

Introduction

My overarching aim in this book is to elaborate and to defend an account – an understanding – of the political morality of liberal democracy.¹ By “political” morality, I mean the moral convictions and commitments that govern decisions about what laws to enact (or to maintain on the books), what policies to pursue, such as:²

- Should we retain capital punishment – or abolish it? (By “we,” I mean here “we the citizens of a liberal democracy, acting through our elected representatives.”)
- Should we ban abortion – or permit it?
- Should we ban physician-assisted suicide – or permit it?
- Should we refuse to extend the benefit of law to same-sex unions – or should we create civil unions for same-sex couples, and if so, should we call such unions “marriages”?
- Should we affirm, as a fundamental human right, freedom from severe poverty?

And so on. (I discuss abortion and same-sex unions in Chapters 7 and 8.) Such questions are not just moral questions, but they are, in part, moral questions: questions about what is morally right or morally wrong for us to do or not to do. And the political morality of liberal democracy, as I explain in this book, bears directly on such questions.

This book is my contribution to the Christian Jurisprudence Project, sponsored by the Center for the Study of Law and Religion at Emory Law School. As I originally conceived it, the book was to be about, and only about, an issue I have addressed in some of my

¹ Aidan O'Neill uses the term “post-Nuremberg democracy.” Aidan O'Neill, “Roman Catholicism and the Temptation of *Shari'a*,” 15 COMMON KNOWLEDGE 269, 297 et seq. (2009).

² Not that considerations other than moral convictions and commitments – including, of course, “political” considerations, in the popular sense of the term – don't govern such decisions.

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previous books: the proper role of religion in the politics and law of a liberal democracy. As I began to draft the book, however, my focus broadened to include several other issues that have engaged me over the years.

In the mid-1970s, at the beginning of my career as a law professor, I was principally engaged by – and I remain engaged by – constitutional controversies that are closely aligned with moral controversies: the constitutional controversy, for example, over laws banning abortion.³ (I have also been engaged by the related question of the courts' proper role – especially the U.S. Supreme Court's proper role – in resolving such controversies.⁴) I was soon confronted by the question of the proper relationship of morality to constitutional law.⁵ Because for most citizens of the United States morality is religiously grounded, another question – one that would become for me a scholarly obsession – quickly came into view: the proper role of religion in the politics and law of a liberal democracy.⁶ Before long I was in the grip of this large question: Can any worldview that is not religious support – embed – the twofold claim to which liberal democracy is, as such – as *liberal* democracy – committed, namely, that each and every human being has equal inherent dignity and is inviolable?⁷

I can now see, in retrospect, that each of the principal questions that have engaged me over the course of my career concerns one or another aspect of the political morality of liberal democracy; in particular, each question concerns the grounding, the content, the implications for one or another moral controversy, or the judicial enforcement of the political morality of liberal democracy. In this

³ My first article was "Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process," 23 UCLA L. REV. 689 (1976).

⁴ See Michael J. Perry, *The Constitution, the Courts, and Human Rights* (1982); Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (1994); Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (1999); Michael J. Perry, *Constitutional Rights, Moral Controversy, and the Supreme Court* (2009).

⁵ See Michael J. Perry, *Morality, Politics, and Law* (1988).

⁶ See Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (1991); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (1997); Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* (2003).

⁷ See Michael J. Perry, *The Idea of Human Rights* (1998); Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (2007).

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book, I address all four aspects: grounding, content, implications, and judicial enforcement.⁸

Although broader in scope than I first conceived it, this remains a book about – although, now, only partly about – the proper, *and properly limited*, role of religious faith in the politics and law of a liberal democracy. The religious faith I know best is Christianity; my religious tradition is Roman Catholic. The liberal democracy I know best is the United States. Most of what I say in this book, however, is meant to speak to citizens of every liberal democracy – and to speak to them without regard to whether they are Christians or even religious believers. Nonetheless, the particular perspective from which this book is written – *my* perspective – is that of a citizen of the United States who, like most citizens of the United States, is a Christian.

Of the world's liberal democracies, the United States is one of the most religious.⁹ Moreover, the United States, although predominantly Christian, has become one of the most religiously diverse countries in the world.¹⁰ According to a survey published in 2008 by the Pew Forum on Religion and Public Life, three out every four adult Americans identify as members either of a Protestant church or of the Catholic Church: 26.3% as members of “evangelical Protestant churches”; 18.1%, “mainline Protestant churches”; 6.9%, “historically black churches”; and 23.9%, the Catholic Church. Mormons account for only 1.7% of the adult population; Jehovah's Witnesses, 0.7%; Orthodox Christians, 0.6%; and “other Christians,” 0.3%. Jews account for 1.7%; Buddhists, 0.7%; Muslims, 0.6%; and Hindus, 0.4%. Adherents of “other world religions” account for less than 0.3%; adherents of “other faiths,” 1.2%. Those who identify as “unaffiliated” – a group that includes atheists (1.6%), agnostics (2.4%), and those claiming “nothing in particular” (12.1%) – account for

⁸ Along the way, I borrow from and develop earlier work.

⁹ See Jeffrey L. Sheler, “Faith in America,” *U.S. NEWS*, May 6, 2002, at 40, 42: “The United States may well be, as many experts claim, the most religious of the Western democracies.”

¹⁰ See Diana Eck, *A New Religious America: How a “Christian Country” Has Become the World's Most Religiously Diverse Nation* (2001). See also Sheler, n. 9, at 42: “Since the Immigration Act of 1995 eliminated quotas linked to national origin, Muslims, Buddhists, Hindus, Sikhs, Jains, Zoroastrians, and others have arrived in increasing numbers, dramatically altering the religious landscape of many communities. . . . Nationwide, there are now more Buddhists than Presbyterians and nearly as many Muslims as Jews.”

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16.1%; those who “don’t know,” 0.8%.¹¹ That the country is both so religious and so religiously diverse helps to explain why in the United States the question of the proper role of religion in politics and law remains hugely controversial even after more than a generation of sustained debate.¹²

During the time I was writing this book, I would occasionally read something – a book, an article, an op-ed piece, or a blog – and get a whiff of a sentiment to the effect that persons of deep religious faith can be, *at best*, only weakly (halfheartedly) committed to liberal democracy.¹³ (“All religion is toxic to the liberal project, something we should have learned from the events of September 11, 2001 . . . Enlightenment rationalism, not religion, made liberal democracy possible.”¹⁴) I hope this book demonstrates just how confused and mistaken – indeed, how ignorant – such a sentiment is.¹⁵

¹¹ <http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf>.

¹² Since the early 1980s, a large literature has emerged, principally in the United States, about the legitimacy *vel non* of religiously grounded morality as a basis of law – in particular, of *coercive* law – in a liberal democracy. That literature includes three books of my own. See n. 6. For some other, important contributions to the literature, see Richard John Neuhaus, *The Naked Public Square: Religion and Politics in America* (2d ed. 1986); Kent Greenawalt, *Religious Convictions and Political Choice* (1988); Stephen L. Carter, *The Culture of Disbelief* (1993); Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (1997); Kent Greenawalt, *Private Consciences and Public Reasons* (1997); Paul J. Weithman, ed., *Religion and Contemporary Liberalism* (1997); Robert Audi, *Religious Commitment and Secular Reason* (2000); Symposium, “Religiously Based Morality: Its Proper Place in American Law and Public Policy?” 36 WAKE FOREST L. REV. 217–570 (2001); Christopher J. Eberle, *Religious Convictions in Liberal Politics* (2002); Paul J. Weithman, *Religion and the Obligations of Citizenship* (2002); Terence Cuneo, ed., *Religion in the Liberal Polity* (2005).

Not everything I say in this book is consistent with everything I have said in my earlier writings. (For example, in Chapter 6, I argue *for* a position I argued *against* in chapter 2 of *Under God?*, n. 6.) “Only the hand that erases can write the true thing,” said Meister Eckhart.

¹³ See, e.g., Mark Lilla, “The Politics of God,” NEW YORK TIMES, Aug. 9, 2007; Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (2007); Stanley Fish, “Liberalism and Secularism: One and the Same,” NEW YORK TIMES online, <http://fish.blogs.nytimes.com/2007/09/02/liberalism-and-secularism-one-and-the-same/>.

¹⁴ This is how Thomas F. Farr summarizes the sentiment – which he rejects – in his book *World of Faith and Freedom: Why International Religious Liberty Is Vital to American National Security* (2008), at xi.

¹⁵ In commenting on Lilla’s *The Stillborn God* (see n. 13), Damon Linker writes:

Lilla appears to have been led to this extreme and unconvincing position [that the authenticity of a political-theological view is determined entirely by its willingness to challenge by force of arms the legitimacy of all governments that fall short of complete conformity to divine law] by his desire to place the United

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Religious believers, no less than nonbelievers, can, and many do, enthusiastically affirm the political morality of liberal democracy; moreover, many religious believers affirm the political morality of liberal democracy partly *on the basis of their religious faith*. Of course, given that the citizenry of liberal democracies – not least, the citizenry of the United States – includes many religious believers, no elaboration of the political morality of liberal democracy according to which religious faith is, as such, necessarily illiberal would be a plausible elaboration.

Again, this book is my contribution to the Christian Jurisprudence Project, sponsored by Emory Law School's Center for the Study of Law and Religion, funded by the Alonzo L. McDonald Family Agape Foundation, and directed by my colleagues (and friends) John Witte Jr. and Frank S. Alexander. I am grateful to John and Frank for inviting me to participate in the project and to the Foundation – in particular, to Ambassador Alonzo McDonald, his son Peter, and the other Foundation Trustees – for generous financial support. I am also grateful, for helpful discussion, to the other participants in the project. Of course, nothing I say in this book necessarily reflects the views of the Foundation or of the Center for the Study of Law and Religion, where I am privileged to be a Senior Fellow.

States, along with the world's other liberal democracies, firmly on the opposite shore from political theology. . . . The reality, however, is more complicated than this. Not only does the United States need to cope with the political theologies that dominate the Islamic world. Americans who engage in political reflection without reference to religion also need to come to grips with the presence of political theology right here at home – with the fact that millions of their fellow citizens are perfectly comfortable making theological assumptions about the political foundations of the nation, its principles, and its institutions.

Damon Linker, "Political Theology in America," *Cato Unbound*, <http://www.cato-unbound.org/2007/10/10/damon-linker/political-theology-in-america/>. Micah Watson makes a similar criticism:

The American constitutional experiment in religious liberty was made possible in part not only by those who adhered to Hobbes's "great separation," but by many who saw religious toleration and church-state separation as themselves reflective of God's will for politics. In other words, Lilla does not consider the possibility that the most authentic *Christian* understanding of the New Testament may very well be congruent with much of the American approach to religion and politics.

Micah Watson, Book Review, 50 J. CHURCH & STATE 158, 159 (2008). See also Daniel Philpott, "Political Theology and Liberal Democracy, The Immanent Frame," http://www.ssrc.org/blogs/immanent_frame/2008/01/23/political-theology-liberal-democracy/.

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I owe a special word of thanks to the fourteen scholars – philosophers, theologians, and professors of law – who gathered in Atlanta in April 2008, for a roundtable sponsored by the Center for the Study of Law and Religion, to discuss several chapters of this book.

And, as always, I am greatly indebted to my perennially indispensable conversation partners: my students, who in this case include not only my students at Emory Law, where I have taught since August 2003, but also my students at the University of Western Ontario (Canada) School of Law, where I taught a January term course in 2009. While in productive conversation with my students at Western Law, I turned the penultimate draft of this book into the final draft.

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Part I

Liberal Democracy, Human Rights,
and Religious Faith

1

Liberal Democracy and Human Rights

Not every country that advertises (or advertised) itself as a democracy is (was) in fact a democracy. Two examples: The official name of North Korea, translated into English, is the Democratic People's Republic of Korea; the official name of East Germany, translated into English, was the German Democratic Republic.¹ And not every country that can plausibly advertise itself as a democracy² is a *liberal* democracy: a

¹ See Kenneth Roth, "Despots Masquerading as Democrats," in human rights watch, *WORLD REPORT* 1, 7 (2008): "As the Burmese junta rounded up protesting monks and violently suppressed dissent, it spoke of the need for 'disciplined democracy.' China has long promoted 'socialist democracy,' by which it means a top-down centrism that eliminates minority views." See Associated Press, "Report Says Democracies Enable Despots," *NEW YORK TIMES*, Jan. 31, 2008:

Authoritarian rulers are violating human rights around the world and getting away with it largely because the U.S., European and other established democracies accepts their claims that holding elections makes them democratic, Human Rights Watch said in its annual report [today].

By failing to demand that offenders honor their citizens' civil and political rights and other requirements of true democracy, Western democracies risk undermining human rights everywhere, the international rights watchdog said.

Still, Kenneth Roth, Human Rights Watch's executive director, wrote in a segment of the report called "Despots Masquerading as Democrats": "It is a sign of hope that even dictators have come to believe that the route to legitimacy runs by way of democratic credentials."

² For a "modest" definition of democracy, see Andrew Koppelman, "Talking to the Boss: On Robert Bennett and the Counter-Majoritarian Difficulty," 95 *NORTHWESTERN U. L. REV.* 955, 956–57 (2001):

[Joseph] Schumpeter...proposes the following, more modest definition of democracy: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." The people influence political decisions by voting in elections and "do not control their political leaders in any way except by refusing to reelect them or the parliamentary majorities that support them."...

The politician is vulnerable to losing his office unless he continuously manages to attract votes. This creates an incentive for him to pay attention to what voters want. And this incentive guarantees that, in a democracy, the government

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democracy committed, first, to the proposition that each and every human being has inherent dignity and is inviolable and, second, to certain human rights against government – that is, against lawmakers and other government officials – such as the right to freedom of religion.³ The union of the two most widely affirmed political-moral

will not act in a way that attracts the wrath of an electoral majority – or, if it does, that it won't keep it up for long.

(Quoting Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* [3d ed. 1950].) According to Koppelman, “[Joseph] Schumpeter is entirely free of . . . mushy sentimentalism about majoritarianism. . . .” *Id.* at 956. See also Richard A. Posner, “Enlightened Despot,” *NEW REPUBLIC*, Apr. 23, 2007, at 53, 54: “Political democracy in the modern sense means a system of government in which the key officials stand for election at relatively short intervals and thus are accountable to the citizenry.”

- ³ Not that this is the only way to conceive of what makes a democracy a *liberal* democracy: Not everyone who affirms liberal democracy also affirms the idea of “inherent human dignity.” Nonetheless, the conception of liberal democracy articulated in the text is not only common; it is, for many, the most morally attractive conception. Philosopher Thomas Nagel has written that “[t]he term ‘liberalism’ applies to a wide range of political positions. . . . But all liberal theories have this in common: they hold that the sovereign power of the state over the individual is bounded by a requirement that individuals remain inviolable in certain respects. . . . The state . . . is subject to moral constraints that limit the subordination of the individual to the collective will and the collective interest.” Thomas Nagel, “Progressive but Not Liberal,” *NEW YORK REV. OF BOOKS*, May 25, 2006. Similarly, philosopher Charles Larmore has argued that “our commitment to [liberal] democracy . . . cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons.” Charles Larmore, “The Moral Basis of Political Liberalism,” 96 *J. PHILOSOPHY* 599, 624–25 (1999). See also Jeffrey Stout, “A House Founded on the Sea: Is Democracy a Dictatorship of Relativism?,” 13 *COMMON KNOWLEDGE* 385, 387 (2008): “[D]emocracy, rightly understood, derives its legitimacy in part from ‘the affirmation that the human person, unlike animals and things, cannot be subjected to domination by others’” (quoting Pope John Paul II, *The Gospel of Life: Evangelium Vitae* 33 [1995]). Cf. Samuel Brittan, “Making Common Cause: How Liberals Differ, and What They Ought To Agree On,” *TIMES LIT. SUPP.*, Sept. 20, 1996, at 3, 4:

[P]erhaps the litmus test of whether the reader is in any sense a liberal or not is Gladstone’s foreign-policy speeches. In [one such speech,] taken from the late 1870s, around the time of the Midlothian campaign, [Gladstone] reminded his listeners that “the sanctity of life in the hill villages of Afghanistan among the winter snows, is as inviolable in the eye of almighty God as can be your own . . . that the law of mutual love is not limited by the shores of this island, is not limited by the boundaries of Christian civilization; that it passes over the whole surface of the earth, and embraces the meanest along with the greatest in its unmeasured scope.” By all means smile at the oratory. But anyone who sneers at the underlying message is not a liberal in any sense of that word worth preserving.

Listen, too, to Herman Melville: “But this august dignity I treat of, is not the dignity of kings and robes, but that abounding dignity that has no robed investiture. Thou shalt see it shining in the arm that wields a pick or drives a spike; that democratic dignity which, on all hands, radiates without end from God Himself! The great God absolute!

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ideals of our time – democracy and human rights – yields a third great political-moral ideal: liberal democracy. Or, as Aidan O'Neill has termed it: post-Nuremberg democracy.⁴

To say that a democracy is committed to the proposition that every human being has inherent dignity and is inviolable is to say that in the political culture of the democracy, the proposition is axiomatic. To say that a democracy is committed to a human right against government is to say that in the legal system of the democracy, the right is recognized and protected as a fundamental legal right. More precisely, a democracy is committed to a human right against government, understood as a *moral* claim of a special sort – a moral claim about what government may not do to human beings, or about what government must do for human beings, given that every human being has inherent dignity and is inviolable – if in the legal system of the democracy the moral claim is recognized and protected as a fundamental *legal* claim.

Let's begin our inquiry into the political morality of *liberal* democracy by examining the proposition to which, as I said, liberal democracy is, as such – as *liberal* democracy – committed: Every human being has inherent dignity and is inviolable. I call that proposition, for a reason that will soon be apparent, “the morality of human rights.”

I. THE MORALITY OF HUMAN RIGHTS

The name of my state of origin – Kentucky – is said by some to derive from a Native American word meaning “a dark and bloody ground.” An apt name for our century of origin is a dark and bloody time – indeed, *the* dark and bloody time: The twentieth century “‘was the bloodiest in human existence,’ . . . not only because of the total number of deaths attributed to wars – 109 million – but because of the fraction of the population killed by conflicts, more than 10 times more than during the 16th century.”⁵ However, the list of twentieth-century horrors includes much more than wars. As the century began, King Leopold II of Belgium was presiding over a holocaust in the Congo;

The centre and circumference of all democracy! His omnipresence, our divine equality!”
 Herman Melville, *Moby Dick* 126 (Penguin Classics ed. 1992).

⁴ See Aidan O'Neill, “Roman Catholicism and the Temptation of *Shari'a*,” 15 COMMON KNOWLEDGE 269, 297 et seq. (2009).

⁵ Kim A. McDonald, “Anthropologists Debate Whether War Is Inevitable among Humans,” CHRONICLE OF HIGHER EDUCATION, Nov. 22, 1999 (quoting Carol Nordstrom, an anthropologist at the University of Notre Dame).