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## Christian Dignity and the Overlapping Consensus

Frederick Mark Gedicks

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# Christian Dignity and the Overlapping Consensus

Frederick Mark Gedicks\*

*This Article rejects arguments by Christian leaders, scholars, and others who lament the secularization of the West and urge Christian dignity as the foundation of universal human rights. It argues instead that only a secular conception of dignity free of Christian metaphysics can create an overlapping consensus in support of human rights.*

*Part I describes the roots of Christian dignity in medieval theology and status. Part II briefly recounts how the Renaissance and Enlightenment re-centered the end of dignity from knowing God to knowing oneself, while the Reformation's extension of original sin to the intellect left Catholicism as the primary defender of the medieval dignity tradition in modernity. Part III shows that unprecedented religious difference and moral pluralism in the West make the Christian dignity promoted by religious conservatives implausible as the ground of universal human rights. The theological and natural law underpinnings and the political implications of Christian dignity alienate and exclude unbelievers, non-Christians, and even many Christians, impeding the formation of a stable political consensus supporting human rights. Part IV concludes with observations about why conservative Christians might find the overlapping consensus attractive, and why they might not.*

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## INTRODUCTION: AN UNFIRM FOUNDATION

Human dignity is ubiquitous in contemporary rights discourse. International rights agreements guarantee dignity,<sup>1</sup> as do the constitutions of most Western democracies.<sup>2</sup> Courts throughout the world rely on dignity in deciding human rights cases,<sup>3</sup> and

1. *E.g.*, G.A. Res. 2200A (XXI), at 5 (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200A (XXI), at 1 (Dec. 16, 1966) [hereinafter ICESCR]; Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter EUROPEAN CONVENTION]; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty *pmb.*, *opened for signature* May 3, 2002, C.E.T.S. 187 (entered into force Jan. 7, 2003); *see also* G.A. Res. 217 A, A Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UNIVERSAL DECLARATION].

2. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656 (2008); *e.g.*, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 1, at 15 (Christian Tomuschat et al., trans. 2019) (1949), <https://www.btg-bestellservice.de/pdf/80201000.pdf>; Art. 3 COSTITUZIONE [COST.] (It.).

3. McCrudden, *supra* note 2, at 683–85; *e.g.*, *S.W. v. United Kingdom*, App. No. 20166/92, 21 Eur. H.R. Rep. 363, 402 (1995) (declaring human dignity “the very essence” of the European Convention). Although the U.S. Constitution does not expressly protect human dignity, the U.S. Supreme Court routinely invokes it in constitutional rights decisions. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (sexual-orientation discrimination); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (LGBTQ access to marriage); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (racial discrimination);

scholars, jurists, and clerics on both sides of the Atlantic explore its meaning for human rights.<sup>4</sup>

In concert with conservative Christian leaders who decry the marginalization of Christianity in the West,<sup>5</sup> a strand of dignity scholarship argues the relevance and even preeminence of Christian dignity in relation to human rights. Some scholars contend that secular conceptions of dignity cannot be understood

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Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (sex discrimination); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of Kennedy, O'Connor & Souter, JJ.) (access to abortion); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (married use of contraception); Rochin v. California, 342 U.S. 165, 174 (1952) (bodily integrity).

4. See, e.g., AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (Daniel Kayros trans., 2015); ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2013); CATHERINE DUPRÉ, THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE (2015) [hereinafter C. DUPRÉ]; RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011); GEORGE KATEB, HUMAN DIGNITY (2011); MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE 6068 (2012); MICHAEL E. PERRY, A GLOBAL POLITICAL MORALITY 27–35 (2017); MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012); ANDREA SANGIOVANNI, HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS (2017); JEREMY WALDRON, DIGNITY, RANK & RIGHTS (Meir Dan-Cohen ed., 2015); HUMAN DIGNITY IN CONTEXT: EXPLORATIONS OF A CONTESTED CONCEPT (Dieter Grimm et al. eds., 2018) (hereinafter DIGNITY IN CONTEXT); UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013) [hereinafter UNDERSTANDING DIGNITY]; Jove Jim S. Aguas, *The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla*, 3 KRITKE 40 (2009); Nicholas Aroney, *The Rise and Fall of Human Dignity*, 46 BYU L. REV. 1211 (2021); Jasper Doomen, *Beyond Dignity*, 57 ARCHIV FÜR BEGRIFFSGESCHICHTE 57 (2015); Joel Harrison, *Christian Accounts of Religious Liberty: Two Views of Conscience*, 46 BYU L. REV. 1273 (2021); Stamatina Liosi, *Why Dignity Is Not the Foundation of Human Rights*, 8 PUB. REASON 51 (2017); McCrudden, *supra* note 2; Andrea Pin & Luca P. Vanoni, *Catholicism, Liberalism, and Populism*, 46 BYU L. REV. 1299 (2021); POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM: DIGNITATIS HUMANAЕ, ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN MATTERS RELIGIOUS (1965) [hereinafter DIGNITATIS HUMANAЕ], [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

5. See, e.g., Joint Declaration of Pope Francis and Patriarch Kirill of Moscow and All Russia (Feb. 12, 2016), [http://www.vatican.va/content/francesco/en/speeches/2016/february/documents/papa-francesco\\_20160212\\_dichiarazione-comune-kirill.html](http://www.vatican.va/content/francesco/en/speeches/2016/february/documents/papa-francesco_20160212_dichiarazione-comune-kirill.html); Elder Dallin H. Oaks, Religious Values and Public Policy, Address to the Brigham Young University Management Society, Washington, D.C. (Feb. 29, 1992), <https://www.churchofjesuschrist.org/study/ensign/1992/10/religious-values-and-public-policy?lang=eng>; Rev. Ravi Zacharias, Interview, *Defending Christianity in a Secular World*, 13 ENRICHMENT 20, 21 (Fall 2008); see also Elder Lance B. Wickman, Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All, Address at the 2016 Brigham Young University Religious Freedom Conference (July 16, 2016) (“[T]he sphere for the free and open exercise of religion is shrinking as society grows more indifferent toward religion and as government enforces secular values in areas once considered private.”).

apart from their roots in the Christian tradition.<sup>6</sup> Some go further, suggesting that these roots justify sectarian Christian preferences by the state.<sup>7</sup> Still others insist that only the prism of Christian faith yields the correct view of dignity and human rights.<sup>8</sup>

This essay is addressed to these and others who lament the secularization of Western societies and urge Christian dignity as the foundation of universal human rights. Unprecedented religious difference and moral pluralism in the West have made Christian dignity implausible as the ground for human rights. The theological underpinnings and political implications of Christian dignity alienate and exclude unbelievers, unaffiliated believers, adherents to non-Christian religions, and even many Christians, impeding construction of a firm foundation for human rights. If Christian dignity is to be the ground of human rights, they will rest on a perpetually infirm foundation. Only a political conception of dignity free of Christian metaphysics can provide that foundation.

This essay proceeds in four parts. Part I describes the roots of Christian dignity in medieval theology and status. Part II briefly recounts how the Renaissance and Enlightenment re-centered the end of dignity from knowing God to knowing oneself, while the Reformation's extension of original sin to the intellect left Catholicism as the primary defender of Christian dignity in the face of modernity. Part III, the heart of the Article, shows why grounding universal human rights in Christian dignity is unlikely to underwrite an overlapping consensus about the value and necessity of such rights. Part IV concludes with observations about

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6. See, e.g., GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 19–20, 57–58 (2005); David P. Gushee, *A Christian Theological Account of Human Worth*, in *UNDERSTANDING DIGNITY*, *supra* note 4, at 275, 288; Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 *BYU L. REV.* 957, 962, 964.

7. See, e.g., Scharffs, *supra* note 6, at 964 (defending state-mandated display of crucifix in Italian classrooms by reference to Catholic dignity theology); Adrian Vermeule, *A Christian Strategy*, *FIRST THINGS* (Nov. 2017) (arguing for a Catholic “integralism” that would infuse politics and law with Catholicism); see also STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* 278–79 (tentatively endorsing T.S. Eliot’s vision of a Christian society); Michael Stokes Paulson, *The Priority of God: A Theory of Religious Liberty*, 39 *PEPP. L. REV.* 1159, 1203–06 (2013) (arguing that the Free Exercise Clause of the U.S. First Amendment protects only duties owed to a transcendent Creator-God).

8. See, e.g., Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 *J. CONTEMP. LEGAL ISSUES* 165, 181–92 (2013); Janet Soskice, *Human Dignity and the Image of God*, in *UNDERSTANDING DIGNITY*, *supra* note 4, at 229, 240–43.

why conservative Christians might find the overlapping consensus attractive, and why they might not.

# I. MEDIEVAL DIGNITY

The idea of dignity was present in antiquity,<sup>9</sup> but the idea of Christian dignity arose from theology and social rank in the Middle Ages.

## A. Imago Dei

Early Christians adopted the Jewish belief that the dignity of humankind lies in its creation in the image of God.<sup>10</sup> "And God said: 'Let us make man in our image, after our likeness . . . .' And God created man in His own image, in the image of God created He him; male and female created He them."<sup>11</sup> Christian theology, however, demanded reconciliation of creation in the image of Judaism's monotheist God with Trinitarian doctrine, which teaches that God is three manifestations of a single divine essence. As James Hanvey summarized the problem:

If Christian revelation is true, and God is a Trinity and the human person is made in the image of God, then we must in some way be able to discover the *imago Trinitatis* in the human person. If we cannot, then the coherence of revelation and its truth become questionable.<sup>12</sup>

Augustine argued that the Trinitarian image of the Christian God, imprinted on humankind at creation, is the unity of "memory," "understanding," and "will."<sup>13</sup> These are three manifestations of the "intellect" of the soul, or its power to reason.<sup>14</sup> Creation "in the image of God," therefore, meant the divine

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9. See McCrudden, *supra* note 2, at 656–58; e.g., CICERO, *DE OFFICIIS* bk. I, at 109 (Walter Miller trans., 1913) (44 B.C.E.).

10. See BARAK, *supra* note 4, at 18–21; Sergio Dellavalle, *From Imago Dei to Mutual Recognition: The Evolution of the Concept of Human Dignity in the Light of the Defence of Religious Freedom*, in UNDERSTANDING DIGNITY, *supra* note 4, at 435, 438.

11. *Genesis* 1:26, 27 (Jewish Publication Society of America).

12. James Hanvey, *Dignity, Person, and Imago Trinitatis*, in UNDERSTANDING DIGNITY, *supra* note 4, at 209, 218.

13. ST. AUGUSTINE, *THE TRINITY* bk. VIII, at 258–60 (Stephen McKenna trans., Charles Dollen ed., 1965) (c. 417 C.E.).

14. *Id.*, bk. VIX, at 256–57, 263; see also Hanvey, *supra* note 12, at 218. For Augustine, memory, understanding, and will "are the actions of the one mind."

investment in each person of the capacity to act (will) in accordance with one's knowledge (understanding) and experience (memory).

Centuries later, Thomas Aquinas specified what Augustine never quite said: the dignity of humankind is precisely its power to act with conscious rationality, as does God. Aquinas argued that persons affirmatively act on their reason, rather than being passively acted upon by external forces, like animals.<sup>15</sup> This power to reason is qualitatively the same power possessed by God, albeit diminished in human beings:

Since . . . man is said to be made to God's image, in so far as the image implies an intelligent being endowed with free choice and self-movement, . . . it remains for us to treat of His image, that is, man, according as he too is the principle of his actions, as having free choice and control of his actions.<sup>16</sup>

In the Thomist tradition, the dignity of human beings lies in their reflection of the image of God as a reasoning being possessed of freedom to act on his reason.<sup>17</sup> Centuries later, this conception of human dignity informed the Second Vatican Council's statement on religious freedom.<sup>18</sup> As John Paul II later declared, creation in God's image gave to humankind the "spiritual faculties" of "reason, discernment between good and evil, and free will."<sup>19</sup>

### *B. Noble Dignity*

The Thomistic tradition of dignity developed against a socio-legal conception of dignity embedded in the feudal hierarchies of medieval monarchs and the Church. Those of noble birth or title enjoyed special privileges. They were immune from lawsuits by

15. See I ST. THOMAS AQUINAS, SUMMA THEOLOGICA 162 pt. I, Q. 29, art. i, co., 610 pt. I-II, Q. 1, art. i, co. (Dominican Fathers trans., Daniel J. Sullivan rev. trans.) (1485) [hereinafter AQUINAS, SUMMA] in 19 GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., 1952).

16. *Id.* at 609 pt. III, pr; see also *Id.* at 493 pt. I, Q. 93, art. i, sc. ("[I]ntellectual creatures alone, properly speaking, are made to God's image.").

17. See *Id.* at 165 pt. I, Q. 29, art. ii; *Id.* Q. 93, art. vi, ad. 1.

18. *DIGNITATIS HUMANA*, *supra* note 4, para. 2 ("It is in accord with their dignity as persons—that is, beings endowed with reason and free will and, therefore, privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by moral obligation to seek the truth, especially religious truth.").

19. POPE JOHN PAUL II, ENCYCLICAL LETTER: *EVANGELICUM VITAE*, ON THE VALUE AND INVIOABILITY OF HUMAN LIFE para. 34 (Mar. 25, 1995) [hereinafter *EVANGELICUM VITAE*], [http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html).

those of lower rank, even for payment of debts lawfully owed, and they were often exempt from royal taxation.<sup>20</sup> Sumptuary laws reserved certain colors and fabrics for royal and noble clothing, and only noblemen could wear swords.<sup>21</sup> Nobles could not be tried before a jury that included men of lower rank; Magna Carta's celebrated guarantee of trial by a jury of one's "peers" referred precisely to the noble privilege of being judged only by those of equal or higher rank.<sup>22</sup> Powerful customs and conventions restricted nobles to a handful of occupations: defending the monarchy in warfare, serving in the Church, or managing one's land and estates; other occupations, notably "trade" or commerce, were unacceptably common, beneath one's dignity as a noble.<sup>23</sup> These privileges constituted noble "dignities."<sup>24</sup>

Dignity-as-rank contributed both theoretical and practical elements to dignity-as-*imago Dei*. The capacities to reason and to act on reason are bestowed exclusively on human beings. "[U]nlike the rest of earthly creation, which follows God's law by nature, human beings are given a share in divine reason, and the faculty of free choice . . ."<sup>25</sup> The divine gift of intellect thus raises humankind to a rank or "dignity" possessed by no other creature.<sup>26</sup> Christianity envisioned a "great chain of being," in Arthur Lovejoy's phrasing,<sup>27</sup> originating with God, who guarantees the existence and meaning of all creation, and descending through angels and humankind down to the lowest of his creatures.<sup>28</sup> The hierarchal

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20. See, e.g., John Bell Henneman, *Nobility, Privileges, and Fiscal Politics in Late Medieval France*, 13 FRENCH HIST. STUDS. 1, 1 (1983).

21. See, e.g., Josiah C. Russell, *The Triumph of Dignity over Order in England*, 9 HISTORIAN 137, 146–47 (1947).

22. See *Peer*, OXFORD ENGLISH DICTIONARY ONLINE def. 4a, <https://www-oed-com.proxlaw.byu.edu/view/Entry/139725?rskey=09QTLQ&result=1#eid> ("A member of a rank of hereditary nobility in Britain or Ireland; a duke, marquess, earl, viscount, or baron.").

23. See J.M. ROBERTS, PENGUIN HISTORY OF EUROPE 160 (1996).

24. WALDRON, *supra* note 4, at 30–31.

25. Christopher Tollefson, *The Dignity of Marriage*, in UNDERSTANDING DIGNITY, *supra* note 4, at 486.

26. I AQUINAS, SUMMA, *supra* note 15, at 165 pt. I, Q. 29, art. iii, ad. 2, 406 pt. I, Q. 93, art. 6, co., 493 pt. I, Q. 93, art. i, sc., 610 pt. III, Q. 1, art. 3, sc. & co.; see also KATEB, *supra* note 4, at 3, 6 ("The core idea of human dignity is that on earth, humanity is the greatest type of beings. . . . [N]o other species is equal to humanity.").

27. ARTHUR LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1936).

28. See KATEB, *supra* note 4, at 25; ROSEN, *supra* note 4, at 18; see also Genesis 1:26 (Douay-Rheims) ("Let [man] have dominion over the fishes of the sea, and the fowls of the



ranks of royalty, nobility, commoner, and serf mirrored this ontotheological hierarchy.<sup>29</sup>

As a practical matter, *imago Dei* did not play a central role in Christian theology until nearly the twentieth century.<sup>30</sup> Medieval Christian leaders enjoyed their high rank; “princes of the Church” was not merely metaphor.<sup>31</sup> Though God bestowed intellect and will upon all his human creations, some were honored for their greater portions.<sup>32</sup>

## II. MODERN DIGNITY

The Renaissance, Reformation, and Enlightenment transformed dignity as both *imago Dei* and noble rank. The Thomistic tradition had embedded dignity within a teleology that prescribed knowing God as the end of humankind: he granted us dignity that we might use it to love and worship him.<sup>33</sup> The Church’s medieval conception of religious freedom, as the freedom to live according to the true religion, reflected this teleology: the natural law does not bestow upon men and women the freedom “to do whatever we choose but rather to choose that which is true and good.”<sup>34</sup> In modernity, this teleology came undone.

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air, and the beasts, and the whole earth, and over every creeping creature that moveth upon the earth.”); *Psalm* 8:6–8 (Douay-Rheims) (“Thou hast made [man] a little less than the angels . . . Thou hast subjected all things under his feet, all sheep and oxen: moreover, the beasts also of the fields. The birds of the air, and the fishes of the sea.”).

29. Cf. ROBERTS, *supra* note 23, at 150 (“A chain of [feudal] obligations and personal service could stretch (in theory) from the king down through his great men and their retainers to the lowest of the free.”).

30. E.g., POPE LEO XIII, ENCYCLICAL LETTER: *RERUM NOVARUM*, ON CAPITAL AND LABOR (May 15, 1891) [hereinafter *RERUM NOVARUM*], [http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html); see Ingolf U. Dalferth, *Religion, Morality and Being Human: The Controversial Status of Human Dignity*, in *DIGNITY IN CONTEXT*, *supra* note 4, at 69, 70.

31. See COLUMBIA HISTORY OF THE WORLD 380 (John A. Garraty & Peter Gay eds., 1972); Aroney, *supra* note 4, at 1218.

32. See ROSEN, *supra* note 4, at 18.

33. E.g., II AQUINAS, *SUMMA*, *supra* note 15, at 437 pt. II-II, Q. 10, art. xii, ad. 4, 731 pt. III, Q. 4, art. ii, ad. 2, in 20 GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., 1952) (1485); AUGUSTINE, *supra* note 13, bk. 8, at 262–63; cf. *John* 17:3 (Douay-Rheims) (“Now this is eternal life: That they may know thee, the only true God, and Jesus Christ, whom thou hast sent.”).

34. Hanvey, *supra* note 12, at 221; see also Harrison, *supra* note 4, at 1279 (“[C]onscience is . . . understood as the site where a person fulfils the duty to respond to the truth about God.”).

### A. Renaissance

Renaissance philosophers redirected the teleology of *imago Dei* inward, making dignity a tool in service of humanity rather than God.<sup>35</sup> Giovanni Pico della Mirandola, for example, reworked dignity from the freedom to pursue God into the freedom of self-determination: creation in God's image is oriented, not to knowledge of God, but to the fashioning of one's "own being" by one's "own free will."<sup>36</sup> The intellect was still a gift of God, but its end was now to know oneself rather than God.<sup>37</sup> Henceforth human beings would themselves be responsible for shaping the character and content of their lives.<sup>38</sup>

### B. Reformation

The Reformation shattered the formal theological unity of Latin Christianity. Among its victims was the doctrine of original sin. The Church had long taught that original sin had corrupted the will but not the intellect; humankind lost the ability perfectly to conform its behavior to the demands of natural law and justice, but not the ability to know these through the exercise of reason.<sup>39</sup> As Aquinas concluded, original sin "cannot entirely take away from man the fact that he is a rational being, for then he would no longer be capable of sin."<sup>40</sup> By contrast, Martin Luther and John Calvin taught that original sin had wholly corrupted reason and the intellect, making them unreliable guides to justice or truth.<sup>41</sup>

35. BARAK, *supra* note 4, at 25.

36. GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 7 (2005) (1496); *see also* C. DUPRÉ, *supra* note 4, at 30 (Mirandola reworked "the Imago Dei paradigm in the light of man's new freedom constantly to shape and determine his identity.").

37. As Professors Aroney and Harrison pointed out to me, self-discovery is also a theme in Augustine—though still oriented to knowing God. *See, e.g.,* ST. AUGUSTINE, THE CONFESSIONS bk. X (R.S. Pine-Coffin trans., 1961) (c. 397–98 C.E.).

38. LOUIS DUPRÉ, PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE 125 (1993) [hereinafter L. DUPRÉ].

39. *See* HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 48 n.20 (Thomas R. Hanley trans., 1998); TATHA WILEY, ORIGINAL SIN: ORIGINS, DEVELOPMENTS, CONTEMPORARY MEANINGS 141–42 (1989); Dellavalle, *supra* note 10, at 438; Aroney, *supra* note 4, at 1222.

40. II AQUINAS, SUMMA, *supra* note 15, at 179 pt. III, Q. 85, art. 2, co.

41. L. DUPRÉ, *supra* note 38, at 204, 211; WILEY, *supra* note 39, at 142; Dellavalle, *supra* note 10, at 438–39.

The Reformers rested their rejection of reason on Augustine—Luther was an Augustinian monk—despite Augustine’s prominence in identifying dignity with intellect.<sup>42</sup> Writing as the Roman empire collapsed around him, Augustine “viewed the earthly city as a symbol of violence and oppression, blighted by sin and incapable of offering its inhabitants the justice and peace of the City of God.”<sup>43</sup> Many Protestants, therefore, teach that reason’s original corruption disqualifies the intellect as a means of identifying the natural law, and diminishes its theological place.<sup>44</sup> Protestant dignity lies more in one’s acknowledgment of God’s grace in the face of inescapable sin than in reason and intellect.<sup>45</sup> Catholicism thus emerged from the Reformation as the principal custodian of the medieval dignity tradition.

### C. Enlightenment

Mirandola, writing when the Inquisition was still active, softened the anti-clerical force of dignity-as-self-determination by emphasizing its divine source. Enlightenment humanists felt no such need. The decisive figure is Immanuel Kant, who reasoned his way to dignity-as-autonomy without relying on God or the Church.

Kant is known for the “categorical imperative,” the injunction that one must always treat people as ends in themselves, and never

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Like Catholicism, Orthodox Christianity also rejected the Protestant claim that original sin irretrievably tainted reason and intellect. See John Witte, Jr., *Introduction to CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 8, 23–33 (John Witte, Jr. & Frank S. Alexander 2010) [hereinafter *CHRISTIANITY & HUMAN RIGHTS*].

42. See Peter King, *Damaged Goods: Human Nature and Original Sin*, 24 *FAITH & PHIL.* 247, 248–50 (2007).

43. Tina Beattie, *The Vanishing Absolute and the Deconsecrated God: A Theological Reflection on Revelation, Law, and Human Dignity*, in *UNDERSTANDING DIGNITY*, *supra* note 4, at 259, 266; accord L. DUPRÉ, *supra* note 38, at 33.

44. See BARAK, *supra* note 4, at 23; J. BUDZISZEWSKI, *THE REVENGE OF CONSCIENCE: POLITICS AND THE FALL OF MAN* 80 (1999); ROMMEN, *supra* note 39, at 54 & n.26; Beattie, *supra* note 43, at 266.

45. See, e.g., WILEY, *supra* note 39, at 142–43 (placing Reinhold Niebuhr’s conception of human dignity between the Reformers’ insistence that original sin rendered the intellect wholly corrupt and the Thomistic teaching that original sin left it a reliable path to truth); Aroney, *supra* note 4, at 1224–25 (Reformation theologians “tended to place more emphasis on the fallenness of human nature and its dependence on divine grace for its restoration.”); Nicholas Wolterstorff, *Modern Protestant Developments in Human Rights*, in *CHRISTIANITY & HUMAN RIGHTS*, *supra* note 41, at 155, 162 (Besides the dignity of creation in the image of God, “every human being has his own personal dignity which resides in his predestination to personal being.”).

solely as means to one's own ends.<sup>46</sup> He considered an equivalent formulation to be, "Act only in accordance with that maxim through which you can at the same time will that it become a universal law."<sup>47</sup> A "maxim" is the principle the subject adopts as her guide to ethical action.<sup>48</sup> When faced with an ethical decision, one should act in accordance with a rule that could be coherently "universalized" or applied to everyone.<sup>49</sup>

The key here is Kant's view that rational beings are free to choose the moral law *by and for themselves*, so long as they apply the same law to others. "Reason . . . refers to every maxim of the will as giving universal law to every other will and also to every action towards oneself . . ."<sup>50</sup> This capacity for moral self-governance constitutes human dignity, "the dignity of a rational being, who obeys no law other than that which he at the same time gives."<sup>51</sup> Yet the argument is formal rather than substantive: human dignity consists in the giving of the moral law to oneself, not in the content of the law one gives.<sup>52</sup>

Human dignity is thus the source of incomparable human worth.<sup>53</sup> Whatever "is raised above all price and therefore admits of no equivalent," argues Kant, "has a dignity."<sup>54</sup> The self-direction that makes humanity an end in itself "has not merely a relative

46. IMMANUEL KANT, *Groundwork of the Metaphysics of Morals* (1785) [hereinafter KANT, *Groundwork*], in PRACTICAL PHILOSOPHY 41, 80 (Mary J. Gregor ed. & trans., 1996) [hereinafter PRACTICAL PHILOSOPHY].

47. KANT, *Groundwork*, *supra* note 46, at 73 (emphasis omitted); *accord* IMMANUEL KANT, *The Metaphysics of Morals* (1797), in PRACTICAL PHILOSOPHY, *supra* note 46, at 353, 379 [hereinafter KANT, *Metaphysics of Morals*].

Some Kant scholars dispute that these formulations are equivalent. E.g., Christine M. Korsgaard, *Taking the Law into Our Own Hands: Kant on the Right to Revolution*, in RECLAIMING THE HISTORY OF ETHICS: ESSAYS FOR JOHN RAWLS 297, 300 (Andrews Reath, Barbara Herman & Christine M. Korsgaard eds., 1997).

48. KANT, *Groundwork*, *supra* note 46, at 73 n.\*; KANT, *Metaphysics of Morals*, *supra* note 47, at 379–80.

49. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 56 (2008).

50. KANT, *Groundwork*, *supra* note 46, at 84.

51. *Id.* (emphasis omitted).

52. As always with Kant, what appears to be wildly subjective is objectively ordered by his postulate that rational beings possess the same "mental hardware" and thus reason to the same or similar conclusions. See Eugene T. Gadol, *The Idealistic Foundations of Cultural Anthropology: Vico, Kant and Cassirer*, 12 J. HIST. PHIL. 207, 219–20 (1974).

53. KANT, *Groundwork*, *supra* note 46, at 85.

54. *Id.* at 84.

worth, that is, a price, but an inner worth, that is, *dignity*.”<sup>55</sup> Dignity is priceless because nothing in the human economy matches its value.

Kant departed from the Christian dignity tradition in at least three ways. First, the ground of human dignity, the source of humanity’s incomparable worth, became self-direction.<sup>56</sup> After Kant, “to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.”<sup>57</sup> How one uses her autonomy is beside the point of its worth in self-determination. With Kant, human dignity arises from the power of each person to choose her own path, not from the Christian conformity or moral attractiveness of the path she chooses.<sup>58</sup>

Second, God and Christianity play no part in Kant’s argument.<sup>59</sup> Among Kant’s targets were the efforts of Catholicism and High-Church Protestantism to maintain clerical control.<sup>60</sup> The moral law is not given by the Church to Christians, but by Christians to themselves. Human dignity is the ability to reason and to act; it comes, however, not from creation by God in his image, but from the autonomy each person naturally possesses to shape her life to her own ends.<sup>61</sup>

Finally, Kant decentered dignity-as-rank. The Kantian demand that self-given morality be universally applied logically foreclosed socio-legal hierarchies. “Where previously dignity was precisely what attached to the role a person played in society,” after Kant “it would arise from the person who stood apart from the multiplicity of roles in which he or she might appear.”<sup>62</sup> Because the categorical

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55. *Id.*; see also *id.* at 85 (“[T]he lawgiving . . . , which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth . . .”).

56. See ROSEN, *supra* note 4, at 21–22.

57. McCrudden, *supra* note 2, at 660.

58. Cf. Harrison, *supra* note 4, at 1294 (observing the contemporary emphasis on “the centrality of individual judgment—personal autonomy—as the foundation of human dignity and the concern of political authority”).

59. ROSEN, *supra* note 4, at 155.

60. See, e.g., Immanuel Kant, *An Answer to the Question, What Is Enlightenment?*, in PRACTICAL PHILOSOPHY, *supra* note 46, at 15, 17–21 (arguing that “enlightenment” is the capacity and the willingness to make life decisions using one’s own reason and understanding, without direction from religious and other external authorities).

61. Professor Aroney notes that this orientation left behind the interrelatedness of persons and the role of groups intermediate between individual and state, both integral to the Catholic conception of dignity. Aroney, *supra* note 4, at 1234–35.

62. David Walsh, *Dignity as an Eschatological Concept*, in UNDERSTANDING DIGNITY, *supra* note 4, at 245, 249–50.

imperative requires application of one's maxim of action to all in the same way it applies to oneself, it cannot logically accommodate social ranks and their accompanying "dignities." In Kant's world, all human beings possess the same dignity in the same measure.<sup>63</sup>

### III. EQUAL DIGNITY

Kant and Enlightenment notwithstanding, dignity-as-rank persisted in Catholic Christianity into the twentieth century. Leo XIII's 1891 encyclical on the "dignity of labor" laid the foundation for a doctrine aimed at lifting up workers and the poor,<sup>64</sup> but nonetheless reinforced dignity-as-rank by implicitly prioritizing capital to labor and men to women.<sup>65</sup> While all people possess dignity from their creation by God, this dignity consisted "in their playing the role that is appropriate to their station within a hierarchical social order, one in which some are 'nobler than others.'"<sup>66</sup>

Dignity-as-rank began to crumble after World War II. Challenged by the economic equality and political justice agenda of powerful Marxist movements (especially in Italy), and stung by accusations that it did little to stop the Holocaust, the Church rethought its role in advancing human dignity. It reconceptualized itself as a kind of "human-dignity umbrella," which shelters the exercise of human rights by all people, Catholic or not, believing or

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63. Jeremy Waldron has elaborated equal rank and status into a general theory of dignity and human rights. See WALDRON, *supra* note 4. Of course, even liberal democracies have perpetuated a sort of hierarchical rank with salutations, titles, and deference for government officials, doctors, lawyers, academics, and others whose education or accomplishments are thought to represent special "merit."

64. See McCrudden, *supra* note 2, at 662.

65. See *RERUM NOVARUM*, *supra* note 30, paras. 4–5, 46–47 (condemning economic redistribution); *id.* paras. 17, 19, 34 (suggesting that economic inequality is dictated by the natural law); *id.* paras. 36, 42 (implying that women in the workplace cause immorality, declaring women unsuited for certain occupations, and concluding that women be confined to the domestic sphere to which they are naturally suited); see also ROSEN, *supra* note 4, at 48–51 (arguing the profoundly hierarchical character of Leo's economic and social thinking); SANGIOVANNI, *supra* note 4, at 29–30 (noting the nineteenth-century Church's "ambivalent relationship with democracy," "religious freedom," and "natural liberal rights").

66. ROSEN, *supra* note 4, at 49.

not;<sup>67</sup> John Paul II particularly embraced this role.<sup>68</sup> Though Christian dignity remains largely informed by a distinctively Catholic theology, that theology now concludes that dignity is equally the entitlement of all members of the political community.<sup>69</sup> Nevertheless, even this expanded conception of Christian dignity is insufficient to ground universal human rights.

### A. An Overlapping Consensus

One of John Rawls's insights was that a stable political order safeguarding basic human rights cannot persist in conditions of pluralism unless its participants abandon the quest to enact their differing metaphysical commitments into law.<sup>70</sup> Only by bracketing these commitments can an "overlapping consensus" emerge that attracts broad support precisely because it safeguards basic rights that allow individual pursuit of the good and the true.<sup>71</sup> The emphasis on political rather than metaphysical consensus explains "how, given the plurality of conflicting comprehensive religious, philosophical, and moral doctrines always found in a democratic society . . . [,] free institutions may gain the allegiance needed to endure over time."<sup>72</sup>

Rawls's theory is controversial,<sup>73</sup> though even his critics concede he is the starting point for contemporary political

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67. See Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71, 124–27 (2014).

68. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 88 (1984); Zachary R. Calo, *Catholicism, Liberalism and Human Rights*, 1 J. CHRISTIAN LEGAL THOUGHT 9 (2011); Pin & Vanoni, *supra* note 4, at 1304.

69. See Aroney, *supra* note 4, at 1234–35; see also *supra* note 61 and accompanying text.

70. See JOHN RAWLS, *POLITICAL LIBERALISM* 133–34 (2005) [hereinafter RAWLS, *LIBERALISM*]. Rawls specified these "basic rights" as political and civil equality, equal opportunity, economic reciprocity, and mutual respect. See *id.* at 139.

71. *Id.* at 138–42; see also *id.* at xlv ("[R]ather than confronting religious and nonliberal doctrines with a comprehensive liberal philosophical doctrine, the thought is to formulate a liberal political conception that those nonliberal doctrines might be able to endorse."). For Rawls's detailed exposition of the overlapping consensus, see *id.* at 133–72, 385–95.

72. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234 (1989).

73. See, e.g., Michael G. Barnhart, *An Overlapping Consensus: A Critique of Two Approaches*, 66 REV. POL. 257 (2004); Maurits De Jongh, *Le libéralisme politique se réfute-t-il lui-même? [Is Political Liberalism Self-Defeating?]*, 68 REVUE FRANÇAISE DE SCIENCE POLITIQUE 515 (2018).

philosophy.<sup>74</sup> But one need not accept Rawls's normative claims to recognize the descriptive insight illuminated by his argument for a metaphysically thin consensus. In radically plural societies committed to the protection of human rights, a thick metaphysical account of the truth is unlikely to attract broad, enduring support for democracy and human rights without state repression that would undermine both.

### *B. Problems for Christian Dignity*

The question whether Christian dignity ought to ground human rights in the overlapping consensus raises the further question, which Christianity? One might construct a universal or widely shared Christianity for analytic purposes, but this would indeed be a fabrication—Christian denominations and sects are innumerable and sharply diverse in their beliefs and practices. Only a Christianity raised to a very high level of abstraction could authentically incorporate all or most of contemporary Christian belief.

A highly abstract Christianity is unlikely to capture the real problems of building the overlapping consensus on Christian dignity. *Abstract* Christianity is not the root of political conflicts in the West. Politically liberal Christians, like the Protestant “mainline” in the U.S. and the remnants of state churches in Europe, have, for the most part, already adapted their beliefs to an overlapping political consensus.<sup>75</sup> It is *conservative* Christianity—Catholicism and evangelical Protestantism—that currently insists on a Christian ground of human rights in tension with overlapping values.<sup>76</sup>

Rather than attempt to fashion a generalized Christianity, therefore, I will use contemporary expressions of conservative Christianity to analyze its relation to the overlapping consensus. The metaphysics of conservative Christian dignity renders it an inapt foundation for contemporary human rights, for at least three reasons: the stringency of the Catholic teleology that primarily

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74. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 183 (1974) (“Political philosophers now must either work within Rawls’ theory or explain why not.”).

75. See, e.g., OLIVIER ROY, *IS EUROPE CHRISTIAN?* 62 (Cynthia Schoch trans., 2019) (“The dominant trend in European Protestantism is the self-secularization of the religious sphere, both in terms of morals—the best of Christianity resides in ethics, which are universal—and in terms of theology—God reveals himself in the profane.”).

76. See *supra* notes 5–8 and accompanying text.



informs its contemporary content, its tension with Western commitments to political and social equality, and its prioritization of the good to the right.

### 1. Catholic teleology

John Paul II sometimes spoke of Christian dignity in Kantian terms,<sup>77</sup> yet his conception of dignity could not have been more different. Christian dignity and its succeeding Enlightenment conceptions both incorporate the individual power to make of oneself what one will, but for quite different ends. Christian dignity is oriented to an external good (knowledge and love of God), whereas Kantian dignity is oriented to an internal one (realization of the self as its own end).<sup>78</sup> Kant understood personal freedom to be constrained by the reality that it “coexist with the freedom of every other,”<sup>79</sup> whereas the Pope affirmed transcendent constraints beyond the competing claims of mere mortals.<sup>80</sup>

It would seem self-evident that a political consensus founded on Christian dignity is unlikely to attract non-Christian and unbelieving members in a pluralistic polity. Christian dignity presupposes the God who fulfilled the promises of the Old Testament with the Gospel of the New; it offers something theologically unpalatable to almost every other species of belief – the mystery of the Trinity, the Crucifixion, and the Resurrection to nonsalvific or more rigorous monotheists (Jews and Muslims); a commitment to monotheism that contradicts polytheism (Hindus) and animistic spirituality (First Nations, Native Americans, and other indigenous religions); and an insistence on transcendence to immanence (Buddhists and other Asian religions).<sup>81</sup> On top of all

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77. ROSEN, *supra* note 4, at 99–100 (quoting *EVANGELICUM VITAE*, *supra* note 19, para. 19; POPE JOHN PAUL II, *ENCYCLICAL LETTER: VERITATIS SPLENDOR* para. 48 (1993), [http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor.html](http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html)).

78. See John F.X. Knasas, *Kantianism and Thomistic Personalism on the Human Person: Self-Legislator or Self-Determiner?*, 7 *STUDIA GILSONIANA* 437, 444–49 (2018).

79. Kant, *Metaphysics of Morals*, *supra* note 47, at 393.

80. See ROSEN, *supra* note 4, at 100.

81. Dellavalle, *supra* note 10, at 439; see also SANGIOVANNI, *supra* note 4, at 63 (noting the “sectarian character” of *imago Dei*); SMITH, *supra* note 7 (arguing for a conflict from antiquity between pagan immanence and Christian transcendence).

these are the “nones,” or the “spiritual but not religious,”<sup>82</sup> who might encounter even greater dissonance.

One might object that theological difference does not preclude political consensus. As James Davison Hunter observed, contemporary “orthodox” or “traditional” believers may have more in common with conservatives of other religions than they do with their “liberal” or “progressive” brothers and sisters of the same faith.<sup>83</sup> This suggests that Christian dignity might similarly cross religious lines to form an overlapping consensus attractive to non-Christians and unbelievers.

Ironically, Hunter’s observation illustrates both the need for an overlapping consensus and how ill-suited Christian dignity is to ground it. Cultural conservatives are only able to make common political cause with each other by bracketing deep theological differences, just as Rawls advises the bracketing of all comprehensive beliefs.<sup>84</sup> But cultural conservatism still leaves out cultural liberalism; even as culture rather than religion, conservative Christianity embodies beliefs and commitments that are not uniformly or widely shared in Western democracies.<sup>85</sup>

Ronald Dworkin encapsulated the challenge: “[M]any people in Europe and America insist on connecting human rights with some religious tradition. If we insist that human rights have finally a religious source and ground, then our appeal to those rights will inflame people whose religious traditions and convictions are very different from our own . . . .”<sup>86</sup> (If “inflame” seems overwrought, “antagonize” or “provoke” does not.) This remains true when the

82. The literature on these “not quite believers” is large and growing. See, e.g., DIANA BUTLER BASS, *CHRISTIANITY AFTER RELIGION: THE END OF CHURCH AND THE BIRTH OF A NEW SPIRITUAL AWAKENING* (2012); Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 *BUFF. L. REV.* 127 (2003); PEW FORUM ON RELIGION & PUBLIC LIFE, “NONES” ON THE RISE (Oct. 9, 2012), <https://www.pewresearch.org/wp-content/uploads/sites/7/2012/10/NonesOnTheRise-full.pdf>; Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 *IND. L.J.* 37 (2000).

83. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 47 (1991).

84. Hunter and others have noted the political alliances of Latter-day Saints, evangelical Protestants, and other religious conservatives despite longstanding theological animosity. See *id.* at 100, 145, 181; DEAN M. KELLEY, *WHY CONSERVATIVE CHURCHES ARE GROWING* 138–42 (1972).

85. See generally LORI G. BEAMAN, *THE TRANSITION OF RELIGION TO CULTURE IN LAW AND PUBLIC DISCOURSE* (2020) (detailing the political rifts and social schisms created when Christianity is treated as culture rather than religion).

86. DWORKIN, *supra* note 4, at 339.

ground of dignity is shifted from Christian theology to Christian culture. Neither a dignity defined by Trinitarian teleology nor one enlisted with religious conservatives in the Culture Wars is likely to persuade most liberal Christians, non-Christians, or unbelievers of its preeminent claim to ground universal human rights.<sup>87</sup>

## 2. *Uncertain equalities*

A signal achievement of Western democracy is equality of rights—the idea that fundamental rights, privileges, and immunities are held by all, regardless of social rank or status. The major human rights texts guarantee equal rights, either directly,<sup>88</sup> or by general prohibitions of discrimination based on race, ethnicity, sex, sexual orientation, religion, and other comparable characteristics.<sup>89</sup> The national constitutions of most Western democracies contain similar provisions.<sup>90</sup>

Many Western democracies also guarantee equal dignity in tandem with equal rights.<sup>91</sup> This is the legacy of Kant. Beyond respect for one's own life, argued Dworkin, the categorical imperative "entails a parallel responsibility for the lives of all human beings. If you are to respect yourself, you must treat their lives, too, as having an objective importance."<sup>92</sup> But Kantian dignity

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87. Dellavalle, *supra* note 10, at 440.

88. *E.g.*, U.N. Charter pmbl., art. 1, ¶ 2; UNIVERSAL DECLARATION, *supra* note 1, pmbl., art. 1.

89. *E.g.*, UNIVERSAL DECLARATION, *supra* note 1, art. 2; ICCPR, *supra* note 1, art. 2, ¶ 1, art. 26; EUROPEAN CONVENTION, *supra* note 1, art. 9, protocol 12, art. 1.

90. *E.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, ¶¶ 15(1), 28 (U.K.); 1958 CONST. pmbl., art. 1, (Fr.); BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 3, at 15 (Christian Tomuschat et al. trans., 2019) (1949), <https://www.btg-bestellservice.de/pdf/80201000.pdf>; Art. 3 COSTITUZIONE [COST.] (It.); U.S. CONST. amend. XIV, § 1 (1868) (Equal Protection Clause). In the United States, the Religion Clauses of the First Amendment prohibit religious discrimination. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982).

91. *E.g.*, Art. 3 COSTITUZIONE [COST.] (It.) ("All citizens have equal social dignity . . . . It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens . . .") (translated in CONSTITUTION OF THE ITALIAN REPUBLIC, Art. 3, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)); *Obergefell v. Hodges*, 576 U.S. 644, 660, 672–73, 681 (2015) (holding that the "equal dignity" protected by the Fourteenth Amendment guarantees marriage equality); *see* UNIVERSAL DECLARATION, *supra* note 1, art. 1 ("All human beings are born free and equal in dignity and rights.").

92. DWORKIN, *supra* note 4, at 255.

is more than the right to respect; it is the right to the *same* respect.<sup>93</sup> With Kant, “dignity and equality go together.”<sup>94</sup> Equal dignity, in its turn, implies a particular understanding of equal rights. Both Christian and Kantian dignity incorporate self-determination as a matter of morality and ethics (though, again, each differs in its end or purpose). If dignity is the power to decide for oneself what the good is and to conform oneself to it, as Kant maintained, then the right to *equal* dignity guarantees this to everyone in the same measure.

Different people will decide upon different and often incommensurable ideas of the good, so conflicts are inevitable. A government that is both ordered and democratic requires a means of mediating these conflicts. Unlike moral and ethical decisions, however, resolution of legal conflicts over the good cannot be left to personal choice, but must be enforced by state coercion under law, through the definition of rights.<sup>95</sup> Rights are not *suggestions*; they embody the respect the state may *demand* that its citizens afford each other, the actions it may properly coerce citizens to take (or to refrain from taking) in their interactions with others.<sup>96</sup>

This prevents Christian dignity from adequately grounding human rights, even now that its principal guardian teaches universal entitlement to those rights. Neither dignity nor rights can depend on moral concessions by others. History teaches that Christians, like most of humankind, do not consistently endorse or respect human rights; today, some conservative Christians hesitate or refuse to recognize rights widely recognized in liberal democracies, while some Catholic scholars even question the Church’s commitment to liberalism itself.<sup>97</sup> People are owed

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93. Isabel Trujillo, *Dignity, Rights, and Virtues in the Department of Value*, in *DIGNITY IN THE LEGAL AND POLITICAL PHILOSOPHY OF RONALD DWORKIN* 246, 260 (Salman Khurshid, Lokendra Malik & Veronica Rodriguez-Blanco eds., 2018); accord Dalfert, *supra* note 30, at 91, 124; see also DWORKIN, *supra* note 4, at 266 (“[T]reating people with the respect we accord ourselves requires, at a minimum, that we claim no right in ourselves that we do not grant others and suppose no duty for them we do not accept for ourselves.”).

94. ROSEN, *supra* note 4, at 31; see also KATEB, *supra* note 4, at 1 (“[Dignity] now turns out to mean in its most common use the equal dignity of every person . . .”).

95. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 535–43 (1987).

96. See, e.g., WALDRON, *supra* note 4, at 50; Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984); Fletcher, *supra* note 95, at 544.

97. See Pin & Vanoni, *supra* note 4, at 1299–302.

dignity and rights irrespective of Christian teachings or their observance by Christians—indeed, often in the face of those teachings. Rights grounded in Christian dignity would perpetually depend on the understanding and evolution of these rights *within Christianity*. Human dignity does not consist in what Christianity teaches is morally owed to others, but the treatment those others may legally demand—of Christians, non-Christians, and the state itself—irrespective of what Christians think.

In a society that values equal rights, every right must be the expression of a *reciprocal* freedom: the state is only justified in coercing respect for rights if each right we demand for ourselves is also afforded to everyone else. As Kant put it, “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”<sup>98</sup> When a person legally claims more freedom for herself than she grants to others, she is a hindrance to freedom, and the state is justified in coercively reigning in her claim, since the state’s “hindering of a hindrance to freedom” actually preserves freedom.<sup>99</sup>

In Western democracies, conservative Christians are often unwilling to accept the reciprocity of rights that equal dignity implies. Resistance to antidiscrimination laws is an obvious example. These laws safeguard the equal dignity of women and of racial, ethnic, religious, and sexual minorities, by ensuring that they do not suffer harm or disadvantage from stereotypes, prejudice, or exclusion. Conservative Christians in the United States often seek a

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98. Kant, *Metaphysics of Morals*, *supra* note 47, at 387.

99. *Id.* at 388 (emphasis omitted). Rawls makes a comparable argument. See JOHN RAWLS, A THEORY OF JUSTICE § 31, at 195–201 (1971) [hereinafter RAWLS, JUSTICE].

It is often assumed that Kant’s discussion of dignity in *Groundwork* applies *tout court* to his argument for the universal principle of right in *Metaphysics of Morals*. The latter, however, does not mention “dignity,” let alone discuss it, and for good reason: the right is not a matter of morality, but of justified state coercion. BARAK, *supra* note 4, at 117; ROSEN, *supra* note 4, at 90; Fletcher, *supra* note 95, at 543, 553.

The extent to which Kant’s moral philosophy informs his political philosophy remains a matter of controversy among Kant scholars. Compare CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 83–84, 103 n.7 (1996) (arguing for a connection), and Japa Pallikkathayil, *Deriving Morality from Politics: Rethinking the Formula of Humanity*, 121 ETHICS 116 (2010) (same), with Herlinde Pauer-Studer, “A Community of Rational Beings”. Kant’s Realm of Ends and the Distinction between Internal and External Freedom, 107 KANT-STUDIEN 125 (2016) (arguing against a connection), and Christian F. Rostbøll, *Kant, Freedom as Independence, and Democracy*, 78 J. POLS. 792 (2016) (same).

right to be categorically excused from observing norms prohibiting LGBTQ and (sometimes) sex discrimination, yet seek the protection of such laws for themselves.<sup>100</sup> Conservative Christian nonprofit and commercial businesses have taken comparable positions in disputes involving mandatory coverage of contraception and related reproductive services in employee health plans, seeking categorical exemptions that vindicate employer free-exercise rights without concern for the loss of contraception coverage by employees with different beliefs about contraception.<sup>101</sup>

In tension with the Western commitment to equality, conservative Christians claim asymmetric rights of exemption from laws protecting or enhancing the exercise of reproductive rights and LGBT antidiscrimination rights, while insisting for themselves the antidiscrimination protections and social welfare benefits they deny to others. This makes Christian dignity an implausible basis for forming an overlapping consensus for the protection of human rights.

### 3. *Exclusive truth*

The refusal of conservative Christians to accept some applications of equal rights and equal dignity is not simply the consequence of group self-interest. Conservative Christian religions—especially Catholicism—adhere to one conception of the good; they claim that the truth about God and his creation is accessible to all through the exercise of natural reason.<sup>102</sup> Laws, institutions, and other government actions that do not conform to

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100. *Compare* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n, 138 S. Ct. 1719 (2018) (baker arguing that his conservative Protestant beliefs against same-sex marriage require his exemption from civil rights law requiring him to bake wedding cake for same-sex marriage), *with* *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), cert. granted, 140 S. Ct. 1104 (Feb. 24, 2020) (No. 19-123) (Catholic Social Services arguing that city anti-discrimination policy barring it from city-sponsored adoption program because of opposition to same-sex marriage constitutes unlawful religious discrimination).

101. *See, e.g.*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also* Frederick Mark Gedicks, *Paying for the Boss’s Beliefs*, WASH. POST, Jan. 20, 2014, at A15 cols.3-4 (“Americans must be free to practice their respective faiths but also free from bearing the burdens of their employer’s faith.”).

102. *See DIGNITATIS HUMANA*, *supra* note 4, para. 3 (“Man has been made by God to participate in th[e] divine law, with the result that, under the gentle disposition of divine Providence, he can come to perceive ever more fully the truth that is unchanging.”); *e.g.*, Tollefsen, *supra* note 25, at 493 (asserting that, because the Catholic conception of marriage is based on the natural law, it is persuasive even to unbelievers).

the natural law are unjust or deficient;<sup>103</sup> *all* persons, therefore, are obligated to oppose them or, at least, to withhold their support.<sup>104</sup> As Rawls observed, political theories which presuppose “but one conception of the good which is to be recognized by all persons . . . tend to be teleological and to hold that institutions are just to the extent that they effectively promote this good.”<sup>105</sup>

For example, natural-law theorists argue for a single, true conception of marriage, necessarily exclusive of other conceptions: marriage is an intrinsic human good, realized by reproductive sexual acts within a heterosexual relationship between two persons committed to each other as friends, partners, and parents.<sup>106</sup> While this definition does not expressly rely on God or transcendent knowledge, the Biblical injunction that husband and wife become “one flesh” is an indispensable premise;<sup>107</sup> not a mere metaphor for marital accord,<sup>108</sup> this commandment signifies a literal physical

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103. See II AQUINAS, *SUMMA*, *supra* note 15, at 228 Q. 95, art. 2, co. (“[E]very human law has just so much of the character of law as it is derived from the law of nature. But if in any point it differs from the law of nature, it is no longer law but a corruption of law.”); SAINT AUGUSTINE, *ON FREE CHOICE OF THE WILL* bk. I, Q. 5, at 11 (Anna S. Benjamin trans., 1964) (c. 395 C.E.) (“I think that a law that is not just is not a law.”); MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* 10–11 (2006) (arguing that an unjust law is still a law but a defective one, in the same way that a duck that is a poor swimmer is defective but still a duck).

104. See GERMAIN GRISEZ & RUSSELL SHAW, *BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF FREEDOM* 145 (1974); John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 9 NOTRE DAME J.L., ETHICS & PUB. POL’Y 11, 31 (1995).

105. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFFS. 223, 248 (1985); see also RAWLS, *JUSTICE*, *supra* note 99, at 396 (contrasting teleological theories of the good with metaphysically “thin” theories).

106. See, e.g., ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 168 (1999); Finnis, *supra* note 104, at 28.

107. Compare Genesis 2:24 (Douay-Rheims) (“Wherefore a man shall leave father and mother, and shall cleave to his wife: and they shall be two in one flesh.”), with Finnis, *supra* note 104, at 30–31 (“A husband and wife who unite their reproductive organs in an act of sexual intercourse which . . . is of a kind suitable for generation, do function as a biological (and thus personal) unit and thus can be actualizing and experiencing the two-in-one-flesh common good and reality of marriage . . .”), GEORGE, *supra* note 106, at 139 (describing marriage as a “two-in-one-flesh communion of persons” that is “an intrinsic . . . human good”), Tollefson, *supra* note 25, at 490 (asserting that in one view the marital is realized when spouses join “so as to become ‘one flesh’”), and John Tuskey, *The Elephant in the Room – Contraception and the Renaissance of Traditional Marriage*, 18 REGENT U. L. REV. 315, 320 (2006) (claiming that contraception is inconsistent with a “one flesh” union).

108. Tuskey, *supra* note 107, at 320.

unity achievable only in heterosexual intercourse.<sup>109</sup> Conservative Protestants accept this conclusion without its metaphysics.<sup>110</sup>

Unbelievers, non-Christians, and many Christians reject this narrow and complex definition of marriage. Many religions have no objection to same-sex marriage, and some affirmatively support it<sup>111</sup>—even conservative Christians may find the analytic weight borne by a single Biblical allusion to be more than it, and they, can bear. Yet acceptance of same-sex marriage would require conservative Christians to abandon part of the good around which their religious faith is organized—namely, traditional marriage. It's less that they refuse to recognize marriage equality, which would constitute mere bigotry, and more that they *can't*—their theologies do not permit it.

This conservative Christian conception of marriage runs through many constitutional issues touching marriage, sexuality, and reproduction in Western democracies. It is a source of Catholic opposition not only to the legalization of controversial practices like human cloning, euthanasia, and genetic manipulation, but also opposition to abortion (in all circumstances), contraception, premarital sex, in vitro fertilization, and, of course, same-sex marriage.<sup>112</sup> Conservative Protestants share the opposition to abortion (in most circumstances), certain forms of contraception, premarital sex, and same-sex marriage. Yet many Westerners—perhaps most—engage in or approve of these behaviors and practices, which generally enjoy constitutional protection.<sup>113</sup>

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109. *Id.* at 168–69 (“In sexual intercourse between a man and a woman . . . the bodily parts of the male and the bodily parts of the female participate in a single action, coitus . . . a unitary action in which the male and the female become literally one organism.”); *accord* Finnis, *supra* note 104, at 28; Tollefson, *supra* note 25, at 490.

110. See Gilbert Meilaender & Philip Turner, in *Contraception: A Symposium*, 88 FIRST THINGS 17, 23–24 (Dec. 1998) [hereinafter *Contraception Symposium*]; R. Albert Mohler, Jr., in *id.* at 25.

111. FRANK S. RAVITCH, *FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA* 16 (2016).

112. See, e.g., Archbishop Charles J. Chaput, in *Contraception Symposium*, *supra* note 110, at 20; see also ROY, *supra* note 75, at 99 (John Paul II and Benedict XVI identified “abortion, euthanasia, same-sex marriage[, and] artificial procreation” as “non-negotiable moral issues.”).

113. Natural law theorists are clear that the state is obligated to ban abortion, artificial reproductive technologies, and same-sex marriage; the logic of their position also extends to prohibition of contraception for married couples. See Ryan T. Anderson, *Proxy Wars over Religious Liberty*, NAT'L AFFS., Spring 2020, at 152, 153 (lamenting that “[f]ew people have argued that contraception is immoral, and that therefore a government mandate requiring



Rawls labels this prioritization of the good to the right an obstacle to formation of the overlapping consensus, which is political, not metaphysical. The overlapping consensus is constituted by a set of largely instrumental rights oriented to self-realization, not a single conception of the good.<sup>114</sup> Indeed, a consensus founded on a single conception of the good is neither “overlapping” (a point of convergence for incommensurable comprehensive doctrines) nor “political” (resting on a metaphysically thin set of rights instrumental to individual autonomy). The overlapping consensus requires, therefore, the priority of the right to the good, not vice versa.

An overlapping consensus cannot form around the conservative conception of the good to which Christian dignity is now oriented. Whenever this good is inconsistent with the exercise of a basic human right, including equality of rights, Christian dignity would require that the right give way to the good, as conservative Christians understood that marriage equality should have been subordinated to traditional marriage.

#### IV. CHRISTIAN DIGNITY AND THE OVERLAPPING CONSENSUS

Christian and liberal values enjoyed a tentative alliance during the post-war years, when Europe and the United States recommitted themselves to human rights while retaining traditional Christian values in law.<sup>115</sup> Towards the end of the twentieth century, this alliance came apart under the centrifugal pressures of increasing secularity and religious and moral pluralism,<sup>116</sup> exposing the current ideological fault: Protestant state

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coverage of it is unjust—for everyone, not just religious or conscientious objectors”); Tuskey, *supra* note 107, at 315 (“[C]ontraception is antithetical to the traditional Christian understanding of marriage” and “vitiates the logic” that distinguishes Christian marriage from same-sex marriage and other relationships.). Some theorists are more circumspect, suggesting that a prudential respect for marital privacy could justify confining contraception bans to unmarried persons. See GEORGE, *supra* note 106, at 152–53; Finnis, *supra* note 104, at 1076.

114. Even a political conception of justice must include a few substantive commitments constituting a “thin theory of the good.” See RAWLS, JUSTICE, *supra* note 99, at 396–97; RAWLS, LIBERALISM, *supra* note 70, at 178.

115. See Pin & Vanoni, *supra* note 4, at 1303–04; e.g., WIL HERBERG, PROTESTANT – CATHOLIC – JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955). See generally CHARLES TAYLOR, A SECULAR AGE 423–72 (2007).

116. See, e.g., ROY, *supra* note 75, at 71 (suggesting Paul VI reaffirmed traditional teachings in *Humanae Vitae* because “[s]ociety’s values were no longer secularized Christian values”). See generally SMITH, *supra* note 7, at 258–300; TAYLOR, *supra* note 115, at 473–504.

churches (in Europe) and the liberal Protestant “mainline” (in the United States) “self-secularized” to fit within the more political consensus that was emerging, while the Catholic Church and evangelical Protestant faiths soldiered on alone in a quest to preserve or restore substantive Christian values as the implicit ground of law and public life.<sup>117</sup>

Of course, laws in the West no longer implicitly reflect Christian values. Christian assertions of religious free exercise have accordingly become more controversial as the sites of accommodation have become more public.<sup>118</sup> In the overlapping consensus, government and public spaces are either secular or religiously neutral. Christianity and belief generally are in long term decline while disaffiliation and unbelief are on the rise. Indicia of Christian practice are low, even in the United States. European nationalists now appropriate symbols of Christian faith as markers of secular political identity without regard for their once-potent Christian meaning;<sup>119</sup> U.S. Establishment Clause doctrine likewise permits government display of Christian symbols only on the assumption their meaning is not religious.<sup>120</sup>

Conservative Christians might be attracted to a metaphysically thin overlapping consensus as a response to their increasing minority status. Western democracies guarantee freedom of worship, freedom from religious persecution and violence, political

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117. ROY, *supra* note 75, at 86; see also Pin & Vanoni, *supra* note 4, at 1326 (suggesting that Catholicism continues to endorse human dignity and constitutional culture, but has departed from liberalism “because it does not perceive it as compatible with key ideals such as localism or transcendence, or solidarity with the poor”); John Milbank, *Dignity Rather Than Rights*, in UNDERSTANDING DIGNITY, *supra* note 4, at 205 (“Catholicism, and its development of ‘dignity’, remains at bottom incompatible with liberal notions of rights and democracy.”).

118. I have discussed the importance of the public/private distinction to the problem of religious accommodations in Frederick Mark Gedicks, *Dignity and Discrimination*, 46 BYU L. REV. 961 (2021), and Frederick Mark Gedicks, *The Odd Couple: Freedom from Religion and Religious Group Rights*, YOUTUBE (Mar. 25, 2016), [https://www.youtube.com/watch?v=qBA5kJym7Qo&list=PLh9g559k1eTvNNNaJLVUL9-LNTt\\_SfLQ-&index=41&t=0s](https://www.youtube.com/watch?v=qBA5kJym7Qo&list=PLh9g559k1eTvNNNaJLVUL9-LNTt_SfLQ-&index=41&t=0s). See also Wickman, *supra* note 5 (discussing religious accommodations in terms of the public/private distinction).

119. ROY, *supra* note 75, at 120–24; Pin & Vanoni, *supra* note 4, at 1319–20.

120. *E.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (state display of large Latin cross held constitutional because it predominantly signified military sacrifice); *Cty. of Allegheny v. Am. C.L. Union*, 492 U.S. 573 (1989) (same regarding Christmas tree and Hanukkah menorah because context transformed them into secular symbols of the “winter holiday season”).

equality among believers and between believers and unbelievers,<sup>121</sup> including the right of religions to govern themselves and their members in private or “internal” spaces, the freedoms to proselytize willing listeners and to change or abandon religious belief or affiliation, and the freedom to exercise religion beyond private spaces so long as the rights of others are not infringed.<sup>122</sup> This leaves conservative believers and the groups with which they affiliate generally free to chart their own courses.<sup>123</sup>

This political overlapping consensus is attractive to many religious minorities. Richard Schragger and Micah Schwartzman observe that Jews have “benefited tremendously from the rise of a secular state, one in which religious status does not determine rights of citizenship or, more generally, a person’s life chances.”<sup>124</sup> Other religious minorities can say the same, including conservative Christians. The overlapping consensus would appear even more attractive if regulation of private religious spaces were relaxed and private religious speech and exercise not so rigorously excluded when allowing them would not significantly threaten the rights of others.<sup>125</sup>

But the attractiveness of the overlapping consensus to a religious minority depends first on recognition that it is, in fact, a minority. Many conservative Christians are not yet reconciled to

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121. Marco Ventura, *The Formula “Freedom or Religion or Belief” in the Laboratory of the European Union* (unpublished manuscript) (on file with author).

Modest institutional religious preferences remain in those European countries, like the United Kingdom, Germany, and Scandinavia, that have retained weak religious establishments.

122. Cf. McCrudden, *supra* note 2, at 679 (proposing a “minimum core” or “overlapping consensus” for dignity consisting of commitment to the “intrinsic worth” of every human being, the mandatory recognition of this worth by others, and the priority of the individual to the state).

123. Pin & Vanoni, *supra* note 4, at 1303; see also WEIGEL, *supra* note 6, at 61, 182 (lamenting the substantively thin character of the overlapping consensus).

124. Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497, 515 (2019).

125. See, e.g., ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY: THE UNNECESSARY CONFLICT 2* (2020) (“Most Americans . . . would like to live in peace with their fellow citizens, and are willing to consider and, if possible, accommodate other people’s perspectives and fears.”); RAVITCH, *supra* note 111110, at 19 (Secular and religious moderates are “caught between religious conservatives who want to roll back advances for LGBT and reproductive freedom and secular progressives who view all religious freedom laws as dangerous.”).

the fact that they can no longer dictate the good to all of society.<sup>126</sup> These will not find the overlapping consensus attractive unless and until they come to terms with the reality that they have been overtaken as political and cultural arbiters of the West.

In any event, conservative Christianity is an obstacle to formation of an overlapping political consensus in support of human rights, and thus ill-suited to provide their foundation, now and in the future.

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126. See, e.g., Ryan T. Anderson & Robert P. George, *The Unfairness of the Misnamed "Fairness for All" Act*, J. LEG. ONLINE SUPP., Summer 2020, at 1, [https://scholarship.law.nd.edu/jleg\\_blog/4/](https://scholarship.law.nd.edu/jleg_blog/4/) (arguing that law should incorporate traditional teachings about gender, sex, and marriage and should fully accommodate believers in these teachings when the law deviates from them); *id.* at 7–8.

