

Religion in Politics

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If few Americans were religious believers, the issue of the proper role of religion in politics would probably be marginal to American politics, because religion would be marginal to American politics. But most Americans are religious believers. Indeed, the citizenry of the United States is one of the most religious—perhaps even the most religious—citizenries of the world's advanced industrial democracies. According to recent polling data, “[a]n overwhelming 95% of Americans profess belief in God;”¹ moreover, “70% of American adults [are] members of a church or synagogue.”² If there were a consensus among Americans about most religious matters, the issue of the proper role of religion in politics would probably engage far fewer Americans than it does, because American religious believers would not have to fear being subjected to alien religious tenets. But there is, among American religious believers, a

* Copyright 1996, Michael J. Perry, all rights reserved. Howard J. Trienens Chair in Law, Northwestern University. This essay is drawn from a larger work, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES*, which will be published by the Oxford University Press in 1997. For helpful discussion, as I was writing the larger work from which this essay is drawn, I am grateful to many friends and colleagues, especially Robert Audi, Thomas Berg, William Collinge, Daniel Conkle, Charles Curran, Kent Greenawalt, Stephen Gardbaum, Andrew Koppelman, William Kralovec, Daniel Morrissey, Mark Noll, David Smolin, Laura Underkuffler, Howard Vogel, Gerry Whyte, and Ashley Woodiwiss. I am also grateful to have had the opportunity to discuss a draft of the larger work in several venues (in addition to the University of California, Davis School of Law) during the 1995-96 academic year: Wheaton College (Illinois); the Northwestern University Center for the Humanities; the Saint Thomas University School of Law; the Cumberland School of Law of Samford University; the University of Colorado School of Law; the University of San Diego School of Law; and St. John's University. Finally, I am grateful to the Northwestern University law students who, in recent years, joined me in thinking about “Religion, Politics, and the Constitution.”

¹ Richard N. Ostling, *In So Many Gods We Trust*, *TIME*, Jan. 30, 1995, at 72.

² Book Note, *Religion and Roe: The Politics of Exclusion*, 108 *HARVARD L. REV.* 495, 498 n. 21 (1994) (reviewing ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993)). Cf. Andrew Greeley, *The Persistence of Religion*, *CROSS CURRENTS*, Spring 1995, at 24.

dissensus about many fundamental religious matters, including many fundamental religious-moral matters. Because the United States is *both* such a religious country *and* such a religiously pluralistic country (now more than ever), the issue of the proper role of religion in politics is anything but marginal to American politics. The proper role of religion in politics is a central, recurring issue in the politics of the United States.

In this essay, I address a fundamental question about religion in politics: what role may religious arguments play, if any, either in public debate about what political choices to make or as a basis of political choice?³ Two phrases appear throughout my discussion: "political choices" and "religious arguments." Political choices are not all of the same kind. The political choices with which I am principally concerned are those that ban or otherwise disfavor one or another sort of human conduct based on the view that the conduct is immoral. A law banning abortion is a paradigmatic instance of the kind of political choice I have in mind; a law banning homosexual sexual conduct is another. The religious arguments with which I am principally concerned are arguments that one or another sort of human conduct, like abortion or homosexual sexual conduct, is immoral. By a "religious" argument, I mean an argument that relies on (among other things) a religious belief: an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. The belief that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything else—is a "religious" belief, as is a belief about the nature, activity, or will of God.

The controversy about the proper role of religious arguments in politics comprises two debates: a debate about the *constitutionally* proper role of religious arguments in politics and a related but distinct debate about their *morally* proper role.⁴ The consti-

³ I have pursued aspects of this inquiry before. See MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991). In the years since LOVE AND POWER was published, and partly in response to critical commentary on LOVE AND POWER, I have continued to think about the difficult problem of religion in politics. As it happens, my thinking has been a rethinking.

⁴ As a matter of political morality, secular arguments that one or another sort of human conduct is immoral, as distinct from religious arguments, are not, as such, a problematic basis of political choice. See Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L.

tutional law of the United States directs government not to “establish” religion. Given this “nonestablishment” norm, what role, if any, is it constitutionally permissible for religion to play, if any, in the politics of the United States? In particular:

- Does a legislator or other public official, or even an ordinary citizen, violate the nonestablishment norm by presenting a religious argument in public debate about what political choice to make? For example, does a legislator violate the nonestablishment norm by presenting, in public debate about whether the law should recognize homosexual marriage, a religious argument that homosexual sexual conduct is immoral?
- Does a political choice violate the nonestablishment norm if it is made on the basis of a religious argument? For example, does a law banning abortion violate the nonestablishment norm if it is based even partly on a religious argument that abortion is immoral?

Beyond the constitutional inquiry lies the moral inquiry. That an act does not violate any constitutional directive does not mean that the act is morally appropriate. Moreover, constitutional illegality does not entail, much less equal, moral impropriety. That an act would violate a constitutional norm does not entail that the act would be, apart from its unconstitutionality, morally inappropriate.

- Even if, as I believe to be the case, neither citizens nor even legislators or other public officials violate the nonestablishment norm by presenting religious arguments in public political debate (i.e., in public debate about what political choices to make), the question remains whether, all things considered, it isn’t morally inappropriate for citizens and especially legislators and other public officials to present such arguments in public political debate.
- Even if, as I believe to be the case, a political choice would violate the nonestablishment norm if no plausible secular argument supported it, the question remains whether, apart from the nonestablishment norm, it isn’t morally appropriate for a citizen, legislator, or other public official, in her view, to rely on religious arguments in making a

political choice even if no persuasive or even plausible secular argument supports the choice.⁵

I. CONSTITUTIONAL PERSPECTIVES

Given the freedom of religion protected by the constitutional law of the United States—given, in particular, the nonestablishment norm—what role, if any, may religious arguments constitutionally play, either in public debate about what political choices to make or as a basis of political choice?⁶

First, a clarification. By a “religious” argument, I mean an argument that relies, at least in part, on a religious belief: an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. A “religious” belief is, for present purposes, either the belief that God exists—“God” in the sense of a transcendent reality that is the source, the ground, and the end of everything else—or a belief about the nature, activity, or will of God.⁷ A belief can be “non-religious,” then, in one of two senses. The belief that God does not exist is nonreligious in the sense that it is “atheistic.” A belief that is about something other than God’s existence, nature, activity, or will is nonreligious in that it is “secular.” In addition to religious arguments, therefore, we can imagine “atheistic” arguments and “secular” arguments. One who is “agnostic” about the existence of God—who neither believes nor disbelieves that God exists—will find only secular arguments persuasive.⁸

⁵ Those with the principal policymaking authority and responsibility — legislators, in particular — should ask themselves whether they find a secular rationale persuasive. See *infra* note 22 and accompanying text.

⁶ I have presented and defended, elsewhere, a particular construal of the nonestablishment norm. See Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES (forthcoming 1996).

⁷ Although some Buddhist sects are theistic, Buddhism — unlike Christianity, for example — is predominantly nontheistic, in the sense that Buddhism does not affirm the meaningfulness of “God”-talk. Nonetheless, Buddhism does seem to affirm the existence of a transcendent reality that is the source, the ground, and the end of everything else. See David Tracy, *Kenosis, Sunyata, and Trinity: A Dialogue With Masao Abe*, in *THE EMPTYING GOD: A BUDDHIST-JEWISH-CHRISTIAN CONVERSATION* 135 (John B. Cobb, Jr. & Christopher Ives eds., 1990).

⁸ My position, in this section, about the constitutionally permissible role of religion in politics — like my position in the rest of this essay about the morally proper role of religion in politics — is meant to apply to atheistic arguments as well as to religious ones: arguments that presuppose the truth of and include as one of their essential elements the

Let's begin with this question: does a legislator or other public official,⁹ or even an ordinary citizen, violate the nonestablishment norm by presenting a religious argument in public political debate? For example, does a legislator violate the nonestablishment norm by presenting, in public debate about whether the law should recognize homosexual marriage, a religious argument that homosexual sexual conduct is immoral? An affirmative answer is wildly implausible. Every citizen, without regard to whether she is a legislator or other public official,¹⁰ is constitutionally free to present in public political debate whatever arguments about morality, including whatever religious arguments, she wants to present.¹¹ Indeed, the freedom of speech protected by the constitutional law of the United States is so generous that it extends even to arguments, including secular arguments, that may not, as a constitutional matter, serve as a basis of political choice—for example, the argument that persons of nonwhite ancestry are not truly or fully human (which is an unconstitutional basis of political choice under the antidiscrimination part of the Fourteenth Amendment¹²). Thus, whether or not religious arguments may, as a constitutional matter, serve as a basis of political choice, it is clear that citizens and even legislators and other public officials are constitutionally

belief that God does not exist. In a society that, like the United States, is overwhelmingly religious, it would not be acceptable to deprive religious arguments relative to atheistic ones. As Kent Greenawalt has cautioned, "one must present grounds for [the proposed principle of restraint] that have appeal to persons of religious and ethical views different from one's own." KENT GREENAWALT, *RELIGIOUS CONSCIENCES AND PUBLIC REASON* 128 (1995). Cf. *id.* at 63 ("assum[ing] that a principle of restraint against reliance on religious grounds would also bar reliance on antireligious grounds").

⁹ By "other public official" I mean, here and elsewhere in this essay, principally the policymaking officials in the executive branch of government. The chief policymaking official in the executive branch of the national government is, of course, the President of the United States; the chief policymaking official in the executive branch of a state government is the governor of the state.

¹⁰ See Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, NOTRE DAME L. REV. 581, 604 n.83 (1995). Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978).

¹¹ The Supreme Court recently remarked that "in Anglo-American history, at least, governmental suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2441 (1995).

¹² See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 143-49 (1994) [hereinafter *THE CONSTITUTION IN THE COURTS*].

free to present such arguments in public political debate.¹³ The nonestablishment norm is not to the contrary.

Moreover, to disfavor religious arguments relative to secular ones would violate the core meaning—the antidiscrimination meaning—of the free exercise norm. After all, included among the religious practices protected by the free exercise directive are bearing public witness to one's religious beliefs and trying to influence political decisionmaking on the basis of those beliefs.¹⁴ As the Second Vatican Council of the Catholic Church observed in the document *Dignitatis Humanae*, true freedom of religion includes the freedom of persons and groups "to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity."¹⁵ Although the nonestablishment norm, as I have explained, forbids any branch or agency of government to do certain sorts of things, it does not forbid any person—including any person who happens to be a legislator or other public official—to say whatever she wants to say, religious or not, in public political debate. The serious question, then, is not whether legislators or other public officials, much less citizens, violate the nonestablishment norm by presenting religious arguments in public political debate.¹⁶ The serious question, rather, is whether government would violate the nonestablishment norm by

¹³ This is not to deny that as a constitutional matter government may require as a condition of continued employment that some of its employees (e.g., members of the police force) refrain from saying some things in public that they are constitutionally free to say (e.g., "Blacks aren't human"). *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

¹⁴ See, e.g., PRESBYTERIAN CHURCH (U.S.A.), GOD ALONE IS LORD OF THE CONSCIENCE: A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY 48 (1988). "[I]t is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm." *Id.*

¹⁵ David Hollenbach, S.J., *A Communitarian Reconstruction of Human Rights: Contributions from Catholic Tradition*, in CATHOLICISM AND LIBERALISM 127, 142 (R. Bruce Douglass & David Hollenbach, S.J. eds., 1994).

¹⁶ Of course, presenting religious arguments in *nonpublic* political debate — political debate around the kitchen table, for example, or at a meeting of the local parish's Peace and Justice Committee — is not constitutionally problematic. A practical problem with the position that presenting religious arguments in public political debate is constitutionally problematic is that it may sometimes be difficult to say when "nonpublic" political debate has crossed the line and become "public." But that practical problem is also an academic one, because, as I have explained, presenting religious arguments in public political debate is not constitutionally problematic.

basing a political choice—for example, a law banning abortion—on a religious argument.¹⁷

Recall that among the other things it forbids government to do, the nonestablishment norm forbids government to take any action based on the view that one or more religious tenets are closer to the truth, more authentically American, or otherwise better than one or more competing religious or nonreligious tenets. For example, government may not base any action on the view that the Book of Genesis is a truer account of human origins than one or more competing religious or nonreligious accounts. Thus, the nonestablishment norm *does* forbid government to base political choices on religious arguments in this sense: government may not base any action—therefore, it may not base any choice, including one about the morality of human conduct—on the view that a religious belief is closer to the truth or otherwise better than one or more competing religious or nonreligious beliefs. The nonestablishment norm forbids government to base political choices on religious arguments; thus, at least as an ideal matter, the nonestablishment norm requires that if government wants to make a political choice, including one about the morality of human conduct, it do so only on the basis of a secular argument.

As the foregoing discussion suggests, the nonestablishment norm also forbids government to base political choices on secular arguments of a certain sort, namely, secular arguments to the effect that one or more religious tenets are more authentically American, more representative of the sentiments of the community, or otherwise better, than one or more competing religious or nonreligious tenets. When I refer, in describing the requirements of the nonestablishment norm, to a “secular” argument or rationale, I do not mean to include arguments of the sort described in the preceding sentence, but only those that do not in any way valorize one or more religious tenets—that do not claim that one or more religious beliefs are better, along

¹⁷ I explain below why even one who opposes government basing political choices on religious arguments need not, and indeed should not, oppose legislators or other public officials, much less citizens, presenting religious arguments about the morality of human conduct in public political debate. See *infra* section II.

one or another dimension of value, than one or more competing religious or nonreligious beliefs.

In making a political choice, especially a political choice about the morality of human conduct, legislators and other public officials sometimes rely *both* on a religious argument *and* on an independent secular argument: a secular argument that, if accepted, supports the choice without help from the religious argument. It is noteworthy, in that regard, that many of those who contend that abortion is immoral, like many of those who contend that homosexual sexual conduct is immoral, come armed with an independent secular argument as well as a religious argument; indeed, some of them come armed only with a secular moral argument. If government based a political choice about the morality of human conduct at least partly on a plausible secular supporting argument, it would be extremely difficult for a court to discern whether government based the choice solely on the secular argument or, instead, partly on the secular argument and partly on the religious argument. That government would have made the choice even in the absence of the religious argument, solely on the basis of the secular argument, is some evidence that the choice was based solely on the secular argument. Such evidence is not conclusive; that one would have made a choice in the absence of reason X does not mean that one did not base the choice on X. It does not even mean that, in making the choice, one did not rely solely on X. Moreover, counterfactual inquiry by a court into whether government “would have made” a political choice about the morality of human conduct in the absence of a religious argument on which some officials relied is so speculative as to be unusually vulnerable to distortion by a judge’s own sympathies and hostilities.¹⁸ Indeed, an individual legislator or other public official, inquiring in good faith, might not be able to decide with confidence whether she herself would have made a political choice about

¹⁸ Imagine this scenario: The Supreme Court invalidates a policy choice by one state — for example, the state’s refusal to recognize homosexual marriage — because a majority of the Court speculates that the state would not have made the choice but for a religious argument; two years later, the Court, with a slightly different membership, declines to invalidate the very same policy choice by another state because a majority of the Court speculates that the state would have made the choice even in the absence of a religious argument.

the morality of human conduct in the absence of the religious argument on which she relied (or whether she would make it now).

As an ideal matter, the nonestablishment norm is probably best understood, as I have suggested, to forbid government to make any political choice, even one about the morality of human conduct, on the basis of a religious argument. But, given the difficulty emphasized in the preceding paragraph, we should probably conclude that *as a practical matter*, the nonestablishment norm requires only that government not make political choices of the kind in question here—political choices about the morality of human conduct—unless a plausible secular rationale supports the choice without help from a parallel religious argument. Similarly, Kathleen Sullivan has written that “the negative bar against establishment of religion implies the affirmative ‘establishment’ of a civil order for the resolution of public moral disputes. . . . [P]ublic moral disputes may be resolved only on grounds articulable in secular terms.”¹⁹

Under the foregoing approach—which, concededly, involves an “underenforcement” of the full ideal of nonestablishment²⁰—a court need not pretend that it can discern what it probably could rarely discern, namely, whether government based such a political choice solely on a secular moral argument or only partly on such an argument and partly on a religious moral argument. Moreover, if it became known that political choices about the morality of human conduct would be struck down as unconstitutional if not based solely on a secular argument, public officials could, and many doubtless would, take steps to construct a legislative history that would make it even harder for a court to conclude that such a political choice was not based solely on a secular moral argument. The inevitability of such a strategy reinforces the conclusion that as a practical matter, the nonestablishment norm should be understood to require only that government not make a political

¹⁹ Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992). See also Esbeck, *supra* note 10, at 601-04; Andrew Koppelman, *Same-sex Marriage and the Idea of Nonestablishment* (March 1995) (unpublished manuscript).

²⁰ Cf. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214-15 (1978).

choice about the morality of human conduct in the absence of a plausible secular rationale.²¹ (A qualification is necessary here. I explain, in section III.A, why a religious argument in support of the claim that each and every human being is sacred presents a special case: even if we assume that no secular argument supports the claim that every human being is sacred, government may, under the nonestablishment norm, rely on a religious argument in support of the claim.)

Admittedly, that government may not make a political choice about the morality of human conduct unless a plausible secular rationale supports the choice has less practical significance than one might think, because there will be plausible secular rationales for most such political choices that government might want to make. (In adjudicating the constitutionality, under the nonestablishment norm, of a political choice about the morality of human conduct, the proper issue for a court is not whether a secular rationale is, in the court's own view, persuasive. After all, the judiciary does not have the principal policymaking authority or responsibility. The proper issue for a court is only whether a secular rationale is plausible—that is, whether a legislator or other public official could reasonably find the rationale persuasive.²²) However, that a political choice about the morality of human conduct does not violate the nonestablishment norm does not mean that the choice does not violate some other constitutional requirement. The secular argument, even if plausible, may be constitutionally problematic. For example, a secular argument that supports the refusal to recognize homosexual

²¹ Mark Tushnet has reached much the same conclusion by a different route. See Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 191, 213 (James E. Wood, Jr. & Derek Davis eds., 1991).

Given the importance of the nonestablishment norm, and of the religious freedom it protects, once it has been established that a religious argument has played a nontrivial role in government making a political choice about the morality of human conduct, the party defending the choice in court properly bears the burden of final doubt about whether a plausible secular rationale supports the choice. Therefore, the defending party should be required to show that there is a plausible secular rationale, rather than the party challenging the choice required to show that no such rationale exists.

²² Cf. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992) (discussing “rational basis” test). However, those with the principal policymaking authority and responsibility — in particular, legislators — should ask themselves whether they find a secular rationale persuasive. See *infra* section III.B. Cf. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585 (1975).

marriage may well violate the antidiscrimination part of the Fourteenth Amendment.²³

I said that under the nonestablishment norm, government may not make a political choice about the morality of human conduct unless a plausible secular rationale supports the choice. But what about an individual legislator or other public official: what should she do? Should she vote to support a political choice about the morality of human conduct if she is agnostic about whether, or even skeptical that, a plausible secular rationale supports the choice, leaving it up to others, and ultimately to the courts, to decide if such a rationale exists? In my view, fidelity to the spirit of the nonestablishment norm requires that she vote to support a political choice about the morality of human conduct only if, in her view, a persuasive secular rationale exists. (That she cannot reach a judgment about the soundness of the relevant secular argument or arguments on her own is not disabling, because she can seek the help of those whose judgment she respects and trusts.) In section III.B, I explain why as a matter of political morality too, and not just of constitutionality, she should vote to support a political choice about the morality of human conduct only if, in her view, a persuasive secular rationale exists.

Constitutional legality does not entail moral propriety; that an act would not violate any constitutional directive does not entail that the act would be morally appropriate. Similarly, constitutional illegality does not entail moral impropriety; that an act would violate a constitutional norm does not entail that the act would be, apart from its unconstitutionality, morally inappropriate.²⁴ Indeed, if we conclude that an act that would violate a constitutional norm would not be, apart from its unconstitutionality, morally inappropriate—and especially if we conclude that the act would be morally appropriate—we can proceed to in-

²³ See Perry, *THE CONSTITUTION IN THE COURTS*, *supra* note 12, at 174-79. See also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

²⁴ Even taking into account its unconstitutionality, an act may not be, all things considered, morally inappropriate. While relevant to an assessment of the morality of an act, that an act is unconstitutional does not by itself entail the immorality of the act. After all, one can imagine a constitution that forbids that which is morally required, or requires that which is morally forbidden.

quire whether the constitutional law of the United States shouldn't be revised by the Supreme Court, or even amended pursuant to Article V of the Constitution, to permit the act.²⁵ Beyond the constitutional inquiry, therefore, lies the moral inquiry.

I have explained that citizens and even legislators and other public officials are constitutionally free to present religious arguments, including religious arguments about the morality of human conduct, in public political debate. The question remains, however, whether, all things considered, it isn't morally inappropriate for citizens and especially legislators and other public officials to present such arguments in public political debate. I turn to that question in section II. According to the construal of the nonestablishment norm I have defended elsewhere, government may rely on a religious argument in making a political choice about the morality of human conduct only if a plausible secular rationale supports the choice.²⁶ The question remains, however, whether, all things considered, it isn't morally inappropriate for legislators and other public officials, and for citizens voting in an initiative or referendum election, to rely on a religious argument in making a political choice about the morality of human conduct even if a plausible secular rationale—or even, in their view, a persuasive secular rationale—supports the choice. (I have suggested that those with the principal policymaking authority and responsibility—in particular, legislators—should ask themselves whether they find a secular rationale persuasive.²⁷) From the other side, the question remains whether, *apart from the nonestablishment norm*, it isn't morally permissible for legislators and others to rely on a religious argument in making a political choice about the morality of human conduct even if, in

²⁵ Article V of the United States Constitution provides, in relevant part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

²⁶ See Perry, *Religion, Politics, and the Constitution*, *supra* note 6.

²⁷ See *supra* note 22.

their view, no persuasive or even plausible secular rationale supports the choice. I turn to those questions in section III.

II. RELIGIOUS ARGUMENTS IN PUBLIC POLITICAL DEBATE

I concluded, in section I, that citizens and even legislators and other public officials are constitutionally free to present religious arguments, including religious arguments about the morality of human conduct, in public debate about what political choices to make. I conclude, in this section, that as a matter not just of constitutionality but of political morality too, citizens and even legislators and other public officials may present, in public political debate, religious arguments about the morality of human conduct. Indeed, I conclude that it is important that such religious arguments, no less than secular arguments about the morality of human conduct, be presented in public political debate. It bears emphasis that the inquiry I pursue in this section, about the role of religious arguments in public political debate, is about political morality, not political strategy.

[T]he distinction between principle and prudence should be emphasized. The fundamental question is not whether, as a matter of prudent judgment in a religiously pluralist society, those who hold particular religious views ought to cast their arguments in secular terms. Even an outsider can say that the answer to that question is clearly, "Yes, most of the time," for only such a course is likely to be successful overall.²⁸

I explained, in section I, that citizens and even legislators and other public officials may constitutionally present religious arguments about the morality of human conduct in public political debate. Even so, *should* such arguments be presented in public political debate? Again, that one is constitutionally free to do something does not mean that as a matter of morality one should do it; it does not mean that it is morally appropriate for one to do it. Constitutional legality no more entails moral propriety than constitutional illegality entails moral impropriety.

It is inevitable that some legislators, and some citizens participating in an initiative or referendum election, will put at least some weight on religious arguments in voting for political choic-

²⁸ Tushnet, *supra* note 21, at 213.

es about the morality of human conduct. Moreover, a religious argument can be quite influential in moving a critical mass of legislators or citizens to want to make a particular political choice and in inclining them to accept, as a rationale for the choice, a secular argument that supports the choice. For example, a biblically-based argument that homosexual sexual conduct is immoral²⁹ has moved some citizens and legislators to want to deny legal recognition to homosexual marriage. At the same time, it has inclined some of them to accept, as a secular rationale for their position, the argument that homosexuality, like alcoholism, is pathological and ought not to be indulged, or the argument that recognizing homosexual marriage would threaten the institution of heterosexual marriage and other "traditional family values." Because of the role that religiously based moral arguments inevitably play in the political process, then, it is important that such religious arguments, no less than secular moral arguments, be presented in, so that they can be tested in, public political debate. Ideally, such arguments will sometimes be tested, in the to and fro of public political debate, by competing scripture- or tradition-based religious arguments. Scripture scholar Luke Timothy Johnson's warning is relevant here:

If liberal Christians committed to sexual equality and religious tolerance abandon these texts as useless, they also abandon the field of Christian hermeneutics to those whose fearful and—it must be said—sometimes hate-filled apprehension of Christianity will lead them to exploit and emphasize just those elements of the tradition that have proved harmful to humans. If what Phyllis Trible has perceptively termed "texts of terror" within the Bible are not encountered publicly and engaged intellectually by a hermeneutics that is at once faithful and critical, then they will continue to exercise their potential for harm among those who, without challenge, can claim scriptural authority for their own dark impulses.³⁰

Nonetheless, some persons want to keep religiously based moral arguments out of public political debate as much as possible. For example, American philosopher Richard Rorty has writ-

²⁹ See *infra* section III.C.

³⁰ Luke Timothy Johnson, *Religious Rights and Christian Texts*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES* (John Witte, Jr. & Johan David van der Vyver eds., forthcoming 1996).

ten approvingly of “privatizing religion—keeping it out of . . . ‘the public square,’ making it seem bad taste to bring religion into discussions of public policy.”³¹ One reason for wanting to “privatize” religion is that religious debates about controversial political issues can be quite divisive. But American history does not suggest that religious debates about controversial issues—racial discrimination, for example, or war—are invariably more divisive than secular debates about those or other issues.³² Some issues are so controversial that debate about them is inevitably divisive without regard to whether the debate is partly religious or, instead, only secular.³³

Another reason for wanting to keep religiously based moral arguments out of public political debate focuses on the inability of some persons to gain a critical distance on their religious beliefs—the kind of critical distance essential to truly deliberative debate. But in the United States and other liberal democracies, many persons *are* able to gain a critical distance on their religious beliefs;³⁴ they are certainly as able to do so as they and others are able to gain a critical distance on other fundamental

³¹ Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

³² Cf. Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 413. “Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery.” *Id.*

³³ Cf. *McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring in judgment):

That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. . . . The State’s goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . . Government may not as a goal promote “safe thinking” with respect to religion. . . . The Establishment Clause, properly understood, . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

³⁴ Cf. Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J. L. & RELIGION 1, 31-32 (1993-94).

beliefs.³⁵ David Tracy speaks for many of us religious believers when he writes:

For believers to be unable to learn from secular feminists on the patriarchal nature of most religions or to be unwilling to be challenged by Feuerbach, Darwin, Marx, Freud, or Nietzsche is to refuse to take seriously the religion's own suspicions on the existence of those fundamental distortions named sin, ignorance, or illusion. The interpretations of believers will, of course, be grounded in some fundamental trust in, and loyalty to, the Ultimate Reality both disclosed and concealed in one's own religious tradition. But fundamental trust, as any experience of friendship can teach, is not immune to either criticism or suspicion. A religious person will ordinarily fashion some hermeneutics of trust, even one of friendship and love, for the religious classics of her or his tradition. But, as any genuine understanding of friendship shows, friendship often demands both critique and suspicion. A belief in a pure and innocent love is one of the less happy inventions of the romantics. A friendship that never includes critique and even, when appropriate, suspicion is a friendship barely removed from the polite and wary communication of strangers. As Buber showed, in every I-Thou encounter, however transient, we encounter some new dimension of reality. But if that encounter is to prove more than transitory, the difficult ways of friendship need a trust powerful enough to risk itself in critique and suspicion. To claim that this may be true of all our other loves but not true of our love for, and trust in, our religious tradition makes very little sense either hermeneutically or religiously.³⁶

Of course, some religious believers will undeniably be unable to gain much, if any, critical distance on their fundamental religious beliefs. As so much in the twentieth century attests, however, one need not be a religious believer to adhere to one's fundamental beliefs with closed-minded or even fanatical tenacity.

Although no one who has lived through recent American history can believe that religious contributions to the public

³⁵ To his credit, Richard Rorty insists that there is "hypocrisy . . . in saying that believers somehow have no right to base their political views on their religious faith, whereas we atheists have every right to base ours on Enlightenment philosophy. The claim that in doing so we are appealing to reason, whereas the religious are being irrational, is hokum." Rorty, *supra* note 31, at 4.

³⁶ DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 112 (1987).

discussion of difficult moral issues are invariably deliberative rather than dogmatic, there is no reason to believe that religious contributions are never deliberative. Religious discourse about the difficult moral issues that engage and divide us citizens of liberal democratic societies is not necessarily more problematic—more monologic, say—than resolutely secular discourse about those issues. Because of the religious illiteracy—and, alas, even prejudice—rampant among many nonreligious intellectuals,³⁷ we probably need reminding that, at its best, religious discourse in public culture is not less dialogic—it is not less open-minded and deliberative—than is, at its best, secular discourse in public culture. (Nor, at its worst, is religious discourse more monologic—more closed-minded and dogmatic—than is, at its

³⁷ As David Tracy has written, religion is:

[T]he single subject about which many intellectuals can feel free to be ignorant. Often abetted by the churches, they need not study religion, for “everybody” already knows what religion is: It is a private consumer product that some people seem to need. Its former social role was poisonous. Its present privatization is harmless enough to wish it well from a civilized distance. Religion seems to be the sort of thing one likes “if that’s the sort of thing one likes.”

DAVID TRACY, *THE ANALOGICAL IMAGINATION* 13 (1981). See also KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 6 (1988). “A good many professors and other intellectuals display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience.” *Id.*

worst, secular discourse.)³⁸ David Hollenbach's work has developed this important point:

Much discussion of the public role of religion in recent political thought presupposes that religion is more likely to fan the flames of discord than contribute to social concord. This is certainly true of some forms of religious belief, but hardly of all. Many religious communities recognize that their traditions are dynamic and that their understandings of God are not identical with the reality of God. Such communities have in the past and can in the future engage in the religious equivalent of intellectual solidarity, often called ecumenical or interreligious dialogue.³⁹

³⁸ See GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE, *supra* note 37, at 159. "[I]f the worry is openmindedness and sensitivity to publicly accessible reasons, drawing a sharp distinction between religious convictions and [secular] personal bases [of judgment] would be an extremely crude tool." *Id.*

David Tracy has lamented that:

For however often the word is bandied about, dialogue remains a rare phenomenon in anyone's experience. Dialogue demands the intellectual, moral, and, at the limit, religious ability to struggle to hear another and to respond. To respond critically, and even suspiciously when necessary, but to respond only in dialogical relationship to a real, not a projected other.

DAVID TRACY, DIALOGUE WITH THE OTHER 4 (1990).

Steven Smith, commenting wryly that "'dialogue' seems to have become the all-purpose elixir of our time," has suggested that "[t]he hard question is not whether people should talk, but rather what they should say and what (among the various ideas communicated) they should believe." Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434-35 (1990). As Tracy's observation suggests, however, there is yet another "hard" question, which Smith's suggestion tends to obscure: Not whether but *how* people should talk; what qualities of character and mind should they bring, or try to bring, to the task.

³⁹ David Hollenbach, S.J., *Civil Society: Beyond the Public-Private Dichotomy*, 5 THE RESPONSIVE COMMUNITY 15, 22 (Winter 1994/95) [hereinafter *Civil Society*]. One of the religious communities to which Hollenbach refers is the Catholic community. See David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 891 (1993) [hereinafter *Contexts*].

For example, the Catholic tradition provides some noteworthy evidence that discourse across the boundaries of diverse communities is both possible and potentially fruitful when it is pursued seriously. This tradition, in its better moments, has experienced considerable success in efforts to bridge the divisions that have separated it from other communities with other understandings of the good life. In the first and second centuries, the early Christian community moved from being a small Palestinian sect to active encounter with the Hellenistic and Roman worlds. In the fourth century, Augustine brought biblical faith into dialogue with Stoic and Neoplatonic thought. His efforts profoundly transformed both Christian and Graeco-Roman thought and practice. In the thirteenth century Thomas Aquinas once again transformed Western Christianity by appropriating ideas from Aristotle that he had learned from

A central feature of Hollenbach's work is his argument, which I accept, that the proper role of "public" religious discourse in a society as religiously pluralistic as the United States is a role to be played, in the main, much more in public culture—in particular, "in those components of civil society that are the primary bearers of cultural meaning and value—universities, religious communities, the world of the arts, and serious journalism"—than in public debate specifically about political issues.⁴⁰ He writes: "[T]he domains of government and policy-formation are not generally the appropriate ones in which to argue controverted theological and philosophical issues. . . ." ⁴¹ But, as Hollenbach goes on to acknowledge, "it is nevertheless neither

Arab Muslims and from Jews. In the process he also transformed Aristotelian ways of thinking in fundamental ways. Not the least important of these transformations was his insistence that the political life of a people is not the highest realization of the good of which they are capable — an insight that lies at the root of constitutional theories of limited government. And though the Church resisted the liberal discovery of modern freedoms through much of the modern period, liberalism has been transforming Catholicism once again through the last half of our own century. The memory of these events in social and intellectual history as well as the experience of the Catholic Church since the Second Vatican Council leads me to hope that communities holding different visions of the good life can get somewhere if they are willing to risk conversation and argument about these visions. Injecting such hope back into the public life of the United States would be a signal achievement. Today, it appears to be not only desirable but necessary.

Id.; see also *id.* at 892-96.

⁴⁰ See Hollenbach, *Civil Society*, *supra* note 39, at 22.

Conversation and argument about the common good [including religious conversation and argument] will not occur initially in the legislature or in the political sphere (narrowly conceived as the domain in which conflict of interest and power are adjudicated). Rather it will develop freely in those components of civil society that are the primary bearers of cultural meaning and value — universities, religious communities, the world of the arts, and serious journalism. It can occur wherever thoughtful men and women bring their beliefs on the meaning of the good life into intelligent and critical encounter with understandings of this good held by other peoples with other traditions. In short, it occurs wherever education about and serious inquiry into the meaning of the good life takes place.

Id.

⁴¹ Hollenbach, *Contexts*, *supra* note 39, at 900. See also Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019, 1034 (1990) (expressing skepticism about "the promise of religious perspectives being transformed in what is primarily political debate").

possible nor desirable to construct an airtight barrier between politics and culture.”⁴²

There is, then, in addition to the reasons I have already given, this important reason for not opposing the presentation of religiously based moral arguments in public political debate: in a society as overwhelmingly religious as the United States, we do present and discuss—and we should present and discuss—religiously based moral arguments in our public culture.⁴³ Rather than try to do the impossible—maintain a wall of separation (“an airtight barrier”) between the religiously based moral discourse that inevitably and properly takes place in public culture (“universities, religious communities, the world of the arts, and serious journalism”) on the one side and the discourse that takes place in public political debate (“the domains of government and policy-formation”) on the other side—we should simply welcome the presentation of religiously based moral arguments in *all* areas of our public culture, *including* public debate specifically about contested political choices.⁴⁴ Indeed, for the reasons I have given, we should not merely welcome but *encourage* the presentation of such arguments in public political debate—so that we can test them there.

To be sure, religious discourse in public—whether in public political debate or in other parts of our public culture—is sometimes quite sectarian and, therefore, divisive. But religiously

⁴² Hollenbach, *Contexts*, *supra* note 39, at 900.

⁴³ Cf. Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 934 (1990). “[W]e can freely and intelligently exercise our freedom of choice on fundamental matters having to do with our own individual ideals and conceptions of the good only if we have access to an unconstrained discussion in which the merits of competing moral, religious, aesthetic, and philosophical values are given a fair opportunity for hearing.” *Id.*

⁴⁴ No one suggests that presenting religious arguments in *nonpublic* political debate — political debate around the kitchen table, for example, or at a meeting of the local parish’s Peace and Justice Committee — is morally problematic. A practical problem with the position that presenting religious arguments in public political debate is morally problematic is that it may sometimes be difficult to say when “nonpublic” political debate has crossed the line and become “public.” Moreover, it is no more possible to maintain “an airtight barrier” between the religiously based moral discourse in nonpublic political debate and that in public political debate than it is to maintain “an airtight barrier” between the religiously based moral discourse that takes place in “universities, religious communities, the world of the arts, and serious journalism” and that which takes place in “the domains of government and policy-formation.” Why not, then, just welcome the presentation of religiously based moral arguments in public as well as in relatively nonpublic political debate?

based moral discourse is not necessarily more sectarian than secular moral discourse. It can be much less sectarian. After all, certain basic moral premises common to the Jewish and Christian traditions, in conjunction with the supporting religious premises, still constitute the fundamental moral horizon of most Americans—much more so than do Kantian (or neo-Kantian) premises, or Millian premises, or Nietzschean premises, and so forth.⁴⁵ According to John Coleman, “the tradition of biblical religion is arguably the most powerful and pervasive symbolic resource” for public ethics in the United States today. “[O]ur tradition of religious ethics seems . . . to enjoy a more obvious public vigor and availability as a resource for renewal in American culture than either the tradition of classic republican theory or the American tradition of public philosophy.” Coleman reminds us that “the strongest American voices for a compassionate, just community always appealed in public to religious imagery and sentiments, from Winthrop and Sam Adams, Melville and the Lincoln of the second inaugural address, to Walter Rauschenbusch and Reinhold Niebuhr and Frederick Douglass and Martin Luther King.” As Coleman explains, “The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command sentiments of emotional depth, when compared to ‘secular’ language, . . . [which] remains exceedingly ‘thin’ as a symbol system.” Coleman emphasizes that “when used as a public discourse, the language of biblical religion is beyond

⁴⁵ The following statement by Jürgen Habermas is noteworthy here:

I do not believe that we, as Europeans, can seriously understand concepts like morality and ethical life, person and individuality, or freedom and emancipation, without appropriating the substance of the Judeo-Christian understanding of history in terms of salvation. And these concepts are, perhaps, nearer to our hearts than the conceptual resources of Platonic thought, centering on order and revolving around the cathartic intuition of ideas. Others begin from other traditions to find the way to the plenitude of meaning involved in concepts such as these, which structure our self-understanding. But without the transmission through socialization and the transformation through philosophy of *any one* of the great world religions, this semantic potential could one day become inaccessible. If the remnant of the intersubjectively shared self-understanding that makes human(e) intercourse with one another possible is not to disintegrate, this potential must be mastered anew by every generation.

JÜRGEN HABERMAS, *POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS* 15 (William M. Hohengarten trans. 1992).

the control of any particular, denominational theology. It represents a common American cultural patrimony. . . . American public theology or religious ethics . . . cannot be purely sectarian. The biblical language belongs to no one church, denomination, or sect." In Coleman's view:

The genius of public American theology . . . is that it has transcended denominations, been espoused by people as diverse as Abraham Lincoln and Robert Bellah who neither were professional theologians nor belonged to any specific church and, even in the work of specifically trained professional theologians, such as Reinhold Niebuhr, has appealed less to revelational warrant for its authority within public policy discussions than to the ability of biblical insights and symbols to convey a deeper human wisdom. . . . Biblical imagery . . . lies at the heart of the American self-understanding. It is neither parochial nor extrinsic.⁴⁶

⁴⁶ JOHN A. COLEMAN, S.J., *AN AMERICAN STRATEGIC THEOLOGY* 192-95 (1982). Coleman adds: "I am further strongly convinced that the Enlightenment desire for an unmediated universal fraternity and language (resting as it did on unreflected allegiance to *very particular* communities and language, conditioned by time and culture) was destructive of the lesser, real 'fraternities' — in [Wilson Carey] McWilliams' sense — in American life." *Id.* at 194.

Cf. John A. Coleman, S.J., *Theology and Philosophy in Public: A Symposium on John Courtney Murray's Unfinished Agenda*, 40 *THEOLOGICAL STUDIES* 701, 704 (1979):

American Catholic social thought in general and [John Courtney] Murray in particular appealed generously to the American liberal tradition of public philosophy and the classic understanding of republican virtue embedded in the medieval synthesis. Curiously, however, they were very sparing in invoking biblical religion and the prophetic tradition in their efforts to address issues of public policy.

There are two reasons for this Catholic reluctance to evoke biblical imagery in public discourse. Much of the public religious rhetoric for American self-understanding was couched in a particularist Protestant form which excluded a more generously pluralistic understanding of America. Perhaps one reason why American Catholics and Jews have never conceived of the American proposition as a covenant—even a broken one—was because Protestant covenant thought tended in practice to exclude the new immigrants. Hence, for American Catholics as for Jews, more "secular" Enlightenment forms and traditions promised inclusion and legitimacy in ways Protestant evangelical imagery foreclosed. As Murray states it, the Protestant identification with America led to "Nativism in all its manifold forms, ugly and refined, popular and academic, fanatic and liberal. The neo-Nativist as well as the paleo-Nativist addresses to the Catholic substantially the same charge: 'You are among us but not of us.'" . . . [Murray] made no religious claims for the founding act of America as such. Catholics, decidedly, were not here in force when the Puritans and their God made a covenant with the land. Nor were they ever conspicuously invited to join the covenant. They preferred, therefore, a less religious, more civil

So, religiously based moral discourse is not always more sectarian than secular moral discourse; it can be less sectarian. But even if religiously based moral discourse were invariably more sectarian than secular moral discourse, this important point would remain: sectarian discourse, including sectarian religious discourse, can make a worthwhile contribution to public deliberation about difficult moral issues. As Jeremy Waldron has explained:

Even if people are exposed in argument to ideas over which they are bound to disagree—and how could *any* doctrine of public deliberation preclude *that*?—it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the views that others hold. Even more important, however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject. . . . I mean . . . to draw attention to an experience we all have at one time or another, of having argued with someone whose world view was quite at odds with our own, and of having come away thinking, “I’m sure he’s wrong, and I can’t follow much of it, but, still, it makes you think” The prospect of losing that sort of effect in public discourse is, frankly, frightening—terrifying, even, if we are to imagine it being replaced by a form of “deliberation” that, in the name of “fairness” or “reasonableness” (or worse still, “balance”) consists of bland appeals to harmless nostrums that are accepted without question on all sides. This is to imagine open-ended public debate reduced to the formal trivia of American television networks. . . . [This] might apply to *any* religious or other philosophically contentious intervention. We do not have (and we should not have) so secure a notion of public consensus, or such stringent requirements of fairness in debate, as to exclude any view from having its effect in the marketplace of ideas.⁴⁷

understanding of America.

The second reason for a Catholic predilection for the two traditions of republican theory and liberal philosophy is the Catholic recognition of the need for secular warrant for social claims in a pluralist society. This penchant is rooted in Catholic natural-law thought.

Id.

⁴⁷ Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 841-42 (1993). Cf. Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1794 (1994).

Again, Richard Rorty thinks that it makes sense to “privatiz[e] religion—[to] keep[] it out of . . . ‘the public square,’ making it seem bad taste to bring religion into discussions of public policy.”⁴⁸ Rorty should think again. Not only are the reasons for wanting to privatize religion weak, there are strong countervailing reasons, which I have given in this section, for wanting to “public-ize” religion, not privatize it. We should welcome religiously based moral arguments into the public square (where we can then test them), not try to keep them out. We should make it seem bad taste to sneer when people bring their religious convictions to bear in public discussions of controversial political issues, like homosexuality and abortion. It is not *that* religious convictions are brought to bear in public political debate that should worry us, but *how* they are sometimes brought to bear (e.g., dogmatically). But we should be no less worried about how fundamental secular convictions are sometimes brought to bear in public political debate.⁴⁹

It is always possible that learning more about a moral or religious doctrine will lead us to like it less. But the respect of deliberation and engagement affords a more spacious public reason than liberalism allows. It is also a more suitable ideal for a pluralist society. To the extent that our moral and religious disagreements reflect the ultimate plurality of human goods, a deliberative mode of respect will better enable us to appreciate the distinctive goods our different lives express.

Id.

⁴⁸ See *supra* note 31 and accompanying text.

⁴⁹ As I have indicated in section I, I am in substantial agreement with the position that, in Kathleen Sullivan’s formulation, “the negative bar against establishment of religion implies the affirmative ‘establishment’ of a civil order for the resolution of public moral disputes. . . . [P]ublic moral disputes may be resolved only on grounds articulable in secular terms.” Sullivan, *supra* note 19, at 197. However, Sullivan is wrong to suggest that the fact that government may not make political choices in the absence of a plausible secular rationale constitutes “the banishment of religion from the public square. . . .” *Id.* at 222. First, “the public square” — the public culture of a society — includes much more than politics. To banish religion from politics is not to banish it from the rest of public culture. Second, religion has not been banished even from politics (much less from the rest of public culture). As I have explained, it is neither constitutionally nor morally inappropriate for legislators or other public officials, much less citizens, to present religiously based arguments about the morality of human conduct in public political debate. Indeed, because of the role that such religious arguments inevitably play in the political process, it is important that such arguments, no less than secular moral arguments, be presented in — so that they can be tested in — public political debate.

III. RELIGIOUS ARGUMENTS AS A BASIS OF POLITICAL CHOICE

According to the construal of the nonestablishment norm I defended in section I, government may rely on a religious argument in making a political choice about the morality of human conduct only if a plausible secular rationale supports the choice. The question remains, however, whether, all things considered, it isn't *morally* inappropriate for legislators and other public officials, and for citizens voting in a referendum or initiative election, to rely on a religious argument in making a political choice about the morality of human conduct even if a plausible secular rationale—or even, in their view, a persuasive secular rationale—supports the choice. From the other side, the question remains whether, *apart from the nonestablishment norm*, it isn't morally permissible for legislators and others to rely on a religious argument in making a political choice about the morality of human conduct even if, in their view, no persuasive or even plausible secular rationale supports the choice.

Why might one be inclined to conclude that government should not rely on religious arguments in making political choices about the morality of human conduct? Two reasons come to mind, one of which is moral in character, the other of which is practical. While the moral reason may be directed specifically at religiously based moral arguments, it is typically directed at moral arguments without regard to whether they are religious or secular. The moral reason posits that when government relies on a moral argument in making a political choice, it denies to those persons the respect that is their due as human beings. This position is deeply problematic. The following comment by William Galston, though it somewhat misconceives the position, goes to the heart of the matter:

[Charles] Larmore (and Ronald Dworkin before him) may well be right that the norm of equal respect for persons is close to the core of contemporary liberalism. But while the (general) concept of equal respect may be relatively uncontroversial, the (specific) conception surely is not. To treat an individual as person rather than object is to offer him an explanation. Fine; but *what kind* of explanation? Larmore seems to suggest that a properly respectful explanation must appeal to beliefs already held by one's interlocutors; whence the need for neutral dialogue. This seems arbitrary and implausible. I would suggest, rather, that we show

others respect when we offer them, as explanation, what we take to be our true and best reasons for acting as we do.⁵⁰

Let me offer two friendly amendments to Galston's comment. First, it is never to show respect for a human being for one person to offer to another—for example, for a Nazi to offer to a Jew—a reason to the effect that “you are not truly or fully human,” even if the Nazi sincerely takes that to be his best reason for acting as he does. Second, Larmore's position, which Galston somewhat misconceives, is that political “justification must appeal, not simply to the beliefs that the other happens to have, but to the beliefs he has on the assumption (perhaps counterfactual) that he affirms the norm of equal respect.”⁵¹ Nonetheless, it remains altogether obscure why we do not give to others the respect that is their due as human beings “when we offer them, as explanation, what we take to be our best reasons for acting as we do” (so long as our reasons do not assert, presuppose, or entail the inferior humanity of those to whom the explanation is offered). According to Robert Audi, “If you are fully rational and I cannot convince you of my view by using arguments framed in the concepts we share as rational beings, then even if mine is the majority view I should not coerce you.”⁵² But *why*? As Gerald Dworkin has observed, “There is a gap between a premise which requires the state to show equal concern and respect for all its citizens and a conclusion which rules out as legitimate grounds for coercion the fact that a majority believes that conduct is immoral, wicked, or wrong. That gap has yet to be closed.”⁵³

According to a second, practical reason for wanting government to forego reliance on religiously based moral arguments, the social costs of government relying on such arguments in making political choices (or, at least, coercive political choic-

⁵⁰ WILLIAM A. GALSTON, *LIBERAL PURPOSES* 109 (1991).

⁵¹ See Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts — and Second Thoughts — on LOVE AND POWER*, 30 SAN DIEGO L. REV. 703, 711 n.23 (1993) (quoting Larmore).

⁵² Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 701 (1993).

⁵³ Gerald R. Dworkin, *Equal Respect and the Enforcement of Morality*, 7 SOC. PHIL. & POL'Y 180, 193 (1990) (criticizing Ronald Dworkin). See also JOHN M. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 221-22 (1980) (criticizing Ronald Dworkin).

es)—costs mainly in the form of increased social instability—are too high. However, it is implausible to believe that in the context of a liberal democratic society like the United States, governmental reliance on religiously based moral arguments in making political choices (even coercive ones) is *invariably* destabilizing—or that it is invariably *more* destabilizing than governmental reliance on controversial secular moral arguments. Although some imaginable instances of political reliance on a religiously based moral argument might, with other factors, precipitate social instability, as a general matter “the risk of major instability generated by religious conflict is minimal. Conditions in modern democracies may be so far from the conditions that gave raise [sic] to the religious wars of the sixteenth century that we no longer need worry about religious divisiveness as a source of substantial social conflict.”⁵⁴ John Courtney Murray warned against “project[ing] into the future of the Republic the nightmares, real or fancied, of the past.”⁵⁵ As Murray’s comment suggests, a rapprochement between religion and politics forged in the crucible of a time or a place very different from our own is not necessarily the best arrangement for our time and place. “[W]hat principles of restraint, if any, are appropriate may depend on time and place, on a sense of the present makeup of a society, of its history, and of its likely evolution.”⁵⁶

In my view, neither of the two reasons just examined—neither the moral reason nor the practical reason—offers adequate support for the proposition that government should never rely on religious arguments in making political choices about the morality of human conduct. Nonetheless, it does seem to me that in making a political choice about the morality of human conduct, in the absence of an independent secular rationale for the choice that they find persuasive, legislators and other public

⁵⁴ Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1096 (1990). Solum is stating the argument, not making it. Indeed, Solum is wary of the argument. See *id.* at 1096-97. Solum cites, as an instance of the argument, Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 939 (1989). For another instance, see Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903 (1993).

⁵⁵ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 23-24 (1960).

⁵⁶ GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASON*, *supra* note 8, at 130.

officials (and citizens, too) should not rely on—at the very least they should be exceedingly wary about relying on—one sort of religious argument about the morality of human conduct: religious argument about human well-being. Religious argument about human worth, however, is a different matter.

Religious arguments about the morality of human conduct typically address one or both of two fundamental moral issues. First: Are all human beings sacred, or only some; does the well-being of every human being merit our respect and concern, or only the well-being of some human beings? Second: What are the requirements of human well-being; what is friendly to human well-being, and what is hostile to it; what is good for human beings, and what is bad? There are, correspondingly, two basic kinds of religious argument about the morality of human conduct: religious argument about who among all human beings is sacred and religious argument about the requirements of human well-being. The claim I want to develop and defend in this section is that in making a political choice about the morality of human conduct, neither legislators nor other public officials should rely on a religious argument about the requirements of human well-being unless a persuasive independent secular argument reaches the same conclusion about the requirements of human well-being as the religious argument. (The secular argument must be one that, in a legislator's or other public official's *own* view, is persuasive.) I want to turn first, however, to religious arguments about human worth, which, as I said in section I, present a special case.

A. *Religious Arguments about Human Worth*

The only claim about human worth consistent with the international law of human rights, and the only claim about human inviolability on which government in the United States may constitutionally rely, is that all human beings, and not just some (e.g., white persons), are sacred.⁵⁷ Claims to the effect that all

⁵⁷ That all human beings are sacred is represented in the Universal Declaration of Human Rights (Article 2) by this language: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See BASIC DOCUMENTS ON HUMAN RIGHTS 108 (Ian Brownlie ed., 1992).

human beings are sacred are quite common in the United States, where the most influential religious traditions teach that all human beings are children of God and sisters and brothers to one another. (As Hilary Putnam has noted, the moral image central to what Putnam calls the Jerusalem-based religions “stress equality and also fraternity, as in the metaphor of the whole human race as One Family, of all women and men as sisters and brothers.”⁵⁸) The opening passage of a recent statement by the Catholic bishops of Florida, on the controversial political issue of welfare reform, is illustrative:

The founding document of our nation says that all are endowed by their Creator with inalienable rights, including the right to life, liberty, and the pursuit of happiness. And as Jesus has told us: “Amen, I say to you, whatever you did for the least of these brothers and sisters of mine you did for me.”⁵⁹

Moreover, claims that all human beings are sacred are quite common not just in the United States, but throughout the world. Indeed, the first part of the idea of human rights—an idea that has emerged in international law since the end of World War II, and that is embraced by many religious believers as well as non-believers throughout the world, is that each and every human being is sacred. (The second part of the idea is that, because every human being is sacred, there are certain things that ought not to be done to any human being and cer-

A political choice based on the view that only white persons are sacred would violate the freedom from racial discrimination protected by the constitutional law of the United States. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS*, *supra* note 12, at 143 et seq.

⁵⁸ HILARY PUTNAM, *THE MANY FACES OF REALISM* 60-61 (1987).

⁵⁹ Florida Bishops, *Promoting Meaningful Welfare Reform*, 24 *ORIGINS* 609, 611 (1995) (quoting Matthew 25:40). There are many such examples. See, e.g., NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: A PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U. S. ECONOMY* (1986).

This letter is a personal invitation to Catholics to use the resources of our faith, the strength of our economy, and the opportunities of our democracy to shape a society that better protects the dignity and basic rights of *our sisters and brothers both in this land and around the world*.

Id. (emphasis added).

By “our sisters and brothers,” the Catholic bishops meant, not “our fellow Catholics” or even “our fellow Christians,” but “all human beings.”

tain other things that ought to be done for every human being.)⁶⁰

"The International Bill of Human Rights," as it is sometimes called, consists of three documents. The first of these, the Universal Declaration of Human Rights (1948), speaks, in the Preamble, of "the inherent dignity . . . of all members of the human family" and of "the dignity and worth of the human person."⁶¹ In Article I, the Declaration proclaims: "All human beings . . . should act towards one another in a spirit of brotherhood." The second and third documents are the International Covenant on Civil and Political Rights (1976) and the International Covenant on Economic, Social and Cultural Rights (1976). The Preamble common to both covenants echoes the Universal Declaration in speaking of "the inherent dignity . . . of all members of the human family." The Preamble then states: "[T]hese rights derive from the inherent dignity of the human person. . . ." The Vienna Declaration and Programme of Action, adopted by the UN-sponsored World Conference on Human Rights on June 25, 1993,⁶² reaffirms this language in insisting that "all human rights derive from the dignity and worth inherent in the human person" The American Declaration of the Rights and Duties of Man (1948) regional human rights documents begins: "The American peoples have acknowledged the dignity of the individual. . . . The American states have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality. . . ." The Preamble to the American Declaration proclaims: "All men . . . should conduct themselves as brothers to one another." Another regional document, the American Convention on Human Rights (1978), echoes the American Declaration in stating, in the Preamble, that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human person. . . ." Similarly,

⁶⁰ I have discussed the idea of human rights at length elsewhere. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FIVE INQUIRIES* (forthcoming 1998).

⁶¹ For the texts of all the human rights documents to which I refer in this paragraph, see *BASIC DOCUMENTS ON HUMAN RIGHTS* (Ian Brownlie ed., 1992).

⁶² The representatives of 172 States adopted by consensus The Vienna Declaration and Programme of Action.

the African [Banjul] Charter on Human and Peoples' Rights (1986) says, in the Preamble, that "fundamental human rights stem from the attributes of human beings. . . ." That *every* human being is sacred, and not just some human beings, is emphasized in the Universal Declaration of Human Rights (1948) and in many other international human rights documents by this statement: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁶³

Of course, the proposition that each and every human being is sacred is, for many persons, a religiously based tenet.⁶⁴ Many persons who are not religious believers embrace the proposition as a fundamental principle of morality. The proposition is an axiom of many secular moralities as well as a fundamental principle, in one or another version, of many religious moralities. The widespread secular embrace of the idea of human rights is conclusive evidence of that fact. As Ronald Dworkin has written: "We almost all accept . . . that human life in all its forms is *sacred*. . . . For some of us, this is a matter of religious faith; for

⁶³ UNIVERSAL DECLARATION OF HUMAN RIGHTS (Dec. 10, 1948), *reprinted in* BASIC DOCUMENTS, *supra*, note 61, at 106-12. Article 2 continues: "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." *Id.*

⁶⁴ In an essay on "The Spirituality of The Talmud," Ben Zion Bokser and Baruch M. Bokser write: "From this conception of man's place in the universe comes the sense of the supreme sanctity of all human life. 'He who destroys one person has dealt a blow at the entire universe, and he who sustains or saves one person has sustained the whole world.'" Ben Zion Bokser & Baruch M. Bokser, *Introduction: The Spirituality of the Talmud*, in *THE TALMUD: SELECTED WRITINGS* 7 (1989). They continue:

The sanctity of life is not a function of national origin, religious affiliation, or social status. In the sight of God, the humble citizen is the equal of the person who occupies the highest office. As one talmudist put it: "Heaven and earth I call to witness, whether it be an Israelite or pagan, man or woman, slave or maidservant, according to the work of every human being doth the Holy Spirit rest upon him." . . . As the rabbis put it: "We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead even as we attend to the burial of the Jewish dead."

Id. at 30-31.

others, of secular but deep philosophical belief.”⁶⁵ Indeed, the proposition that every human being is sacred is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of “the moral point of view” as that view according to which “every person [has] some sort of equal status.”⁶⁶ As Bernard Williams has noted:

[I]t is often thought that no concern is truly moral unless it is marked by this universality. For morality, the ethical constituency is always the same: the universal constituency. An allegiance to a smaller group, the loyalties to family or country, would have to be justified from the outside inward, by an argument that explained how it was a good thing that people should have allegiances that were less than universal.⁶⁷

Recall, from section I, that under the nonestablishment norm, government may not rely on a religious argument in making a political choice about the morality of human conduct unless a plausible secular rationale supports the choice. I have elsewhere called attention to the possibility that no intelligible secular argument supports the claim that every human being is sacred—that the only intelligible arguments in support of the claim are religious in character.⁶⁸ (That an argument is intelligible does not mean that it is persuasive or even plausible.) Let us assume, for the sake of argument, that no intelligible, much less persuasive, secular argument supports the claim that every human being is sacred. It would be silly to insist that because no intelligible secular argument supports the claim that every human being is sacred, the nonestablishment norm forbids government, in making a political choice about the morality of human conduct, to rely on a religious argument that every hu-

⁶⁵ Ronald Dworkin, *Life is Sacred. That's the Easy Part*, N.Y. TIMES, May 16, 1993, (Magazine), at 36. Cf. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 25 (1993) (“sacred” is often used in a theistic sense, but it can be used in a secular sense as well). I have criticized Dworkin’s conception of “sacred.” See Michael J. Perry, *The Gospel According to Dworkin*, 11 CONST. COMMENTARY 163 (1993).

⁶⁶ JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 239 (1986).

⁶⁷ BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 14 (1985).

⁶⁸ See Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, in *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* (Austin Sarat & Thomas Kearns eds., forthcoming 1996). (A later version of this essay will appear as the first chapter of MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS*, *supra* note 60.)

man being is sacred. Similarly, it would be silly to insist that, as a political-moral matter, citizens, legislators, and other public officials should not rely on a religious argument that every human being is sacred. After all, the proposition that every human being is sacred is a fundamental constituent of American moral culture. (The Declaration of Independence states that "all men are created equal, and endowed by their Creator with certain inalienable rights . . . ") Moreover, the proposition is a fundamental part of the Constitution itself, if the Fourteenth Amendment forbids, as it arguably does, government to base any political choice on the proposition that only some human beings—white persons, for example—are sacred.⁶⁹ Therefore, we must conclude that government may, under the nonestablishment norm, and that legislators and others may, as a matter of political morality, rely on a religious argument that every human being is sacred *whether or not any intelligible or persuasive or even plausible secular argument supports the claim about the sacredness of every human being.*

The statement about the nonestablishment norm that begins the preceding paragraph must be qualified, then, with this proviso: in making a political choice about the morality of human conduct, government may rely on a religious argument that every human being is sacred even if no plausible secular argument supports the claim about the sacredness of every human being. This qualification should trouble few, if any, religious nonbelievers. The proposition that every human being is sacred is shared not only among many different religious traditions⁷⁰ but also between many religious believers and many who have no religious beliefs. Laws and public policies rooted in the view that every human being is sacred do not in and of themselves privilege either one religion (as such) over another or even

⁶⁹ See *supra* note 12 and accompanying text.

⁷⁰ See generally WORLD RELIGIONS AND HUMAN LIBERATION (Dan Cohn-Sherbok ed., 1992); THE ETHICS OF WORLD RELIGIONS AND HUMAN RIGHTS (Hans Küng & Jürgen Moltmann eds., 1990); HUMAN RIGHTS AND THE WORLD'S RELIGIONS (Leroy S. Rouner ed., 1988); HUMAN RIGHTS IN RELIGIOUS TRADITIONS (Arlene Swidler ed., 1982); ROBERT TRAER, FAITH IN HUMAN RIGHTS: SUPPORT IN RELIGIOUS TRADITIONS FOR A GLOBAL STRUGGLE (1991).

religion over nonreligion.⁷¹ By contrast,⁷² a law requiring persons to say the Lord's Prayer, for example, *would* privilege not merely religion over nonreligion but also one religion over others.

It remains the case, however, that apart from the qualification just noted, the nonestablishment norm forbids government to rely on a religious argument in making a political choice about the morality of human conduct unless a plausible secular rationale supports the choice. Given the qualification, and given that the other basic sort of religious argument about the morality of human conduct is religious argument about the requirements of human well-being, we may say that the nonestablishment norm forbids government to rely on a religious argument about the requirements of human well-being in making a political choice about the morality of human conduct unless a plausible secular rationale supports the choice. (As I have explained elsewhere, the nonestablishment norm forbids government to base political choices on secular arguments of a certain sort, namely, secular arguments to the effect that one or more religious tenets are more authentically American, more representative of the sentiments of the community, or otherwise better, than one or more competing religious or nonreligious tenets.⁷³ When I refer, in describing the requirements of the nonestablishment norm, to a "secular" argument or rationale, I do not mean to include arguments of the sort described in the preceding sentence, but only those that do not in any way valorize one or more religious tenets—that do not claim that one or more religious beliefs are better, along one or another dimension of value, than one or more competing religious or nonreligious beliefs.) In the next subsection of this essay, I inquire whether, as a matter not of constitutionality but of political morality, legislators and other public officials should rely on a religious argument about the requirements of human well-being in making a political choice about the morality of human conduct if, in their view, no persuasive secular argument reaches the same conclusion about those requirements as the religious argument.

⁷¹ See Koppelman, *supra* note 19, at 33.

⁷² And putting aside imaginable but utterly fantastic scenarios.

⁷³ See Perry, *Religion, Politics, and the Constitution*, *supra* note 6.

The political controversy about abortion—the debate about what public policy regarding abortion should be—looms large in the background, it looms large as a subtext, of the debate about the proper role of religion in politics. As much as any other contemporary political controversy, and more than most, the abortion controversy is a principal, if often unspoken, occasion of the debate about religion in politics.⁷⁴ It is noteworthy that were government to outlaw abortion, it would not have to rely on a religious argument about the requirements of human well-being. (Therefore, the nonestablishment norm, at least, does not stand in the way of restrictive abortion legislation.⁷⁵) This is illustrated by the fact that the most influential religious voice in the United States on the “pro-life” side of the debate about what

⁷⁴ See generally ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993).

⁷⁵ The Constitution of the United States has been interpreted by the Supreme Court to ban legislation outlawing abortion in the period of pregnancy prior to viability. The principal case is *Roe v. Wade*, 410 U.S. 113 (1973), which was substantially reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See PERRY, *THE CONSTITUTION IN THE COURTS*, *supra* note 12, at 179-89.

The Constitution of the Federal Republic of Germany, by contrast, has been interpreted by the German Supreme Court to ban legislation permitting most abortions in the first three months of pregnancy. In 1993, the Constitutional Court of the Federal Republic of Germany ruled that Germany's new liberal abortion law “was unconstitutional because it violates a constitutional provision requiring the state to protect human life.” Stefan Kinzer, *German Court Restricts Abortion, Angering Feminists and the East*, N. Y. TIMES, May 29, 1993, at A1. See Judgment of May 28, 1993, The Constitutional Court of the Federal Republic of Germany, Judgment of the Second Senate, 88 BverfGE 230 (consolidated case nos. 2 BxF2/90m 2 BzF 4/92, 2 BzF 5/92).

The Constitution of Ireland, in Article 40.3.3, states: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” J.M. KELLY, *THE IRISH CONSTITUTION* 486 (1984). Article 40.3.3 also provides: “This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.” *Id.* On Article 40.3.3 and the abortion controversy in Ireland, see GERARD HOGAN & G.F. WHYTE, J.M. KELLY'S *THE IRISH CONSTITUTION* 790-810 (1994). See also Jeffrey A. Weinstein, ‘An Irish Solution to an Irish Problem’: *Ireland's Struggle With Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165 (1993).

The debate about what public policy regarding abortion should be is closed off neither by judicial decisions like the two just referred to — decisions interpreting the constitution to dictate a particular political choice or range of political choices regarding abortion — nor even by a constitutional provision like Ireland's: such decisions and such a provision leave open the question whether to amend the constitution to allow for, or to dictate, a different choice or range of choices.

public policy regarding abortion should be—the voice of the National Conference of Catholic Bishops—does not rely, at the crucial and controversial stage of its case, on a religious argument about the requirements of human well-being. The bishops' argument comprises three steps:

- Because each and every human being is sacred, the intentional killing of any human being—or, at least, of any innocent human being—is morally forbidden.⁷⁶
- Because there is no nonarbitrary way to draw the bounds of the human community at any point short of conception, we must treat a human fetus as a member of the human community—as a human being, that is, albeit a human being at an early stage of development.
- The intentional killing of any human fetus, therefore, is morally forbidden.⁷⁷

⁷⁶ It is not the official Catholic position that infliction of the death penalty is always immoral, although Pope John Paul II has declared in a recent encyclical that the conditions under which infliction of the death penalty is morally justified “are very rare if not practically nonexistent.” John Paul II, *Evangelium Vitae*, 24 ORIGINS 689, 709 (1995).

⁷⁷ Here is a sampling of the Catholic bishops' statements on abortion:

[A]bortion . . . negates two of our most fundamental moral imperatives: respect for innocent life and preferential concern for the weak and defenseless. . . . “Because victims of abortion are the most vulnerable and defenseless members of the human family, it is imperative that we [who are] called to serve the least among us give urgent attention and priority to this issue.”

Catholic Bishops of the United States, *Resolution on Abortion*, 19 ORIGINS 395 (1989). See also Bishop James McHugh, *Political Responsibility and Respect for Life*, 19 ORIGINS 460 (1989).

We would do well to pay special heed to the implications of the great commandment. For, in calling us to love our neighbors as ourselves, Jesus insists that we value the lives and needs of others no less than our own. The right to life of the unborn baby, of the ill and infirm grandparent, of the despicable criminal, of the AIDS patient, is to be affirmed and protected as though it belonged to us. In addition, the refugee from Indochina, the lives of the welfare recipient from Illinois and the homeless in our own community each possess a dignity that matches our own. When we respond to that need, we acknowledge not only their dignity but ours as well.

Catholic Bishops of Wisconsin, *A Consistent Ethic of Life*, 19 ORIGINS 461, 462 (1989).

When people say abortion is a matter of choice, they're forgetting someone. “Pro-choice” is a phrase that is incomplete; it lacks an object. One must ask the natural follow-up: the choice to do what? If it were the choice to poison an elderly person, or to smuggle drugs, or to embezzle from a bank, no one would defend that choice. In this case, it's the choice to take [an unborn] child's life. Who defends . . . the child's inalienable right to life?

Archbishop John May, *Faith and Moral Teaching in a Democratic Nation*, 19 ORIGINS 385, 388 (1989).

The first step of the bishops' case relies on a claim, which for the bishops is, of course, a religiously grounded claim, that every human being is sacred. This is the same claim the bishops rely on in speaking out about what they perceive to be any human rights abuse. The bishops also rely, in their first step, on the claim that killing someone is antithetical to the victim's well-being. *That* claim about human well-being, however, is religious neither in its content nor in its grounding. The crucial second step of the bishops' case, although controversial in the United States, even among religious believers,⁷⁸ gives even many on the

Catholic teaching sees in abortion a double moral failure: A human life is taken, and a society allows or supports the killing. Both concerns, protecting life and protecting the society from the consequences of destroying lives, require attention. Both fall within the scope of civil law. Civil law, of course, is not coextensive with the moral law, which is broader in its scope and concerns. But the two should not be separated; the civil law should be rooted in the moral law even if it should not try to translate all moral prohibitions and prescriptions into civil statutes.

When should the civil law incorporate key moral concerns? When the issue at stake poses a threat to the public order of society. But at the very heart of public order is the protection of human life and basic human rights. A society which fails in either or both of these functions is rightfully judged morally defective.

Neither the right to life nor other human rights can be protected in society without the civil law. . . . [O]ur objective, that the civil law recognize a basic obligation to protect human life, especially the lives of those [like unborn children] vulnerable to attack or mistreatment, is not new in our society. The credibility of civil law has always been tested by the range of rights it defends and the scope of the community it protects. To return to the analogy of civil rights: The struggle of the 1960s was precisely about extending the protection of the law to those unjustly deprived of protection.

Cardinal Joseph Bernardin, *The Consistent Ethic of Life after Webster*, 19 ORIGINS 741, 746 (1990). See also Bishop John Myers, *Obligations of Catholics and Rights of Unborn Children*, 20 ORIGINS 65, 68 (1990); Bishop John O'Connor, *Abortion: Questions and Answers*, 20 ORIGINS 97 (1990). Cf. Archbishop John Roach, *War of Words on Abortion*, 20 ORIGINS 88, 89 (1990) (responding to accusation that call for restrictive abortion legislation is call to "legislate morality"). "That's not a new argument. In the heat of the civil rights debate, Martin Luther King Jr. was accused of wanting to legislate morality. He replied that the law could not make people love their neighbors, but it could stop their lynching them." *Id.*

⁷⁸ See David Smith, MSC, *What Is Christian Teaching on Abortion?*, 42 DOCTRINE & LIFE 305, 316 (1992):

As can be observed from this brief survey of certain Christian Churches, all agree that the human embryo has "value" and must be respected. The disagreement concerns what precisely is the "value" of the human embryo. One view, represented explicitly by the Roman Catholic Church, states that it has exactly

"pro-choice" side of the abortion debate pause. As one of the most prominent "pro-choice" theorists, Laurence Tribe, has written, "[T]he fetus is alive. It belongs to the human species. It elicits sympathy and even love, in part because it is so dependent and helpless."⁷⁹ In any event, the second step does not involve any argument, religious or secular, about the requirements of human well-being. In representing the bishops' position, with which he agrees, Robert George has written: "Opponents of abortion . . . view all human beings, including the unborn . . . , as members of the community of subjects to whom duties in justice are owed. . . . The real issue of principle between supporters of abortion . . . and opponents . . . has to do with the question of who are subjects of justice." In George's view, "The challenge to the orthodox liberal view of abortion . . . is to identify nonarbitrary grounds for holding that the unborn . . . do not qualify as subjects of justice."⁸⁰

It sometimes seems that some of those who want to marginalize the role of religion in politics hope that by doing so they can gain an advantage in the political debate about abortion. It must be sobering for such persons to learn that the most influential religious voice in the United States on the pro-life side of the abortion debate does not even press, in public

the same value as any other human being. Another view, represented by a strong body of opinion in the Church of England, asserts that its value, prior to individuation (consciousness), is less than that of a human being in the proper sense of the word. A third view, represented by the Methodist Conference, would argue that its value depends on its stage of development: thus a progressively increasing value. The Baptist Union seems to favour a similar position, as does the Church in Wales and the Free Churches.

Id.

⁷⁹ Laurence H. Tribe, *Will the Abortion Fight Ever End: A Nation Held Hostage*, N.Y. TIMES, July 2, 1990, at A13 (Op-Ed Page). For a passionate critique, by a pro-choice feminist, of some pro-choice feminists' explicit or implicit denial of the moral status of the fetus, see Naomi Wolf, *Our Bodies, Our Souls: Rethinking Pro-choice Rhetoric*, NEW REPUBLIC, Oct. 16, 1995, at 26.

⁸⁰ Robert F. George, Book Review, 88 AM. POL. SCI. REV. 444, 444 (1994) (reviewing RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993)). George adds: "Frankly, I doubt that this challenge can be met. In any event, Dworkin here fails to make much progress toward meeting it." *Id.* at 446. Cf. Mary Warnock, *The Limits of Toleration*, in ON TOLERATION 123, 125 (Susan Mendus & David Edwards eds., 1987) (commenting on John Stuart Mill's failure to address, *inter alia*, question "Who is to count as a possible object of harm?").

political debate, a sectarian religious argument. If the Catholic bishops need not and do not rely on a religious argument about the requirements of human well-being, then government, were it to enact a pro-life position into law, would not need to rely on any such argument.⁸¹

B. Religious Arguments about Human Well-Being

Arguments about the requirements of human well-being are the second basic kind of religious argument about the morality of human conduct: arguments about what must not be done to, or what must be done for, a human being (including oneself) if she is to flourish—if she is to achieve the greatest well-being of which she is capable—as a human being; what is friendly to authentic human flourishing, or what is hostile to it; what is truly good for human beings, whether all human beings or merely some, or what is truly bad for them. Again, the nonestablishment norm forbids government to rely on a religious argument about the requirements of human well-being in making a political choice about the morality of human conduct unless a plausible secular rationale supports the choice. But, apart from the nonestablishment norm, should legislators and other public officials, as a moral matter, refrain from relying on a religious argument about the requirements of human well-being absent a persuasive (to them) secular argument that reaches the same conclusion about those requirements?

As I am about to explain, for most religious believers in the United States, at least, and probably for most religious believers in other religiously pluralistic advanced industrial democracies, the persuasiveness or soundness of any religious argument about

⁸¹ Cf. Judith Jarvis Thomson, *Abortion*, BOSTON REVIEW, Summer 1995, at 11, 15:

If the legislature constrains the liberty [of a woman to have an abortion] on the ground of this doctrine [that the fetus has a right to life from the moment of conception], and declares that it is entitled to do so because *God says* the doctrine is true, then the legislature does violate the principle of separation of church and state. But no sensible contemporary opponent of abortion invites the legislature to do this. The opponent of abortion instead invites the legislature to constrain the liberty on the ground of this doctrine, and to declare that it is entitled to do so because the doctrine *is* true.

Id.

the requirements of human well-being depends, or should depend, partly on there being at least one persuasive secular argument (i.e., one secular argument that *they themselves* find persuasive) that reaches the same conclusion about the requirements of human well-being as the religious argument. (Some theologically conservative Christians—in particular, “fundamentalist” Christians and some “evangelical” Christians—will disagree. I address them in the concluding section of this essay.) A qualification is necessary here. Imagine a religious argument according to which human well-being requires, among other things, prayer or other spiritual practice conducive to achieving knowledge of or union with God. By definition, no “secular” secular argument can reach such a conclusion about the requirements of human well-being.⁸² But, as I have explained elsewhere, no government committed to the ideal of nonestablishment will take any action based on the view that a practice or practices are, as religious practice—practice embedded in and expressive of one or more religious beliefs—truer or more efficacious spiritually or otherwise better than one or more other religious or nonreligious practices or than no religious practice at all.⁸³ Nonetheless, to be as precise as possible, I should say: the persuasiveness of any religious argument about the requirements of human well-being—any religious argument, that is, on which a government committed *not* to discriminate in favor of religious practice would be prepared to rely—should depend in part on there being at least one sound secular argument that reaches the same conclusion as the religious argument. At least, no religious argument about the requirements of human well-being should be deemed sufficiently strong to ground a political choice, least of all a coercive political choice, unless a persuasive secular argument reaches the same conclusion about the requirements of human well-being.

⁸² William Collinge has written, in correspondence, that, “as a Catholic, I would say that *ultimate* human well-being is sharing in the life of God, participating as somehow befits our status as created beings in the divine Trinity. Talk of grace, ‘beatific vision,’ mystical union all points in the same direction. Many adherents of other religions have corresponding beliefs about what is ultimately best. How could there be a secular argument for something like that?” Letter from William Collinge to Michael J. Perry, Howard J. Trienens Chair in Law, Northwestern University (Sept. 1, 1995).

⁸³ See Perry, *Religion, Politics, and the Constitution*, *supra* note 6.

Why should the persuasiveness of every religious argument about the requirements of human well-being (on which a government committed not to discriminate in favor of religious practice would be prepared to rely) depend partly on there being at least one sound secular route to the religious argument's conclusion about the requirements of human well-being? A "religious" argument about the requirements of human well-being—like a religious argument about anything—is, as I indicated in section I, an argument that relies on (among other things) a religious belief: an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. (As I said in section I, a "religious" belief is, for present purposes, either the belief that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything else—or a belief about the nature, the activity, or the will of God.) The paradigmatic religious argument about the requirements of human well-being relies (partly) on a claim about what God has revealed. Such an argument might be made by someone who believes that we human beings are too fallen (too broken, too corrupt) to achieve much insight into our own nature and that the safest inferences about human nature, about the requirements of human well-being, are based on God's revelation.⁸⁴ However, religious believers—even religious believers within the same religious tradition—do not always agree with one another about what God has revealed. Moreover, many religious believers understand that human beings are quite capable not only of making honest mistakes, but even of deceiving themselves, about what God has revealed—including what God might have revealed about the requirements of human well-being.

(Charles Curran, the Catholic moral theologian, has raised a helpful question, in correspondence, about my "emphasis on human well-being and human nature. Some people might criticize that [emphasis] as being too anthropocentric and not theocentric enough for a truly Protestant position. . . . The primary question perhaps even in the reformed tradition is what

⁸⁴ See *infra* note 130 and accompanying text [Smolin quote]. For a description of the religious mindset that yields such a religious argument, see JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 120-21 (1991).

is the will of God and not what is human flourishing or human nature.”⁸⁵ But given two assumptions that few Christians would want to deny, the distinction between doing “what God wills us to do” and doing “what is conducive to the fulfillment of our nature” is quite false. The two assumptions are, first, that human beings have a nature—indeed, a nature fashioned by God—and, second, that it is God’s will that human beings act so as to fulfill or perfect their nature.⁸⁶)

Therefore, and as many religious believers understand, an argument about the requirements of human well-being—about what is truly good for (all or some) human beings, or about what is truly bad for them—that is grounded on a claim about what God has revealed is highly suspect if there is no secular route to the religious argument’s conclusion. So long as there is no persuasive secular argument that supports the conclusion about the requirements of human well-being reached by a religious argument of the kind in question, the religious argument is problematic.⁸⁷ Indeed, so long as there is no persuasive secular argument, the religious argument is of doubtful soundness for anyone who believes, as do most Christians, for example, that no fundamental truth about the basic requirements of human well-being is unavailable to religious unbelievers—that every such truth, even if available only to some human beings by the grace of “supernatural” revelation, is nonetheless available “in principle” to every human being, including nonbelievers, by

⁸⁵ Letter from Charles Curran, Scurlock Chair for Human Values, Southern Methodist University, to Michael J. Perry, Howard J. Trienens Chair in Law, Northwestern University School of Law (Aug. 7, 1995).

⁸⁶ Cf. Williams, *supra* note 67, at 96. “[Preferred ethical categories] may be said to be given by divine command or revelation; in this form, if it is not combined with a grounding in human nature, the explanation will not lead us anywhere except into what Spinoza called ‘the asylum of ignorance.’” *Id.*

⁸⁷ This is not to say either that the existence of a persuasive secular argument entails the persuasiveness of the religious argument or that the nonexistence of a persuasive secular argument entails that the religious argument is incorrect.

virtue of so-called “natural” reason.⁸⁸ The Roman Catholic religious-moral tradition has long embraced that position.⁸⁹

Aquinas remained . . . convinced that morality is essentially rational conduct, and as such it must be accessible, at least in principle, to human reason and wisdom. . . . In the teaching of Aquinas, . . . the purpose of Revelation, so far as morality is concerned, appears to be essentially remedial, not absolutely necessary for man. . . . [T]he Christian revelation contains in its moral teaching no substantial element over and above what is accessible to human reason without such revelation. . . . Revelation as such has nothing in matters of moral behaviour to add to the best of human thinking.⁹⁰

Of course, Aquinas’ enormous influence on the Christian religious-moral tradition extends far beyond just Catholic Christianity. Christians generally, and not just Catholics, would “want to argue (at least, many of them would) that the Christian revelation does not require us to interpret the nature of man in ways for which there is otherwise no warrant but rather affords a deeper understanding of man as he essentially is.”⁹¹ Moreover, as the American philosopher Robert Audi (who identifies himself as a Christian) has explained, “good secular arguments for moral principles may be *better* reasons to believe those principles divinely enjoined than theological arguments for the principles, based on scripture or tradition.” This is because the latter—in particular, scripture-based and tradition-based religious arguments—are “more subject than the former to extraneous cultural influences, more vulnerable to misinterpretation of texts or their sheer corruption across time and translation, and more liable to bias stemming from political or other nonreligious aims.” (Christianity’s acceptance of slavery comes to mind here—an acceptance that persisted for most of the two millen-

⁸⁸ “In principle,” because “[t]he participation by man in God’s eternal law through knowledge . . . can be corrupted and depraved in such a way that the natural knowledge of good is darkened by passions and the habits of sin. For Aquinas, then, not all the conclusions of natural law are universally known, and the more one descends from the general to the particular, the more possible it is for reason to be unduly influenced by the emotions, or by customs, or by fallen nature.” JOHN MAHONEY, S.J., *THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION* 105-06 (1987).

⁸⁹ For an illuminating recounting, see *id.* at 103-15.

⁹⁰ *Id.* at 106-09. Mahoney then adds: “[B]ut such human thinking is not always or invariably at its best.” *Id.* at 109.

⁹¹ Basil Mitchell, *Should Law Be Christian?*, 96/97 L. & JUST. 12, 21 (1988).

nia of Christianity.⁹²) Audi's conclusion: "[I]t may be better to try to understand God through ethics than through theology."⁹³

Given the demonstrated, ubiquitous human propensity to be mistaken and even to deceive oneself about what God has revealed, the absence of a persuasive secular argument in support of a claim about the requirements of human well-being fairly supports a presumption that the claim is probably false, that it is probably the defective yield of that demonstrated human propensity. At least, it fairly supports a presumption that the claim is an inappropriate ground of political choice, especially coercive political choice. Of course, a religious community may try to insulate itself from such a presumption by means of doctrines about its own privileged and perhaps even infallible insight into God's revelation, including God's revelation about the requirements of human well-being. But such doctrines, which cannot be politically effective in a society as religiously pluralistic as the United States, are destined to seem to outsiders to the community—and, depending on the degree of historical self-awareness among the members of the community, even to some, and perhaps to many, insiders—as little more than hubristic and self-serving stratagems.⁹⁴ Moreover, no religious community that

⁹² See Noonan, *infra* note 94.

⁹³ Audi, *supra* note 52, at 699. One can accept Audi's point and nonetheless believe that there is no good secular argument for the foundational moral proposition that each and every human being is sacred.

⁹⁴ Discussing usury, marriage, slavery, and religious freedom, John Noonan has demonstrated:

Wide shifts in the teaching of moral duties, once presented as part of Christian doctrine by the magisterium, have occurred. In each case one can see the displacement of a principle or principles that had been taken as dispositive — in the case of usury, that a loan confers no right to profit; in the case of marriage, that all marriages are indissoluble; in the case of slavery, that war gives a right to enslave and that ownership of a slave gives title to the slave's offspring; in the case of religious liberty, that error has no rights and that fidelity to the Christian faith may be physically enforced. . . . In the course of this displacement of one set of principles, what was forbidden became lawful (the cases of usury and marriage); what was permissible became unlawful (the case of slavery); and what was required became forbidden (the persecution of heretics).

John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUDIES 662, 669 (1993). See also Seán Fagan, SM, *Interpreting the Catechism*, 44 DOCTRINE & LIFE 412, 416-17 (1994):

fails to honor the ideal of self-critical rationality can play a meaningful role in the politics of a religiously pluralistic democracy like the United States.⁹⁵ As Richard John Neuhaus has warned: "So long as Christian teaching claims to be a privileged form of discourse that is exempt from the scrutiny of critical reason, it will understandably be denied a place in discussions that are authentically public."⁹⁶ Insisting on a persuasive secular argument in support of a claim about the requirements of human well-being is obviously one important way for the members of a religious community to honor the ideal of self-critical rationality. It is also one important way—and, indeed, a relatively ecumenical way—for the citizens of a religiously pluralistic democracy to test the various statements about what God has revealed, including statements about God's revealed will, that are sometimes articulated in public political debate.

I have just indicated why, in making political choices about the morality of human conduct, legislators and other public officials should not rely on—at least, they should be exceedingly wary about relying on—a religious argument about human well-being if, in their view, no persuasive secular argument reaches the same conclusion about the requirements of human well-being. Should we go further and conclude that they should not rely on a religious argument about human well-being even if, in their view, a persuasive secular argument *does* reach the same conclusion? Should legislators and others rely *only* on the persuasive secular argument? History teaches us to be deeply skepti-

A catechism is supposed to "explain," but this one does not say why Catholics have to take such a rigid, absolutist stand against artificial contraception because it is papal teaching, but there is no reference to the explicit centuries-long papal teaching that Jews and heretics go to hell unless they convert to the Catholic faith, or to Pope Leo X, who declared that the burning of heretics is in accord with the will of the Holy Spirit. Six different popes justified and authorized the use of slavery. Pius XI, in an encyclical at least as important as *Humane Vitae*, insisted that co-education is erroneous and pernicious, indeed against nature. The Catechism's presentation of natural law gives the impression that specific moral precepts can be read off from physical human nature, without any awareness of the fact that our very understanding of "nature" and what is "natural" can be coloured by our culture.

Id.

⁹⁵ On self-critical rationality, see PERRY, LOVE AND POWER, *supra* note 3, ch. 4.

⁹⁶ Richard John Neuhaus, *Reason Public and Private: The Pannenberg Project*, FIRST THINGS, March 1992, at 55, 57.

cal about government (about politics, about the politically powerful) acting as an arbiter of *religious* truth. History may teach us to be skeptical as well about government acting as an arbiter of *moral* truth, but there is no way that even a government of very limited powers can avoid making some moral judgments. By contrast, there is simply no need for government to make religious judgments about the requirements of human well-being. Politics is not a domain conducive to the discernment of theological truth; it is, however, a domain extremely vulnerable to the manipulative exploitation of theological controversy. (Theologically conservative Christians, whom I address in the concluding section of this essay, should know this as well as anyone else.) Nonetheless, it seems unrealistic to insist that legislators and others support a political choice about the morality of human well-being only on the basis of a secular argument if they also find persuasive a religious argument that supports the choice. How could such a legislator be sure that she was relying *only* on the secular argument, putting no weight whatsoever on the religious argument? She could ask whether she would support the choice even if the religious argument were absent, solely on the basis of the secular argument. However, trying to ferret out the truth by means of such counterfactual speculation is perilous at best and would probably be, as often as not, self-deceiving and self-serving.

Further considerations buttress the conclusion that no legislator or other public official should rely on a religious argument about human well-being in making a political choice about the morality of human conduct absent a persuasive secular argument that reaches the same conclusion. In a democratic political community (1) that values public deliberation and the political *communitas* that such deliberation helps to nurture and (2) that is religiously pluralistic, legislators and other public officials should not rely on a religious argument about human well-being unless a persuasive secular argument reaches the same conclusion. As the Dutch theologian Edward Schillebeeckx, who is Catholic, has written: "Even when their fundamental inspiration comes from a religious belief in God, ethical norms . . . must be rationally grounded. None of the participants in [religiously based moral discourse] can hide behind an 'I can see what you don't see' and then require others to accept this norm straight

out.”⁹⁷ Even if we assume for the sake of argument that Schillebeeckx’s principle should not govern moral discourse in *all* contexts—for example, in the context of a small, monistic, charismatic religious community—the principle should certainly govern moral discourse in *some* contexts, especially in the context of a large, pluralistic, democratic political community like the United States. In words of J. Bryan Hehir, who, as the principal drafter of the U.S. Catholic bishops’ 1983 letter on nuclear deterrence,⁹⁸ has some experience in the matter:

[R]eligiously based insights, values and arguments at some point must be rendered persuasive to the wider civil public. There is legitimacy to proposing a sectarian argument within the confines of a religious community, but it does violence to the fabric of pluralism to expect acceptance of such an argument in the wider public arena. When a religious moral claim will affect the wider public, it should be proposed in a fashion which that public can evaluate, accept or reject on its own terms. The [point] . . . is not to banish religious insight and argument from public life[, but only to] establish[] a test for the religious communities to meet: to probe our commitments deeply and broadly enough that we can translate their best insights to others.⁹⁹

The drafters of *The Williamsburg Charter*, a group that included many prominent religious believers, have articulated a similar contention: “Arguments for public policy should be more than private convictions shouted out loud. For persuasion to be principled, private convictions should be translated into publicly accessible claims. Such public claims should be made publicly accessible . . . because they must engage those who do not share the same private convictions. . . . ”¹⁰⁰ Neuhaus, who was instrumental in the drafting of *The Williamsburg Charter*, has cautioned that “publicly assertive religious forces will have to learn that the remedy for the naked public square is not naked

⁹⁷ EDWARD SCHILLEBEECKX, *THE SCHILLEBEECKX READER* 263 (Robert Schreiter ed., 1984).

⁹⁸ See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *CHALLENGE OF PEACE: GOD’S PROMISE AND OUR RESPONSE* (1983).

⁹⁹ J. Bryan Hehir, *Responsibilities and Temptations of Power: A Catholic View* (1988) (unpublished manuscript).

¹⁰⁰ *THE WILLIAMSBURG CHARTER: A NATIONAL CELEBRATION AND REAFFIRMATION OF THE FIRST AMENDMENT RELIGIOUS LIBERTY CLAUSES* 22 (1988).

religion in public. They will have to develop a mediating language by which ultimate truths can be related to the penultimate and prepenultimate questions of political and legal contest."¹⁰¹

Consider what we may call the "ecumenical" function of the practice I am recommending here. Declining to make a political choice about the morality of human conduct unless a persuasive secular argument supports the choice helps American politics to maintain a relatively ecumenical character rather than a sectarian one. It is difficult to understand why any religious community that honors the ideal of self-critical rationality (as any religious community should) would object to such a practice, given that, as I said, insisting on a persuasive secular argument in support of a claim about the requirements of human well-being is one important way for a religious community to honor the ideal. It is especially difficult to understand why any religious community that values ecumenical dialogue with those outside the community would object to such a practice, which can only serve to facilitate such dialogue.¹⁰² Only a historically naive religious (or other) tradition would doubt the value of ecumenical dialogue, which is, among other things, a profoundly important project for anyone committed to the ideal of self-critical rationality.

There is, of course, much to gain by sharpening our understanding in dialogue with those who share a common heritage and common experience with us. . . . Critical under-

¹⁰¹ Richard John Neuhaus, *Nihilism Without the Abyss: Law, Rights, and Transcendent Good*, 5 J. L. & RELIGION 53, 62 (1987). In commenting on this passage, Stanley Hauerwas has said that "[r]ather than condemning the Moral Majority, Neuhaus seeks to help them enter the public debate by basing their appeals on principles that are accessible to the public." Stanley Hauerwas, *A Christian Critique of Christian America*, in RELIGION, MORALITY, AND THE LAW 110, 118 (J. Roland Pennock & John W. Chapman eds., 1988).

¹⁰² I have discussed the value of ecumenical political dialogue elsewhere. See PERRY, LOVE AND POWER, *supra* note 3, ch. 6. See also DAVID LOCHHEAD, THE DIALOGICAL IMPERATIVE: A CHRISTIAN REFLECTION ON INTERFAITH ENCOUNTER 79 (1988): Similarly, in discussing the role of dialogue, Davis Lochhead stated that:

In more biblical terms, the choice between monologue and dialogue is the choice between death and life. If to be human is to live in community with fellow human beings, then to alienate ourselves from community, in monologue, is to cut ourselves off from our own humanity. To choose monologue is to choose death. Dialogue is its own justification.

Id.

standing of the [religious] tradition and a critical awareness of our own relationship to it, however, is sharpened by contact with those who differ from us. Indeed, for these purposes, the less they are like us, the better.¹⁰³

For the sake of clarity, let me restate the basic position I am defending here:

- In making a political choice about the morality of human conduct, especially a coercive political choice, legislators and other public officials should not rely on a religious argument about the requirements of human well-being unless, in their view, a persuasive secular argument reaches the same conclusion about the requirements of human well-being as the religious argument.

Some might conclude that according to this position, the moral insight achieved over time by the various religious traditions—by the various historically-extended religious communities—has at most only a marginal place in public political debate about the requirements of human well-being.¹⁰⁴ That conclusion would

¹⁰³ Robin W. Lovin, *Why the Church Needs the World: Faith, Realism, and the Public Life* (1988 Sorenson Lecture, Yale Divinity School) (unpublished manuscript). Defending the moderate style of his participation in public discourse about abortion and other issues implicating what he has famously called “the consistent ethic of life,” Cardinal Joseph Bernardin, Archbishop of Chicago, has said:

The substance of the consistent ethic yields a style of teaching it and witnessing to it. The style should . . . not [be] sectarian. . . . [W]e should resist the sectarian tendency to retreat into a closed circle, convinced of our truth and the impossibility of sharing it with others. . . . The style should be persuasive, not preachy. . . . We should be convinced we have much to learn from the world and much to teach it. A confident church will speak its mind, seek as a community to live its convictions, but leave space for others to speak to us, help us grow from their perspective. . . .

Cardinal Joseph Bernardin, *The Consistent Ethic of Life After Webster*, 19 ORIGINS 741, 748 (1990).

¹⁰⁴ In October 1995, in a homily delivered at a mass in Baltimore, Pope John Paul II asked:

Can the biblical wisdom which played such a formative part in the very founding of your country be excluded from [the political] debate [about the morality of human conduct]? Would not doing so mean that America’s founding documents no longer have any defining content, but are only the formal dressing of changing opinion? Would not doing so mean that tens of millions of Americans could no longer offer the contribution of their deepest convictions to the formation of public policy?

John Paul II, *Faith and Freedom: Text of the Homily Delivered at Mass in Baltimore*, N.Y. TIMES,

be mistaken—for two reasons. First, as I emphasized in section II, there are good reasons not merely for tolerating but for encouraging the airing—and testing—of religiously based moral arguments in public political debate. Second, and more importantly for present purposes, the moral insight achieved over time by a religious tradition, as the yield of the lived experience of an historically extended human community, might well have a resonance and indeed an authority that extends far beyond just those who accept the tradition's religious claims. Put another way, many of the most basic claims about the requirements of human well-being made by one or another religious tradition are often made, and in any event can be made, without invoking any religious claim (i.e., any claim about the existence, nature, activity, or will of God). What Catholic moral theologian James Burtchaell has explained about the nature of moral inquiry or discernment in the Catholic religious tradition is true of any religious tradition—though, of course, not every religious tradition will accept it as true:

The Catholic tradition embraces a long effort to uncover the truth about human behavior and experience. Our judgments of good and evil focus on whether a certain course of action will make a human being grow and mature and flourish, or whether it will make a person withered, estranged and indifferent. In making our evaluations, we have little to draw on except our own and our forebears' experience, and whatever wisdom we can wring from our debate with others. . . . Nothing is specifically Christian about this method of making judgments about human experience. That is why it is strange to call any of our moral convictions "religious," let alone sectarian, since they arise from a dialogue that ranges through so many communities and draws from so many sources.¹⁰⁵

Oct. 9, 1995, at B15.

¹⁰⁵ James Tunstead Burtchaell, *The Sources of Conscience*, 13 NOTRE DAME MAG. 20, 20-21 (Winter 1984-85) (stating that on our neighbor always turns out to be the most unlikely person, noting Luke 10:29-37 ("Parable of the Good Samaritan")). Burtchaell continues:

And when debate and dialogue and testimony do fructify into conviction, and conviction into consensus, nothing could be more absurd than to expect that consensus to be confined within a person's privacy or a church's walls. Convictions are what we live by. Do we have anything better to share with one another?

Burtchaell, *supra*, at 21. For a revised version of Burtchaell's essay, and for several other

Many religious believers and nonbelievers alike have failed to see the overwhelming extent to which both the development of insight into the requirements of human well-being and the debate that attends such development is, inside religious traditions as much as outside them, nonrevelational and even nontheological. Because the moral insight achieved over time by the various religious traditions is substantially nonrevelational and even nontheological, bringing that insight to bear in a politics constrained by the ideal of nonestablishment is not the problem some religious believers and unbelievers imagine it to be. As Jesuit priest and sociologist John Coleman has observed, in a passage that reflects Aquinas' influence:

[M]any elements and aspects of a religious ethic . . . can be presented in public discussion in ways that do not presume assent to them on the specific premises of a faith grounded in revelation. Without being believing Hindus, many Westerners, after all, find in Gandhi's social thought a superior vision of the human than that of ordinary liberal premises.¹⁰⁶

Martin Marty has commented, in much the same spirit, that "religionists who do not invoke the privileged insights of their revelation or magisterium can enhance and qualify rationality with community experience, intuition, attention to symbol, ritual, and narrative."¹⁰⁷

Indeed, to embrace a religious premise—a biblical premise, for example—about what it means to be human, about how it is good or fitting for human beings to live their lives, and then to rely on the premise in public discourse, is not even *necessarily* to count oneself a participant in the religious tradition that has yielded the premise; it is not even necessarily to count oneself a religious believer. You certainly do not have to be Jewish to recognize that the prophetic vision of the Jewish Bible is profound and compelling, any more than you have to be Catholic or Presbyterian or Baptist or even Christian to recognize that the Gospel vision of what it means to be human is profound

illuminating essays by Father Burtchaell, see JAMES TUNSTEAD BURTCHAELL, *THE GIVING AND TAKING OF LIFE* (1989).

¹⁰⁶ COLEMAN, *AN AMERICAN STRATEGIC THEOLOGY*, *supra* note 46, at 196.

¹⁰⁷ Martin E. Marty, *When My Virtue Doesn't Match Your Virtue*, 105 *CHRISTIAN CENTURY* 1094, 1096 (1988). Marty adds: "Of course, these communities and their spokespersons argue with one another. But so do philosophical rationalists." *Id.*

and compelling. Gandhi was not a Christian, but he recognized the Gospel vision as profound and compelling. As David Tracy has emphasized:

Some interpret the religious classics not as testimonies to a revelation from Ultimate Reality, . . . but as testimonies to possibility itself. As Ernst Bloch's interpretations of all those daydreams and Utopian and eschatological visions that Westerners have ever dared to dream argue, the religious classics can also become for nonbelieving interpreters testimonies to resistance and hope. As Mircea Eliade's interpretations of the power of the archaic religions show, the historian of religions can help create a new humanism which retrieves forgotten classic religious symbols, rituals, and myths.¹⁰⁸

Tracy continues:

If the work of Bloch and [Walter] Benjamin on the classic texts and symbols of the eschatological religions and the work of Eliade and others on the primal religions were allowed to enter into the contemporary conversation, then the range of possibilities we ordinarily afford ourselves would be exponentially expanded beyond reigning Epicurean, Stoic, and nihilistic visions.¹⁰⁹

So—and I want to emphasize this—it is simply not true that according to the position I am presenting here, the moral insight achieved over time by the various religious traditions has at most only a marginal place in public political debate about the morality of human conduct. Such insight, as the comments by Burtchaell, Coleman, and Tracy suggest, may play a central role even in a politics constrained by the ideal of nonestablishment.

But, the objection may be pressed, can a religious body argue its case in a secular forum (i.e., one that is not already antecedently committed to the religion in question)? Either, it may be said, it will rely on Christian premises, which *ex hypothesi* opponents will not accept; or it will employ purely secular premises, in which case the ensuing law will not be Christian. In neither case will any genuine debate have taken place between Christians and non-Christians. The dichotomy, however, is altogether too neat to be convincing. It presupposes that there is and always must be a complete discontinuity between Christian and secular reasoning. Certainly this can occur—if, for example, the Christian is an extreme fun-

¹⁰⁸ DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 88 (1987).

¹⁰⁹ *Id.* at 88-89.

damentalist and the secular thinker regards individual preferences as the sole basis for morality. . . . But, . . . Christians would presumably want to argue (at least, many of them would) that the Christian revelation does not require us to interpret the nature of man in ways for which there is otherwise no warrant but rather affords a deeper understanding of man as he essentially is. If that is so, there is room for a genuine exchange of ideas.¹¹⁰

C. A Case in Point: Religious Arguments about the Morality of Homosexual Sexual Conduct

I now want to illustrate, by reference to the political controversy about the morality of homosexual sexual conduct, my point that legislators and other public officials should be extremely wary about relying on a religious argument about the requirements of human well-being in making a political choice about the morality of human conduct if, in their view, no persuasive secular argument reaches the same conclusion. The political controversy in the United States today about the morality of homosexual sexual conduct—which is at the center of the debate about whether the law should recognize homosexual marriage or at least grant some sort of marriage-like status to same-sex unions¹¹¹—is, like the political controversy about the moral-

¹¹⁰ Mitchell, *supra* note 91, at 21.

¹¹¹ See, e.g., David W. Dunlap, *Some States Trying to Stop Gay Marriages Before They Start*, N.Y. TIMES, Mar. 15, 1995, at A18. For a discussion of the issue, see Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995). Few people in the United States today argue that criminal laws against homosexual sexual conduct should be enforced. Indeed, laws banning homosexual sexual conduct have become a concern of the international human rights movement. For example, one of the world's foremost nongovernmental human rights organizations, Amnesty International, has recently taken up the cause "not/only [of] those arrested for advocating homosexual rights, but also [of] those arrested solely for homosexual acts or identity. . . ." Amnesty International USA, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation*, AMNESTY ACTION, Winter/Spring 1994, at 1. Two decisions of the European Court of Human Rights have invalidated laws banning homosexual sexual conduct. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (ser. A) (1981); *Norris v. Ireland*, 142 Eur. Ct. H. R. (ser. A) (1988). I have criticized the United States Supreme Court's failure, in *Bowers v. Hardwick*, 478 U.S. 1039 (1986), to invalidate laws banning homosexual sexual conduct. See PERRY, *THE CONSTITUTION IN THE COURTS*, *supra* note 12, at 174-79.

Article 2 of the Universal Declaration of Human Rights, in language that is repeated both in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights, explicitly forbids discrimination based

ity of abortion, a principal context for the debate about the proper role of religion in politics. Moreover, the controversy is at its core about the requirements of human well-being. According to the explicit or implicit position of those on one side of the controversy, the fundamental reason why homosexual sexual conduct is invariably immoral is because such conduct is invariably antithetical to, subversive of, the authentic well-being—the authentic flourishing—of anyone who engages in it. They believe that such conduct is, in that sense, unworthy of anyone who would be truly, fully human.

Just as it is implausible to suggest that all heterosexual sexual conduct is moral, it is implausible to suggest that all homosexual sexual conduct is moral. Homosexual sexual conduct, like heterosexual sexual conduct—even heterosexual sexual conduct between persons married to one another—can be exploitative, abusive, self-destructive, and so on.¹¹² The serious question is

on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." It does not explicitly forbid discrimination based on sexual orientation. Recently, however, the Human Rights Committee of the United Nations, interpreting the International Covenant on Civil and Political Rights, has ruled that discrimination based on "sex" includes discrimination based on "sexual orientation." *Nicholas Toonen v. Australia*, Communication No. 488/1992 (Mar. 31, 1994). For an argument in support of such a construal, see Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 23, at 197. See also ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* (1995).

¹¹² Cf. Margaret A. Farley, *An Ethic for Same-Sex Relations*, in *A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH* 93, 105 (Robert Nugent ed., 1983):

My answer [to the question of what norms should govern same-sex relations and activities] has been: the norms of justice—the norms which govern all human relationships and those which are particular to the intimacy of sexual relations. Most generally, the norms are respect for persons through respect for autonomy and rationality; respect for relationality through requirements of mutuality, equality, commitment, and fruitfulness. More specifically one might say things like: sex between two persons of the same sex (just as two persons of the opposite sex) should not be used in a way that exploits, objectifies, or dominates; homosexual (like heterosexual) rape, violence, or any harmful use of power against unwilling victims (or those incapacitated by reason of age, etc.) is never justified; freedom, integrity, privacy are values to be affirmed in every homosexual (as heterosexual) relationship; all in all, individuals are not to be harmed, and the common good is to be promoted. The Christian community will want and need to add those norms of faithfulness, forgiveness, of patience and hope, which are essential for any relationships between persons within the Church.

Id.

whether some homosexual sexual conduct, like some heterosexual sexual conduct, can be moral, or whether all such conduct is immoral, *even homosexual sexual conduct that is embedded in and expressive of a lifelong, monogamous relationship of faithful love—indeed, that is a generative matrix of such a relationship, of such love.*¹¹³

Consider the religious argument that God has revealed that all homosexual sexual conduct is immoral. Although many Christians (and other religious believers) accept that argument, a growing number of Christians do not. For example:

In June 1994, the General Assembly of the Presbyterian Church (U.S.A.) came within a few votes of permitting ministers to bless same-sex unions. Also in June 1994, a draft proposal by the Episcopal bishops, after describing homosexuality as an orientation of “a significant minority of persons” that cannot usually be reversed, “went on to say that sexual relationships work best within the context of a committed lifelong union: We believe this is as true for homosexual relationships as for heterosexual relationships and that such relationships need and should receive the pastoral care of the church.” In October 1993, a draft report by a national Lutheran study group on sexuality called for the blessing and even legal acknowledgement of loving gay relationships.¹¹⁴

Even in the Catholic Church, a growing number of moral theologians are dissenting from the Church’s official position that all homosexual sexual conduct is immoral.¹¹⁵ Moreover, recent

¹¹³ By “lifelong” sexual unions, I mean sexual unions, whether heterosexual or homosexual, in which the partners hope and intend that their relationship will be lifelong, and in which they struggle with all the resources at their command to bring that hope and intention to fulfillment.

¹¹⁴ Mohr, *supra* note 111, at 238.

¹¹⁵ For a statement of the Catholic Church’s official position on homosexual sexual conduct, see CATECHISM OF THE CATHOLIC CHURCH 566 (par. 2357) (1994); *id.* (pars. 2358–59). See also Alan Cowell, *Pope Calls Gay Marriage Threat to Family*, N.Y. TIMES, Feb. 23, 1994, at A5. The “Ramsey Colloquium” agrees with the Catholic Church’s official position; *The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS, March 1994, at 15. For a powerful “counter-response,” see the letter from various members of the National Association of College and University Chaplains, FIRST THINGS, September 1994, at 2. For a discussion of the Church’s official position, see RICHARD P. MCBRIEN, CATHOLICISM 993–97 (rev. ed., 1994).

For a sampling of influential critiques by Catholic theologians and philosophers of the position the Church espouses, see Farley, *supra* note 112; CHRISTINE E. GUDORF, BODY, SEX, & PLEASURE: RECONSTRUCTING CHRISTIAN SEXUAL ETHICS (1994); PATRICIA BEATTIE JUNG & RALPH F. SMITH, HETEROSEXISM: AN ETHICAL CHALLENGE (1993); Daniel Maguire, *The Mo-*

polling data suggests that only about 56% of all Catholic priests in the United States accept the Church's official position on the morality of homosexual sexual conduct.¹¹⁶

Although many Christians believe that God has revealed, in the Bible, that all homosexual sexual conduct is immoral, many thoughtful Christians reject that interpretation of the Bible.¹¹⁷ Fundamentalist religious arguments of any kind, including fundamentalist religious arguments against homosexual sexual conduct,¹¹⁸ are deeply problematic, *even for those who count themselves religious*.¹¹⁹ To be sure, not every argument against homosexual sexual conduct based on the Bible—whether the Jewish Bible, the New Testament, or both—is a fundamentalist argument. Nonetheless, as an impressive growing literature in con-

ality of Homosexual Marriage, in *A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH*, *supra* note 112, at 118; RICHARD A. MCCORMICK, SJ, *THE CRITICAL CALLING: REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II*, ch. 17 ("Homosexuality as a Moral and Pastoral Problem") (1989); RICHARD WESTLEY, *MORALITY AND ITS BEYOND* 169-98, 222-28 (1984). (Farley, Gudorf, Jung, Maguire, and McCormick are all Catholic moral theologians or ethicists; Jung's co-author, Smith, is a Lutheran pastor; Westley is a Catholic moral philosopher.) For an excellent discussion, see Jeffrey S. Siker, *Homosexual Christians, the Bible, and Gentile Inclusion: Confessions of a Repenting Heterosexual*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* 178 (Jeffrey S. Siker ed., 1994). (Siker is a Christian ethicist and an ordained member of the Presbyterian Church (USA).) See also David S. Toolan, *In Defense of Gay Politics: Confessions of a Pastoralist*, *AMERICA*, Sept. 23, 1995, at 18. (Toolan, a Jesuit priest, is an associate editor of the Jesuit weekly *America*.)

¹¹⁶ Andrew M. Greeley, *A Sea of Paradoxes: Two Surveys of Priests*, *AMERICA*, July 16, 1994, at 6, 8.

¹¹⁷ Cf. Eric Zorn, *Citing a Wrong to Block a Right*, *CHI. TRIB.*, April 21, 1994, §2, at 1. Zorn writes:

[T]he favorite biblical passage of those who rail against homosexuality [is] Chapter 18, Verse 22 of Leviticus: "You shall not lie with a male, as with a woman; it is an abomination."

Suffice it to say that this particular book—with its obsession with animal sacrifice, expressions of disgust at the uncleanness of menstruating women, approval of the death penalty for blasphemers, acceptance of human slavery, endorsement of torture, and vilification of the disabled—is not otherwise considered a reliable legislative guide in contemporary society.

The Bible's relevance in such debates is further clouded by [the way in which] one can find in it justifications for any number of practices most of us frown on, including cannibalism (Deuteronomy 28), incest (Genesis 19), genocide (Numbers 31), self-mutilation (Matthew 18), and the execution of Sabbath breakers (Exodus 31).

Id.

¹¹⁸ See Brenda You, *A Holy War Against Gays*, *CHI. TRIB.*, Apr. 26, 1994, §5, at 1.

¹¹⁹ See THOMAS F. O'MEARA, O.P., *FUNDAMENTALISM: A CATHOLIC PERSPECTIVE* (1990).

temporary Christian ethics argues, no biblically-based argument against homosexual sexual conduct fails to be deeply problematic even for those who accept the authority of the Bible.¹²⁰

In any event, many Christians (and others) understand that human beings are prone not only to making honest mistakes, but even to deceiving themselves about what God has revealed. For example, there have been Christian (and other) religious arguments for racist beliefs and for slavery and other racist practices; those arguments have been discredited. There have also been Christian (and other) religious arguments for sexist beliefs and practices; those arguments, too, have been discredited. That today there are Christian (and other) religious arguments for “heterosexist” beliefs and practices¹²¹—in particular the belief that all homosexual sexual conduct is morally bad—does not entail that the arguments are correct or that they will not be discredited; many think that the arguments are already well on the way to being discredited.¹²² Because religious believers, like other human beings, are prone both to error and to self-deceit, the religious argument that all homosexual sexual conduct is contrary to what God has revealed in the Bible is highly suspect if there is no secular route to the religious argument’s conclusion that all homosexual sexual conduct is morally bad. Indeed, if there is no persuasive secular argument in support of that conclusion, the religious argument is highly suspect, for anyone who believes—as do Catholics and many other Christians, for example—that fundamental truths about the basic requirements of human well-being are available “in principle” to every human being, including nonbelievers, by virtue of so-called “natural” reason.

Is there a persuasive secular argument that all homosexual sexual conduct is morally bad? John Finnis recently tried to

¹²⁰ See, e.g., Gerald D. Coleman, S.J., *The Vatican Statement on Homosexuality*, 48 THEOL. STUD. 727, 733 (1987); Victor Paul Furnish, *The Bible and Homosexuality: Reading the Texts in Context*, in SIKER, *HOMOSEXUALITY IN THE CHURCH*, *supra* note 115, at 18; Jung & Smith, *supra* note 115, ch. 3 (“The Bible and Heterosexism”); McBrien, *supra* note 115, at 993-97; McCormick, *supra* note 115; Siker, *Homosexual Christians, the Bible, and Gentile Inclusion*, *supra* note 115. See also *infra* text accompanying note 136.

¹²¹ See Jung & Smith, *HETEROSEXISM*, *supra* note 115; Virginia Ramey Mollenkott, *Overcoming Heterosexism—To Benefit Everyone*, in SIKER, *HOMOSEXUALITY IN THE CHURCH*, note 115, at 145.

¹²² See *supra* notes 114-20.

construct a secular argument in support of the traditional religious tenet that all homosexual sexual conduct is morally bad—even homosexual sexual conduct embedded in and expressive of a lifelong, monogamous relationship of faithful love.¹²³ As I and others have demonstrated elsewhere, however, Finnis' secular argument is far from persuasive.¹²⁴ In the wake of Finnis' failure, one may fairly doubt that any secular argument that all homosexual sexual conduct is immoral is sound. If no such secular argument is persuasive, then, for the reasons I have given in this section, no religious argument that all such conduct is immoral should serve as a basis of political choice, least of all as a basis of coercive political choice.

IV. A CONCLUDING COMMENT

(MAINLY FOR THEOLOGICALLY CONSERVATIVE CHRISTIANS)

My book, O philosopher, is the nature of created things, and any time I want to read the words of God, the book is before me.¹²⁵

As the twentieth century draws to a close, Christians still constitute the largest religious group in the United States—although Christians in the United States are so pluralistic that I hesitate to call them a group. I want to conclude this essay with a word to those Christians most likely to view my argument in this essay with a skeptical eye: theologically conservative Christians, many of whom form the base of political support for the so-called “religious right” in American politics today.¹²⁶

¹²³ See John M. Finnis, *Law, Morality, and 'Sexual Orientation'*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 25-31 (1995).

¹²⁴ See Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41, 44-46 (1995) [hereinafter THE MORALITY OF HOMOSEXUAL CONDUCT]. See also Andrew Koppelman, *Homosexuality, Natural Law, and Morality*, in HOMOSEXUALITY AND NATURAL LAW (Robert P. George & Andrew Koppelman eds., forthcoming 1996); Paul J. Weithman, *Natural Law, Morality and Sexual Complementarity*, in LOVE AND NATURE (Martha Nussbaum & David Estlund eds., forthcoming, 1996).

¹²⁵ *Anthony of the Desert*, quoted in THE WISDOM OF THE DESERT 62 (Thomas Merton ed., 1960). St. Anthony was a fourth-century Christian monk. *Id.*

¹²⁶ See generally Hunter, *supra* note 84. In discussing drafts of this work with various persons and groups, I have occasionally been asked about the “voice” that informs my conception of the proper role of religion in politics. I have written this essay (and the larger work from which it is drawn) as a Christian. In particular, I have written it as a Catholic Christian thoroughly imbued with the spirit of the Second Vatican Council (1962-65). See

As I have explained, most Christians in the United States today—including Catholics, Episcopalians, and “reformed” Christians (e.g., Lutherans, Methodists, and Presbyterians)—have no basis in their religious-moral traditions for doubting that any religious argument about the requirements of human well-being is of doubtful soundness unless a persuasive secular argument reaches the same conclusion. Nor, in particular, do they have a basis in their traditions for doubting that any argument about the requirements of human well-being that is grounded on a claim about what God has revealed is highly suspect if no persuasive secular route reaches the religious argument’s conclusion. Such Christians understand that they do not have to choose between “faith” and “reason;” for them, faith and reason are not incompatible. To the contrary, faith and reason are, for such Christians, mutually enriching. David Hollenbach explains:

Faith and understanding go hand in hand in both the Catholic and Calvinist views of the matter. They are not adversarial but reciprocally illuminating. As [David] Tracy puts it, Catholic social thought seeks to correlate arguments drawn from the distinctive religious symbols of Christianity with arguments based on shared public experience. This effort at correlation moves back and forth on a two-way street. It rests on a conviction that the classical symbols and doctrines of Christianity can uncover meaning in personal and social existence that common sense and uncontroversial science fail to see. So it invites those outside the church to place their self-understanding at risk by what Tracy calls conversation with such “classics.”¹²⁷

Hollenbach then adds, following Tracy: “At the same time, the believer’s self-understanding is also placed at risk because it can be challenged to development or even fundamental change by dialogue with the other—whether this be a secular agnostic, a Christian from another tradition, or a Jew, Muslim, or Bud-

Michael J. Perry, *The Idea of a Catholic University*, 78 MARQUETTE L. REV. 325 (1995). But I have written this essay as a Christian who is extremely wary of the God-talk in which most Christians (and many others) too often and too easily engage; I have written it, that is, in the spirit of apophatic Christianity. See DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 108-09 (1987). Moreover, I have written this essay as one who stands between all religious unbelievers on the one side and many religious believers—especially theologically conservative believers—on the other.

¹²⁷ David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 894 (1993) (citation omitted).

dhist.¹²⁸ I add, with an eye on an issue that has engaged me in this essay and elsewhere: or whether this be a lesbian or a gay man, perhaps even a Christian lesbian or a Christian gay man, living in a lifelong, monogamous relationship of faithful love.¹²⁹

Predictably, some Christians—in particular, “fundamentalist” Christians and some Christian “evangelicals”—will be skeptical that an argument about the requirements of human well-being that is grounded on a claim about what God has revealed is highly suspect if there is no secular route to, if there is no argument “based on shared public experience” for, the religious argument’s conclusion about the requirements of human well-being. For such Christians, faith—including faith in what God has revealed—and reason are often incompatible; in their view, human reason is too corrupted to be trusted. For example, David Smolin, a law professor who identifies himself as an evangelical Christian, has written that:

[E]ven our intellectual capacities have been distorted by the effects of sin. The pervasive effects of sin suggest that creation, human nature, and human reason are often unreliable means for knowing the law of God. . . . Thus, scripture and Christian tradition have come to have a priority among the sources of knowledge of God’s will. Indeed, these sources of revelation are considered a means of measuring and testing claims made on behalf of reason, nature, or creation, in order to purify these now-subsidary means of the distortive effect of sin.¹³⁰

I want to make two points in response to theologically conservative Christians. (The points could easily be adapted to respond to theologically conservative members of other religious traditions as well.) First, they would do well to study Mark Noll’s powerful, eloquent book, *The Scandal of the Evangelical Mind*.¹³¹ Noll—the McManis Professor of Christian Thought at Wheaton College (Illinois), one of the foremost Christian (Protestant) colleges in the United States—is himself a committed evangelical

¹²⁸ *Id.* at 894-95.

¹²⁹ Cf. PERRY, THE MORALITY OF HOMOSEXUAL CONDUCT, *supra* note 124, at 73 n.76.

¹³⁰ David M. Smolin, *The Enforcement of Natural Law by the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 381, 391-92 (1991).

¹³¹ MARK A. NOLL, THE SCANDAL OF THE EVANGELICAL MIND (1994).

Christian. Noll comments critically, in one chapter of his book, on the emergence of “creation science” in evangelical Christianity: “[I]f the consensus of modern scientists, who devote their lives to looking at the data of the physical world, is that humans have existed on the planet for a very long time, it is foolish for biblical interpreters to say that ‘the Bible teaches’ the recent creation of human beings.” Noll explains:

This does not mean that at some future time, the procedures of science may shift in such a way as to alter the contemporary consensus. It means that, for people today to say they are being loyal to the Bible and to demand belief in a recent creation of humanity as a sign of obedience to Scripture is in fact being unfaithful to the Bible, which, in Psalm 19 and elsewhere, calls upon followers of God to listen to the speech that God has caused the natural world to speak. It is the same for the age of the earth and for all other questions regarding the constitution of the human race. Charles Hodges’s words from the middle of the nineteenth century are still pertinent: “Nature is as truly a revelation of God as the Bible, and we only interpret the Word of God by the Word of God when we interpret the Bible by science.”¹³²

What Noll says about the proper relation between religious faith and secular inquiry into the origins of human beings is no less true about the proper relation between religious faith and secular inquiry into the well-being of human beings. “My book, *O philosopher, is the nature of created things*, and any time I wish to read the words of God, the book is before me.”¹³³

Second, theologically conservative Christians should not overlook that, as the history of Christianity discloses, sin can distort, and indeed has often distorted, “scripture and Christian tradition,” not to mention what human beings believe about “scripture and Christian tradition.”¹³⁴ Given their belief in the “fallenness” of human nature—which is, after all, *their* nature, too—Christians should be especially alert to this dark possibility. Smolin privileges religiously based moral arguments over secular moral arguments, but *both* sorts of arguments are, finally, human arguments. Why, then, doesn’t a truly robust sense of “the

¹³² *Id.* at 207-08.

¹³³ See *supra* note 125 and accompanying text.

¹³⁴ See Noonan *supra* note 94, at 668-69.

distortive effect of sin" counsel that we should test religious arguments about the morality of human conduct—both those based on scripture and those based on tradition—with secular arguments about the morality of human conduct (as well as test the latter with the former)? Recall Robert Audi's important point about the relative unreliability of both scripture-based and tradition-based religious arguments: "[I]t may be better to try to understand God through ethics than ethics through theology."¹³⁵ John Robinson, introducing a symposium on law, morality, and homosexuality, has amplified much the same point in the context of religious arguments about the (im)morality of homosexual sexual conduct:

Jesus had little to say about human sexuality, and the canonical letters add little to the little that he is reported to have said. It is not that their authors had nothing to say about human sexuality—Paul was particularly wont to write critically of the sexual libertinism of his pagan contemporaries. No, the point is that except for a luminous passage in Paul's letter to the Ephesians, the canonical letter writers make little effort to *integrate* their thoughts about human sexuality into their appropriation of the Gospel message, and even in that luminous passage, modern readers can find a profoundly troubling subtext. The problem for us today is that we do not find the canonical writers making a conscious effort to distinguish what their *culture* told them about sex from what the *Gospel* told them about it. The same is true of the patristic writers and of the work of the schoolmen, all of whose work was set in an intellectual and cultural context that they themselves did not adequately distinguish from the Gospel message that they handed on to us. The result is that as we moderns come to doubt the moral propriety of patriarchalism, for example, we find that we cannot resolve that doubt by reference to scripture and tradition. They are both influenced by the same patriarchalism that we are questioning, and yet the mode of that influence is such that we would be supremely unwise to regard either Scripture or tradition as validating it for us.

We find ourselves in a similar quandary as we reconsider the close nexus between morally permissible sexual activity and reproduction, a nexus that the tradition has handed down to us. Is that nexus an ineluctable implication of the Gospel message or is it an understandable but no longer

¹³⁵ See Audi, *supra* note 52, at 699.

relevant feature of the cultures in which that message was first articulated and later systematized? Neither scripture nor tradition answers that sort of question for us; so we must answer it for ourselves. This does not mean that we abandon scripture and tradition in our reassessment of the nexus between sex and reproduction, but it *does* mean that our resort to scripture and tradition has to be critical if it is to be useful.¹³⁶

It scarcely seems radical to suggest that Christians, like other religious believers, must be alert to the possibility that a scripture-based or a tradition-based religious argument about the morality of human conduct is mistaken. (As I said, Christians should be especially alert to this possibility.) There is, of course, no virtue in adhering to a mistaken position; nor, therefore, is there any virtue in adhering to a position uncritically, so that one is unable to discern whether it is, or might be, mistaken.

John Noonan's eloquent statement seems a fitting conclusion here:

One cannot predict future changes; one can only follow present light and in that light be morally certain that some obligations will never alter. The great commandments of love of God and of neighbor, the great principles of justice and charity continue to govern all development. God is unchanging, but the demands of the New Testament are different from those of the Old, and while no other revelation supplements the New, it is evident from the case of slavery alone that it has taken time to ascertain what the demands of the New really are. All will be judged by the demands of the day in which they live. It is not within human competence to say with certainty who was or will be saved; all will be judged as they have conscientiously acted. In new conditions, with new insight, an old rule need not be preserved in order to honor a past discipline. . . .

In the Church there can always be fresh appeal to Christ, there is always the possibility of probing new depths of insight. . . . Must we not, then, frankly admit that change is something that plays a role in [Christian] moral teaching? . . . Yes, if the principle of change is the person of Christ.¹³⁷

¹³⁶ John H. Robinson, *Church, State, and Sex*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 5 (1995) (citation omitted).

¹³⁷ See Noonan, *supra* note 94, at 676-77. Indeed, uncritical adherence to a position is also, for a Christian, *unfaithful* adherence. See also Mahoney, *supra* note 88, at 327 (empha-

sis added). Mahoney argues that,

At any stage in history all that is available to the Church is its continual meditation on the Word of God in the light of contemporary experience and of the knowledge and insights into reality which it possesses at the time. To be faithful to that set of circumstances . . . is the charge and the challenge which Christ has given to his Church. But if there is a historical shift, through improvement in scholarship or knowledge, or through an entry of society into a significantly different age, then what that same fidelity requires of the Church is that it respond to the historical shift, such that it might be not only mistaken *but also unfaithful* in declining to do so.

Id.