluntariness, and the absence of conflict between religious belief and political obligation.⁸⁴

By this we see what difference there is between the Church and the Commonwealth. Whatsoever is lawful in the Commonwealth, cannot be prohibited by the Magistrate in the Church. Whatsoever is permitted unto any of his Subjects for their ordinary use, neither can nor ought to be forbidden by him to any Sect of People for their religious Uses.⁸⁵

To put church-state controversies in the context of the nation's motto, the separationists assume the *pluribus*, churches, religious dissenters, and "diversity in the faculties of men,"⁸⁶ can be given maximum liberty without undermining the integrity or identity of the *unum*, the state, the common good, and the public sphere.⁸⁷ While strict separationism need not inevitably result in the decline

⁸¹ See sources cited *supra* note 79.

⁸² Michael W. McConnell, *Believers as Equal Citizens*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90, 92 (Nancy L. Rosenblum ed., 2000). McConnell's "Believers as Equal Citizens" has deeply shaped the argument of this entire section.

⁸³ *Id.* at 93.

⁸⁴ See JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Pople trans., London, Awnsham Churchill 1689).

⁸⁵ *Id.* at 33.

⁸⁶ THE FEDERALIST, *supra* note 71.

⁸⁷ Neal Devins & Benjamin Feder, *Reading the Establishment Clause*, COMMONWEAL, Sept. 20, 1985, at 492, 492.

or marginalization of religion, this is part of Deneen's critique of liberalism in general, and of the American founding in particular.⁸⁸ Conceiving religion as private, domesticated, and easily bracketed reflects and perpetuates a fragmented conception of the person whereby things of ultimate meaning are relegated to the private realm and consequently diminished, which in turn hollows out the institutions and associations themselves—thereby rendering them less worthy of protection and less able to facilitate the formation of meaning and the pursuit of constitutive ends.⁸⁹

For another category of liberals, let us call them the *civic totalists*, religion was not so easily dismissed.⁹⁰ Drawing upon classical conceptions of a unified society, Jean-Jacques Rousseau, for example, understood the powerful role of religion, including its power to shape public life.⁹¹ He favored state control of religion in service to the state—the *pluribus* in service of the *unum*—and proposed a civic religion that was designed and controlled by the state and was to be deployed to solidify individuals' commitments to the civic order.⁹² Individuals, according to Rousseau, were born free but often failed to recognize their freedom because of social conventions, the “preference[s]” of their “particular wills,” and the indoctrination of so-called “partial societies.”⁹³ For Rousseau, promoting identification with the “general will” and banning the “partial societies” had the advantage of removing a layer of intermediary institutions that frequently interfered with the individuals' realization of true freedom and genuine equality.⁹⁴

What does all this have to do with Deneen? Deneen projects both the separationism of Locke and the civic totalism of Rousseau onto his interpretation of Madison and the United States Constitution and then groups all together under the generally derisive tag of “liberalism.”⁹⁵ This conflation, however, is unwarranted. Madison recognized more clearly than separationists like Locke

⁸⁸ DENEEN, *supra* note 2, at 34.

⁸⁹ *See id.* at 9.

⁹⁰ Michael P. Bobic, *Accommodationism and Religion*, FIRST AMEND. ENCYCLOPEDIA (2017), <https://www.mtsu.edu/first-amendment/article/825/accommodationism-and-religion> [<https://perma.cc/L68Q-T5JK>].

⁹¹ JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT (1762), *reprinted in* ROUSSEAU: *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 148 (Victor Gourevitch ed. & trans., 1997).

⁹² *Id.* at 150–51.

⁹³ *Id.* at 60–62 (“It is important, then, that in order to have the general will expressed well, there be no partial society in the State . . .”).

⁹⁴ *Id.*

⁹⁵ DENEEN, *supra* note 2, at 36–37.

the inevitable tension between the *pluribus* of religion and the *unum* of state.⁹⁶ Madison followed Rousseau in appreciating the important role of religion, including its implications for public life, but he rejected Rousseau's civic totalism whereby religion primarily operated in service to the state.⁹⁷ Madison's aims, to be sure, were not simply to "disassemble . . . irrational religious and social norms."⁹⁸ Rather, he sought to implement a constitutional structure that could account for this inevitable tension and, to the extent possible, provide accommodations for religious diversity and "diversity in the faculties of men," without losing sight of the project for national unity.⁹⁹

Deneen also misunderstands, and underestimates, Madison's interest in virtue and the common good. The mere fact that Madison was especially interested in the role of structure to produce good outcomes, or at least prevent bad outcomes, did not mean that Madison was uninterested in virtue. Informed by his early Calvinist influences and education, Madison insisted that structure, including law, and virtue complemented each other.¹⁰⁰ As he argued in *Federalist 57*:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society, and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various.¹⁰¹

⁹⁶ A recognition reflected most clearly in the text and history of the Religion Clauses of the First Amendment.

⁹⁷ THE FEDERALIST, *supra* note 71. Following the adoption of the Constitution and Bill of Rights, Madison continued to defend the sort of "partial societies" that Rousseau rejected. Madison, for example, acted as a leading advocate of the Democratic-Republican civic associations that formed during and after the Whiskey Rebellion of 1794. See, e.g., Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1532–33 (2004); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 577–81 (2010).

⁹⁸ DENEEN, *supra* note 2, at 24.

⁹⁹ THE FEDERALIST, *supra* note 71.

¹⁰⁰ See, e.g., Leonard R. Sorenson, *Madison on Sympathy, Virtue, and Ambition in the Federalist Papers*, 27 POLITY 431, 432–34 (1995).

¹⁰¹ THE FEDERALIST NO. 57, *supra* note 71, at 348 (James Madison).

While neither the Founders nor the 1787 Constitution was perfect, the approach taken by the Founders reflects and has helped perpetuate a central truth regarding the maintenance of a liberal republic: virtues of humility and conviction are important on their own and in tandem, and even perhaps in tension, with each other. From a system-level perspective, the state must be designed in such a way as to promote with conviction shared values, but those efforts must always be tempered by a recognition of *pluribus* and the limits of the state's power or competencies. These virtues of humility and conviction are useful for individuals as well. Citizens who feel a sense of conviction regarding the value of their system, while also recognizing the limits of their own knowledge and values, are most equipped to undertake the sort of public deliberation that liberal democracy requires.

IV. LAW AND MEANING: LEGISLATIVE AND CONSTITUTIONAL DEVELOPMENTS

The post-fusionist critique of liberalism is ultimately a story about disenchantment and the loss of meaning. Human beings are purposive and social creatures, according to Deneen, and liberalism, as theorized on the right and left, systematically separates the self from the things that provide meaning, purpose, and belonging.¹⁰² “[L]iberalism teaches a people to hedge commitments and adopt flexible relationships and bonds. Not only are all political and economic relationships seen as fungible and subject to constant redefinition, so are *all* relationships—to place, to neighborhood, to nation, to family, and to religion. Liberalism encourages loose connections.”¹⁰³

In its quest for universally applicable principles of justice, liberal theory has often resorted to thin, caricatured views of personhood, separated from history and located in a state of nature or behind a “veil of ignorance.”¹⁰⁴ “Individuals, liberated and displaced from particular histories and practices, are rendered fungible within a political-economic system that requires universally replaceable parts.”¹⁰⁵ Separated from history and unable to forge a vision for the future or a common conception of the good, liberal societies, Deneen insists, struggle to engage, much less

¹⁰² DENEEN, *supra* note 2, at 34.

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 118–23 (6th prtng. 2003).

¹⁰⁵ DENEEN, *supra* note 2, at 82.

facilitate, meaning-making.¹⁰⁶ “In this world, gratitude to the past and obligations to the future are replaced by a nearly universal pursuit of immediate gratification”¹⁰⁷

The story Deneen tells is a compelling one in certain respects, but less so when the critique is focused on liberal practices rather than liberal theory. In this Section, I catalogue various ways in which American law recognizes human beings as embedded creatures who seek meaning and recognition in community. I outline some ways that law enables individuals to realize their constitutive ends and facilitates the formation of robust communal memberships, even on some occasions when communal norms challenge liberal values and in contexts ranging from constitutional to corporate law. In addition to providing impersonal, procedural norms for regulating behavior, law signals values, embodies commitments, promotes particular visions of the good, and teaches citizens what citizenship in a liberal democracy entails.

Law supports meaning-making in two primary ways. First, by securing the conditions for the exercise of individual conscience and associational autonomy, in what we often consider the private sphere, the law of liberalism enables individuals and communities to develop, pursue, and share their most deeply held values and to cultivate the associated virtues in a context of mutual support and shared meaning-making. Second, by supporting norms and adopting policies that guarantee equal citizenship in the public realm, the law of liberalism recognizes the values of solidarity and equality in pointing toward a vision of the common good realized in the public realm. Recall our nation's original motto, discussed above. The *pluribus* charge of that motto aims to take seriously the “diversity in the faculties of men,”¹⁰⁸ while the *unum* points towards that which we share in common as citizens.

It is not simply the *structure* of American constitutional law that supports shared meaning-making, however. Recent legislative and constitutional developments reflect law's capacity to enable meaning-making, facilitate virtue, and promote the common good.

¹⁰⁶ *Id.* at 29–30, 34.

¹⁰⁷ *Id.* at 39.

¹⁰⁸ *Id.* at 163 (quoting THE FEDERALIST, *supra* note 71).

A. *Conscience and Community*

Deneen claims that the individualism of liberalism alienates individuals from their communities and sources of meaning, which leaves them only able to find meaning through the state.¹⁰⁹

Shorn of the deepest ties to family (nuclear as well as extended), place, community, region, religion, and culture, and deeply shaped to believe that these forms of associations are limits upon their autonomy, deracinated humans seek belonging and self-definition through the only legitimate form of organization remaining available to them: the state.¹¹⁰

While this total dependence on the state might characterize a system organized on the basis of Rousseau’s civic totalism—one that dissolves so-called “partial societies” for the sake of realizing “true” freedom and equality via the state¹¹¹—this is simply not the way American law works.

It is of course too simple to draw a straight line from Madison to contemporary America or from Rousseau to contemporary France, but the two nations have consistently reflected distinctive visions of liberal community. In his haste to lump various forms of liberalism together and dismiss them, Deneen misses this nuance.

Forty years after the Founding, Alexis de Tocqueville, one of Deneen’s intellectual heroes, observed the powerful role civil associations had played in cultivating Americans’ capacity for self-governance, in contrast to what he perceived as France’s dependence on the state:¹¹²

Americans [form] associations [for] entertainment[, to found . . . education[nal institutions], to build inns, to construct churches, to [distribute] books, [and] to . . . found hospitals, prisons, and schools Wherever . . . [there is a] new undertaking . . . [in the place of] the government in France, . . . in the United States you will be sure to find an association.¹¹³

Questions regarding the role and extent of the state as the mediator of citizens’ freedom continue to play out differently in

¹⁰⁹ *Id.* at 60–61.

¹¹⁰ *Id.* at 60.

¹¹¹ ROUSSEAU, *supra* note 91, at 27.

¹¹² In his tour of America, Tocqueville observed Americans through participating in civil associations and found that “[f]eelings and opinions are recruited, the heart is enlarged, and the human mind is developed by no other means than by the reciprocal influence of men upon each other.” ALEXIS DE TOCQUEVILLE, 2 *DEMOCRACY IN AMERICA* 983 (Henry Reeve trans., Floating Press 2009) (1840).

¹¹³ *Id.* at 979.

French and American contexts. Consider recent disputes regarding religious dress. France has generally conceived of the public in more aspirational terms and has been less inclined to tolerate departures from “French” norms, including, for example, wearing of the hijab in public contexts.¹¹⁴ Hijab bans in public contexts have typically been justified on the grounds that they reflect the internalization of inferiority by women who wear them and the public should avoid being complicit in such oppression.¹¹⁵ French *laïcité* is much more demanding than whatever form of secularism is facilitated by the Establishment Clause of the American Constitution, which is counterbalanced by the right to religious free exercise.¹¹⁶

Or consider the different ways the two nations treat nonprofit corporations. The United States differs from France and just about every other nation in the way its tax laws view nonprofit corporations.¹¹⁷ Individuals and groups in the United States can easily form nonprofit corporations to advance an extraordinarily wide range of issues. The 501(c)(3) charitable nonprofit corporation, which facilitates the advancement of religious, educational, charitable, scientific, literary, and other causes, is the most well-known, but section 501 of the Internal Revenue Code provides for thirty-three different types of nonprofit corporations, ranging from civil leagues and chambers of commerce to cemetery companies and credit unions.¹¹⁸ Formation of nonprofit corporations not only provides a mechanism for their creators to promote their values, along with fellow like-minded citizens, but also enables individual taxpayers to make tax-exempt donations to these organizations in order to advance their concerns and signal their values.¹¹⁹ While it is almost certainly more efficient for the state to provide social services directly, rather than allowing individuals to effectively decide where some of their tax dollars will be used, American norms and American tax law reflect a distinctly American commitment to the role and value of private associations.¹²⁰ As Tocqueville noted, participation in these sorts of civic associations not only enables the development of various virtues necessary for

¹¹⁴ See, e.g., McConnell, *supra* note 82, at 100–02.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 101–04.

¹¹⁷ See, e.g., Alyssa A. DiRusso, *American Nonprofit Law in Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39, 75 (2011).

¹¹⁸ See I.R.C. § 501.

¹¹⁹ See I.R.C. § 170(a)(1).

¹²⁰ TOCQUEVILLE, *supra* note 112, at 981–85.

democracy but also reflects the importance of communities in developing capacities for meaning-making and self-governance.¹²¹

The Free Exercise Clause of the First Amendment has historically reflected the Founders' commitment to freedom of conscience as well as their recognition of the role of private, non-state associations and communities in meaning-making.¹²² In the wake of *Employment Division v. Smith*, however, that constitutional protection has been weakened.¹²³ Whereas under the previous Free Exercise Clause standards, burdens on religious free exercise had to be justified on the basis of a compelling state interest, such burdens are now presumptively valid if resulting from a law that is "generally applicable" and "religion-neutral."¹²⁴

While this new interpretation of the Free Exercise Clause has substantively limited the religious liberty of certain populations,¹²⁵ the overall impact to religious liberty and associational autonomy has been less significant than some onlookers had predicted.¹²⁶ In response to the unpopular *Smith* decision in 1990, Congress passed—by a simple voice vote in the House¹²⁷ and by ninety-seven to three in the Senate¹²⁸—the Religious Freedom Restoration Act (RFRA) that aimed to reinstate the previous compelling-state-interest standard to Free Exercise case law.¹²⁹ Although the Supreme Court of the United States ruled in *City of Boerne v. Flores* that Congress overstepped its authority in establishing

¹²¹ *Id.*

¹²² Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 616–17, 620–21 (2006).

¹²³ *Emp. Div. v. Smith*, 494 U.S. 872, 885–86 (1990).

¹²⁴ *Id.* at 886 n.3. "Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents." *Id.*

¹²⁵ Burdens to religious liberty arising from state, not federal, action and that are not easily recast in the language of freedom of speech or expressive association are less protected following *Smith*.

¹²⁶ See, e.g., *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 1–2, 4, 7, 37–38, 47–48 (1992).

¹²⁷ H.R. REP. NO. 103-88 (1993).

¹²⁸ S. REP. NO. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 1892.

¹²⁹ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

RFRA, as it applied to states,¹³⁰ RFRA continues to apply to federally imposed burdens to religious liberty.¹³¹ In 1993, states also began to adopt their own RFRAs, resulting in a current total of twenty-one state-based RFRAs.¹³² Congress and states have stepped in to fill gaps as the Free Exercise Clause has lost its bite at the Supreme Court.

Even as the Free Exercise Clause came to be interpreted less expansively by the Supreme Court, the Court has expanded its jurisprudence in other related areas, such as expressive association.¹³³ While not explicitly mentioned in the First Amendment, courts have determined that a right of expressive association is implied by, or derives from, other protected First Amendment rights, including free speech, free exercise, petition, and assembly.¹³⁴ In one of the foundational expressive association cases, the Supreme Court explained, “[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”¹³⁵ In a series of cases since, the Supreme Court and other lower courts have cited the right of expressive association in recognizing that the search for meaning, purpose, and identity are collective endeavors facilitated by the First Amendment.¹³⁶

These developments reveal not only the persistence of meaning-making institutions and communities but also the adaptability of American law to acknowledge and support the formation and maintenance of communities where virtue is developed and meaning is found.

¹³⁰ *City of Boerne*, 521 U.S. at 519, *superseded by statute*, Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc, *as recognized in* *Holt v. Hobbs*, 574 U.S. 352 (2015).

¹³¹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

¹³² *State Religious Freedom Restoration Acts*, NAT’L. CONF. ON STATE LEGISLATURES (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/X6FC-66LC>].

¹³³ *See, e.g.*, *Healy v. James*, 408 U.S. 169, 181 (1972); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835–37 (1995).

¹³⁴ *See, e.g.*, *Healy*, 408 U.S. at 181.

¹³⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

¹³⁶ *See, e.g.*, *Rosenberger*, 515 U.S. at 835–37; *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Healy*, 408 U.S. at 181.

B. Solidarity and Equality

Recall that Deneen believes liberalism has failed not only because of its inability to take seriously the traditional sources of meaning and loci of virtue but also because of its impoverished conception of the common good.¹³⁷ Prior to the “Great Separation” of faith and politics and of law and meaning, premodern societies were characterized by a degree of unity that liberalism forecloses.¹³⁸ Where premodern law worked hand-in-glove with the customs of a community and was informed by natural law, modern liberal law is disconnected from custom and is rooted in artificial, positive law.¹³⁹ Deneen bemoans a modern liberal world characterized by separation rather than unity and in which law regulates bad behavior but is not part of a holistic, integrated effort to cultivate individual virtue and promote the common good.¹⁴⁰

While Deneen is correct to note the development of the “bad man” theory of law that has coincided with, and been shaped by, the rise of liberalism,¹⁴¹ he is too quick to assume that liberal law lacks the ability to teach and form as well as to regulate or punish. Just because liberal societies tend to be especially solicitous of the meaning-making role of private associations and affiliations does not mean that liberal states can, or should, ignore law’s capacity for meaning-making and identity formation in the public sphere.

Citizenship in a liberal republic requires the liberal state to recognize individuals as free and equal before the law. The liberal state’s commitment to free and equal citizenship is a reflection of the society’s commitment to solidarity and equality and is meant to apply to all citizens irrespective of their particular backgrounds. Cathleen Kaveny, professor of law at Boston College, and former colleague of Deneen’s at Notre Dame, has offered “a nuanced view about how law can function as a moral teacher in a pluralistic society such as the United States, a view that is at once optimistic about the effectiveness of moral pedagogy without being utopian, and realistic about moral disagreement without being relativistic.”¹⁴² This combination of dispositions is particularly useful in

¹³⁷ DENEEN, *supra* note 2, at 24–29.

¹³⁸ *Id.* at 38.

¹³⁹ *Id.*

¹⁴⁰ *See id.* at 38–40.

¹⁴¹ *Id.* at 32.

¹⁴² CATHLEEN KAVENY, LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY 2 (2012).

a liberal democracy where legitimacy requires some measure of consent and effectiveness.

According to Kaveny, "If we look closely at the American legal system, we will find ample evidence of how law can still function as a powerful moral teacher by holding up a compelling, integrated vision of our common life that inspires people to move beyond its strict requirements."¹⁴³ In particular, she points to signature legislative efforts such as the Civil Rights Act,¹⁴⁴ the Family and Medical Leave Act (FMLA),¹⁴⁵ and the Americans with Disabilities Act (ADA)¹⁴⁶ as tangible reflections of the vision of American political community and the role of law in realizing that vision of solidarity.¹⁴⁷ These legislative accomplishments "all adopt a normative and holistic attitude toward the function of law; in other words, each law gestures toward a vision of how the citizens of the United States should live their lives in common."¹⁴⁸ In particular, "each piece of legislation signals the hope that the subjects of the law will move beyond mere compliance with the external requirements of the law to appreciate the broader vision of community that it wishes to encourage."¹⁴⁹ The content of "that broader vision of community," according to Kaveny, "exemplifies the fruitful relationship between autonomy and solidarity."¹⁵⁰

Kaveny's work calls to mind Robert Cover's now-famous *Nomos and Narrative*, in which he argues that law performs both a "world-creating" as well as a "world[-]maintaining" function.¹⁵¹ These functions map onto, respectively, law-as-meaning and law-as-social-control and to two distinctive approaches to education: "*paideic*" and "*imperial*."¹⁵² The paideic, or world-creating, ideal-typical pattern aims to educate citizens *into* a normative system and involves "a sense of direction or growth that is constituted as the individual and his community work out the implications of their law."¹⁵³ The discourse that emerges from the paideic model is "initiatory, celebratory, expressive, and performative, rather

¹⁴³ *Id.* at 65.

¹⁴⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e.

¹⁴⁵ Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

¹⁴⁶ Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101.

¹⁴⁷ KAVENY, *supra* note 142, at 34.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 12–13 (1983).

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.* at 13.

than critical and analytic.”¹⁵⁴ In contrast, the imperial, or world-maintaining, ideal-typical pattern, involves educating citizens *about* different values and systems, and in this model “norms are universal and *enforced* by institutions.”¹⁵⁵ The discourse of this system is “premised on objectivity,” and “[i]nterpersonal commitments are weak, premised only upon a minimalist obligation to refrain from . . . coercion and violence.”¹⁵⁶

Whether dealing with race, gender, or disability, the legislative efforts that Kaveny describes reflect a conception of liberty that does not fit squarely with the negative view of liberty that Deneen associates with liberalism. The Family and Medical Leave Act, which requires employers to provide unpaid family and medical leave in qualifying circumstances,¹⁵⁷ and the Americans with Disabilities Act, which prohibits discrimination on the basis of disability and imposes accessibility requirements on public accommodations,¹⁵⁸ reflect a positive conception of liberty and a substantive, rather than merely formal, conception of equality. One who fears taking off work to care for a child or one whose disabilities prevent her wheelchair from accessing a potential place of employment is not unfree from the standpoint of negative liberty. The problems that these pieces of legislation address deal not with tangible, state-sanctioned limits on the free movement of individuals but rather the capacity of individuals for self-realization and full participation in the community.

Similarly, the public accommodations and public facilities provisions of the Civil Rights Act were designed to remove the badges of inferiority that had marked Black Americans since the early days of the republic.¹⁵⁹ Even if formal, state-based discrimination ended, the Civil Rights Act recognized that full, free, and equal citizenship could not be realized if a group of citizens were unable to take part in a wide range of social and economic activities.¹⁶⁰

Deneen seems to have an all-or-nothing understanding of law’s relationship to social norms and meaning-making.¹⁶¹ Either law is organically and inextricably bound up with a community’s

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

¹⁵⁸ Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101.

¹⁵⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e.

¹⁶⁰ *Id.*

¹⁶¹ DENEEN, *supra* note 2, at 38, 40.

customs and aspirations, which seems to be his preference, or law is simply a matter of regulation and compliance.¹⁶² In the preface to his updated 2019 edition of *Why Liberalism Failed*, Deneen cites Thomas Aquinas for conceiving “custom as a form of law.”¹⁶³ Throughout the book, when speaking of liberal law, Deneen frames in terms of its role “disassembling” what has come before.¹⁶⁴

Where Deneen sees liberal law through the lens of compliance and views pluralism as a threat to common purpose, Kaveny shows that law reflects and shapes a community’s vision, and she does “not believe the moral, religious, and cultural pluralism that characterizes American society precludes the possibility for our law to function as an effective moral teacher.”¹⁶⁵ Deneen is hampered here in part by his lack of engagement with law in the context of the Protestant Reformation and its aftermath. Early Christian understandings of law frequently conceived civil law as continuous with, and inseparable from, religious law, a view which persists among certain Catholic post-fusionists, the integralists most obviously.¹⁶⁶ Martin Luther planted seeds for the separation of civil and religious realms, including the “bad man” theory of law that Deneen associates with liberalism.¹⁶⁷ According to Luther, law was only necessary because of human sin,¹⁶⁸ but, for John Calvin, law played an essential role not simply in punishing bad behavior but in teaching values and in molding character.¹⁶⁹ These

¹⁶² *Id.*

¹⁶³ *Id.* at xiii.

¹⁶⁴ *Id.* at 27.

¹⁶⁵ KAVENY, *supra* note 142, at 4.

¹⁶⁶ See Schwartzman & Wilson, *supra* note 35, at 1041.

¹⁶⁷ See MARTIN LUTHER, TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED (1523), reprinted in LUTHER: SELECTED POLITICAL WRITINGS 51, 56 (J.M. Porter ed., 2003); see also DENEEN, *supra* note 2, at 38.

¹⁶⁸ According to Luther,

[i]f all the world were composed of real Christians, that is, true believers, there would be no need for . . . law. . . . [I]t is impossible that the temporal sword and law should find any work to do among Christians, since they do of their own accord much more than all laws and teachings can demand, just as Paul says in 1 Timothy 1 [:9], “The law is not laid down for the just but for the lawless.”

LUTHER, *supra* note 167, at 54.

¹⁶⁹ Calvin wrote:

For [law] is the best instrument for enabling [believers] daily to learn with greater truth and certainty what that will of the Lord is which they aspire to follow, and to confirm them in this knowledge Let none of us deem ourselves exempt from this necessity, for none have as yet attained to such

Protestant conceptions of civil society have deeply shaped the modern development of republicanism and liberalism, including the founding of the United States.¹⁷⁰ American law certainly regulates bad behavior, but it also facilitates solidarity by signaling which values merit the state's imprimatur.

C. *Between (Private) Communities and (Public) Solidarity: Hard Cases*

Achieving solidarity in some of the ways Kaveny describes has admittedly come at a cost. Employers have had to change cultures and expend additional resources to avoid discrimination and to accommodate employees with disabilities or those on leave to care for family.¹⁷¹ Private businesses no longer have the freedom to serve simply those whom they want to serve but are now forbidden from discriminating on the basis of race, among other things.¹⁷² Mainstream American culture seems to have accepted, and embraced, these tradeoffs, however, and has come to see law—whether we are fully conscious of it or not—as necessary for the fuller realization of our shared identity. Yet it would be naïve to ignore the conceptual and practical tensions that arise when different, important values come into conflict, including conflicts between values associated with conscience and community and those associated with solidarity and equal treatment.

Conflicts concerning fundamental values are typically taken up by the courts, but public understanding surrounding these types of cases is often hampered by various judicial norms. Judges are neither philosophers nor theologians, and courts are neither college seminars nor Sunday schools. Courts are bound by certain rules and norms, including staying within the bounds of the record of the case and issuing as narrow of a ruling as possible to resolve disputes. While these norms are important, they can obscure the extent to which constitutional law often concerns the deep conflict of fundamental values, leaving non-lawyer onlookers a bit dissatisfied or confused.

a degree of wisdom, as that they may not, by the daily instruction of the Law, advance to a purer knowledge of the Divine will.

JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 158 (Anthony Uyl ed., Henry Beveridge trans., 2017).

¹⁷⁰ DENEEN, *supra* note 2, at 44–45.

¹⁷¹ See, e.g., *Employer/Small Business Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers> [<https://perma.cc/6PKA-YAKA>] (last visited Dec. 28, 2020).

¹⁷² *Id.*

1. *Christian Legal Society v. Martinez*

Consider, for example, *Christian Legal Society v. Martinez*,¹⁷³ in which the Supreme Court reviewed the applicability of nondiscrimination policies for religious groups in the university context.¹⁷⁴ The *Martinez* litigation concerned whether the Christian Legal Society (CLS) at the University of California–Hastings Law School could discriminate in its membership selection on the basis of religion and sexual orientation and still maintain its affiliation with the law school.¹⁷⁵ Hastings considered its nondiscrimination policy a legitimate tool for preventing discrimination against gay and lesbian students and for promoting tolerance.¹⁷⁶ The Christian Legal Society claimed Hastings's nondiscrimination policy unconstitutionally restricted its associational freedom by tying its eligibility for university recognition, including meeting space and an allocation of student activity fees, to its willingness to change its beliefs regarding human sexuality as well as its practices regarding group membership.¹⁷⁷ In a decision that left somewhat unresolved the extent to which public universities can limit associational freedoms in limited public forum contexts, the Court upheld Hastings's nondiscrimination policy, which required CLS either not to discriminate on the basis of religion or sexual orientation or forego university affiliation and the attendant benefits.¹⁷⁸

The obvious conflict in the case concerned the autonomy interests of a conservative religious student group against the full inclusion rights of gay students, but Justice Ginsburg's majority opinion was careful not to frame the controversy as one about full and free citizenship or the vision of the political community.¹⁷⁹ Rather, Ginsburg emphasized the neutral design and application of the Hastings's nondiscrimination policy,¹⁸⁰ and she downplayed

¹⁷³ *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010).

¹⁷⁴ *Id.* at 668.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 671.

¹⁷⁷ *Id.* at 673–74.

¹⁷⁸ *Id.* at 669.

¹⁷⁹ *Id.* at 667–98.

¹⁸⁰ *Id.* at 694–95 (“In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO[Registered Student Organization,] status, in short, is textbook viewpoint neutral.”).

the aspirational qualities of the nondiscrimination policy.¹⁸¹ She minimized the harm done to CLS by the application of the policy,¹⁸² and she only considered one version of the policy, which lent itself more easily to neutralist interpretations.¹⁸³ Furthermore, Ginsburg made clear it was not the Court's role to assess the "advisability" of the public forum that Hastings has established, only the "permissibility."¹⁸⁴

Ginsburg neither celebrated the nondiscrimination aspirations of Hastings nor criticized what the concurring opinions considered the narrowness of CLS but instead praised the "textbook viewpoint neutral[ity]" of the Hastings policy.¹⁸⁵ Since neutrality was Ginsburg's focus, and since she determined the policy to have been designed and applied in a neutral way, Ginsburg avoided having to discuss directly the particular burdens upon, or the rights of, the religious student group in the *Martinez* controversy.¹⁸⁶ While this approach is perhaps technically sufficient, it leaves skeptics and supporters alike dissatisfied in that it elides questions regarding the value and role of associations and religious communities, on the one hand, and the importance of inclusion and nondiscrimination on the other.

One can almost hear Robert Cover shouting at the Court from the grave! In the closing pages of Cover's *Nomos and Narrative*,¹⁸⁷ he bemoans what he considered the Supreme Court's cowardly ruling in *Bob Jones University v. United States*, in which the Court upheld the IRS's removal of tax-exempt status for the university,

¹⁸¹ The main evidence showing Ginsburg downplayed the aspirational qualities of the policy is the fact that she does not really acknowledge any aspirational features of the policy. *See id.* at 667–98.

¹⁸² *Id.* at 673 ("If CLS instead chose to operate outside the RSO program, Hastings stated, the school 'would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities.' CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them." (alteration in original) (citations omitted)).

¹⁸³ *See id.* at 675–78.

¹⁸⁴ *Id.* at 692 ("[T]he *advisability* of Hastings' policy does not control its *permissibility*. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum 'need not be the most reasonable or the only reasonable limitation.'" (citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985)).

¹⁸⁵ *Id.* at 695.

¹⁸⁶ *Id.* at 667–703.

¹⁸⁷ Cover, *supra* note 151, at 60–68.

even though Bob Jones cited its religious beliefs as the basis for its racially discriminatory policies.¹⁸⁸ According to Cover:

The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional. The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong. . . .

. . . It is a case in which authority is vindicated without the expression of judicial commitment to principle that is embodied in constitutional decision. In the impoverished commitment of Chief Justice Burger's opinion, the constitutional question was not unnecessary, but the Court avoided it by simply throwing the claim of protected insularity to the mercy of public policy. The insular communities deserved better—they deserved a constitutional hedge against mere administration. And the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of racism.¹⁸⁹

Cover goes on to acknowledge in a footnote that

[s]uch a commitment would necessarily have invited a host of problems. But that is as it should be. The invasion of the *nomos* of the insular community ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community.¹⁹⁰

In other words, according to Cover, the liberal state must recognize that law is more than a mechanism for coordination or punishment; it reflects and creates normative universes, and even insular communities seeking to discriminate on the basis of race, religion, or sexual orientation deserve to be told candidly what substantive vision of solidarity through law is the basis for limiting their associational autonomy.¹⁹¹

2. *Burwell v. Hobby Lobby Stores, Inc.*

Consider, also, the much-celebrated and much-maligned *Burwell v. Hobby Lobby, Inc.*, decision in which a Health and

¹⁸⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983) (Powell, J., concurring).

¹⁸⁹ Cover, *supra* note 151, at 66–67.

¹⁹⁰ *Id.* at 67 n.195.

¹⁹¹ *Id.*

Human Services (HHS) regulation adopted under the Affordable Care Act imposed a “contraception mandate” on employers who have more than fifty employees.¹⁹² Hobby Lobby and other closely held corporations contested the HHS regulation on the grounds that it imposed a burden on the corporations’ sincerely held religious beliefs and thus violated RFRA.¹⁹³ The petitioners objected, in particular, to being forced to cover four forms of contraception that they considered abortifacients and thus especially objectionable.¹⁹⁴ Hobby Lobby insisted that, as a closely held corporation that operates on the basis of religious values, it should be eligible for the same work-around that the HHS regulation provided for religious nonprofit corporations to be exempted from the mandate.¹⁹⁵

HHS argued, and the Third Circuit ruled, that Hobby Lobby could not bring a successful religious liberty claim under RFRA because it was a for-profit corporation.¹⁹⁶ The Third Circuit explained, “General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”¹⁹⁷

The majority opinion, written by Justice Alito, reversed the Third Circuit and upheld Hobby Lobby’s claim, citing both general corporation law as well as the particular features of the corporations at issue in the case.¹⁹⁸ In Alito’s opinion, to deny Hobby Lobby’s claim under RFRA would be a form of unjust discrimination, effectively making it more expensive to be business owners who seek to live out their values through their work than to be

¹⁹² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014) (construing 42 U.S.C. § 300gg-13 (2018)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 691.

¹⁹⁵ *Id.* at 729–31.

¹⁹⁶ *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Hum. Servs.*, 724 F.3d 377, 385 (3d Cir. 2013), *rev’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹⁹⁷ *Id.* (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev’d en banc*, 723 F.3d 1114 (10th Cir. 2013)).

¹⁹⁸ *Hobby Lobby*, 573 U.S. at 706–07 (“A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

business owners who simply want to make a profit.¹⁹⁹ The record clearly revealed, according to Alito, business owners who sought to align their work with their values:

Hobby Lobby's statement of purpose commits the [plaintiffs] to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the [plaintiffs] calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."²⁰⁰

Of particular relevance to the case, the plaintiffs "believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."²⁰¹

Alito further noted that since "HHS concedes that nonprofit corporations can be protected by RFRA," the "corporate form alone cannot provide the explanation" for refusing Hobby Lobby's RFRA claim,²⁰² especially since the division between for-profit and nonprofit corporations in the context of religious liberty claims is simply not "clear-cut."²⁰³ Alito explained:

Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.²⁰⁴

"This argument,"²⁰⁵ "that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to

¹⁹⁹ *Id.* at 706.

²⁰⁰ *Id.* at 703 (second and third alterations in original) (citations omitted).

²⁰¹ *Id.* (citing *Hobby Lobby*, 723 F.3d at 1122).

²⁰² *Id.* at 709.

²⁰³ *Id.* at 712.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 710.

make money,”²⁰⁶ Alito concluded, “flies in the face of modern corporate law.”²⁰⁷ Pointing to the history and structure of corporation law, Alito determined:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.²⁰⁸

Alito went on to note recent developments in corporation law that have made it even easier for owners to integrate their values into their work.²⁰⁹

In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.²¹⁰

Thirty-six states, plus the District of Columbia, currently provide for the creation of benefit corporations, enabling their owners to advance and signal their values to external audiences while also conducting the more traditional activities associated with corporations.²¹¹

Whether one views the outcome of *Hobby Lobby* favorably or unfavorably, it is hard to deny that the case concerned complicated questions of meaning, purpose, and identity and involved individuals seeking to express their values and pursue their ends, not simply their economic interests, in the context of their interpretive communities.²¹²

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 711.

²⁰⁸ *Id.* at 711–12.

²⁰⁹ *Id.* at 710–13.

²¹⁰ *Id.* at 712–13.

²¹¹ *State by State Status of Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/Y7NT-3RWE>] (last visited Dec. 28, 2020).

²¹² Deneen, however, saw little to cheer in *Hobby Lobby* due to the fact that the whole dispute took place in a context of the liberal market economy of alienated individuals. See Patrick J. Deneen, *Even If Hobby Lobby Wins, We Lose*, AM. CONSERVATIVE (Mar. 25, 2014, 9:24 AM), <https://www.theamericanconservative.com/hobbylobby/> [<https://perma.cc/M9G9-B862>]. Hobby Lobby’s handling of the COVID-19

What *Hobby Lobby* reveals, perhaps most clearly, is the pervasiveness of considerations of meaning and purpose in American law. It is somewhat widely recognized that the Constitution creates and maintains contexts in which individuals can give voice to their deepest values;²¹³ it is less widely recognized that even American corporate law's history and structure provide individuals who seek integrated lives some tools for realizing that integration. And even though the form of that integration in *Hobby Lobby* took on a politically conservative valence, there is nothing, as a formal matter, that precludes closely held corporations from seeking integration for more liberal or progressive causes. As Alito noted, "So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits."²¹⁴ Stated differently, corporate law in America affirmatively enables those who own closely held corporations to pursue their values through their work.²¹⁵

The question courts must ask when important values conflict is not whether to traffic in meaning, purpose, and identity, but in what way to do so. Alito's opinion made a strong, liberal, case for respecting the religious liberty rights of the petitioners so that they could integrate the personal and professional spheres of their lives, but it should not be forgotten that, on the other side, HHS articulated a compelling—even if not compelling enough for the majority—case for the interests of women.²¹⁶ Similar to the motivation of legislative acts such as the ADA and FMLA, the HHS regulation was designed to effectuate the freedom of a frequently disadvantaged segment of the population: women.²¹⁷ By requiring employers to cover preventive health care plans—

crisis has provided a new cause for skepticism regarding the company's integrity. *See, e.g.*, Dahlia Lithwick, *Of Course Hobby Lobby Thinks It's Above the Law*, SLATE (April 3, 2020, 1:47 PM), <https://slate.com/news-and-politics/2020/04/hobby-lobby-scotus-coronavirus.html> [<https://perma.cc/XPK8-PZ5Z>].

²¹³ *See Freedom of Expression—Speech and Press*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press> [<https://perma.cc/9J2J-JCDH>] (last visited Dec. 28, 2020); Anna M. Taruschio, Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1010 (2000).

²¹⁴ *Hobby Lobby*, 573 U.S. at 712.

²¹⁵ *Id.*

²¹⁶ *See id.* at 691–92.

²¹⁷ H.R. REP. NO. 111-299, pt. 1, at 143 (2009).

which typically cost more for women than for men—the ACA, in general, and the HHS regulation, in particular, aimed to fulfill the promise to women of full and equal citizenship.²¹⁸

While the conflicts between conscience and community, and between fairness and solidarity, can feel intractable, the conflicts themselves offer a clear reminder that law in the United States does not preclude the pursuit of meaning but rather it provides a mechanism for mediating different visions of meaning-making and the relationship between individuals, groups, and the state.

V. LIBERALISM'S PERSISTENCE AND THE LEGAL PROFESSION

A. *Finding Agency in Uncertain Times*

I have suggested that the conclusions of Deneen and the post-fusionists should be resisted for various reasons, among them (1) liberal practices, including law, should be distinguished from liberal theory; (2) liberal law reflects and facilitates meaning-making, cultivation of virtue, and pursuit of the common good in ways that these critics overlook; and (3) because of the foregoing reasons, the story of the inevitable, or already complete, demise of liberalism is misguided.

While Deneen overstates the inevitability of liberalism's demise and overlooks ways the law of liberalism can guard against some of its deleterious effects, he is not completely wrong. Deneen's critique has received such a warm welcome precisely because he has tapped into the popular anxieties of the age in a way that is rare for a book in legal and political theory. My argument, then, is not a naïve one. Liberal societies face serious problems. Popular trust in liberal institutions, norms, and practices is low and declining.²¹⁹ Leaders often seem incapable of, or uninterested in, offering a vision or a plan that interrupts the narratives of decline and distrust.²²⁰ Rising income inequality is hollowing out a middle class, leading many on the left and right to question whether liberalism's free market is worth trying to save.²²¹ And there is increasing evidence to demonstrate Americans lack the type of relationships—whether from family, church,

²¹⁸ *Id.*

²¹⁹ *See, e.g.,* YUVAL LEVIN, A TIME TO BUILD: FROM FAMILY AND COMMUNITY TO CONGRESS AND THE CAMPUS, HOW RECOMMITTING TO OUR INSTITUTIONS CAN REVIVE THE AMERICAN DREAM (2020).

²²⁰ *See id.* at 4–5.

²²¹ *See, e.g.,* Beauchamp, *supra* note 3.

or even the local bowling league²²²—where meaning and purpose are cultivated.

Though admittedly depressing, the evidence post-fusionists marshal to prove liberalism's failure is still subject to interpretation. Will our great-grandchildren view the early twenty-first century as the moment when liberalism breathed its last gasps before being replaced by other legal and political orders? Or will our great-grandchildren look back at our time as one that tested the durability, flexibility, and viability of liberalism, but from which liberalism emerged, perhaps even stronger? We do not know.²²³ The Owl of Minerva only takes flight at dusk.²²⁴ I have attempted to argue, however, that although there are reasons for pessimism, there are also signs and sources of hope, often rooted in law, that critics like Deneen generally avoid or misunderstand.

Not only is there a principled case to be made regarding liberalism's capacity for survival, but there are also very practical aspects to consider when contemplating liberalism's health and viability. If liberalism has died—but whatever is to follow has not yet been born—where does that leave those of us who inhabit (formerly) liberal societies?

If the demise of liberalism, the dominant sociopolitical legal system of our time, is inevitable, what are we to do? And what will take liberalism's place in a world where exposure to diverse ways of life—which helped prompt liberalism's initial rise—is only increasing?

Various critiques of Deneen have noted—and he has generally conceded²²⁵—that his plans and predictions for what follows liberalism are vague, at best, and his guidance no clearer for how citizens are to conduct themselves in this period of transition.²²⁶ In an effort to empower disillusioned citizens, Deneen proposes a turn inward and away from public life,²²⁷ but it is far from clear

²²² See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 183 (2000).

²²³ The COVID-19 crisis has of course provided a particularly powerful reminder of the limits of our predictive powers.

²²⁴ According to Hegel, the ancient Athenian Owl of Minerva represents the wisdom of an age. We only begin to understand an epoch as it is passing us by. HEGEL, *supra* note 79, at 13.

²²⁵ DENEEN, *supra* note 2, at xxii–xxiii.

²²⁶ See, e.g., Ross Douthat, *Is There Life After Liberalism?*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/opinion/sunday/life-after-liberalism.html> [<https://perma.cc/M3UX-TMGZ>].

²²⁷ DENEEN, *supra* note 2, at 191–94, 197–98.

what the positive impact of that would be. If anything, an inward turn could make the present divides in liberal societies even greater and the quest for the common good only more elusive.

Rather than turning inward and giving up on liberalism and the prospect of seeking a common good amidst diversity, why not interpret the current moment as an opportunity to use our associations and institutions to address some of the deficiencies liberalism's critics have identified? The question seems especially relevant for those institutions and professions that have at various times and in various ways been caretakers of the public good. In these final pages, I briefly outline some of the ways that legal education and the legal profession have contributed to the crisis of legitimacy facing liberalism's law, and I begin to sketch a way forward.

B. Law, Virtue, and the Public Good

There is an all-too-familiar story of decline regarding the legal profession, a story in which lawyers were once statesmen who embodied virtues of integrity, justice, and courage but who have fallen prey to various social, market, and professional forces in recent generations.²²⁸

Law students, according to this story of decline, still sometimes enroll in law school for seemingly noble reasons but find themselves subject to forces that seem largely out of their control and end up choosing career paths very different from what led them to law school in the first place.²²⁹ These students become lawyers who feel compelled to bracket their own values from their work and to set aside questions of meaning, purpose, and the common good in favor of a professional identity rooted primarily, if not exclusively, in zealous representation of one's clients.²³⁰ All too often these lawyers go on to become unhappy, if not depressed,

²²⁸ See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1–4, 7 (6th prtg. 2001).

²²⁹ Samuel Moyn, *Law Schools Are Bad for Democracy*, CHRON. OF HIGHER EDUC. (Dec. 16, 2018), <https://www.chronicle.com/article/Law-Schools-Are-Bad-for/245334> [<https://perma.cc/KD6M-MM39>].

²³⁰ Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, but Does Anyone Really Care? How Law Schools Are Failing To Develop Students' Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339, 351–52 (2015).

addicted, or suicidal, all the while the profession itself loses whatever credibility it had with the public.²³¹

Legal education is often blamed for contributing to, if not creating, a lawyerly mindset that not only leads to various unhealthy social and personal outcomes but that also embodies some of the worst features of liberalism, including the alienation of one's self from one's ends and a form of consumerist individualism that leaves little room for considerations of personal virtue or social good.²³²

One response to the mounting evidence of the profession's decline would be to conclude that law, like liberalism,

has failed—not because it fell short, but because it was true to itself. It has failed because it has succeeded. As [law] has “become more fully itself,” as its inner logic has become more evident and its self-contradictions manifest, it has generated pathologies that are at once deformations of its claims yet realizations of [law's] ideology.²³³

But this conclusion, like Deneen's regarding liberalism's failure, fails to account for sources and resources internal to law that can be channeled to resist some of these less healthy trends and developments.

It is well documented that law students often enroll in law school for reasons that seem to have very little to do with their jobs after graduation.²³⁴ This is not necessarily a problem, in and of itself, but it presently reflects the ways in which law students, and the law generally, often lack a clear *telos*. As the profession has come to understand itself primarily in terms of service to clients, its self-understanding has increasingly focused on competence rather than character, and on serving clients rather than promoting some vision of the public good—a vision that is admittedly elusive at times. It is striking, for example, how little attention is paid to justice—as an individual virtue or as an orienting, collective vision—in legal education and in the profession.²³⁵ If law

²³¹ See, e.g., Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596, 597, 602–03 (2006); *Public Esteem for Military Still High*, PEW RSCH. CTR. (July 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high> [https://perma.cc/FV53-5AN8].

²³² See, e.g., Moyn, *supra* note 229.

²³³ DENEEN, *supra* note 2, at 3.

²³⁴ Moyn, *supra* note 229.

²³⁵ See, e.g., Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLIN L. REV. 513, 514–16, 519–21 (2007).

students and lawyers are not constrained by or oriented toward justice, they will understand legal reform in incrementalistic terms, if at all, and will lack a sense of personal or professional agency in effecting social change.²³⁶ This incrementalistic, status-quo conception of law works in tandem with a judicial-centric vision of legal education, what Robert Cover would call “world maintaining,”²³⁷ that conceives the work of the lawyer as concerned primarily with making the “right” argument to a judge rather than using law, in concert with one’s fellow citizens, to establish, maintain, and pursue the community’s vision.²³⁸ Law creates as well as contains, but legal education typically focuses more on law’s role as a mechanism for social coordination rather than as a tool for social transformation or the realization of justice.

One of the ever-present risks of law, as a discipline, is that its focus on neutrality will alienate it from the particularity that it must navigate. Law must be impartial and impersonal, if it is to be fair, but, if it loses all cognizance of the human element in which it operates, it will risk losing its relevance and legitimacy in the eyes of those whom it serves. The human element of law is of course taking on new salience with the rise of artificial intelligence and machine learning.²³⁹ Many of the tasks historically performed by entry-level associates are already being done by machines, and, if predictions are to be believed, even more law-related jobs will be taken over by robots in the coming years.²⁴⁰ This makes it all the more imperative that legal education take seriously virtues such as wisdom and justice in the training of future lawyers. Legal education and the legal profession will increasingly be required to articulate a value proposition that extends beyond technical competency and that implicates an ethical register.

Four distinct but related charges emerge from these observations. Law schools and the legal profession must: (1) engage both

²³⁶ According to Moyn, this method of education is pernicious because it reorient[s] the hopes and even reshap[es] the personalities of the young people who enter [law school]. Having entertained inchoate dreams about social transformation, the students themselves are transformed the most, especially when they accept a set of beliefs about how the world is likeliest to change—through a politics of marginal legal reform by insiders to the system. That is, if the world can change at all.

Moyn, *supra* note 229.

²³⁷ Cover, *supra* note 151, at 13.

²³⁸ See Moyn, *supra* note 229.

²³⁹ See, e.g., Daniel E. Harmon, *Artificial Intelligence in Law*, LAW.’S PC, Jan. 15, 2017, at 1.

²⁴⁰ *Id.*

individual and profession-wide questions of meaning and purpose more fully; (2) provide instruction in the skills needed to be an excellent lawyer but also the virtues and character traits required to be a successful and fulfilled lawyer who understands her relationship to the broader public; (3) keep in mind Madison's admonition that "[j]ustice is the end of government"²⁴¹ and that law is the chief instrument in realizing that end; and (4) recognize that lawyers have distinct opportunities and obligations to uphold the public good in a liberal democracy, including with respect to cultivating and modeling self-government.

There are no doubt principled as well as practical reasons to be skeptical of these suggestions regarding legal education and the legal profession. Some might argue, for example, that my admonitions are naïve in that they fail to understand the social and market dynamics of contemporary legal practice. Others might insist that this values-and-vision approach is not bad in and of itself, but that it belongs in a school of theology or philosophy rather than a school of law tasked with developing certain core competencies. Focusing on these matters in law school would inevitably result in omitting other, essential instruction. Others might insist that talk of values and vision presents not just logistical challenges but principled ones as well. If law schools engage in the domain of virtues and values, do they not risk elevating some conceptions of the good and denigrating others? If law orients students and practitioners toward some vision of the good, what about those who hold other visions? Still others might simply ask if law school occurs too late in the lives of students to shape their values in any meaningful way.

These critiques reflect the same sorts of sentiments expressed by liberals who fail to take seriously the types of concerns Deneen raises. The fact is that legal education and the legal profession cannot avoid engaging questions of meaning, purpose, and identity any more easily than liberalism. Law schools socialize students in deep and numerous ways whether or not law schools recognize that they are doing so. The question is in what ways—not whether—values will be engaged and character formed. Furthermore, the wellbeing of lawyers, the profession, and the broader public depends on institutional leaders who can channel the virtue of courage in responding to current pressures. Liberalism's persistence is not inevitable, but it is possible if the institutions and

²⁴¹ THE FEDERALIST NO. 51, *supra* note 71, at 321 (James Madison).

associations upon which the health of liberal democracy depends recognize and respond to changing needs.

VI. CONCLUSION

While Deneen and the post-fusionists are too quick to conclude that liberalism's failure is inevitable, they are right to note that liberalism's persistence is not foreordained.²⁴² If liberalism is to persist, which I believe it can, it will not be because of an inevitable march of history but instead because of the dedicated efforts of individuals and groups from the political left and right who recognize the value of liberalism even while acknowledging its limitations. I have argued that liberal practices, including law, should be distinguished from liberal theory; that liberal law reflects and facilitates meaning-making, cultivation of virtue, and pursuit of the common good in ways that Deneen and the post-fusionists overlook; and that, as a result, the story of the inevitable—or already complete—death of liberalism is misguided. And I have briefly sketched what reform efforts might look like for legal education and the legal profession to perform the mediating functions required by institutions needed in the distinctive context of America's liberal democracy. Law and legal education are, of course, not the only institutions in need of engaging meaning, virtue, and the common good. For liberalism to persist, various associations, institutions, and professions must acknowledge the dearth of trust in American society, especially towards institutions, and think creatively about implementing reforms that recognize broader social needs as well as the distinctive opportunities those associations and institutions have for reorienting themselves in ways that will conduce to the benefit of those particular institutions as well as for the common good. While liberalism's diagnosis of bad health is not without conceptual, anecdotal, and empirical evidence, it is premature to call the coroner.

²⁴² DENEEN, *supra* note 2, at 18, 28–31.