

Between Liberalism and Theocracy

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I. INTRODUCTION

Our symposium conveners have focused us on “the relationship between liberalism and Christianity and their influence on American constitutionalism.”¹ My objective is to complicate the relationship and reorient the influence. The focus of my inquiry is the liberty of conscience and its implications for navigating the relationship between church and state.² By approaching these issues through the lens of political theology (as distinct from either political or constitutional theory), I hope to show that some of the most significant embodiments of conscience in the American colonies can neither be squared with an individualistic liberalism (as some on the left are prone to do) nor appropriated in the service of arguments that collapse the distinction between church and state (as some on the right are prone to do).

I have in mind the political practices of Roger Williams and William Penn. Both are important figures in American political thought, both were known to many of the Founders, and both have drawn increased attention in recent scholarship.³ Both were also deeply theological

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1. Symposium, *Liberalism, Constitutionalism, and Christianity: Perspectives on the Influence of Christianity on Classical Liberal Legal Thought*, 33 CAMPBELL L. REV. 501 (2011).

2. There is, of course, no express “freedom of conscience” in the Constitution, but scholars have increasingly focused on the influence of conscience on a number of constitutional provisions. See, e.g., ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2010); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008); NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT (2005).

3. Williams, in particular, has been the focus of a spate of recent scholarship. See, e.g., TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS

thinkers—and their political practices cannot be given sense outside of the theological narratives within which those practices arose.⁴

My engagement with Williams and Penn is not confined to *their* arguments. Both men lived out their political practices in an era much different than our own. For this reason, identifying the theological context of Williams and Penn is only a first step. An equally important objective of this Article is to frame the ongoing relevance of their contributions. To this end, I link the theological politics of Williams and Penn to two contemporary theologians, John Howard Yoder and Stanley Hauerwas. I then suggest a way to connect the theological insights of Yoder and Hauerwas back to Williams and Penn through the work of constitutional scholar H. Jefferson Powell. This Article sketches these connections as a roadmap to future work. It is offered as an opening round of what I hope will evolve into an extended discussion about the contributions of these five theological thinkers to our understanding of religious freedom and the intersection of theology, political theory, and law.

LIBERTY (1998); JAMES CALVIN DAVIS, *THE MORAL THEOLOGY OF ROGER WILLIAMS: CHRISTIAN CONVICTION AND PUBLIC ETHICS* (2004); MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008); MICHAEL ANTHONY LAWRENCE, *RADICALS IN THEIR OWN TIME* (2011). For a favorable characterization of the significance of Penn relative to Williams, see WILLIAM COMFORT, *WILLIAM PENN, 1644–1718: A TRICENTENARY ESTIMATE* 170 (1944) (“Both [Williams and Penn] contributed to the evolution of American institutions, but Penn had the opportunity of writing on a clean slate those principles which have become the foundations of our American democracy. Probably no one would contend that Williams’ writings can be compared, for either quantity or importance, with Penn’s.”); see also JOHN WITTE, JR. AND JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 15–16 (3d ed. 2011) [hereinafter WITTE & NICHOLS] (discussing the influence of both Williams and Penn).

4. I should be clear that my attention to Williams and Penn does not stem from any supposed influence they may have had on the founding or on particular founders. To be sure, Williams’ writings were known by the Baptists Isaac Backus and John Leland. See HALL, *supra* note 3. And a number of the Framers of the First Amendment were aware of the significance of Penn’s life and writings. But Williams and Penn are far more significant today as iconic figures in American political thought than as historical figures in American constitutionalism. That reality does not eliminate the need for careful attention to history and context, but it shifts the locus of the inquiry to *their* histories and contexts as the predicate to rendering their ideas intelligible.

II. WILLIAMS AND PENN THE THEOLOGIAN

History has not been kind to Roger Williams and William Penn: the theological dimensions of their contributions to religious liberty are often marginalized or misinterpreted.⁵ That this has happened is not entirely surprising. The liberty of conscience at the core of each of their thought is easily construed as an *individual* matter for at least three reasons: (1) much of the Protestant tradition from which they drew has emphasized the conscience of the individual; (2) the Enlightenment understanding of conscience evolved into an individualistic guarantee that “[o]ver himself, over his own body and mind, the individual is sovereign”;⁶ and (3) contemporary American rights discourse has exacerbated both of these theological and liberal theoretical emphases.⁷ But as Robert Vischer has rightly noted, “the dictates of conscience are defined, articulated, and lived out in relationship with others.”⁸ Vischer elaborates:

Our consciences are shaped externally; our moral convictions have sources, and our sense of self comes into relief through interaction with others. By conveying my perception of reality’s normative implications, my conscience makes truth claims that possess authority over conduct—both my own and the conduct of those who share, or come to share, my perception. Conscience, by its very nature, connects a person to something bigger than herself, not only because we form our moral convictions through interactions with the world around us, but also because we invest those convictions with real-world authority in ways that are accessible, if not agreeable, to others. This is the relational dimension of conscience.⁹

5. The most egregious example in recent years is MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008). Nussbaum argues that Williams “nowhere alludes to [theological] beliefs in arguing for liberty of conscience—nor should he, since it is his considered position that political principles should not be based on sectarian religious views of any sort.” *Id.* at 43. Her claim is baffling in light of the corpus of Williams writings and settled historical scholarship. On the latter, see, e.g., Leroy Moore, *Roger Williams and the Historians*, 32 *CHURCH HIST.* 432 (1963) (critiquing, among other arguments, Louis Parrington’s claim that Williams was “primarily a political philosopher rather than a theologian”).

6. JOHN STUART MILL, *ON LIBERTY* 81 (David Bromwich & George Kateb eds., 2003) (1859).

7. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

8. ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* 3 (2010).

9. *Id.*

The theological framework of both Williams and Penn presupposes a relational conscience that is situated in religious practice. This relational dimension of conscience is not always explicit in their writing, and it is particularly obscured by Williams's narrow orthodoxy.¹⁰ But the comprehensive theological narratives of these two men make clear that their primary objective for liberty of conscience was to create a space for the church separate from the strictures of civil authority, not to defend conscience for its own sake.¹¹ Penn argued that religious liberty meant "not only a mere liberty of Mind, in believing or disbelieving . . . but [also] the Exercise of ourselves in a visible Way of Worship."¹² Williams similarly insisted that "to molest any person, Jew or Gentile, for either professing doctrine, or practicing worship merely religious or spiritual, it is to persecute him, and such a person (whatever his doctrine or practice be, true or false) suffereth persecution for conscience."¹³ Conscience for Williams and Penn meant an embodied practice of worship.¹⁴

The protections of conscience also gave both men pause about too a porous relationship between church and state. As many have noted and

10. John Winthrop apparently believed that Williams would refuse to worship with anyone other than his wife. See EDMUND MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 40 (2007). Morgan notes that "Winthrop's report may have exaggerated the extent of Williams' exclusiveness, but Williams had clearly pushed the principle of separation to the point where the church was threatened with extinction for lack of suitable members." *Id.*

11. John Witte has distinguished between Enlightenment views and the "evangelical" views of Williams and Penn. John Witte, *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1995). Enlightenment views were based "on the belief that a person is fundamentally an individual being and that religion is primarily a matter of private reason and conscience and only secondarily a matter of communal association and corporate confession." *Id.* at 384. In contrast, "[t]he chief concern of the evangelicals was theological, not political. Having suffered for more than a century as a religious minority in colonial America, and even longer in Europe, they sought a constitutional means to free all religion from the fetters of the law, to relieve the church from the restrictions of the state." *Id.* at 383.

12. WILLIAM PENN, *THE GREAT CASE OF LIBERTY OF CONSCIENCE ONCE MORE BRIEFLY DEBATED AND DEFENDED* (Kessinger Publ'g 2010) (1670).

13. ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* (1664). As Leroy Moore has suggested, Williams's principal concern for religious liberty was "that the state leave the way clear for Christ to be Lord and God to be God." MOORE, *supra* note 5, at 444. Moore notes that the point is "readily overlooked by the romantic historians, who read natural-rights ideology into all that Williams said." *Id.*

14. Cf. WITTE & NICHOLS, *supra* note 3, at 45 (contending that the American founders embraced the "organic tie between religious conscience and religious exercise" and rejected the distinction between religious belief and religious action).

more have forgotten, Williams invoked the metaphor of a wall of separation long before Thomas Jefferson.¹⁵ For Williams, the divide was crudely simplistic: the first table of the Decalogue corresponded to the realm of the church in which man related to God, and the second table set forth the jurisdiction of the state in which man related to man.¹⁶ Penn expressed a similarly binary distinction: “God and Caesar divide the man; faith and worship belong to God, civil obedience and tribute to Caesar.”¹⁷ The problem, of course, is that these simplistic divisions between the realms of church and state offer little practical guidance. The weakness of Williams’s separation principles is evident in his “Ship of State” letter, which he wrote to disclaim the charge that he believed in “an infinite liberty of conscience.”¹⁸ Williams endorsed the right of the civil authority to punish those who “refuse to help, in person or purse, towards the common charges or defense” and who “should preach or write that there ought to be no commanders or officers, because all are equal in Christ.”¹⁹ In these claims, he elevated the civil authority over the religious beliefs and practices of Quakers like Penn. Yet Williams’s disquieting limitations in his “Ship of State” letter are a rare aberration to the unity of thought expressed in his writings. Elsewhere, his defense of religious expression is largely unqualified, despite his disdain for most of the religious beliefs he encountered.²⁰ In *The Bloody Tenent*, he asserted that in “spiritual and divine” matters, “. . . the worship which a state professes may be contradicted and preached against, and yet no breach

15. Williams wrote of a “wall of separation between the Garden of the Church and the Wilderness of the world.” ROGER WILLIAMS, MR. COTTON’S LETTER EXAMINED AND ANSWERED, *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (Perry Miller ed., 2005). For Williams, the wall served to protect the church: God had broken down the wall “and made his Garden a Wilderness” and in order “to restore his Garden and Paradise again, it must of necessity be walled in peculiarly unto himself from the world.” *Id.*

16. Williams sought support for this distinction in the writings of Calvin and Beza (questionable allies given their advocacy of the burning of Michael Servetus). 4 THE COMPLETE WRITINGS OF ROGER WILLIAMS, at 264.

17. EDWARD BEATTY, WILLIAM PENN AS SOCIAL PHILOSOPHER 123 (1939).

18. Letter from Roger Williams to the Town of Providence (Jan. 1654) in 6 THE COMPLETE WRITINGS OF ROGER WILLIAMS, at 278.

19. *Id.* at 279.

20. Throughout his writings, Williams railed against the beliefs of Jews, Muslims, Quakers, Catholics, Indians, and Anglicans.

of civil peace. And if a breach follow, it is not made by such doctrines, but by the boisterous and violent opposers of them.”²¹

Penn at times cabined his defense of dissent to religious matters: “[W]e have not defended any dissenters, whose quarrel or dissent is rather civil and political, than religious and conscientious; for both we really think unworthy of protection from the English government, who seek the ruin of it.”²² This reliance on the distinction between the religious and the political led him to the same theoretical problems that Williams encountered. Although Penn once wrote of Pennsylvania that “the first fundamental of the government of my country” was “that every person that does or shall reside therein shall have and enjoy the free possession of his or her faith and exercise or worship towards God,” he conditioned his principle upon the requirement that “every such person useth not this Christian liberty to licentiousness, that is to say, to speak loosely and profanely of God, Christ, or religion, or to commit any evil in their conversation.”²³

Despite these limits to his thought, Penn made important advances in rooting conscience in social practice. Nowhere was this more evident than in his defense of the freedom of assembly.²⁴ Penn made clear the communal nature of Quaker gatherings: “For any to say, our Meetings are not Religious, is not only a poor Evasion but great Incharity; for that is properly a Religious Assembly where persons are congregated with a real Purpose of worshipping God, by Prayer, or otherwise”²⁵ In 1670, Penn was arrested and tried for unlawful assembly stemming from

21. 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS, at 96. Williams’s views of religious expression could only have been heightened by the hastening of his banishment in 1636 after complaints were “made to the Court that he would not refrain, in his own house, from uttering his opinions.” Reuben A. Guild, *A Biographical Introduction to the Writings of Roger Williams*, in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS, at 28. Eight years later, Parliament ordered the burning of *The Bloody Tenent*. EDWIN S. GAUSTAD, ROGER WILLIAMS 100 (2005).

22. WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN 119 (Andrew R. Murphy ed., 2001) [hereinafter PENN, POLITICAL WRITINGS].

23. BEATTY, *supra* note 17, at 160. As Edward Beatty has observed, this view “did not guarantee freedom of religion for atheists, nor did it contemplate free speech for those who lacked proper respect for the Christian faith or doctrine.” *Id.* Penn nevertheless grew increasingly nearer to the position that “truth can and must be found by free inquiry and debate.” Hugh Barbour, *William Penn, Model of Protestant Liberalism*, in 48 CHURCH HIST. 164 (1979).

24. For the broader constitutional connections between assembly and social practice, see John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010).

25. PENN, POLITICAL WRITINGS, *supra* note 22, at 118.

a sermon that he delivered to fellow Quakers on Gracechurch Street in London.²⁶ Responding to the charges against him, Penn proclaimed:

We confess our selves to be so far from recanting, or declining to vindicate the Assembling of our selves, to Preach, Pray, or Worship the Eternal, Holy, Just God, that we declare to all the World, that we do believe it to be our indispensable Duty, to meet incessantly upon so Good an Account; nor shall all the Powers upon Earth be able to divert us from Reverencing and Adoring our God, who made us.²⁷

Penn's words and actions were not soon forgotten in Old or New England. When Congressman Sedgwick questioned the value of a right of assembly during the House debates over the language of the Bill of Rights, Congressman Page silenced him with a reference to Penn's trial for unlawful assembly, a reference that Irving Brant characterized as the "equivalent to half an hour of oratory" before the First Congress.²⁸ Yet despite his prominent defense of the inherently communal act of assembly, Penn, like Williams, is remembered today mostly as a defender of individual religious liberty.²⁹

Contrary to the individualistic gloss cast upon Williams and Penn, both men were theological thinkers whose vision of the state presupposed the existence and continued witness of the church. Their attention to liberty of conscience arose out of a Christian particularity that viewed the church as a body of believers rather than a collection of individuals. The modern individualistic gloss on conscience would have sounded foreign to their ears. Williams and Penn also viewed their religious practices as central to all aspects of their lives. They would have rejected the distinction between "public" and "private" that underlies much of contemporary liberalism. In contemporary parlance, they would have rejected the Rawlsian prioritization of the right over the good and insisted upon an inseparable connection between their "comprehensive doctrines" and their political practices.³⁰

26. See Inazu, *supra* note 24, at 575–76.

27. WILLIAM PENN, THE PEOPLE'S ANCIENT AND JUST LIBERTIES ASSERTED, *reprinted in* PENN, POLITICAL WRITINGS, *supra* note 22, at 9–10.

28. Inazu, *supra* note 24, at 575.

29. See, e.g., Presidential Proclamation No. 5284: Honorary United States Citizenship for William and Hannah Penn (Nov. 28, 1984) (recognizing the Penns as among "a small number of men and women whose contributions to [this Nation's] traditions of freedom, justice, and individual rights have accorded them a special place of honor in our hearts and minds").

30. See JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993). For one critique of the Rawlsian move to prioritize the right over the good, see

And yet Williams and Penn also maintained a distinction between church and state. Theirs was not a *theocratic* vision. Williams and Penn, after all, *were* the state.³¹ If their theological vision had been theocratic, then their attention to conscience and separation would have been either an incoherent sideshow or an irrational hedging of bets (a futile attempt to prevent those who came after them from changing the rules). To be sure, both Williams and Penn imposed some limits on liberty of conscience that we would rightly reject today. But those limits are better seen as imperfect manifestations of freedom of conscience than deliberate attempts at theocracy—Williams and Penn left far too much room for dissenting practices to be labeled as theocrats. In this respect, their concern for liberty of conscience distances them not only from today's secular liberals but also from religious believers who ignore or diminish the protections of conscience for those outside of the church. Consider, for example, some segments of the evangelical right who advocate a return to a historically implausible "Christian America."³²

MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1998). Importantly, opposition to Rawlsian ontology does not align with "conservative" and "liberal" labels. See, e.g., JASON C. BIVINS, *THE FRACTURE OF GOOD ORDER: CHRISTIAN ANTLIBERALISM AND THE CHALLENGE TO AMERICAN POLITICS* (2003). Religious believers who accept liberalism's premise of privatized religion pose far less of a threat to liberal political theory. See Mario M. Cuomo, *Religious Belief and Public Morality*, N.Y. REV. OF BOOKS, Oct. 25, 1984, at 32 ("Our public morality, then—the moral standards we maintain for everyone, not just the ones we insist on in our private lives—depends on a consensus view of right and wrong. The values derived from religious belief will not—and should not—be accepted as part of the public morality unless they are shared by the pluralistic community at large, by consensus."). This is not to say that these religious believers never dissent on discrete policy matters. Religious believers of all kinds oppose government policies about capital punishment, decisions to engage in war, and other issues. But believers who accept the premises of contemporary liberalism generally challenge government policies from a position that accepts and often legitimates the fundamental authority of the state. See Stephen L. Carter, *Liberalism's Religion Problems*, FIRST THINGS, Mar. 2002, at 21, 35. ("The conflict with liberal theory . . . is posed not by those faith traditions that surrender to the pull of the world but by those that struggle against it, exercising their power of resistance.").

31. While much of what Williams and Penn wrote on conscience and separation preceded their political rule, their later writings and political practices generally reinforced their earlier claims.

32. See, e.g., DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION* (1996); TIM LAHAYE, *FAITH OF OUR FOUNDING FATHERS* (1987); JERRY FALWELL, *LISTEN, AMERICA!* (1980). For a critique of these approaches, see MARK A. NOLL, NATHAN O. HATCH, & GEORGE M. MARSDEN, *THE SEARCH FOR CHRISTIAN AMERICA* 17 (1983), *quoted in* STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN* 185 n.1 (1988) [hereinafter HAUERWAS, *CHRISTIAN EXISTENCE TODAY*].

Among other things, these believers argue for a return of prayer in public schools, the posting of the Ten Commandments in courtrooms, and the display of nativity scenes on public property.³³ Too often, they provide an insufficient account of liberty of conscience for those outside of the church. But not all believers seek to clothe the naked public square. Some aim only to endure the offense of its nakedness.³⁴

III. BETWEEN CHURCH AND STATE

Williams and Penn sought to endure rather than to dominate. While they would have rejected the compartmentalization of faith demanded by contemporary liberalism, they would also have recoiled at the efforts of some contemporary religious believers to tether a kind of religious orthodoxy to the power of the state. They represented a kind of political theology that not only prioritized the witness of the church over the pretensions of the state but also sought to keep the two distinct from one another.

This kind of political theology has been captured more recently by the Mennonite theologian John Howard Yoder. Like Williams and Penn, Yoder sees the state and the rights that it grants as parasitic to the existence of the church:

The enlightenment notion of the morally autonomous individual citizen, bearer of 'inalienable rights,' is a later secular translation of the previous century's puritan conviction that the rights are God's. For the puritan, it is not because the individual is reliable but because God's word must be heard that there must be freedom to assemble, to preach, to print, and to read.³⁵

("[A] careful study of the facts of history shows that early America does not deserve to be considered uniquely, distinctively or even predominantly Christian, if we mean by the word 'Christian' a state of society reflecting the ideals presented in Scripture. There is no lost golden age to which American Christians may return.")

33. One example of these efforts is playing out in debates over public school curriculum in Texas (which, based on the size of its educational system, sets the textbook market for much of the rest of the country). See Russell Shorto, *How Christian Were the Founders?*, N.Y. TIMES MAG., Feb. 11, 2010.

34. The reference is, of course, to RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1986).

35. John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J. L. & RELIGION 417 (1989) [hereinafter Yoder, *Amateur Historian*]. Yoder elaborated this view in notes published by Thomas Shaffer: "[w]hat Milton was fighting for is freedom of press, assembly. [It] [w]as not individual nor individualistic. The stake was the glory of God and the Sovereignty of the Word." THOMAS SHAFFER, MORAL MEMORANDA FROM JOHN

According to Yoder, “[t]here was a long British Puritan history, from the age of Milton to the 1689 Bill of Rights, in the course of which the civil freedoms of speech, press, and assembly arose out of religious agitation, not the other way round.”³⁶ He links these continued developments in the American colonies to Williams and Penn.³⁷ Yoder sees both men as concerned first and foremost with “the authenticity of free Christian allegiance.”³⁸ He cites them as exemplars of the view that “the alternative to buying into the power game according to its rules is to begin a new game.”³⁹ And for Yoder, the story of Williams and Penn “give[s] the lie to those who claim that dissent is necessarily linked to social withdrawal or anarchism.”⁴⁰

HOWARD YODER 102 (2002). Yoder elsewhere develops three aspects of Puritan thought that differ from Enlightenment notions: (1) Puritan proclamation made a canonical claim in which “the Puritan case for the freedoms of speech and assembly appealed to the sovereignty of the Word of God”; (2) Puritan proclamation assumed a congregational structure which “brought forth an alternative social location and an original social shape for the truth-finding process”; and (3) “Puritan proclamation was ecumenical in the sense of recognizing no provincial boundaries, relativizing the clan and the nation, and thereby the state.” JOHN HOWARD YODER, *FOR THE NATIONS: ESSAYS EVANGELICAL AND PUBLIC* 20 (1997) [hereinafter YODER, *FOR THE NATIONS*].

36. Yoder, *Amateur Historian*, *supra* note 35, at 416–17. Cf. Michael McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 16 (2000) (“[T]he struggle for the freedom to publish religious tracts was a precursor to the struggle for the freedom of the press more generally, as the freedom to gather together for purposes of religious worship was for the freedom of assembly.”).

37. YODER, *FOR THE NATIONS*, *supra* note 35, at 20.

38. JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* 187 (1984) [hereinafter YODER, *THE PRIESTLY KINGDOM*].

39. *Id.* at 180.

40. Yoder, *Amateur Historian*, *supra* note 35, at 422. In Yoder’s view, “it was the free churchmen Roger Williams and William Penn who—no less practical for being guided more by their churchman’s experience of the faith community than by England’s experience of royal authority—were first not only to envisage but also to create a commonwealth with religious freedom.” YODER, *THE PRIESTLY KINGDOM*, *supra* note 38, at 180–81. In similarly laudatory language, Yoder writes that “[r]oughly contemporary with that ‘glorious revolution’ the Quaker William Penn was founding a colony with a statutory commitment to religious liberty, democracy, and the rights of Indians. Before him, a century before the Enlightenment and two and a half before Max Weber and Ernst Troeltsch, Roger Williams gave the lie to the legend that people without armies or people called ‘sectarian’ by their persecutors cannot shape society.” JOHN HOWARD YODER, *THE ROYAL PRIESTHOOD: ESSAYS ECCLESIOLOGICAL AND ECUMENICAL* 135–36 (Michael Cartwright, ed., 1994).

Yoder's reliance on Williams and Penn is complicated by the fact that both colonial leaders were able to "begin a new game"⁴¹ by claiming a new territory and establishing a new civil authority. That option no longer exists—the church today always confronts the state and its laws. But this present reality also reinforces the relational dimension of conscience rooted in social practice. As Yoder recognizes, the church exists as a communal, decision-making body that bears witness through its collective action and voice. It is not a collection of individuals but a political body.⁴² Yoder insists that while today "the application of the term *political* to the state rather than to the church is so well established that it cannot be combated . . . in biblical thought the church is properly a political entity, a *polis*."⁴³ Similarly, the *ekklesia* of the New Testament "did not mean what *church* means in modern usage: it meant parliament or town meeting, a gathering in which serious business can be done in the name of the kingdom."⁴⁴ For believers like Yoder, that church will never be the state but it will always be political.

Yoder's insights have been appropriated more recently by the theologian Stanley Hauerwas.⁴⁵ Like Yoder, Hauerwas seeks neither to

41. YODER, *THE PRIESTLY KINGDOM*, *supra* note 38, at 180.

42. My use of the terms "politics" and "political" to describe the church follows Yoder and Stanley Hauerwas. James Davison Hunter has recently criticized Hauerwas for using the terminology: "The use of the language of politics is a bid to translate social marginality into social relevance. The problem is that this language comes with all sorts of baggage and it cannot rid itself of this baggage." JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 163 (2010). I find Hunter's critique misguided. Critical theorists have long challenged the state's monopoly on the meaning of "politics" in ways that are helpful to stimulating political imagination; there is good reason for arguments rooted in political theology to do the same.

43. JOHN HOWARD YODER, *THE CHRISTIAN WITNESS TO THE STATE* 17–18 (2002).

44. YODER, *FOR THE NATIONS*, *supra* note 35, at 186–87. There is a rich political-theological meaning to assembly (*ekklesia*). See BERND WANNENWETSCH, *POLITICAL WORSHIP: ETHICS FOR CHRISTIAN CITIZENS* 138 (Margaret Kohl, trans., 2004) (explaining that the Christian use of *ekklesia* "had a distinctly political colouring"); WAYNE A. MEEKS, *THE FIRST URBAN CHRISTIANS: THE SOCIAL WORLD OF THE APOSTLE PAUL* 108 (1983) (explaining that the first Christians "seem[ed] early on to have been using [*ekklesia*] in a peculiar way that must have been puzzling to any ordinary Greek" because the term "name[d] not just the occasional gathering, but the group itself"); SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 96 (2004) (stating that the *ekklesia* viewed itself "as a polity, over other political entities").

45. Although Hauerwas is not read widely by political theorists or legal scholars, he has arguably "articulated the most coherent and influential political theology in and for the North American context." R. R. Reno, *Stanley Hauerwas*, in *THE BLACKWELL COMPANION TO POLITICAL THEOLOGY* 302 (Peter Scott & William Cavanaugh, eds., 2004).

control legal institutions to impose his own religiously informed conception of the good nor to withdraw from society.⁴⁶ Hauerwas insists that the church occupies a political space that is neither privatized nor subsumed by the state:

When “Christianity” becomes separable from the social form in which it is to be embodied, two things happen: one, Christian belief gets located in an interior, asocial sphere, “the heart” or “conscience” or some other private (i.e., non-public) space, and this degenerates into “mere belief”; and two, in consequence of the first, a “public” space is cleared away for a counterfeit form of “religion” to emerge that is said to be “common” and thus become “the religion of the nation.” What gets obscured in this arrangement is the possibility of a Christianity the material form of which is located neither in a private space nor in a general public space, but the body of believers, in the church.⁴⁷

Hauerwas argues that the church is a “contrast model” against the liberal practices that underlie the authority of the state.⁴⁸ His conception of the church is inherently dissenting: “Learning to speak as a Christian is to acquire habits that will put me at odds with the world.”⁴⁹ He insists that the church has ontological primacy over the state: “[w]ithout the church the world would have no history.”⁵⁰ It is from this starting point, “from the life of the church, past, present, and future, that [Christians] even come to understand the nature of politics and have a norm by which all

Jeffrey Stout calls Hauerwas “the most prolific and influential theologian now working in the United States,” and suggests that “[t]he more thoroughly Rawlsian our law schools and ethics centers become, the more radically Hauerwasian the theological schools become.” JEFFREY STOUT, *DEMOCRACY AND TRADITION* 75, 140 (2004).

46. While Hauerwas challenges the notion “that the only option for Christians is either *complete* involvement in culture or *complete* withdrawal,” HAUERWAS, *CHRISTIAN EXISTENCE TODAY*, *supra* note 32, at 11, he is often called “sectarian.” For a summary of these characterizations, and Hauerwas’s repeated denial of them see STOUT, *supra* note 45, at 140–61.

47. Stanley Hauerwas & Michael Baxter, *The Kingship of Christ: Why Freedom of “Belief” is Not Enough*, 42 DEPAUL L. REV. 107, 119–20 (1992).

48. STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* 84 (1981) [hereinafter HAUERWAS, *COMMUNITY OF CHARACTER*].

49. STANLEY HAUERWAS & WILLIAM H. WILLIMON, *WHERE RESIDENT ALIENS LIVE: EXERCISES FOR CHRISTIAN PRACTICE* 78 (1996).

50. HAUERWAS, *CHRISTIAN EXISTENCE TODAY*, *supra* note 32, at 61. This is “the most determinative realist claim Christians can possibly make.” *Id.*

other politics can be judged.”⁵¹ These provocative claims do not shy from controversy, but neither are they theocratic claims.⁵²

For all of his insights that shape his understanding of the church, Hauerwas offers a thin account of the state. He might say that he has no need for such an account, but to this extent, he diverges from Williams and Penn (and Yoder, to the extent that Yoder relies on Williams and Penn). In fairness to Hauerwas, it is wrong to suggest that he dismisses any vision for the state. For example, he has written that “[w]hat is required for Christians is not withdrawal but a sense of selective service and the ability to set priorities.”⁵³ And in an early essay coauthored with Thomas Shaffer, Hauerwas praised the iconic Thomas More as an example “of those who wield power but who try to live truthfully.”⁵⁴ But Hauerwas remains at odds with legal institutions when he claims that “Christians must withdraw their support” from any form of government and society that “resorts to violence in order to maintain internal order and external security.”⁵⁵ This aversion to the state and its legal apparatus matters in the constitutional context that frames the questions of this symposium. Religious believers who want to engage with constitutional protections need constitutional arguments, and Hauerwas cannot get them there.⁵⁶ But we can move closer to the intersection of political

51. HAUERWAS, *COMMUNITY OF CHARACTER*, *supra* note 48, at 2.

52. Hauerwas contrasts his work to that of theologian John Milbank. See STANLEY HAUERWAS, *PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE* 217 n.4 (2004) [hereinafter HAUERWAS, *PERFORMING THE FAITH*] (“The most profound difference has to do with why I think enduring is so important for how Christians are to learn to live in the world as we find it. Milbank wants Christians to win . . . I think at best we should want Christians to endure.”). See JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* (2006), for Milbank’s seminal work.

53. HAUERWAS, *CHRISTIAN EXISTENCE TODAY*, *supra* note 32, at 15; see also *id.* at 11 (“The issue is how the church can provide the interpretive categories to help Christians better understand the positive and negative aspects of their societies and guide their subsequent selective participation.”).

54. Stanley Hauerwas & Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 *NOTRE DAME L. REV.* 569, 583 (1979). Hauerwas and Shaffer also argue that “the most elementary hope that law has” is that “analysis and knowledge will go a long way toward containing power.” *Id.* at 578.

55. HAUERWAS, *CHRISTIAN EXISTENCE TODAY*, *supra* note 32, at 15; see also STOUT, *supra* note 45, at 148 (making a similar critique of Hauerwas).

56. An interesting question is whether Hauerwas’ aversion to liberal constitutionalism renders him a *de facto* sectarian, notwithstanding his protests to the contrary. At a minimum, Hauerwas differs from those who advocate complete withdrawal because he directs some of his arguments toward interlocutors outside of his

theology and constitutionalism (and the antecedent political practices of Williams and Penn) by turning to the work of constitutional law scholar H. Jefferson Powell.⁵⁷

Powell shares both Hauerwas's wariness toward liberalism and his recognition that violence underlies the functions of the state.⁵⁸ In fact, he sharpens Hauerwas's critiques by injecting Robert Cover's important insights about the violence inherent in the law.⁵⁹ He adopts Cover's view that:

[O]ne of the primary functions of American courts is "jurispathic": by declaring the "imperial" *nomos* of the nation, judges (attempt to) kill or destroy the contrary *nomoi* of subnational, ethnic, and religious groups. A system of constitutional rights, grounded upon the basis of the will of the people, is necessarily intolerant, even in its enforcement of a liberal tolerance.⁶⁰

Powell differs from Hauerwas in his openness toward constitutional practices that limit (but do not eliminate) the state's jurispathic tendencies. He hints at this openness in his 1993 book, *The Moral Tradition of American Constitutionalism*: "An authentically theological approach to social criticism does not require the avoidance of all nontheological methods any more than a theological critique of cosmology must eschew quantum mechanics. Theology by itself does not generate all of the tools necessary to engage in many theological tasks."⁶¹ He is more explicit in an essay eight years later, arguing that

community. See HAUERWAS, PERFORMING THE FAITH, *supra* note 52, at 232 n.33 (2004) ("I wish those who constantly accuse me of 'sectarianism' might from time to time ask themselves why they are so angry about what I say. If I have 'withdrawn' from 'public' debates surely I am not worth the time they spend in attacking me."). *But cf.* STANLEY HAUERWAS, A BETTER HOPE: RESOURCES FOR A CHURCH CONFRONTING CAPITALISM, DEMOCRACY, AND POSTMODERNITY 24 (2000) ("I have never sought to justify Christian withdrawal from social and political involvement; I have just wanted us to be involved as Christians.").

57. The move from Hauerwas to Powell is unsurprising: Hauerwas supervised Powell's doctoral studies, and the two share many of the same philosophical and theological influences.

58. See, e.g., H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 91 (Michael W. McConnell et al. eds., 2001); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 269–70 (1993) [hereinafter POWELL, MORAL TRADITION].

59. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

60. POWELL, MORAL TRADITION, *supra* note 58, at 273.

61. *Id.* at 266.

Christians may have “good theological reasons to support the legal enforcement of certain individual rights as a strategy for protecting and promoting the temporal peace of American society.”⁶² While the American obsession for individual rights is cause for concern, “the language of individual rights is at the same time the most effective means—often the only effective means—of raising questions about social justice and social peace.”⁶³ As Powell argues:

For all the questionable decisions American courts have made in elaborating the current constitutional law of individual rights, the overall effect of much of that law has been “to promote the well-being of the common people” by imposing procedural and substantive restraints on the government’s use of violence, by imposing significant limitations on government’s ability to exclude identifiable groups from equal treatment, and by prohibiting most governmental interference with criticism of government.⁶⁴

Unlike Hauerwas the theologian, Powell the lawyer participates in shaping these rights.⁶⁵ He does not “underwrite uncritical Christian support for the American legal system,”⁶⁶ but he envisions an active engagement with democratic practices and wants “to suggest ways in which Christians involved in the constitutional order (as lawyers, school board members, voters, or victims) can rightly respond to the demands and the pretensions of [American constitutionalism].”⁶⁷ As he notes, the purpose of this engagement is to limit the hold of the democratic process

62. Powell, *supra* note 58, at 86. Powell makes this argument within an Augustinian framework. See also JEAN BETHKE ELSHTAIN, *AUGUSTINE AND THE LIMITS OF POLITICS* 21 (1995) (explaining that Christians “can use the political order because it introduces regularity into social relations and thus helps to make possible the life of the Church”); ERIC GREGORY, *POLITICS AND THE ORDER OF LOVE: AN AUGUSTINIAN ETHIC OF DEMOCRATIC CITIZENSHIP* 381 (2008) (explaining that the church can “use liberal politics along the way to enjoying the politics of an infinite God”).

63. *Id.* Powell offers a qualified endorsement of the value of the language of “individual rights.” He is highly critical of excessive “rights talk” and shows little patience for the “American selfishness” to which it leads. *Id.* at 84 (“The constant refrain ‘it’s my right’ undermines efforts to promote a sense of loyalty to society. Most fundamentally, the American fetish of individual rights reinforces and furthers the tendencies to selfish and antisocial behavior that underlie and warp American society.”).

64. *Id.* at 86.

65. On this point, it is important to note that Powell has served in both the federal and state governments, as a Deputy Assistant Attorney General and as principal Deputy Solicitor General in the United States Department of Justice, and as Special Counsel to the Attorney General of North Carolina.

66. POWELL, *MORAL TRADITION*, *supra* note 58, at 8.

67. *Id.*

on other communities: “[t]he ultimate goal of the positive case for democracy . . . is actually to *reduce* the sphere in which the coercive power of the democratic process holds sway by strengthening the voices of disagreement and dissent that can challenge the exercise of dominion.”⁶⁸ In a critique that could be leveled at Hauerwas, Powell writes that “[a] blanket refusal to employ the linguistic and institutional resources of constitutionalism . . . ignores the real (if limited) possibility of using constitutional argument to enhance the ability of the victim and the outsider to be heard.”⁶⁹

Powell’s emphasis on “the victim and the outsider” links his theology to his constitutionalism. It also brings us one step closer to Williams and Penn. The “right of dissent that Christian experience and reflection has shown to be theologically mandated”⁷⁰ is not confined to orthodoxy—it extends not only to the Christian church but also to the Muslim mosque, the Unitarian gathering, and the metaphysical club. This theological view of religious freedom challenges the church to resist the political constraints that the state places upon *other* religious and even non-religious practices. Williams and Penn embodied similar views. Both men were among the leading proponents of their day for respecting the religious and political integrity of Native Americans. And while they thought Native American religious views and practices misguided, they did not tolerate them merely instrumentally. The usually implacable Williams even showed a glimmer of epistemological humility in his encounter with Native American spirituality: “I find what I could never hear before, that they have plenty of Gods or divine powers.”⁷¹

Williams’s and Penn’s concern for Native Americans suggests that the integrity of the church need not come at the cost of ignoring or marginalizing other religious or nonreligious practices. Yoder and

68. *Id.* at 287.

69. *Id.* at 11.

70. *Id.* at 291–92. In context, Powell advocates for Christian support of “majoritarian processes in the United States, at least when policed by [a certain kind of] limited judicial activism.” *Id.* However, he makes clear that this is a contingent judgment and that “[a]t other points in history a contrary Christian judgment may have been appropriate.” *Id.* at 292 n.121. *See id.* (“During the period of massive resistance to *Brown v. Board of Education*, for example, it probably was appropriate to stress judicial freedom and authority.”).

71. 6 THE COMPLETE WRITINGS OF ROGER WILLIAMS 88 (Perry Miller ed., 2005).

Hauerwas have made similar claims.⁷² But it might be that affirming the dignity of others today requires a kind of political engagement beyond what Yoder and Hauerwas have theorized. Powell suggests that one way to do so is through the state's legal apparatus. That creates an uneasy alliance. It mixes forms of dissent with forms of power in ways that risk distorting teleology and eschatology. But it also gestures toward an enduring presence that seeks neither to dominate nor to withdraw. Williams and Penn offer a similar lesson. But theirs is a theological lesson, and one easily missed by ignoring or misconstruing the context in which they wrote and lived.

72. See JOHN HOWARD YODER, *THE ROYAL PRIESTHOOD: ESSAYS ECCLESIOLOGICAL AND ECUMENICAL* 256 (Michael Cartwright, ed., 1994) (“[T]he kerygmatic truth claim stands in no tension with a posture of dialogue that affirms fully the dignity of the interlocutor.”); STANLEY HAUERWAS & ROMAND COLES, *CHRISTIANITY, DEMOCRACY, AND THE RADICAL ORDINARY: CONVERSATIONS BETWEEN A RADICAL DEMOCRAT AND A CHRISTIAN* (2007).