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Presented at the Religion and Politics Seminar, Weatherhead Center
for International Affairs, Harvard University, March 16, 2009.

CHAPTER 23

Religiously Based Judgments and Religious Discourse in Political Life

This chapter and the next explore related subjects that lie at the outer boundaries of the restraints the Establishment Clause imposes on governments or concern issues of political philosophy that reach beyond constitutional limitations. In the following chapter we will consider a constitutional question we have not yet directly addressed: when the law enforces a moral judgment that is grounded squarely on religious sentiments, does that violate the Establishment Clause? No one doubts that laws against killing and stealing are all right, although *one reason* that some people think these acts are wrong is because the Ten Commandments forbid them. But what of laws that lack a plausible secular justification or would not have been adopted except for religious sentiments? Some think one or both of these characterizations are true about laws limiting marriage of persons of different genders, laws restricting sexual acts among consenting adults, laws (or administrative decisions) forbidding government assistance for embryonic stem cell research, and laws prohibiting abortions. Occasional judicial opinions and more extensive writings by scholars have suggested that certain exercises in the enforcement of a morality that is grounded in religious premises are unconstitutional. The next chapter undertakes to explain to what extent this thesis has support in the existing law and to what extent it represents a wise understanding of the Establishment Clause. In that endeavor, we will look carefully at exactly which kinds of laws and government policies might be singled out as depending on religious sentiments.

The controversy over legal enforcement of morality is one aspect of a wider discussion about the role of religion in our political life, and in the political life of liberal democracies more generally. This discussion, which is often cast as one about “public reasons,” definitely reaches beyond *constitutional law*, but one can, as I shall explain, think of it as concerning concepts of nonestablishment and free exercise in the realm of political philosophy. It thus merits our consideration for its own sake, but it is also a needed backdrop for the specifically legal discussion in the chapter that follows. Because

I have written on this subject extensively,¹ my treatment here will be highly summary, but it does sketch the basic positions and competing claims.

Before we begin, a caution about the relation between the competing claims in political philosophy and their relevance for constitutional law may help. For the most part in these two volumes, we have assumed that when a government violates the Free Exercise Clause or the Establishment Clause, a court presented with a case involving a violation will say so. That, I have noted, is an oversimplification, one that is particularly relevant for these two chapters. One might believe that a fair amount of legislation enforcing morality violates the Establishment Clause, but not in a way a court can declare. One might believe that individual legislators violate the Establishment Clause, or some spirit of the Establishment Clause, even though the official action to which they contribute does not do so. I shall say more about these nuances in what follows, but readers need to recognize that the conceivable options about the status of various claims are more complex than (merely) political philosophy or (judicially enforceable) constitutional law.

“PUBLIC REASONS” AND THE STATUS OF RELIGIOUS JUDGMENTS

Influenced by the writings of John Rawls,² political philosophers in recent decades have debated whether political decisions in liberal democracies should be based on public reasons, reasons accessible in the right way to all citizens. It is generally assumed that reasons grounded in religious premises fall outside the domain of public reasons. If citizens and officials improperly rely heavily on religious premises in advocating and adopting laws, we could think of that as a misguided “establishment” of religion, although not one necessarily covered by the Establishment Clause.

People who challenge the injection of religion in politics adopt what we may call an “exclusivist” position. Religion should be excluded from politics. In the politics of pluralist liberal democracies, decisions (they claim) should be made on grounds that are shared premises of that form of government and on forms of justification and ways of determining facts that are accessible to all citizens. Whatever is the exact mix of the rational, nonrational, and irrational in religious understandings, no religious perspective is shared by all citizens, no perspective rests on methods of justification and

¹ *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988); *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995).

² The most relevant passages for this subject are in *Political Liberalism* 212–54 (New York: Columbia University Press, 1993).

determining facts that are accessible in the required way. To some extent, religious belief depends on faith, personal experience, and distinctive tradition; adherents of one religion cannot present “logical” arguments that alone will persuade outsiders to their basic religious presuppositions and the conclusions they draw from those presuppositions. Religious belief and practice is fine for individuals and communities of faith; and religious perspectives may enrich our cultural understandings. But at least when citizens are coerced, the state acts unfairly unless it has reasons that have force *for all citizens*. Religious reasons do not fall into this category. They do not belong in democratic politics. This is a matter of fairness, and also of political stability. Neither citizens nor officials should present religious reasons in public debate; neither group should rely on such reasons.

Some brief clarifications about this “exclusivist” position can help avoid confusion. First, it concerns politics, not broader public culture. It need not assert that religion belongs in a private, wholly nonpublic sphere; it need assert only that religion should be kept out of politics. Second, no one claims that people *will be wholly uninfluenced* by religious understandings. Any claim of that sort would be absurdly naive. The assertion is that people should discuss political issues in public without reliance on religious premises and they should *try* to make up their minds accordingly. Third, the claim is not that religion is foolish superstition and *therefore* deserves no place in our political life. Of course, all arguments based on foolish superstition should be avoided, but if *that* were the basis for excluding religion, the exclusion would have to rest on persuasive argument that religion is foolish superstition. Whatever they may think about religion, the leading proponents of exclusion base their position on premises of democratic government, not on the intrinsic foolishness of religion. More to the point, more than 90 percent of our citizens identify themselves as religious; one cannot reasonably suppose they should avoid religion in politics because religion is foolish. Finally, we have to be careful about what the “exclusivist” position entails. What is mainly being urged is “self-exclusion.” No one proposes that anyone can be punished or silenced for making religious arguments; indeed, guarantees of free speech and free exercise protect such arguments. The proposal is that people should refrain from making religious arguments because they do not fit with how liberal democracies should work. Whether a misguided reliance on religious grounds could make a law invalid is left for our next chapter.

The competing “inclusive” position is that citizens and officials should be able to rely on whatever sources of understanding seem to them most reliable and illuminating. If a respected religious authority like the pope, or a divinely inspired text, or one’s personal sense of how God relates to human beings,

suggests that we should help those who are less fortunate, why should that not count for our position on welfare reform and medical insurance? People do not feel whole if they try to divorce their deepest sources of insight from their political stances. Moreover, shared premises and methods of justification are too thin to resolve many political issues; they just do not settle enough in a society as diverse and divided as our own. Fairness consists not in exclusion, even self-exclusion, but in everyone relying on what they think is most convincing. Indeed, the ability to rely on one's religious convictions is part of the free exercise of religion. A full airing of all those views will enrich everyone's understanding. People can often learn from others who do not share their fundamental religious beliefs.³ A healthy democracy will not be unstable if religious arguments are part of political discourse.

For the inclusivist position, only one clarification is required. A defender of that position need not claim that *every ground* for a political position is appropriate. Some grounds may be contrary to premises of liberal democracy. We now suppose that racism and other denials of equal worth fall into this category. But religion has never been so regarded in our country. From the beginning, religious belief and practice have been thought fully compatible with the underpinnings of our political order.

As I have put it so far, the controversy about religious grounds seems fairly straightforward, if not easy to resolve; but matters are in fact much more complicated. No one claims that it is *only* religious reasons that are excluded by public reasons, and it becomes evident on examination that deciding which reasons counts as public is not simple. Perhaps we might do better to think of reasons which are more or less public. And I shall argue that it should make a crucial difference for whether one should rely on nonpublic reasons that he or she is an ordinary citizen or an official and, if an official, engaging in public discourse or silently employing grounds of judgment.

Some of the difficulties with deciding what count as "public reasons" may be illustrated with reference to natural law theory, a theory that is powerfully associated with Roman Catholic tradition, but is not limited to that tradition and in modern times has typically been defended as not resting on religious premises.⁴ According to my understanding, the standard, full-bodied,⁵ natural law position rests on the following premises.

³ See Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004).

⁴ The leading treatment in Anglo-American legal philosophy is that of John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

⁵ Readers of legal philosophy will be familiar with Lon Fuller's idea of a procedural natural law, *The Morality of Law* (rev. ed., New Haven: Yale University Press, 1969), and Ronald Dworkin's "naturalism," *Law's Empire* (Cambridge: Belknap Press of Harvard University Press, 1986); "Natural Law Revisited," 34 *University of Florida Law Review* 165 (1982). These are much more modest in their claims.

1. Human life is integrally related to all of existence.
2. Human nature is universal.
3. The defining characteristic of human beings is their reason or rationality.
4. Human beings have inherent purposes (the teleological approach associated with St. Thomas Aquinas) or self-evident goods (the approach some modern proponents of natural law defend).
5. These purposes, or goods, are discoverable by reason, reason being understood in a broad sense to include the light of experience.
6. Morality is objective, universal, and discoverable by reason.
7. People's moral obligations are consonant with their own true purposes, or their realization of self-evident goods, and with their true happiness.
8. At the deepest levels, no conflict arises between individual good and the common good.
9. Human laws appropriately reflect the natural law (though not every dictate of natural law should be subject to state coercion). Human laws appropriately determine details left open by natural law, such as the precise punishments for various crimes, and they settle matters of indifference.
10. Human laws that are not in accord with natural law are not "really" law in some sense. A failure to accord with natural law may occur if a human law requires behavior that natural law forbids, or if a law forbids behavior that natural law values, or if the burdens and benefits of a law are highly unjust.

AN ILLUSTRATION: THE STEM CELL DEBATE

To grasp the complexities of a concept of public reasons and the place of natural law, it helps to start with an illustration drawn from a contentious political issue during the presidency of George W. Bush—the question whether the federal government should fund research with embryonic stem cells. Before the president's decision to allow funding only to existing lines of stem cells, the *Wall Street Journal* carried a debate between David Baltimore, Nobel laureate scientist and president of the California Institute of Technology, and Robert George, a political and legal philosopher who teaches at Princeton.⁶

Dr. Baltimore argued strongly in favor of federal funding. Adult stem cells are not now a viable alternative to embryonic stem cells, which have "the potential to become every part of the human body" and "could be used to

⁶ Compare David Baltimore, "Stem Cell Research: A Debate—Don't Impede Medical Progress," *Wall Street Journal*, July 30, 2001, at A18, with Robert P. George, "Stem Cell Research: A Debate—Don't Destroy Human Life," *Wall Street Journal*, July 30, 2001, at A18.

make up for the deficits in brain and pancreas cells that cause Parkinson's disease or diabetes."⁷ For these stem cells to become practically effective in curing human diseases, scientists must carry forward work of many types. The "publicly funded American research effort is the most effective . . . in the world. To refuse to allow it to participate in this exciting research would be an affront to the American people, especially those who suffer from diseases that could one day be reversed by these miraculous cells."⁸

About the concern that the embryos deserve protection, Baltimore had this to say: "To me, a tiny mass of cells that has never been in a uterus is hardly a human being. . . . By treating the use of stem cells as akin to murder, we would lose a great deal."⁹

That is the issue to which Professor George devoted his full attention. He did not discuss the likely medical benefits of stem cell research because these are irrelevant, in his view. It is wrong to harvest organs from human beings without their consent. "[K]illing for the purpose of harvesting body parts . . . is inconsistent with the inherent dignity of all human beings."¹⁰ A human being, George claimed, is a whole, living member of the species *Homo sapiens*. Unlike a sperm cell or an ovum, or skin cells, human embryos, "[m]odern science shows[,] . . . are whole living members of the human species, who are capable of directing from within their own integral organic functioning and development into and through the fetal, infant, child, and adolescent stages of life and ultimately into adulthood."¹¹ It is not that a human embryo has the potential to be a human being; he or she "is already a living human being."¹² George eschewed relying on controversial religious premises such as "ensoulment"; he said "the science will do just fine" and he would be pleased if opponents would agree that "the scientific facts about when new human beings begin" should be determinative.¹³ Given the status of embryos as human beings, compromises, such as using stem cells from embryos created by in vitro fertilization that would be discarded in any event, are unacceptable.¹⁴

Do Baltimore's and George's arguments count as ones of public reason, and should that matter? To answer those questions we need to relate the

⁷ See Baltimore, note 6 *supra*, at A18.

⁸ *Id.*

⁹ *Id.*

¹⁰ George, note 6 *supra*, at A18.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Professor George notes in passing that the Catholic Church has no official position on the "eternal destiny" of embryos. *Id.*

¹⁴ *Id.* Professor George does not comment on President Bush's actual compromise of allowing federal funding of research on lines from embryos already destroyed. *Id.*

basis of philosophies of public reasons to the possible scope of those reasons. We need to ask both what count as public reasons and when people should be constrained to rely on them.

A typical public reason is that citizens' opportunities should not depend on their race, gender, or religion. This is a central tenet of the modern political theory of liberal democracy; to embrace it, one need not reach to controversial moral theories or religious perspectives. David Baltimore's contention that use of stem cells can produce important medical benefits is a public reason; everyone agrees that cure of disease and disability is good. On the other hand, the claim that biblical passages tell us that God abhors homosexual acts is not a public reason; it relies on a text that does not carry authority for all reasonable citizens.

Whatever the exact range of public reasons, they do not include reasons drawn from biblical revelation or church authority. Within a liberal society, people will disagree about such fundamental matters as the existence and nature of God and the quality of a good life. The idea is that when citizens adhere to public reasons, they respect each other as free and equal citizens, they take intractable moral and religious questions off the political agenda. *If* Robert George's argument against embryonic stem cell research depended on a belief about ensoulment, derived from church doctrine, it would not be a public reason.

Theorists disagree not only about who should constrain themselves to rely on public reasons but also when. Does the constraint apply in the same way to officials and ordinary citizens? Should public reasons underlie all laws and policies, or all coercive laws,¹⁵ or, as John Rawls proposed, constitutional essentials and basic matters of justice?¹⁶ Does a constraint of public reasons concern the underlying grounds on which people decide, the explanations and arguments they put forward on behalf of their positions, or both of these?

Theorists also disagree over exactly what makes reasons nonpublic. Among the candidates that have been suggested are ideas of the good (or controversial ideas of the good), nonrational grounds, reasons that are not widely accepted, and comprehensive views (roughly, overarching philosophies of life).

The notion that coercive laws, in particular, should be based on public reasons is that governments should not compel people on the basis of reasons that are not persuasive for them. If the government is not coercing people, its reasons matter less. Our stem cell example presses hard on that distinc-

¹⁵ I am putting aside for purposes of this analysis those situations in which it is perfectly appropriate to vote on the basis of self-interest.

¹⁶ See generally Rawls, note 2 *supra*.

tion. We know that the government would fund this research were it not for concern about embryos. If it refuses to fund, many scientists will not do embryonic stem cell research and, much more important, sufferers of diseases like Parkinson's and Alzheimer's may not receive critical medical benefits that might otherwise have been available. Can it be that the government needs public reasons if it is to *coerce* people not to hunt endangered species, but that it can curtail potential lifesaving medical assistance on the basis of nonpublic reasons? That would be paradoxical.

The stem cell illustration also helps to show why we should not draw a sharp distinction between ordinary political issues and constitutional essentials and basic questions of justice. As Rawls once applied these terms, a right to abortion falls within constitutional essentials;¹⁷ funding of stem cell research is an ordinary issue. For both abortion and embryonic stem cell research, the central question is whether conception gives rise to a human being (or potential human being) who deserves society's protection. Can it be that we should rely only on public reasons to determine the legal treatment of abortion but may rely on nonpublic reasons in respect to stem cell research? Not only is this conclusion odd from a theoretical point of view, convincing people that the status of an embryo may be determined in one way for one political issue and must be determined in another way for a related issue would be very hard. I conclude that, insofar as public reasons are concerned, no sharp line should be drawn between coercive and noncoercive laws or between ordinary issues, on the one hand, and constitutional essentials and questions of basic justice on the other.¹⁸

WHEN SHOULD PEOPLE FEEL CONSTRAINED BY PUBLIC REASONS, NOT RELYING ON SPECIFICALLY RELIGIOUS GROUNDS? PRELIMINARY CONCLUSIONS

Most proponents of public reasons have assumed that any constraint applies in the same manner to officials and citizens, and in the same manner to grounds of judgment and public discourse.¹⁹ My position differs. It relies

¹⁷ See *id.*, at 243 n. 32 (discussing balance of political values concerning human life, reproduction and equality of women).

¹⁸ One might think, however, that a constraint to follow public reasons is especially important as laws and policies impinge on members of society in more important ways.

¹⁹ For a discussion of various arguments about how public reasons apply to citizens, see Paul J. Weithman, "Citizenship and Public Reason," in Robert P. George and Christopher Wolfe, eds., *Natural Law and Public Reason* 125 (Washington, D.C.: Georgetown University Press, 2000).

heavily on distinctions between advocacy and justification, on the one hand, and grounds of judgment, on the other, and between officials and ordinary citizens.

When we think about how we make up our minds and how we discuss issues, we realize that monitoring our discourse is a lot easier than restricting our bases for decision. Moreover, while other people hear our discourse, they cannot know our full grounds of decision. These truths matter.

Most people would be hard put to *try* to carry out a program of excluding their deepest religious convictions from their political judgments. They could not disentangle what they believe because of underlying religious convictions from what they would believe if they relied only on premises of liberal democracy and shared techniques of understanding.

Speaking without reference to religious convictions is not difficult. Members of our law faculty share an assumption that school problems are to be resolved in terms of values that are not explicitly connected to particular comprehensive views. I have yet to hear a specifically Jewish, Christian, atheist, or Benthamite argument for a faculty decision. Yet, when decisions involve the point of legal education, I doubt that colleagues try rigorously to remove the threads of their religious understandings about the nature of society and education for a profession.

If it is working, a constraint of public reasons is reciprocal. People can tell easily whether arguments are being made from explicit religious premises; they will know if restraint on their part is matched. If they try to purge their silent deliberations of religious influence, they cannot be sure if others are similarly motivated. And once someone realizes just how arduous this purging exercise is, he will question the success of others, even if he thinks they are trying. Such uncertainties are a poor basis for reciprocity.

Consider some differences between officials and ordinary citizens. Officials have a lot more to do with the law that gets made and applied than do citizens; there are a lot more citizens than officials. Officials are used to making judgments and offering reasons that do not include all that is relevant in their personal lives. Citizens are less used to practicing such restraint. Perhaps a highly educated, participating citizenry could learn to draw distinctions between what matters for most aspects of life and what matters for politics. But that is not our citizenry. When officials practice restraint, that impinges much less on a population's religious liberty than when citizens do so. Official restraint more greatly affects the quality of political life. These basic distinctions—between advocacy and judgment and between officials and citizens—suggest that if any self-exclusion is justified, it is mainly self-exclusion for officials in their public statements.

Among officials we can divide roughly between those who apply law and those who make law or exercise ordinary discretionary judgment. Among those who apply law, judges and quasi-judicial officials often provide reasoned justifications for their decisions. At this stage of American history, one does not often find explicitly religious grounding in opinions, even when courts reach beyond standard legal sources to comment on the social benefits or harms of a possible ruling. By an explicitly religious grounding, I mean reasoning in this form: "Given a true religious proposition, these conclusions about social good follow." Some examination of religious sources might be acceptable to show the community's attitudes toward a practice or its deep moral assumptions, and judges might employ familiar religious stories to illustrate a point; but none of these is a reliance on religious grounds in the sense that I mean. Although judicial opinions are rarely completely candid about the strength of competing arguments, one expects judges to rely on arguments they believe should have force for all judges. In our culture, this excludes arguments based on particular religious premises.

When we turn to legislators, we may start with the proposition that if an explicit religious grounding were placed in the preamble to a statute, that should be viewed as a promotion of religion that would violate the Establishment Clause. Although the use of religious language has increased among legislators and executive officials during the second Bush administration, it is still true that members of Congress typically do not make religious arguments on the floor of Congress or before their constituents. There is, however, no accepted understanding that they should avoid giving any weight to their own religious convictions, and to those of constituents, in the formulation of their positions. I believe legislators should give greater weight to reasons that are generally available than to those they understand are not; but some reliance on religious and similar reasons is appropriate, especially since the generally available reasons are radically indecisive about some crucial social problems.

If legislators rely on religious understandings more than their public advocacy reflects, are they not lacking in candor? Does restraint impoverish discourse and leave voters less well informed than they might be? Realism counsels that much legislators say is far from fully candid, so self-restraint about religious grounds is hardly a *major* contributor to lack of candor. In any event the value of self-restraint overrides this drawback and whatever reduction in information voters suffer. Legislators should not deny religious bases that motivate them, but they should not develop public arguments in these terms.

Because citizens are not used to practicing self-restraint of this kind, and because most citizens have little involvement in the political process, I do

not think they should regard themselves as constrained to avoid relying on religious grounds *or* to avoid stating those grounds. Some citizens, however, such as university and corporation presidents, and individuals consistently engaged in political life, have a much more public role. For them, something like the constraints for legislators are appropriate.

Religious leaders and organizations have a special place. They properly develop religious grounds as these relate to political problems, and they also properly take part in direct efforts to win support for particular positions, although it is usually unfortunate when religious leaders endorse parties or candidates.

Much of the theorizing about public reasons and religious reasons has been cast in terms of liberal democracies in general, or as what the Establishment Clause of our Constitution actually requires. Neither of these approaches answers the most central practical questions. The Establishment Clause, in its direct force, has modest implications. It is mainly about what laws do, not why they are enacted. What of liberal democracies and theories of legitimacy? Democratic theorists argue persuasively that in a liberal society people will adopt many different comprehensive views. This condition will not change. The history of Western liberal democracies, forged out of religious division, shows that differences in religious views can be a source of intense conflict; but we can imagine people of various religious views who seek to learn from one another and who trust each other's social judgments. These people might welcome religious perspectives in political discourse. On the other hand, one might not recommend an explicitly religious politics as the most fruitful approach for a newly constituted Northern Ireland or for the fledgling, fragile union that may emerge in Bosnia. Much depends on history, culture, the religious and other broad views that people hold, and their degree of mutual tolerance and respect. Specific principles of self-restraint should be offered for particular political orders, not in gross. If this is true about religious discourse and public reason, it is also true about many other practical issues to which political philosophers speak.²⁰

The United States is a country of great diversity in culture and religion. The percentage of our people that is neither Christian nor Jewish increases

²⁰ One may analyze the problem of public reason and the closely related problem of religion and politics from a particular religious or other "comprehensive" view, say Roman Catholicism, Orthodox Judaism, liberal Protestantism, or Kantianism, and see what implications follow, or one may try to do "detached" political philosophy, not relying on any particular comprehensive view. Both exercises are valuable. What I do summarily in this chapter is the latter, "detached" political philosophy, although readers will not be surprised that my conclusions fit my own comprehensive view, a variety of liberal Protestantism. The hope is that the analysis will appeal to those who hold different comprehensive views.

steadily, with immigration policies that no longer discriminate egregiously against Asians. Outright religious conflict is rare, but religious differences remain a source of distrust and tension. Religious convictions are intense and widespread enough to influence politics and to disturb people with their influence. That is partly why some restraint may be needed.

WHAT COUNT AS PUBLIC REASONS?

A general degree of acceptance cannot alone be the test of what reasons are public. Were that the only standard, Christians could rely on the New Testament in a country that was mainly Christian; Muslims could rely on the Koran in a Muslim society. This evident inequality for what happen to be minority perspectives conflicts with the ideals of liberal democracy. General acceptance might play some role in whether reasons are relevantly public, but it cannot be the exclusive or primary standard.²¹

Sometimes it is suggested that particular ideas of the good, or controversial ideas of the good, are what are excluded by public reasons.²² People have various convictions about what makes life good, and they should be able to pursue them within a framework of just social relations and mutual respect.²³ This position, to be clear, is not that the government should avoid all moral questions, but that it should limit itself to moral questions that concern justice and mutual respect, not resolving moral questions about the kinds of activities people should value in their lives.²⁴

This constraint alone leaves untouched much that proponents of public reasons believe should be excluded. Most notably, it does not exclude much that religions have to say about just social relations.²⁵ Here, our stem cell illustration is illuminating. Whether embryonic stem cells should be used for medical purposes is *not* an issue about the good life; it is an issue of justice and respect for the embryo that may be a human being. If the only public-

²¹ For one claim about general acceptance, see Mario M. Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective," 1 *Notre Dame Journal of Law Ethics and Public Policy* 13, 18 (1984).

²² See generally Charles E. Larmore, *Patterns of Moral Complexity* (New York: Cambridge University Press, 1987).

²³ See *id.* at 118–35.

²⁴ See *id.* at 133 (stating that "the ideal of neutrality must always take precedence over disputed ideals of the good life").

²⁵ More precisely, it does not exclude religious conclusions about just relations that do not depend on claims about what is a good life.

reasons constraint concerned claims about the good life, an argument that a papal encyclical condemns stem cell research would be within the realm of public reasons. But that sort of argument is just the kind that the public-reasons filter is designed to exclude. So a constraint of public reasons cannot be limited to questions of the good life.

Should it at least include all such questions, whatever else it may also contain? The answer is no. We expect public schools to educate children about desirable ways to live, about the importance of physical and mental health, about the dangers of addictions, about the benefits of culture, and about the value of activity as contrasted with indolence. All these aspects of what schools do cannot be summarized fully as helping to make children into good citizens and aiding them to realize whatever goals they set for themselves; they encourage students to live well according to our society's ideas of what a good life contains. State support of arts and literature and high taxes on alcohol and cigarettes show that the government's involvement in questions of the good life extends to adults. Laws against the use of drugs are controversial, but few object to laws that forbid human beings from having sex with animals. These cannot be defended as consistent with neutrality about the good life, unless one (implausibly) regards them as mainly protecting animals who would be potential sexual partners.

It is at least a defensible position that the state should not coerce people in respect to *controversial* judgments about the good life;²⁶ but the basis for such a position seems to be more a judgment that individuals should have autonomy in this realm than a judgment that the reasons for coercion could never be sufficiently public.

Another possibility for grounds that do not qualify as public is reasons that do not rest on rational grounds. Here, roughly, the idea is that people should be able to rely on reasoned arguments that other people can understand and accept, not on faith or intuition that others do not share.²⁷ Remember how careful Professor George was to say that his argument against stem cell research did not depend on controversial religious premises but on "the scientific facts." One difficulty with the "rational grounds" approach is

²⁶ See Jeffrey Reiman, "Abortion, Natural Law, and Liberal Discourse: A Response to John Finnis," in George and Wolfe, *supra* note 19, at 107, 109–10 ("What is ruled out is forcing people to live this way or that, beyond what is needed to protect every sane adult's chances of living as he or she sees fit").

²⁷ See Thomas Nagel, "Moral Conflict and Political Legitimacy," 16 *Philosophy and Public Affairs* 215, 230 (1987) (referring to grounds of decision that "can be shown to be justifiable from a more impersonal standpoint").

drawing the line between rational grounds and nonrational bases for judgment. In much of what we believe, rational understanding, however that is conceived, intertwines with other assumptions.

Insofar as a constraint conceived in terms of rational grounds privileges one particular way of understanding, some people object that it unfairly discriminates against other modes of apprehension; but a more troubling practical worry arises out of divergent opinions about what can be established rationally. A good many people believe that the existence of a beneficent God can be established rationally. Years ago, one of my sons had me read a book that claimed that by proof of miracles and accurate prophecies, the Bible established itself as the infallible word of God and showed that Jesus was the Son of God. Any constraint of public reasons is to operate as a self-restraint. If people agreed that they should rely only on rational grounds, they would still disagree vigorously about what rational grounds could establish. The author who thought that he could rationally establish the infallibility of the Bible would feel free to rely on biblical passages; others they might be no less certain the passages represent God's true word.

The most appealing single category of claims that do not count as ones of public reason are those based on comprehensive views, overarching philosophies of life.²⁸ According to Rawls, people resolving constitutional essentials and basic questions of justice should rely neither on religious perspectives nor on secular philosophies, such as utilitarianism or the view that human autonomy is the most fundamental good.²⁹

We need to recognize that what people will sacrifice if they forgo reliance on comprehensive views will be uneven. A utilitarian will give up less than a Christian fundamentalist, because the specific arguments a utilitarian makes do not depend on his utilitarian premises in the way that would be true for the fundamentalist. Thus, David Baltimore's argument about the

²⁸ See Rawls, *supra* note 2, at 62 ("There is no reason . . . why any citizen, or association of citizens, should have the right to use the state's police power to decide constitutional essentials or basic questions of justice as that person's, or that association's, comprehensive doctrine directs").

²⁹ If someone's comprehensive view reflects his overarching approach to life, how can he possibly be expected not to rely on it? Rawls's answer to this question is a two-level approach. People with a variety of comprehensive views will coalesce around the premise that liberal democracy is a desirable form of government. A feature of liberal democracy is resolving political questions in a way that is detached from people's comprehensive view. Thus, a person's comprehensive view calls on him to accept a political arrangement in which issues are resolved without direct reference to comprehensive views. There is nothing illogical about this arrangement, as we can see clearly if we imagine people of different religious convictions who agree upon principles of religious liberty and separation of church and state, including a principle that officials will not resolve issues based on their own understanding of religious truth.

great potential medical benefits of stem cell research lies within premises that are shared in the society. It is also the kind of argument a utilitarian makes. Granted, a utilitarian has a particular device for weighing reasons—the greatest happiness principle (or some similar principle)—and he has a basis for excluding some possible grounds; but all the reasons a utilitarian will be likely to suggest for or against a policy are likely to fall within the domain of arguments that people accept independent of their comprehensive views. That certainly is not true for much a religious fundamentalist holds true. This inequality of sacrifice is troubling, but it may be acceptable if we have good reasons to exclude comprehensive views from the domain of politics.

To recapitulate, what are not public reasons? We have looked at grounds that are not widely accepted, conceptions of the good, grounds that are not rational, and comprehensive views. Although the most plausible single criterion for what reasons are public is that they do not rest on comprehensive views, we should be open to the possibility that more than one of these criteria may count for whether a reason is public. We should also be open to the possibility that some reasons may be more or less public, rather than public or not.

DIFFICULTIES IN CLASSIFYING NATURAL LAW ARGUMENTS

Recognizing that the very concept of public reasons is far from unproblematic, we turn now to some perplexities in discerning what should count as reasons that are public, focusing particularly on natural law arguments such as Professor George's argument that the embryo is a human being.

We may start with this thought by Robert George and Christopher Wolfe: "On the one hand, if 'public reason' is interpreted broadly . . . , then natural law theorists believe that natural law theory is nothing more or less than the philosophy of public reason. . . . On the other hand, if 'public reason' is interpreted in the narrower sense . . . [which] generally excludes reliance on 'comprehensive' moral, philosophical, and religious doctrines, then natural law theorists reject the idea."³⁰ Although this sentence captures a large measure of truth, I think we can delve more deeply into which aspects of natural law reasoning might qualify as public reasons, under various approaches to public reason.

³⁰ Robert P. George and Christopher Wolfe, "Introduction," in George and Wolfe, *supra* note 19, at 1, 2.

John Courtney Murray, the most widely read American theorist of natural law in the twentieth century, and a drafter of the Second Vatican Council's statement on religious liberty, claimed in his book *We Hold These Truths*³¹ that American traditions and natural law understanding coalesce. He urged that the American political community is based on a tradition of natural law and natural rights, resting on a belief that "the people as a whole are inwardly governed by the recognized imperatives of the universal moral law."³² The American consensus implies "that there are truths that we hold in common, and a natural law that makes known to all of us the structure of the moral universe."³³ Natural law reasoning best articulates the principles of this consensus, although they can be fully understood only by the wise. According to Murray, therefore, a natural law approach provides the best reasoned foundation for the public philosophy of our society, and its government. Rather than analyzing how Murray's understanding would look in light of more recent theorizing about public reason, I shall suggest a number of distinctions regarding natural law theories, trying to discern how far claims of natural law might fall within a domain of public reason. For this exercise, I am assuming that claims *might* be disqualified as public reasons because they do not rest on rational grounds, because they are based on controversial ideas of the good, or because they are aspects of comprehensive views.³⁴

The distinctions regarding natural law that seem important are these: (1) nonreligious understandings of natural law principles contrasted with religious understandings; (2) the theoretical premises of natural law approaches contrasted with practical ways to resolve moral problems; (3) teleological understandings of morality contrasted with the idea that basic moral premises are self-evident; (4) rational derivation of moral conclusions contrasted with judgments based on the fruits of experience; (5) moral claims that are dependent on ideas of a good life contrasted with those that are independent of those ideas; (6) conclusions susceptible to universal understanding contrasted with those that only the wise can grasp; (7) understanding that is independent of time and place contrasted with understanding that develops according to time and culture. These distinctions can contribute to analytical

³¹ John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960).

³² *Id.* at 36 (contrasting this belief with highly voluntaristic accounts of natural rights).

³³ *Id.* at 40.

³⁴ We need to remember that if important natural law claims are "disqualified," that does not necessarily mean that they do not belong in politics given the controversial status of any theory that citizens or officials should constrain themselves to rely on public reasons.

clarity, but I definitely do not mean to suggest that every version of natural law theory or every particular moral claim comes down neatly on one side or the other of the dichotomies.³⁵

Religious Understanding or Not

The close association between Roman Catholicism and the natural law tradition leads some outsiders to suppose that natural law is an essentially religious view about law and morality, but that is contrary to what most modern natural law theorists claim. They contend that, in some sense, morality is universal and that fundamental moral norms can be grasped by people whatever their religious traditions and opinions.³⁶

Natural lawyers within the Christian tradition have believed that scripture and church teachings complement what we can discern by natural reason, and some believe that a relatively few moral duties are discoverable only from religious sources; but these views alone do not disqualify natural law arguments from being ones of public reason.³⁷ Various Protestant theologians and a few Roman Catholic ones have challenged this universalist natural law view as failing to be distinctly Christian; for them, a Christian ethic should depend on Christian sources and a Christian worldview.³⁸ Jean Porter's study of scholastic philosophers and theologians shows that they drew a less sharp distinction between natural reason and religious sources of in-

³⁵ For example, insofar as we can differentiate between rational derivation from basic premises and reliance on the fruits of experience, a theorist might believe both are highly relevant to drawing sound moral conclusions.

³⁶ See Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* 29–30 (Grand Rapids, Mich.: Eerdmans, 1999) (describing Catholic version of natural law: “Because moral norms are grounded in human nature, which is the same everywhere, they are accessible to all reasonable men and women without the necessity of revelation”); Yves R. Simon, *The Tradition of Natural Law: A Philosopher's Reflections*, Vukan Kuic, ed. 125–36 (New York: Fordham University Press, 1965) (explaining that natural laws are premises that all societies grasp, but from which they may draw different moral conclusions); George and Wolfe, *supra* note 19, at 56 (describing view held by natural law theorists: “basic moral norms are widely known, though in some cases they or their more specific applications may be obscured by wayward passions or corrupt customs or habits”).

³⁷ A full analysis needs to take account of people whose certainty about resolution of a moral issue is increased because of religious sources or whose sense of the validity of a natural law conclusion is based on religious sources, but I leave these nuances aside here.

³⁸ See Porter, *note* 36 *supra*, at 30–34 (reviewing criticisms of natural law raised by Reinhold Niebuhr, Stanley Hauerwas, Karl Rahner, Bernard Lonergan, and James Gustafson, among others); *id.* at 168–72 (discussing criticisms of natural law raised by Karl Barth, who is described as believing that “an adequate account of morality must be not only theological but specifically and distinctively Christological”).

sight than modern natural lawyers tend to do.³⁹ She suggests that the scholastic approach has much to teach us about ethical understanding.⁴⁰ Whatever the intrinsic soundness of the approach Porter reports and recommends, reasoning and conclusions that depend on specifically Christian sources do not satisfy requirements of public reason, as elaborated by modern theorists of liberal democracy.

Overall Theory or Ways of Reasoning about Moral and Political Problems

Most natural law theorists have provided accounts of human good and moral duty within an overall perspective about fundamental reality.⁴¹ Typically, the theorists have connected human existence to the rest of the physical universe, in which all objects, or all living objects, have a natural inclination to fulfill their essential purposes.⁴² In this teleological view of life, human beings share some purposes with animals, and perhaps some even with plants and stones, but they have a higher purpose than all other earthly beings. That purpose is to realize their rational nature. In many versions, God is a crucial element in this structure of being. When natural law claims rest directly upon assertions about God, or upon a complete theory of natural reality, they are based on a comprehensive view in Rawls's sense. But that need not disqualify every moral and political argument made by natural lawyers from being consonant with public reason.

The complete relation between full natural law theories and their bases of moral reasoning is complex, but here is how moral claims might escape depending on a comprehensive view. Most natural-law accounts assert that people do (descriptively) reach common judgments about basic moral issues and that these judgments are sound.⁴³ So long as a theorist believes that

³⁹ The scholastics used scripture to determine which aspects of nature to treat as normative, and they used their understanding of nature and reason to interpret scripture. Rather than forming two complementary tracks to moral understanding, religious interpretation and natural reason interpenetrated each other. See *id.* at 129–40.

⁴⁰ See *id.* at 303–17 (suggesting that moral reflection is theological yet “remains open to the best insights of the natural and social sciences”).

⁴¹ See generally Lloyd L. Weinreb, *Natural Law and Justice* 55–60 (Cambridge: Harvard University Press, 1987).

⁴² See Porter, *supra* note 36, at 70 (quoting a “highly influential definition” of natural law made by Ulpian, a Roman jurist: “The law of nature is that which nature teaches all animals. For that law is not proper to the human race, but it is common to all animals which are born on the earth and in the sea, and to the birds also”).

⁴³ There is substantial variation in how much common reason reaches. Compare Porter, *supra* note 36, at 29–30 (describing Catholic version of natural law, which holds that the same moral norms are

people can reason to sound moral judgments *without* understanding or accepting any overall theory that explains how these judgments fit with physical reality or God's purposes, then the moral arguments the theorist presents might qualify as public reasons, even though his complete theory definitely does not.⁴⁴

Notice, in this respect, that George made his appeal without explicitly relying on any comprehensive natural law theory. If his contention about the status of an embryo can be detached from such a theory, it could be a public reason not to engage in stem cell research.⁴⁵

Teleology or Self-Evidence

The traditional understanding of natural law is built on a purposive sense of nature; as an acorn develops into an oak, things have a tendency to fulfill their essential purposes. Human beings live good lives if they fulfill their true purposes; the norms that they should observe help them realize their essential nature. To take a practical example, we might discern that the essential purpose of human sexuality is procreation. We could proceed to condemn masturbation, homosexual relations, and the use of artificial contraceptives as unnatural deviations from appropriate sexual acts. This theoretical approach has been challenged by Germain Grisez and John Finnis,⁴⁶ and by Robert George, although their own conclusions about practical moral issues differ little from those whose teleological approach they reject. Their account unties moral understanding from any theory of physical reality. Rather, human beings are capable of identifying certain goods as self-evidently valuable. From this identification of basic goods and from recognition that none has priority over others, we can ascertain what actions are morally right or morally wrong.

Our question is whether either of these approaches is intrinsically more susceptible of providing public reasons than the other. Insofar as the teleolog-

accessible to all persons), with Simon, *supra* note 36, at 3–5, 23–26, 66, 146–48 (expressing skeptical view about how much is really shared in common).

⁴⁴ See Simon, *supra* note 36, at 62 (speaking of acquaintance with natural law as being logically antecedent to knowledge of God's existence, although understanding of natural law is preserved only by recognizing God as its ultimate foundation).

⁴⁵ However, when a natural law theorist advances a moral claim, it may be very difficult to decide just how far the claim can fairly be detached from his overall theory.

⁴⁶ The explication with which I am most conversant is John Finnis, *Natural Law and Natural Rights*, note 4 *supra*, which I reviewed in 10 *Political Theory* 133 (1981). In a book that is critical of this approach, Russell Hittinger examines its major claims in detail and refers to many writings of its defenders. See generally Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987).

ical theory rests on broad claims about purpose in nature, it certainly amounts to a comprehensive view in Rawls's sense.⁴⁷ No doubt, the Grisez-Finnis-George approach is also a comprehensive view, but it does not follow that every moral claim made from that perspective must rest on the comprehensive view. George, for example, might argue that his particular claim about the embryos is self-evidently correct, and can be seen to be so by people who need not accept the idea that self-evident truths lie at the core of moral understanding.⁴⁸

Rational Derivations or the Fruits of Experience

How are we to draw correct moral conclusions? Various natural law theorists have emphasized rational derivations from first principles or insights from human experience. I do not want to overstate the dichotomy. Everyone agrees that reflection on experience is a vital aspect of understanding moral truth, and no one rejects rational analysis that moves from general truths to particulars. But, nevertheless, some theorists rely much more heavily on rational derivations than do others. Many modern proponents of natural law, both those who maintain a teleological perspective and those who start from self-evidence, draw highly controversial conclusions from supposedly irresistible first principles. To take just one example, the natural purposes or self-evident values of human sexuality are said to lead to a conclusion that persons who are powerfully inclined from birth to homosexual rather than heterosexual relations should refrain from sexual acts altogether, rather than engage in the only sexual acts that attract them.⁴⁹

In the abstract, rational derivation is fully consonant with public reason. After all, if one begins with a valid first principle and draws from it by rigor-

⁴⁷ See Rawls, *supra* note 2, at 175 (stating that “[a] doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought, whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and is rather loosely articulated”).

⁴⁸ Rawls has talked about people relying on practices of common sense and science. See John Rawls, “Kantian Constructivism in Moral Theory,” 77 *Journal of Philosophy* 515, 539 (1980). Such a reliance does not stray from public reason. George talks about his conclusion as based on science, but the scientific evidence alone does not tell us how the embryo should be valued. If George conceded as much, he might still contend that his conclusion that an entity capable of development through internal organic functioning into a human being *is* a human being is a conclusion of common sense (albeit a kind of rarified common sense). Conceivably, a teleological theorist could advance similar arguments that some claims about basic human purposes, such as preserving life, rest on a shared common sense; but, in general, claims within a teleological perspective seem to rest more directly on a comprehensive view than claims asserted as self-evident.

⁴⁹ I have criticized this position. See Kent Greenawalt, “How Persuasive Is Natural Law Theory?” 75 *Notre Dame Law Review* 1647, 1666–71 (2000).

ous analysis, one's conclusions are rationally compelling. Regrettably, what for some natural law thinkers are unassailable first principles and irrefutable derivations strike many outsiders as uncongenial abstractions that have lost sight of the human condition. If we were focusing exclusively on this feature of claimed rational derivation, the proponent of a norm about sexual behavior might think his view falls within the domain of public reasons; an outsider might find that the norm is not only unpersuasive on balance but that it appeals to an esoteric set of assumptions rather than any common reason.

The more modest approach of reliance on human experience may fall more indisputably within the range of public reason, at least if the reliance on experience is of a certain kind.⁵⁰ Someone who examines the morality of incest by surveying the norms of various cultures and psychological studies of family relations begins with the evidence of social science. If he concludes that, even apart from genetic hazards and the unacceptability of sexual relations with minors, incestuous sexual relations carry very serious risks to family life, and are therefore rightly regarded as immoral, that judgment falls more easily within the domain of public reasons than the top-down reasoning one finds in some natural law approaches.

Dependent on Ideas of the Good or Not

Natural law theory has developed notions of morality out of judgments about what are fulfilling lives for human beings.⁵¹ Were "public reason" to exclude all ideas of the good, it would disqualify most claims of natural law.⁵² Undoubtedly, the natural lawyer's best response is that no sensible version of public reasons should exclude claims about the good life. The natural lawyer *might* acknowledge that controversial claims of the good may be excluded, but say that his claims about the good life are uncontroversial. Faced with the indisputable fact that many natural law claims about good lives *are* controversial, he might claim that he *begins* with uncontroversial claims about the good life and derives his controversial conclusions by a

⁵⁰ A reliance on one's own personal experience, in the sense of subjective reactions, is not clearly in the domain of public reason, unless one has a basis to suppose that other people react similarly.

⁵¹ See Mark C. Murphy, *Natural Law and Practical Rationality* 46 (New York: Cambridge University Press, 2001) (noting that natural law theorists claim that individuals act to increase their well-being). This characterization fits both teleological and self-evidence approaches.

⁵² Interestingly, George's particular argument about stem cell research does not rest on a controversial notion of a good life, or perhaps on any notion of a good life. George's main argument, based on science and what we should reasonably conclude about an entity that can develop into an adult person, is about who counts as a human being. That argument is more about right or justice, the required respect for persons, than it is about what constitutes a good life.

chain of rationally persuasive arguments. In form, this argument has considerable appeal, but if we look at most practical examples, we find either that the initial premises are controversial or that the derivation of conclusions does not seem rationally compelling to outsiders, even ones who are fair and open-minded.⁵³

Universal Understanding or Understanding of the Wise

Although natural law theorists have claimed that fundamental moral understanding is universal, it has not followed that ordinary people can resolve complex moral questions on their own. How to resolve some difficult problems, they believe, can be grasped only by the wise.⁵⁴ This role for the wise is not a serious difficulty for “public reason” if the wise can explain their initial conclusions in a way that all the rest of us will understand is convincing, or if the wise are a group conveniently identified by public reason. If all of us understand the conclusions the wise reach, their reasoning is what convinces us, even if we lacked the insight to reach those conclusions by ourselves. But our understanding might not be essential. For many matters, notably scientific ones, most people depend on the judgments of experts, and they are not able to evaluate why the experts are right. So long as the experts can be identified in some objective way, relying on what they say is consonant with a reliance on public reason.

If reliance on scientific experts fits with public reason, why should not the same be true for reliance on “the wise” for moral and political judgments? We can see two related possible objections. One is that in deciding what is right morally and politically (insofar as that does not depend on scientific understanding about what is true descriptively), people should rely on their own judgments, not those of experts. On this account, a moral argument that is so complicated that only the wise can understand it falls outside the domain of public reasons.⁵⁵ A second objection is that we have no confident

⁵³ This very disagreement about what can be persuasively derived from uncontroversial premises might be used to bolster the contention that only uncontroversial conclusions about the good life qualify as public reasons, not controversial conclusions purportedly derived from uncontroversial premises.

⁵⁴ We can imagine a view that ordinary people resolve moral issues just as well as anyone else, but that they are incapable of rationalizing and theorizing their insights as well as the most intelligent and highly trained among us. But the role of the wise in much natural law theory goes beyond this. That view, which fits well within the notion that reason is the distinctive human characteristic, is that the wise are better capable of resolving moral issues than the less wise.

⁵⁵ For a suggestion that arguments should be discounted if they are extremely difficult to assess and are subject to reasonable disagreement, see Stephen Macedo, “In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?” in George and Wolfe, note 19 *supra*, at 23.

way to identify the morally wise. This objection seems to me crucial to deciding that conclusions that only the wise may perceive are not within the domain of public reasons.⁵⁶

Understanding Independent of Time and Place or Understanding Dependent on Time and Place

To draw a stark contrast, one can imagine a moral understanding that is more or less constant across times and cultures or a moral understanding that develops and recedes in context.⁵⁷ On the second view, explaining how anyone could ever have thought that slavery was consonant with natural law becomes easier; but that view renders one less confident that conclusions reached now have any permanent validity. This distinction, by itself, has little bearing on the issue of natural law and public reason within a particular society,⁵⁸ although the developing view fits more comfortably with a sense that the wise have a special role.

If this quick survey of natural law perspectives and arguments and their relation to ideas of public reason suggests a great deal of complexity, that indeed is the point. With a particular argument by a natural lawyer on some political issue, we (and he) might doubt how much the argument depended on religious premises, how closely it was tied to an overall theory that would amount to a comprehensive view, whether it was self-evident in a way that would make it part of the stock of common reasons, whether any claimed derivations from higher premises followed in the way the argument asserted, whether it rests on a controversial idea of the good, and whether it could be understood by ordinary people or only the wise. We can imagine that even if a speaker and listener agreed on the standards for determining if reasons are public, they might disagree over whether a particular argument by the speaker qualified. We can also imagine that many arguments might not seem to be sharply public or sharply nonpublic, but to fall into some gray area of arguably public or more or less public. Finally, we can imagine that the problem of classification is still more difficult because there is uncertainty about what the criteria are for reasons being public. As difficult as it may be to say whether any particular argument is “in” or “out” of the domain of public

⁵⁶ If almost everyone could agree on who was “wise,” and the basis for that agreement was itself a matter of public reason, then we would have a good public reason to accept a consensus of the wise.

⁵⁷ Simon adopts a strong version of the second view. See Simon, note 36 *supra*, at 161–63 (arguing that our knowledge of natural law develops gradually with progression of human nature).

⁵⁸ That is, one could believe that natural law arguments are ones of public reason within a culture even if they are substantially conditioned by time and place.

reasons, generalizing across the wide range of natural law arguments is virtually impossible.

If natural law arguments are this hard to classify, we can expect the same to be true of many other approaches to moral and political questions that do not depend on explicit religious perspectives. We might find that many reasons and arguments seem to be more or less “public” rather than public or not. We might also wonder if the appropriate degree of publicness of arguments depends on the circumstances. What might be insufficiently public for the preamble of a statute may be sufficiently public in a speech by a senator to her constituents.

LAW AS AN ILLUSTRATION OF PUBLIC REASONS

We might be drawn to an even more skeptical conclusion: namely, that whatever other virtues it may have, a theory of public reasons founders completely on the impossibility of specifying just what reasons are public. But standing against this skeptical rejection of any ideal of public reasons is the law. Is not the law, and I mean here assessment of what the law provides, a domain in which a theory of public reasons is realized? If so, does not that raise the possibility that politics could be a domain of public reason? Rawls talks about the Supreme Court’s work as an exemplar of the use of public reason,⁵⁹ and it is certainly true that some reasons that count outside the law count for less or do not count at all inside the law. I initially supposed that what Rawls said about the law was uncontroversial, that law is an area in which a theory of public reasons applies, and that the difficult question is whether the limited stock of reasons within the law has any bearing on the broader realm of politics. But I have found surprising resistance to the idea that law is a domain of public reasons.

Everyone seems to agree that some reasons that might carry weight outside the law do not count when judges interpret statutes or constitutions or develop the common law. Thus, a Roman Catholic judge would not render a decision on the basis that it accords with the stance taken in a papal encyclical.⁶⁰ Within the law, judges are supposed to rely on reasons that have force for other judges, and the reasons need to be accessible, both in the sense of being comprehensible and in the sense of being capable of being grasped on

⁵⁹ See Rawls, note 2 *supra*, at 235.

⁶⁰ However, reference to the encyclical might be made as evidence that all major religious traditions unite in taking a certain view.

the basis of rational thought, not faith or intuition. So the law limits relevant reasons; it requires that reasons be understood by rational analysis and have a force that is generally understood. These seem to be strong credentials for the law's being a regime of public reasons.

Just how many reasons lie wholly outside the law for various kinds of legal issues is debatable. But even if the discrepancy between reasons that count in politics and reasons that count in law is not large, particular reasons have different weight within and without the law. An argument that a particular result will be more just or will make people happier *may* have some weight when judges interpret statutes, but it will not carry the day if the language of a statute clearly requires a contrary conclusion. Perhaps the most significant difference between reasoning within the law and reasoning in politics has to do with the special weight that certain reasons have in law, especially reasons concerning textual meaning, legislative intent, and the force of precedents, and the diminished weight accorded other reasons. In any event, we may say that in some imprecise way, leaving room for debate over many specific examples, that some reasons that can carry force outside the law do not carry force for legal interpretation, and that the weight of many other reasons is sharply affected by whether one is talking about personal judgment or legislative policy, as contrasted with legal interpretation.

What might be said against the proposition that the law is a system of public reasons, a system in which people are supposed to rely on reasons that have a general or public force and in which many reasons are disqualified or diminished? Skeptics have put the point something like this: "The law allows all reasons to count that are made relevant by the law. One need not ask about what reasons are public reasons but what reasons the law makes relevant."⁶¹ So put, the challenge seems a matter of conceptual labeling,⁶² but I believe a deeper question lies beneath it. The deeper question is the manner in which one resolves what reasons the law allows. My response is that the manner in which one determines whether the law allows some reasons is very similar to how one might decide what reasons count as public for political life.

We might imagine two contrasting ways in which to resolve which reasons the law admits. One way would be to see the law as a distinctive endeavor that has its own peculiar strategy to identify what reasons count. It is as if we said that the reasons that are relevant to settle disputes in tennis are the

⁶¹ This is my paraphrase of a position taken by some participants during a May 2001 conference at Catholic University on public reason.

⁶² My response to the formal distinction between reasons the law allows and public reasons is that the distinction itself is indecisive about every important normative issue.

reasons supplied by the rule book of tennis. Then we would have a limited stock of reasons, comprehensible reasons of force for every decision maker, but all this would be a consequence of the narrow coverage of the rule book.⁶³ That tennis has a limited stock of comprehensible reasons with force for all decision makers would tell us hardly anything about public reason in politics, about why people might eschew otherwise persuasive reasons for justifying laws and policies.

An alternative way that one might resolve whether the law admits reasons is to ask whether otherwise persuasive reasons for reaching decisions are (or should be) excluded because they do not meet some requisite degree of publicness. If the answer were yes, if this were how we decided what reasons the law excludes, we would have an example of “public reasons” that could be relevant for politics. In that event, the assertion that the law makes some reasons relevant and other reasons irrelevant would be quite consistent with the conclusion that the law is a regime of public reasons.

Without doubt, the distinctive character of law, and the authoritative sources of law, lead to some reasons counting within the law and others counting little or not at all in many contexts. For example, the practice that misguided precedents are deemed to have force is an aspect of common-law jurisprudence. To this extent, the law is not so unlike tennis governed largely according to the rule book. But lawyers may usually argue to judges that, in an otherwise close case, one interpretation of a precedent or a reading of a statute will promote justice or human welfare better than another. In fact, the domain of *relevant* arguments in law is not much narrower than the domain of relevant arguments in politics, although, as I have said, differences in weight are critical.⁶⁴ The considerations that determine whether reasons are excluded resemble those that have been suggested for political life by proponents of public reason.

The point is easiest to illustrate for determinations that judges must make that do not depend much on authoritative statutes or precedents. In virtually all states, the main standard for determinations of child custody is “the best interests of the child.”⁶⁵ Suppose a judge must decide whether to place a child with her father or with her mother, who is living with another woman in an

⁶³ In fact, I doubt if tennis or any similar game (I put aside board games) could be completely self-contained in this way; general notions of fairness, for example, would be bound to affect interpretation; but *most* of the reasons that count in tennis might be derived from the rule book.

⁶⁴ It is sufficient for my argument that it is correct for common law, even if, contrary to what I believe, reasons of justice and desirability are properly excluded in statutory or constitutional interpretation, or both.

⁶⁵ See 24A Am. Jur. 2D Divorce and Separation § 931 (West Group, 2006).

intimate relationship. The judge should not refuse custody to the mother because the Bible condemns homosexual relations as sinful. Nor should the judge announce the truth of greatest happiness utilitarianism as the basis for resolving what is in the child's best interest. The basis for excluding these possible reasons is very similar to the arguments put forward by public-reasons theorists in respect to politics: the reasons do not have appropriately general force and they rely too heavily on controversial overarching views.

All this is sufficient to suggest that the law is not only a domain of limited reasons,⁶⁶ but that part of the basis for deciding what reasons are included and excluded has to do with determining which reasons are public.

If the law *is* a domain of public reasons, then it is at least possible that in politics, people do have, or should have, a sense that their reasons should be public, and it is possible that that sense could strengthen and sharpen over time, *or* that it could dissipate in the face of challenges that God should not be removed from the public square. As I have said, my own sense is that the constraint of public reason applies primarily to the public expressions of officials, and that saying just what count as public reasons in various contexts is no simple matter.

CONCLUSION

Our treatment of public reasons may seem to have wandered far from the constitutional principle that no law should be adopted that establishes religion. The crucial connection is that whatever other reasons may be *non*public, it is widely assumed that religious reasons fall within that amorphous category. According to a theory of public reasons, if laws are adopted based mainly on the religious convictions of citizens and officials, something has

⁶⁶ If we ask just what reasons count in law and how much they count, we face difficulties like those that troubled the examination of natural law and public reason. Notably, Supreme Court justices disagree about the relevance of legislative history in statutory cases, and related to this is an apparent disagreement whether the subjective intentions of legislators matter. One theory of common-law development is that judges should very heavily rely on community norms. See generally Melvin Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988). Another theory is that they should forthrightly interpret in light of their own judgments about justice. See generally Ronald Dworkin, *Law's Empire*, note 5 *supra*. People who agree that certain arguments are relevant may disagree greatly about how much weight these should carry in relation to other arguments. Thus, our law is hardly a model of a regime in which telling arguments are neatly lined up with their appropriate weight. But all this does not deprive it of being a domain of public reasons, in which some arguments are acknowledged not to be valid because these arguments fail to exhibit sufficient publicness, and the force of other arguments may be diminished because they seem less public than alternative arguments.

gone wrong from the standpoint of liberal political philosophy, and that impropriety may well be considered a kind of establishment of religion. No one thinks that because *some* citizens and officials have relied upon religious convictions, resulting laws actually violate the Establishment Clause as a matter of law. But conceivably if enough officials rely mainly on their religious convictions or those of the constituents, laws are invalid, and should be so declared by courts.

The part of this chapter devoted to the uncertain boundaries of public reasons does not directly touch the status of reliance on the Bible or on church authority—those are unpublic in the relevant sense—but it affects that reliance in a more complicated way. Any minimally fair theory of public reasons cannot include religious reasons and no other reasons. If religious reasons are to be “excluded,” then other reasons that are similarly not rational or based on comprehensive views must also be excluded. If one is hard put to explain just what other reasons are nonpublic, that casts doubt on whether it is fair to insist that good citizens and officials not rely on religious reasons.

The earlier part of the chapter summarizing my own limited, “intermediate,” account of the constraints of public reasons provides a more decisive response to extravagant claims about the relevance of the Establishment Clause for this subject. It has never been widely assumed in the course of the country’s history that people should refrain from relying on their religious convictions when they consider the wisdom of proposed legislation. Among other movements, arguments for abolition of slavery, for Prohibition, and for civil rights were substantially religious. Neither widespread reliance on religious premises nor the active involvement of religious groups should, alone, be regarded as marking laws that violate the Establishment Clause, much less as marking laws that courts should declare to violate the Establishment Clause.

What remains for our next chapter is consideration whether certain narrower connections of religion to laws that are adopted—connections different from ones we have considered in earlier chapters—might render the laws unconstitutional.

Legal Enforcement of Religion-Based Morality

This chapter explores the implications for constitutional law of the broader subject we considered in the previous chapter—legislative and executive policies that are grounded in religious premises. At the end of the day, these implications are very slight if one is interested in what measures courts should hold invalid, or so I shall argue. But the analysis leading to this conclusion can help dispel confusions about the relation between political rhetoric and judicially enforceable constitutional law. It can also enable those who would like the courts to play a more active role to see exactly how they differ from those who reject such a role.

The overarching question for us in this chapter is which laws and policies violate the Establishment Clause *because* they rest on religious premises. The question mainly has cogency in respect to legally enforced morality; but to understand why this is so, we need to clear away various matters that are not at issue.

Most of this volume has been about tangible assistance to religious groups and about government sponsorship of religious ideas. We have examined a number of topics and the major constitutional approaches for dealing with them. Government assistance can be open, as with financial aid to religious charities, or covert, as with the hypothetical example of a highway route chosen because it will benefit a particular church. Government sponsorship of religion can be undeniable, as with devotional Bible reading in public schools and the hiring of army chaplains, or it can be more subtle or debatable, as with moments of silence and “under God” in the Pledge of Allegiance. If the obvious and dominant purpose or a “primary” effect is to aid religion, legislation is invalid under the Establishment Clause.

As far as purpose is concerned, the Supreme Court has declared invalid only those laws whose overriding objective was to promote religion. One can certainly imagine stricter approaches, ones under which more legislation would fail a purpose test. A court might ask whether a religious aim was influential or whether a statute would have been adopted in the absence of religious objectives. Our highway board example involved secret deliberations, but let us suppose instead that the proceedings were open, that two of

the five-member board voted for Route C, which would have gone thirty miles from the Baptist church (thus inconveniencing churchgoers), that one member who voted for Route A said she would have voted for Route C except that she wanted to aid the church and its members, and that two other members said they preferred A on a number of grounds, one of which was that it would aid the Baptists. In these circumstances, we could say that the religious aim was influential *and* that the decision would (almost certainly) have been different without it. In deciding whether a worker had been improperly fired because of his race or religion, a court might employ such an approach, not allowing the firing to stand if it probably was a consequence of discrimination.¹ And I have suggested that if an individual legislator votes for a bill only for a religious reason that would render a statute invalid if it was the reason of every legislator, the individual legislator has violated the Establishment Clause.² But the Supreme Court has been very clear that it will not engage in such nuanced inquiries. On the understanding that courts should accord deference to legislatures, it has required that promoting religion be the evident dominant purpose if legislation is to fail the purpose test.

The legislative measures we are considering in this chapter do not mainly promote religious groups or religious perspectives. They do not give religions tangible aid and they do not encourage people to adopt any particular view about religion. What they do, to put it starkly, is to force nonadherents to behave in ways that those with particular religious views think they should behave. Thus, laws that forbade people from engaging in sexual acts with others of the same gender were not intended to convert to a religious view; rather, they were aimed at making people comply with a moral standard, or, to put it differently, at preventing people from falling into sin.

For analytical purposes, it helps initially to assume that every legislator has the same attitude about a law and that this shared attitude is spread on the record for all to see. What attitudes run counter to the Establishment Clause? Religious convictions that underlie reasons to vote might function in one of at least five different ways. (1) Among entities that undoubtedly deserve the protection of the state, religious convictions are the basis for determining what is a just distribution of resources, privileges, and penalties. Into this category could fall laws regarding welfare for the poor and authorizing, or not authorizing, capital punishment. (2) The crucial question is

¹ *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1996).

² One might fairly resist this conclusion and say the legislator has violated only the spirit of the clause.

whether entities of some kind deserve serious protection, and religious convictions determine the answer. Arguments based on religious authority for a law against use of embryonic stem cells (because embryos are human beings) or against scientific experimentation with animals fall into this category. (3) Religious convictions determine judgments whether actions will harm persons other than consenting adults who are most directly involved. One argument against incestuous marriage is that the knowledge that such marriage is possible among adults will have a detrimental effect on family relations while children are still minors (e.g., a brother and sister may relate differently to each other, and in a less healthy way, if they realize they can marry each other when they are old enough). A person might believe this argument is persuasive *only* because a sacred text condemns incest. (4) Religious convictions are the basis to decide that actions will harm the adults who choose to perform them. A person's religious beliefs might lead him to think that homosexual relations are bound to be psychologically damaging to participants, damaging according to ordinary assessments of psychological health. (5) Religious convictions are a basis to judge acts as wrongful, though without any harm as conceived by nonreligious standards. A person might oppose homosexual acts in the face of powerful evidence that they do not cause ordinary physical and psychological damage, on the basis that they constitute sins in the eyes of God (perhaps to be punished in some form of afterlife).

We should not be surprised that argument about this topic tends to focus mainly on my last two categories, usually without a distinction being drawn between them. I shall concentrate on these as well, but I first explain why the first three categories are also important and are different. Normative questions about what entities deserve protection and about what justice requires for these entities are not matters of simple fact. In a liberal democratic society, there will be wide agreement about some of these questions. All or virtually all human beings who have been born and are now alive warrant protection, and justice for people within a society requires some form of equal treatment. At the edges of which entities deserve protection and to what degree, there is controversy. What protection, if any, should be given to animals, to the environment (for its own sake), and to embryos and fetuses? How far should the state assist the less fortunate? Should capital punishment be available as a penalty? As to these matters, disagreements hardly fall out with religious opinions lined up neatly on one side and secular opinions on the opposite one. Various religious people have different views. It would be hard to trace any particular position a legislature might adopt directly to religious convictions. It is true that most people in the United States now who want to protect embryos are people of religious faith, but,

as we have seen with Robert George's argument against stem cell research, many of these people also believe that one need not rely on religious premises to justify that protection.

Two other aspects about issues of justice and the borders of protection strike me as very important. For many of these issues, rational analysis is highly indecisive.³ In making up their minds about whether to protect higher mammals, everybody will rely to an extent on nonrational (I do not say irrational) intuitions. Were citizens and officials permitted to rely on nonreligious intuitions but not to rely on religious convictions, that would constitute a form of implicit discrimination against religious perspectives. Moreover, any religious individual would have a hard time saying where his religious convictions left off and what his intuitions would tell him apart from these convictions.

The other crucial aspect of our first two categories concerns the rationale for regulating behavior. Suppose it were true that only those with particular religious convictions believed that the state should protect dolphins, and they managed to get a law adopted that prohibited the killing of dolphins. Their *aim* would not be to promote a religion or even to prevent sin, but to protect entities that deserve protection. It would be odd to think that it should be impermissible for society to protect dolphins, even if the great majority of its members holds the religious view that they deserve that protection.⁴ When the issue is the distribution of benefits and burdens, the analysis of legislative aims is typically similar. It is not that those adopting a law particularly want to control behavior to make sure it is moral; rather they want to see that people (and other protected entities) get the benefits they deserve and share burdens fairly.

Although arguments against restrictive abortion laws are often cast as ones about immoral behavior, and thus not so different from arguments about laws restricting sexual behavior, in fact the most powerful argument *for* a restrictive law is quite different. It involves, first, a claim that at the moment of conception, or at some later stage, the embryo, or fetus, deserves protection. (Often this point is put in terms that the fetus is a human being, implying that the fetus deserves as much protection as a full human being,

³ In *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988), I make an extended argument along these lines about animals, the environment, the status of a fetus, and some issues of just distribution.

⁴ One *might* take a different view if the reasons for protection are actually *at odds* with what rational, secular morality might indicate—if, for example, the species that received special protection had much lower capacities than some other species but was thought by some to be favored by God. I discuss this possibility in *id.* at 204–7.

but someone might believe a fetus deserves significant protection from the state though less than does a full human being.) The protection afforded it by a restrictive law is of the kind that would benefit the fetus from any point of view. It concerns physical survival. The second part of the argument against abortion is one about justice, about burdens and benefits. The innocent fetus should be protected even if the cost is that the pregnant woman must carry the fetus against her wishes and give birth to a baby she would rather not have. Because the basic issues about abortion concern disagreements about entities deserving protection and about the degree to which fetuses should be protected if that impinges severely on the liberty of persons who undoubtedly deserve protection (i.e., pregnant women), any assertion that restrictive laws about abortion violate the Establishment Clause is less promising than similar assertions about laws more easily classifiable as aimed at sin.

Our third category (like the fourth and fifth categories) mainly involves laws that are directly addressed at people who together wish to perform a forbidden act. There is no immediate innocent victim, in the way that the fetus is an innocent victim in the eyes of those who want restrictions on abortions. Often with respect to such laws, people disagree about indirect harms. I have used the example of incest. If we put aside the concern about the genetic effects of inbreeding, which rest on a solid scientific base but would not apply to incestuous marriages of couples unable to conceive children together, we face a concern about the effect on minor children within families who knew that they might someday be eligible to marry a parent or sibling. Perhaps legal permission would have extremely little effect, especially if social taboos about incest remained strong. Were social scientists to study the effect of the repeal of laws against incest on typical family life, changes in attitudes would take time, and claimed causal relations would be disputable. And, of course, all anyone could do in advance of such a legal change would be to make an educated guess. A person might respond to this inevitable uncertainty from the standpoint of social science by reasoning as follows: "My religion firmly condemns incest. That is a strong basis to conclude that legal acceptance of incest would harm family life more broadly."

As I have put the point so far, the exact chain of inference from religious basis to harm for families is inexact. Here are two oversimple stark alternatives. (1) "My religion condemns incest. So also, I believe, do most other religions. Whatever the theological truth of my religion, the rejection of incest probably reflects a sound moral sense that it is destructive of family life." (2) "My religion condemns incest. I believe my religion accurately understands God's will. Since God forbids incest, that probably means it is destructive of

family life.” Were someone to rely on the first chain of inference, that could hardly present a problem for liberal political philosophy or the Establishment Clause. If one looks to past societies to provide *some evidence* of what kinds of restrictions promote healthy social life, one could hardly disregard what religious traditions have to say.⁵ The second chain of inference, relying on the truth of a particular religion, is more questionable, but, *if* social science evidence is substantially indeterminate, people should be able to rely on religious convictions as well as nonreligious intuitions to fill in their sense of the broad effects of proposed laws.⁶ *If* one believed, contrary to my view, that in some way the Establishment Clause *was* at odds with officials’ relying on the second kind of inference, that would still not provide a workable principle for courts to invalidate laws under the Establishment Clause.

This leaves us with our last two categories, involving laws that restrict behavior just because it is immoral or because it is thought to harm the very people who choose to engage in it. In moving to these last two categories, we already are practicing deceptive oversimplification, because those who want to restrict behavior as immoral almost always believe that behavior does have corrosive effects on the broader society. But for clarity of analysis, we can put claims about those effects aside.

Laws restricting sexual conduct among consenting adults provide the main examples for these last two categories. We can focus on laws against homosexual acts, against fornication, and against bestiality, and on restrictions on marriage between persons of the same gender. The Establishment Clause argument against such laws is that they would not be adopted were it not for people’s religious convictions and that they, therefore, amount to an establishment of religion. At least so long as the proponents of the restrictions do not rely heavily on claimed harm to innocent third parties, these laws differ from ones we have yet considered. They are not about borderlines of status or about distributive justice;⁷ they *are* efforts to control behavior because that behavior is regarded as intrinsically wrongful.

Before engaging the main discussion, I need to defend my inclusion of bestiality on this list and to note alternative routes to constitutional protec-

⁵ However, were one to rely only on that first approach, one would need to be open to moral assumptions of other religions, to evidence not from religious traditions, *and* to the possibility that various restrictions have reflected indefensible oppression or outright ignorance.

⁶ As a matter of liberal political philosophy, I am inclined to think they should not rely in politics on factual judgments (grounded in religion) that are strongly opposed to what the evidence of science and social science establishes. Thus, people who believe the world will end five years from now should not press for government policies based on that assumption. Note 3 *supra*, at 204–11.

⁷ I am here assuming that the argument that the majority should be protected against behavior that affronts it is not an appropriate claim of justice in a liberal society.

tion of much of the behavior involved. When the establishment claim is presented with respect to bestiality, it is often answered that laws prohibiting sex between humans and animals protect the animals from cruelty.⁸ I find that implausible, whether it is offered as a causal explanation of why such laws are adopted or as a justification for them. If a society were mainly concerned with the welfare of animals, it would be very odd to allow humans to kill them for almost any reason and to confine them in small spaces on factory farms where they lead incredibly impoverished lives, but to impose a serious penalty to protect them from infrequent sexual relations with humans.⁹ And if inducing male animals to orgasm to obtain sperm for breeding purposes is regarded as perfectly all right, why are actual sexual relations qualitatively much worse?¹⁰ The overwhelming reason why sex with animals is forbidden is that it is regarded as utterly degrading for the human beings who choose to engage in it.

Two alternative constitutional arguments against restrictive laws about sexual behavior are ones of substantive due process (or constitutional privacy) and equal protection. The minimal notion of substantive due process¹¹ is that a law must have a “rational basis,” but for most kinds of laws courts have stretched to find rational grounds for their enactment.¹² A heightened review has been exercised for laws regulating sexual behavior and abortion, but the main emphasis has been on the underlying right that is curtailed, not on the basis for restriction. The Establishment Clause argument concerns reasons for enactment rather than the nature of the behavior that is restricted.¹³ Were the due process argument similarly to focus mainly on the reasons for enactment, it would differ from the Establishment Clause argument in disqualifying certain grounds for enactment, whether they were religious or not. For example, suppose it were determined that a mere wish to prevent immoral behavior (absent any plausible theory of harm to entities deserving protections) was an invalid basis for legislation. If a court then

⁸ *DeBartolomeo v. State*, 486 A.2d 256, 260 (Md. 1984); *Dronenurg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

⁹ In South Dakota, for example, engaging in a sexual act with an animal is a Class 6 felony, punishable by up to two years in prison. S.D. Codified Laws §§ 22-22-42, 22-6-1 (2007).

¹⁰ Perhaps the comedy show *Ali G* is a poor authority, but in one episode Borat explains that in Kazakhstan his job was to bring animals to orgasm for breeding.

¹¹ “Due process” is mainly a matter of fair procedure. How far the Due Process clauses of the Fifth and Fourteenth Amendments *should* be used to review the substantive bases for legislation is controversial among scholars and justices.

¹² See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

¹³ One can imagine some sort of weighing process in which the quality of the actions restricted would influence evaluation of the reasons for restriction.

decided that a prohibition on bestiality was grounded on such a wish, it would not matter whether the moral opinion was religious or not.

This illustration shows why, for practical purposes, the due process approach has advantages over the establishment approach. Whatever may have been the origins of feelings about human beings having sexual relations with other species, most people now would react that they are seriously degrading without reference to specific religious views. For many subjects, people might be hard put to say how far their feelings of revulsion depend on religious premises and how far they rest on nonreligious intuitions or cultural sentiments. Yet the Establishment Clause approach requires such distinctions.¹⁴

The second alternative constitutional argument is cast in terms of oppressed groups. The idea is that regulation violates equal protection of the law. Laws against interracial marriage violate equal protection;¹⁵ laws against intragender marriage could be similarly viewed, since homosexuals as a group have long suffered discrimination by the majority. For this alternative argument, one needs to find a group that has suffered historical discrimination, something easier to do with abortion laws and limits on the privileges of gay couples than with fornication and bestiality. In any event, these last few paragraphs are a caution that Establishment Clause challenges to laws in our last two categories are only one kind of constitutional claim against their validity, and perhaps far from the most promising.

Our two crucial inquiries for Establishment Clause analysis are (1) whether laws that are directed against behavior just because it is immoral promote or endorse religion; and (2) what the connection would need to be between religious premises and a law's enactment to generate an invalid establishment of religion. On the question of promotion or endorsement, we need to assume that the reason legislators prohibit behavior is not because it bears a close relation to what they consider to be distinctive and desirable religious practices. Arnold Loewy has hypothesized a law requiring attendance at Methodist church on Sunday because it is immoral not to go to that church¹⁶ and a law forbidding all members of society from driving vehicles during the Jewish Sabbath.¹⁷ The first of these is obviously unconstitutional because it requires attendance at particular worship services; the connection

¹⁴ The strength of that approach is that it fits comfortably with notions of improper religious purposes. It is harder to say that the Due Process clauses do not allow prohibitions that reflect the moral sentiments of society.

¹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁶ Arnold H. Loewy, "Morals Legislation and the Establishment Clause," *55 Alabama Law Review* 159, 166 (2003).

¹⁷ *Id.* at 164.

of the second law to Sabbath observance is also probably strong enough to make it a promotion of that religious practice.¹⁸ Laws against homosexual acts and bestiality are not quite like this. The legislators regard the behavior as wrongful whenever it is engaged in, and refraining from the behavior does not, in itself, involve any strong connection to anyone's religious practices.¹⁹

The two contrasting positions about laws that forbid behavior just because it is immoral, according to a religious view, are that (1) to enforce the morality of a religion *is* to promote and endorse that religion²⁰ and (2) to enforce morality is different from promoting religion, and it has always been assumed that legislatures can enforce the dominant morality in society.²¹ I think a more discriminating analysis is needed.²² Let us suppose that the overwhelming basis for a restriction is a religious view that behavior is wrong. So long as it is clear that all legislators want to do is to stop the behavior, their aim is not to promote the religious practices of a particular religion. Whether citizens will take the law as expressing approval of a particular religion may depend on circumstances, and particularly whether the religious perspective about morality that wins enforcement is sharply at odds with the moral views of others. Whether a particular religion is or is not implicitly approved, I believe that requiring people to comply with the moral code of a religion, absent any belief about ordinary harm to entities deserving protection, is a kind of imposition of that religious view on others. Thus, as a matter of theoretical principle, I think enactment of a religious morality could violate the Establishment Clause, even if the religion, as a set of beliefs and religious practices, is not promoted or endorsed in the more straightforward sense.

This comparatively modest view of when enforcement of a religiously based morality might be regarded as violating the Establishment Clause does not take us very far in a practical sense, because we have yet to examine possible differences between our fourth and fifth categories and to consider the appropriate role of courts reviewing legislation. Were a legislator to con-

¹⁸ Loewy thinks that the strongest permissible argument for the ordinance would be to protect the safety of the larger than usual number of pedestrians.

¹⁹ Of course, one *might* view refraining from sinful acts as parts of religious practice.

²⁰ Loewy, note 16 *supra*, at 161, concludes that a law should be held to violate the Establishment Clause if it "simply condemns the activity because it is immoral."

²¹ See Michael Perry, "Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause," 42 *William and Mary Law Review* 663 (2001); Scott L. Idleman, "Religious Premises, Legislative Judgments, and the Establishment Clause," 12 *Cornell Journal of Law and Public Policy* 1 (2002). Professor Idleman provides an extensive review of relevant cases and competing scholarly opinions.

²² See Greenawalt, note 3 *supra*, at 87–95.

sider bestiality to be a grave sin even though he does not believe it typically causes any damage in this life to voluntary human participants and causes only a very slight impairment of the interests of the animals, his rationale for prohibiting it would fall into our fifth category. A law adopted by all legislators for just this reason would violate the Establishment Clause, and, according to my earlier analysis, a single legislator who voted for just this reason would either himself violate the Establishment Clause, or would violate the spirit of the Establishment Clause, by engaging in a course of action that would, if replicated by his fellows, violate the Establishment Clause.

But suppose our legislator, instead, reasons as follows. My religion condemns sexual relations with animals. This is substantial evidence that such relations probably do harm human participants in this life, giving them a degraded sense of themselves and impairing their possibilities of healthy sexual relations with other people. (We can understand a similar argument about why frequent sexual relations with prostitutes have a detrimental effect on committed relationships.) As we have seen in respect to harm to third persons (and a future human sexual partner might be regarded as a relevant third person here), such a factual conclusion might or might not be grounded on the theological truth of the religion. Even if it is grounded on the truth of the religion, I have suggested that people should be as free to rely on their religious convictions as on nonreligious intuitions in respect to factual questions about which science or social science provide no convincing answers. If the evidence is scanty on what happens to otherwise healthy individuals who happen to engage in sexual relations with animals²³—we might imagine shepherds left alone with flocks of sheep for many months—one would expect citizens and legislators to rely on their own senses about likely consequences. Many of them would not easily distinguish their religiously informed sense from the intuitions they would have otherwise. Once we acknowledge that religion may properly play a role in influencing judgment about harms to voluntary actors, we can see just how narrow is our last category—prohibition because an act is morally wrong, but without a belief in ordinary harmful consequences.

A further clarification narrows that category even further. We have touched in other chapters on arguments that a liberal society should not make judgments about the good life. These arguments are closely similar to J. S. Mill's principle in *On Liberty* that the government has no business con-

²³ The evidence could not be drawn from a random selection of those who engage in bestiality in a modern society, because, very likely, those who do so in a culture in which it is so condemned may be psychologically unhealthy to begin with.

straining self-regarding acts. That principle rules out paternalistic legislation designed to protect actors against their own misguided choices. Neither neutrality about the good life nor antipaternalism has ever been an accepted premise of actual liberal democracies or of our constitutional law. Further, were either of these principles to be adopted as part of our constitutional law, the logical vehicle would be some form of substantive due process, *not* the Establishment Clause. The reason is simple. Paternalism and judgments about the good life can flow from nonreligious as well as religious sources. Neither of these proposed restraints on legislative action would be limited to religious visions about the good life or about the need to protect actors from themselves. If it continues to be true that neither of these controversial principles becomes part of our constitutional law, then the factual reasons that our fourth category embraces would include factual claims that relate to “the good life” and to the need for paternalism. People could rely on religious convictions that inform their factual judgments about healthy forms of life and desirable protections against bad choices.

The division between our last two categories—is a practice thought to cause ordinary harm to participants or not?—has implications for government officials. Suppose a legislator thinks that bestiality is definitely a sin and probably has adverse psychological consequences for human participants. In deciding whether to vote for criminalization, the legislator should not count his simple judgment about sin; rather he should ask if the likely adverse consequences are sufficient to justify making the behavior a crime. It is possible that if he performs this exercise conscientiously, he will see that the legitimate reasons for voting to criminalize are weaker than he initially thought, that if he discounts his “pure” judgment of sin, he does not believe the probable consequences are damaging enough to warrant a prohibition.

But what is a court to do? We can roughly sketch out three possible standards for judicial application of the Establishment Clause.²⁴ (1) A law violates the Establishment Clause if religious convictions were influential in its adoption. (2) A law violates the Establishment Clause if “a substantial number of religious skeptics” would not have supported it.²⁵ (3) A law violates the Establishment Clause if the ascertainable dominant reason for its passage was a view that acts are immoral, based on a religious point of view and detached from any perspective about harm in this life that would be sufficient to justify a prohibition or regulation. The third position is my own. Given

²⁴ I put aside here fact-sensitive appraisals that a particular law strongly, if indirectly, endorses some religion.

²⁵ Loewy, note 16, *supra*.

all the other ways religious judgments can figure in legislative choice, given the mixture of religious and nonreligious reasons individuals may have, given the mixture of reasons different legislators bring to bear, and given the deference courts do and should show to legislative decisions, this approach will rarely, if ever, lead a court to invalidate a law.

The first approach is much too broad. Religious convictions figure in many appropriate ways in the judgments of citizens and legislators. For that reason and because of considerations of deference, much too much legislation would be held invalid were religious influence sufficient to render laws invalid.

The second approach may seem more promising. If a court asks whether a substantial number of skeptics would support the legislation, that seems reasonably deferential to the legislature. The court is not applying a fine-tooth comb to the legislative process or trying to pry apart mixed motives. If few skeptics would support legislation, is not that a sure indication that religious convictions underlie it? This approach, however, founders on three objections. The first objection is that it will not be easy to decide whether the number of skeptics would be substantial, and to decide what number counts as “substantial.” The second objection involves the connection between religious grounds and nonreligious ones. Suppose it were determined that the number of skeptics who would restrict embryonic stem cell research is not substantial. Suppose it were also determined that many serious Roman Catholics believe with Robert George that the wrongness of such stem cell research can be established on nonreligious “scientific” or natural law grounds. A substantial number of citizens do believe the wrongness of research need not depend on religious convictions. Are we to label these citizens as dishonest or deluded, to say that their self-consciously nonreligious understanding doesn’t count because they have a religious understanding with the same import for legal regulation and *we know* that the latter drives the former? That is not an approach that is very respectful of fellow citizens, and it is not the kind of judgment a court should be essaying.

The third objection takes us back to the various ways religious convictions can figure. Professor Loewy puts forward his test as an application of a principle that the legislature cannot simply condemn an activity because it is immoral. That sounds like our fifth category. But it is possible that many people with religious convictions will believe, not unreasonably, that an activity (such as marriages of people of the same gender) will have harmful enough consequences to justify a prohibition, although few skeptics will agree. In their minds, these religious people would not be forbidding the activity simply because it is immoral; they think they would be protecting people from harm.

Having argued that many reliances on religious convictions are appropriate, I do not accept a standard that would render laws invalid if few skeptics would support them. I have resisted the idea that all legislation of religious morality is constitutional, but, as far as courts are concerned, and apart from situations in which a religion or a specific religious outlook is promoted or endorsed, the limits on appropriate grounds for laws are too narrow to have much practical significance.