2021

Two Constitutional Rights, Two Constitutional Controversies

Michael J. Perry

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Perry, Michael J., "Two Constitutional Rights, Two Constitutional Controversies" (2021). *Connecticut Law Review*. 490.

https://opencommons.uconn.edu/law_review/490

CONNECTICUT LAW REVIEW

VOLUME 52

APRIL 2021

NUMBER 5

Article

Two Constitutional Rights, Two Constitutional Controversies

MICHAEL J. PERRY

This Article is my contribution to the Festschrift celebrating the distinguished scholarly career of Richard S. Kay, Wallace Stevens Professor Emeritus, and Oliver Ellsworth Research Professor, University of Connecticut School of Law.

My overarching aim in the Article is to defend a particular understanding of two constitutional rights and, relatedly, a particular resolution of two constitutional controversies. The two rights I discuss are among the most important rights protected by the constitutional law of the United States: the right to equal protection and the right of privacy. As I explain in the Article, the constitutional right to equal protection is, at its core, the human right to moral equality, and the constitutional right to privacy is best understood as a version of the human right to moral freedom. The two controversies I discuss, each of which implicates the two rights, are among the most divisive constitutional controversies of our time: the controversies concerning, respectively, abortion and same-sex marriage.

*Arguments of the two sorts I make in this Article—arguments defending a particular understanding of one or more constitutional rights and arguments defending a particular resolution of one or more constitutional controversies—necessarily presuppose a theory of judicial review. The theory of judicial review on which I rely, and whose basic features I rehearse in the Article, is the theory I defend at length in my most recent book, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* (Cambridge Univ. Press 2017).*

ARTICLE CONTENTS

INTRODUCTION	1599
I. A PRELIMINARY MATTER: JUDICIAL REVIEW	1600
II. THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AS THE HUMAN RIGHT TO MORAL EQUALITY	1604
A. THE HUMAN RIGHT TO MORAL EQUALITY	1605
B. THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION	1608
III. THE CONSTITUTIONAL RIGHT OF PRIVACY AS THE HUMAN RIGHT TO MORAL FREEDOM.....	1612
A. THE HUMAN RIGHT TO MORAL FREEDOM.....	1613
B. THE CONSTITUTIONAL RIGHT OF PRIVACY.....	1624
IV. ABORTION	1629
V. SAME-SEX MARRIAGE.....	1638

Two Constitutional Rights, Two Constitutional Controversies

MICHAEL J. PERRY *

INTRODUCTION

In this Article, I excerpt, reconfigure, revise, and expand on portions of my most recent book, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism*.¹ I do so in order to present in a single article my reflections on two constitutional rights and two constitutional controversies. The two rights I discuss are among the most important rights protected by the constitutional law of the United States: the right to equal protection and the right of privacy. And the two controversies are among the most divisive constitutional controversies of our time: the controversies concerning, respectively, abortion and same-sex marriage. My overarching aim here is to defend a particular understanding of each of the two rights and, relatedly, a particular resolution of each of the two controversies.

* Robert W. Woodruff University Chair and Senior Fellow, Center for the Study of Law and Religion, Emory University. Professor Perry was the inaugural occupant both of the Howard J. Trienens Chair in Law, Northwestern University, 1990-97, and of the University Distinguished Chair in Law, Wake Forest University, 1997-2003.

I am both honored and delighted to have been invited to contribute to the Festschrift celebrating Rick Kay's scholarly career. I have long and greatly admired Rick's constitutional scholarship. I don't remember exactly when I first encountered Rick's work, but it was no later than 1980, when I was a member of the Ohio State law faculty and invited Rick to contribute to a symposium that the *Ohio State Law Journal* would publish the following year. The symposium, titled *Judicial Review versus Democracy*, was occasioned by the publication in 1980 both of John Ely's *Democracy and Distrust: A Theory of Judicial Review* (Harvard Univ. Press 1980) and of Jesse Choper's *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Univ. of Chi. Press 1980). See Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981). Several years later, after I'd become a member of the Northwestern law faculty, Rick shared with me the draft of a paper so discerning and wise that I immediately encouraged the student editors of the *Northwestern University Law Review* to publish the paper, which they did. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). About twenty years later, Rick published a related and no less superb paper in the same venue: Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009). The three writings I've just cited are just a small part of Rick Kay's scholarly corpus—a truly impressive scholarly corpus.

I am grateful to my colleague Deborah Dinner for very helpful comments on a draft of this Article.

¹ MICHAEL J. PERRY, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* (2017) [hereinafter, PERRY, *A GLOBAL POLITICAL MORALITY*].

I. A PRELIMINARY MATTER: JUDICIAL REVIEW

Arguments of the two sorts I make in this Article—arguments defending a particular understanding of one or more constitutional rights and arguments defending a particular resolution of one or more constitutional controversies—necessarily presuppose a theory of judicial review. The theory of judicial review on which I rely here is the theory I defend at length in *A Global Political Morality*.² It suffices, for purposes of this Article, to rehearse the basic features of the theory.

The General Rule. When deciding whether a challenged law or other government action violates a particular constitutional norm, the Supreme Court of the United States (SCOTUS) generally should rule in the negative if the judgment is at least reasonable either that the norm is not a constitutional norm or that the government action does not violate the norm.³

What are the conditions whose satisfaction warrants the conclusion that a particular right or other norm claimed to be a constitutional norm—claimed, that is, to be protected by the constitutional law of the United States—truly is a constitutional norm? Let N stand for a particular norm. N is a constitutional norm if any of the three following conditions are satisfied:

First. N is a constitutional norm if constitutional enactors made N a constitutional norm—if they entrenched N in the Constitution of the United States; if other, later enactors did not entrench in the Constitution a norm that supersedes N; and if no norm that supersedes N has become constitutional bedrock. (I explain what I mean by “constitutional bedrock” below.) By constitutional “enactors,” I mean what Richard Kay means:

By enactors, I mean the human beings whose approval gave the Constitution the force of law. In the case of the original establishment of the United States Constitution that means the people comprising the majorities in the nine state conventions whose ratification preceded the Constitution entering into force. With respect to the amendments that means the people comprising the majorities in the houses of

² See *id.* at 95–118 (arguing that judicial review is the enforcement of constitutional norms and rights).

³ The General Rule is Thayerian, and I use the term “reasonable” in the sense in which James Bradley Thayer used it. On the Thayerian approach to judicial review, see *id.* at 103–07. For a recent, succinct statement of Thayer’s position on judicial review, see Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2349–50 (2017).

Congress proposing the amendments and in the ratifying legislatures of the necessary three-quarters of the states.⁴

Second. N is a constitutional norm if N is an inescapable inference (a) from the structure of government established by the Constitution, which consists of (i) a separation of powers among the three branches—legislative, executive, and judicial—of the national government and (ii) a division of powers between the national government and state government (“federalism”),⁵ or (b) from the kind of government (“representative democracy”) presupposed by the Constitution;⁶ and if no norm that supersedes N has been entrenched in the Constitution or become constitutional bedrock.

Third. N is a constitutional norm if N is constitutional bedrock—if N is a bedrock feature of the constitutional law of the United States—in this sense: N has become, in the words of Robert Bork, “so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions,” that SCOTUS should and almost certainly will continue to deem N constitutionally authoritative even if it is open to serious question whether enactors ever entrenched N in the Constitution.⁷ As Michael McConnell has put the point: “[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American

⁴ Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 n.28 (2009).

⁵ See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 47 (1969) (basing the Supreme Court’s role in due process in federalism). See also Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1297 (2019) (stating that Supreme Court opinions “rest . . . on freestanding principles of federalism”); Michael Ramsey, *Thomas Colby: Originalism and Structural Argument*, ORIGINALISM BLOG (Apr. 25, 2019), <https://originalismblog.typepad.com/the-originalism-blog/2019/04/thomas-colby-originalism-and-structural-argumentmichael-rmasey.html> (commenting on Colby’s position that originalists rest on freestanding principles of federalism in lieu of the original meaning of the Constitution).

⁶ In his well-known and oft-cited 1971 lecture, “Neutral Principles and Some First Amendment Problems,” Robert Bork, then Professor of Law at Yale, observed that historical inquiry into the original understanding of those parts of the First Amendment that concern speech had yielded little if any useful information: “The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. . . . The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971). Bork hastened to add that this state of affairs was problematic because, Bork reasoned, “the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.” *Id.* at 23. Such freedom “could and should be inferred even if there were no first amendment.” *Id.* According to Bork, then, whatever the “hastily drafted” First Amendment happens to say about speech, a constitutional right to freedom of speech is appropriately inferable from the kind of government—“representative democracy”—established by the Constitution of the United States.

⁷ ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1989).

life; it is inconceivable that they would now be overruled. . . . This overwhelming public acceptance constitutes a mode of popular ratification

The foregoing threefold position regarding the conditions whose satisfaction warrants the claim that a norm truly is a constitutional norm seems to me to be the least contentious on offer.⁹ And given both that position and the General Rule, it follows that when deciding whether a norm claimed to have constitutional status has such status, SCOTUS generally should rule in the negative if the judgment is at least reasonable that none of the three conditions specified above is satisfied; SCOTUS should do so, that is, even if the judgment is reasonable that one (or more) of the three conditions *is* satisfied.

The Exception to the General Rule. There is, however, an important exception to the General Rule: If in a case before SCOTUS a right *that is part of the morality of human rights*¹⁰ is claimed to have constitutional status, SCOTUS should rule that the right has such status if the judgment is

⁸ Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: OUR DEMOCRATIC CONSTITUTION* (2005)). For a more recent, nuanced statement of Professor McConnell's position that "stare decisis, at least in its moderate form, is essential to any system of fair adjudication, including constitutional law," see Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1765 (2015). See also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 239 (2012) (discussing how judicial precedent is ingrained in society); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 175–76, 179, 181 (2013) (discussing the crucial role of judicial precedent).

For an argument that "[i]t is not necessarily unoriginalist to adhere to an unoriginalist precedent," see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015). See also MCGINNIS & RAPPAPORT, *supra*, at 172–73 (explaining the interaction between precedent and originalism); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 861–64 (2015) (discussing stare decisis and its role in originalism theories).

It is not inconsistent to affirm an originalist response to the question of what it means, or should mean, to interpret the constitutional text while also affirming that the constitutional text is not the sole legitimate basis of constitutional adjudication. For support of this position, see Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1309–10 (2013); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1551 (2012).

⁹ Cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–39 (Amy Guttmann ed., 2d ed. 2018):

Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpious new ones.

¹⁰ On "the morality of human rights," see, for example, PERRY, *A GLOBAL POLITICAL MORALITY*, *supra* note 1, at 20–21.

at least reasonable that at least one of the three conditions specified above is satisfied.

The fundamental rationale for the General Rule is that by exercising the power of judicial review according to the General Rule, SCOTUS would bring the constitutional law of the United States into closer alignment with the morality of human rights; SCOTUS would reduce—not eliminate, but reduce—the extent to which the constitutional law of the United States is morally problematic, as evaluated from the perspective of the morality of human rights—from the perspective, in particular, of the human right to democratic governance—a core aspect of which (as I explain in *A Global Political Morality*) is the presumptive right of a majority to prevail.¹¹ But, the very same rationale supports the Exception, because by exercising the power of judicial review according to the Exception, SCOTUS would bring the constitutional law of the United States into closer alignment with the morality of human rights.

Assume that the right whose status as a constitutional right is in question, R, is part of the morality of human rights; assume, that is, that R is internationally recognized—including by the United States—as a human right. Because R is part of the morality of human rights, R is a limitation on the human right to democratic governance; the human right to democratic governance does not entitle a majority to violate R. Therefore, the fundamental rationale for the General Rule does not apply: Excluding R from the constitutional law of the United States would not bring the constitutional law of the United States into closer alignment with the morality of human rights. Instead, the fundamental rationale for the Exception applies: Because R is part of the morality of human rights, including R in the constitutional law of the United States would bring the constitutional law of the United States into closer alignment with the morality of human rights. If the constitutional law of the United States does not include R, there is a moral shortfall in the constitutional law of the United States, as evaluated from the perspective of the morality of human rights. Imagine the moral shortfall, for example, if the constitutional law of the United States did not include the right to freedom of religion.

With respect to most norms claimed to have constitutional status, judicial review exercised according to the General Rule would bring the constitutional law of the United States into closer alignment with the morality of human rights. But, with respect to some norms (rights) claimed to have constitutional status—rights that are part of the morality of human rights—judicial review exercised not according to the General Rule but, instead, according to the Exception to the General Rule, would bring the

¹¹ *Id.* at 48–50.

constitutional law of the United States into closer alignment with the morality of human rights.

Assume that in a case before SCOTUS, however, the serious question is not, or not only, whether the norm the challenged government action is claimed to violate has constitutional status. Assume that even if it is well established that the norm has constitutional status, there is a serious question whether the government action violates the norm. I said above that when confronted with that question, SCOTUS should rule in the negative if the judgment is at least reasonable that the government action does not violate the norm.¹² Even if the norm the government action is claimed to violate is a constitutional right that is part of the morality of human rights, SCOTUS should rule in the *negative* on the question whether the challenged government action violates the right if the judgment is reasonable that the government action does not violate the right. So ruling would bring the constitutional law of the United States into closer alignment with the morality of human rights—more precisely, into closer alignment with the human right to democratic governance.

Again, I defend the foregoing theory of judicial review in *A Global Political Morality*. Now, let's pursue the implications of the theory for the two constitutional rights and the two constitutional controversies that are the principal subject matter of this Article.¹³

II. THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AS THE HUMAN RIGHT TO MORAL EQUALITY¹⁴

The constitutional right to equal protection—by which I mean the particular right to “the equal protection of the laws” that is protected by the constitutional law of the United States¹⁵—forbids government, federal as

¹² See *supra* text accompanying note 3 (denoting the instances in which the Supreme Court should rule against government action or a challenged law that is claimed to violate particular constitutional norms).

¹³ As I explain in *A Global Political Morality*, the implications of the theory for *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), are that both cases were wrongly decided. PERRY, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 113–15. For an argument relying on the theory that capital punishment is “cruel and unusual” in violation of the Constitution, see *id.* at 124–28.

¹⁴ The constitutional right to equal protection has been a principal interest of mine since the beginning of my scholarly career. See, e.g., Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541–42 (1977) (critiquing aspects of the Supreme Court decision in *Washington v. Davis* as failing to address systemic aspects of racial discrimination); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1024–25 (1979) [hereinafter Perry, *Modern Equal Protection*] (providing an appraisal of “modern equal protection doctrine” by focusing on unifying principles of equal protection cases).

¹⁵ U.S. CONST. amend. XIV, § 1.

well as state, to deny equal protection to any person. What sort (or sorts) of government action denies equal protection to a person? As I am about to explain, the human right to moral equality—which is a fundamental part of the global political morality of human rights—is the core of the constitutional right to equal protection: Any government action that violates the human right to moral equality denies equal protection to a person—and thereby violates the constitutional right to equal protection.

A. *The Human Right to Moral Equality*

What is the human right to moral equality—and what sort of government action violates the right?

Article 1 of the Universal Declaration of Human Rights begins by affirming that “[a]ll human beings are born free and equal in dignity and rights” and then goes on to state that all human beings “should act towards one another in a spirit of brotherhood.”¹⁶ According to Article 1, every human being is as worthy as every other human being—no human being is less worthy than any other human being—of being treated “in a spirit of brotherhood.”¹⁷ Put another way, every human being is as entitled as every other human being—every human being is *equally* entitled—to be treated “in a spirit of brotherhood.”¹⁸ Thus, the right to moral equality—the right of every human being to be treated as the moral equal of every other human being, in this sense—as *equally entitled with every other human being to be treated—as no less worthy than any other human being of being treated—in a spirit of brotherhood.*¹⁹

The most common grounds for demeaning and even dehumanizing some human beings, thereby treating them as morally inferior—the most common grounds for treating some human beings as less worthy than some other human beings, if worthy at all, of being treated “in a spirit of brotherhood”²⁰—have been, as listed both in Article 2 of the Universal Declaration and in Article 26 of the International Covenant on Civil and Political Rights, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²¹

¹⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* art. 2; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights art. 26 (Mar. 23, 1976). See also Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111, 112–16 (Stephen Shute & Susan Hurley eds., 1993) (attributing dehumanization to a different cultural group’s perceived lack of “rationality”); DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS 15 (2011) (discussing instances of horrific acts facilitated by dehumanizing propaganda); David Livingstone Smith, *The Essence of Evil*, AEON (Oct. 24, 2014),

Under the right to moral equality, government may not disadvantage any human being based on the view that she—or someone else, someone, for example, to whom she is married²²—is morally inferior. Similarly, government may not disadvantage any human being based on a sensibility to the effect that she is morally inferior—a sensibility such as “racially selective sympathy and indifference,” namely, “the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”²³ Or, analogously, a sensibility such as sex-selective sympathy and indifference. Government is disadvantaging a human being based at least partly on such a view or sensibility if but for that illicit, demeaning view or sensibility, government would not be disadvantaging her.

The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to *equal* citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior.²⁴ So, for example, government may not abridge—it may not dilute much less deny—any citizen’s right to vote based on the view that she is morally inferior.

The right to moral equality obviously “does not require—no sensible right requires—government to treat all human beings the same [as every other human being.]”²⁵ Government need not permit children to vote—or to drive cars. Nor need government distribute food stamps to the affluent. And so on. The examples are countless. But what government may *not* do is deny a benefit to anyone or impose a cost on anyone—government may not disadvantage any human being—based on the view (or on a sensibility

<http://aeon.co/magazine/society/how-does-dehumanisation-work/> (positing that dehumanization means literally conceiving of others as subhuman).

²² See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing marriage as a fundamental right). In response to “a now-discredited argument in defense of antimiscegenation laws”—namely, that “whites can marry only within their race; nonwhites can marry only within their race; therefore, antimiscegenation laws do not deny ‘equal options,’”—John Corvino has written:

Putting aside the problematic assumption of two and only two racial groups—whites and nonwhites—the argument does have a kind of formal parity to it. The reason that we regard its conclusion as objectionable nevertheless is that we recognize that the very point of antimiscegenation laws is to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites (that is, unequal).

John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 509 (2005).

²³ Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

²⁴ MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES* 107 (2013).

²⁵ *Id.*

to the effect) that she is morally inferior²⁶ or less worthy than someone else, if worthy at all, of being treated “in a spirit of brotherhood.”²⁷

As (in part) a right against government, the right to moral equality is often articulated as the right to “the equal protection of the law.”²⁸ Some examples include:

- Article 26 of the International Covenant on Civil and Political Rights: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁹
- The African Charter on Human and Peoples’ Rights states, in Article 2, that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”;³⁰ the Charter then states, in Article 3: “1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”³¹
- Article 15(1) of the Canadian Charter of Rights and Freedoms: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”³²
- Article 9 of the South African Constitution: “1. Everyone is equal before the law and has the right to equal protection and benefit of the law. . . . 3. The state may

²⁶ *Id.*

²⁷ *Id.* at 105.

²⁸ *Id.* at 106.

²⁹ International Covenant on Civil and Political Rights, *supra* note 21, art. 26.

³⁰ African Charter on Human and Peoples’ Rights, art. 2, June 27, 1981, 1520 U.N.T.S. 246.

³¹ *Id.* art 3.

³² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, c 15(1) (U.K.).

not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”³³

B. *The Constitutional Right to Equal Protection*

Like the preceding provisions, the Fourteenth Amendment of the Constitution of the United States—specifically, the second sentence of section one of the Fourteenth Amendment—speaks, *inter alia*, of equal protection:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*³⁴

When they added the foregoing language to the Constitution, what norms did the enactors of the Fourteenth Amendment constitutionalize; what rights did they entrench? That question has been and remains contested.³⁵

However, the ongoing controversy about precisely what rights the Fourteenth Amendment’s enactors entrenched matters little as a practical matter, because notwithstanding the controversy, it is now constitutional

³³ S. AFR. CONST., 1996.

³⁴ U.S. CONST. amend. XIV, § 1 (emphasis added).

³⁵ The literature is voluminous. For a small sampling, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 18–19 (2011) (“The widespread agreement among all interpreters of the Fourteenth Amendment . . . is that the [Civil Rights Act of 1866] was later constitutionalized by the Fourteenth Amendment, but there is disagreement about whether it is significant that the Fourteenth Amendment used broader terms than the 1866 Act.”); and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1899 (1995) (criticizing the view which assumes that the Fourteenth Amendment was designed to ban public school segregation). *Cf.* Adam Gopnik, *How the South Won the Civil War*, NEW YORKER (Apr. 1, 2019), <https://www.newyorker.com/magazine/2019/04/08/how-the-south-won-the-civil-war>.

There is no shortage of radical egalitarian thought at the time, coming from figures who were by no means marginalized. Thaddeus Stevens chose to be buried in an integrated cemetery, with the inscription on his stone reading “Finding other Cemeteries limited as to Race by Charter Rules, I have chosen this that I might illustrate in my death, the Principles which I advocated through a long life: EQUALITY OF MAN BEFORE HIS CREATOR.”

Id. For my own effort, years ago, to discern what rights the Fourteenth Amendment’s enactors entrenched when they added section one of the Fourteenth Amendment, including the equal protection clause, to the Constitution of the United States, see MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 48–50 (1999) [hereinafter PERRY, *WE THE PEOPLE*].

bedrock that the human right to moral equality is the core of the right to equal protection that is protected by the constitutional law of the United States.

Assume, for the sake of discussion, that the Fourteenth Amendment's enactors did not constitutionalize the right to moral equality. Now imagine a law—any law—that fits this profile: based on one or another view to the effect that some persons (members of a racial minority, for example, or women, or children born out of wedlock) are morally inferior. The Supreme Court of the United States would not dream of ruling that any such law—or any other government action based on any such view—complies with the constitutional right to equal protection.³⁶ Not even in its notorious “separate but equal” opinion in *Plessy v. Ferguson*,³⁷ decided almost one hundred and twenty-five years ago, in 1896, did the Supreme Court deny that a law or other government action based on the view that one or more persons are by virtue of their race morally inferior violates the Fourteenth Amendment. Instead, the Court implausibly denied that the law at issue in the case was based on such a view:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.³⁸

In his passionate, prophetic dissent in *Plessy*, Justice Harlan articulated the true significance of the challenged law:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will

³⁶ In *Loving v. Virginia*, the Supreme Court declared that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of *invidious* racial discrimination in the States.” 388 U.S. 1, 10 (1967) (emphasis added). Cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 88 (2012) (“[T]he Equal Protection Clause . . . can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally.”).

³⁷ 163 U.S. 537 (1896).

³⁸ *Id.* at 551.

admit, is the real meaning of such legislation as was enacted in Louisiana.³⁹

Sixteen years before its decision in *Plessy*, and just twelve years after ratification of the Fourteenth Amendment, the Supreme Court, in *Strauder v. West Virginia*, wrote:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their *inferiority*, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.⁴⁰

The human right to moral equality, in the guise of the constitutional right to equal protection, is clearly a bedrock feature—and has long been a bedrock feature—of the constitutional law of the United States.⁴¹ It is also constitutional bedrock that the right to equal protection applies to the federal government as well as to the states.⁴²

³⁹ *Id.* at 559–60 (Harlan, J., dissenting).

⁴⁰ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (emphasis added).

⁴¹ For a collection of the relevant caselaw, see, for example, JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS* 1359–1551 (12th ed. 2015); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 616–767 (18th ed. 2013).

A question for constitutional historians: How is it that the human right to moral equality, in the guise of the constitutional right to equal protection, became a bedrock feature of the constitutional law of the United States? *Cf.* David L. Sloss, *How International Human Rights Transformed the US Constitution*, 38 HUM. RTS. Q. 426, 445–48 (2016) (arguing that the Supreme Court’s decisions in *Brown* and *Bolling* were driven by a combination of foreign policy, domestic politics, and psychological factors, not by the UN Charter).

⁴² See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“We hold that racial segregation in the public schools for the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”).

The so-called “rationality” (or “rational basis”) requirement is one of the most familiar aspects of the Supreme Court’s equal protection doctrine. For a collection of the relevant caselaw, see CHOPER ET AL., *supra* note 41, at 1332–51; SULLIVAN & FELDMAN, *supra* note 41, at 602–16. That requirement is best understood as an implication of the right to moral equality: If it is not “rational”—reasonable or plausible—to believe that a particular instance of government’s disadvantaging some persons relative to some other persons serves a “legitimate” government interest; if it is not “rational” to believe that a particular instance of such disadvantaging serves, in other words, any aspect of the common good, then presumably government, even if it is not doing anything *otherwise* constitutionally problematic, is simply “playing favorites” (by disfavoring some persons relative to some others) and thereby violating the right to moral equality. As a federal appeals court put the point in 2008, “mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. . . . [E]conomic protectionism for its own sake, *regardless of its relation to the common good*, cannot be said to be in furtherance of a legitimate governmental interest.” *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 n.15 (9th Cir. 2008) (emphasis added); see also

It bears emphasis that the constitutional right to equal protection, because its core is the human right to moral equality, forbids more than racist government action. The right forbids any government action that fails to treat some persons as the moral equals of some other persons—that fails to treat some persons as entitled to the same respect and concern to which other persons are entitled. So, for example, the Supreme Court has struck down many laws based on what the Court recently described as “overbroad generalizations about the way men and women are[,] . . . about the different talents, capacities, or preferences of males and females.”⁴³ Government action based on such a generalization violates the constitutional right to equal protection if in the Court’s judgment, government, by relying on the generalization, treats some persons—often (some) women, but sometimes (some) men⁴⁴—in a demeaning way—a way that, all things considered, does not respect, that discounts if not disregards, their welfare or abilities—thereby failing to treat them as moral equals. Demeaning government action of a sexist sort, no less than that of a racist sort, violates the constitutional right to equal protection.

Because, as historical experience teaches, government reliance on “overbroad generalizations about the way men and women are” is so often demeaning, it makes sense for the Supreme Court to do what it does with respect to every instance of such reliance at issue before the Court: Presume that government’s reliance on the generalization is demeaning

St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (“mere economic protection of a particular industry is [not] a legitimate governmental purpose”). Cf. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997) (“[Equal protection forbids] the state to single out any person or group of persons for special benefits or burdens without an adequate ‘public purpose’ justification.”). For a recent discussion of how the rationality requirement is being applied in the federal courts, see *Rational Basis Review—Substantive Due Process—Eighth Circuit Upholds Licensing Requirement for African-Style Hair Braiders—Niang v. Carroll*, 879 F.3d 870 (8th Cir. 2018), 131 HARV. L. REV. 2453, 2453–56 (2018) (“Recently, in *Niang v. Carroll*, the Eighth Circuit applied rational basis review in upholding the constitutionality of Missouri laws that prohibit braiding hair for pay without a cosmetology license.” (internal footnote omitted)).

That the human right to moral equality is the core of the constitutional right to equal protection does not mean that, as a matter of existing constitutional doctrine, the former right exhausts the content of the latter right. The Supreme Court has struck down some laws on the basis of the constitutional right to equal protection without regard to whether the law was based on the view that some persons are morally inferior. That aspect of the Court’s equal protection doctrine—the so-called “fundamental interests” aspect—is not my concern here. For a collection of the relevant caselaw, see, for example, CHOPER ET AL., *supra* note 41, at 1551–1644; SULLIVAN & FELDMAN, *supra* note 41, at 767–809.

⁴³ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683–84 (2017). For insightful commentary on Justice Ginsburg’s majority opinion in *Morales-Santana*—an opinion that spoke for six members of the Court including herself, Chief Justice Roberts, and Justices Kennedy, Breyer, Kagan, and Sotomayor—see Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supreme-court.html>.

⁴⁴ See, e.g., *Morales-Santana*, 137 S. Ct. at 1698, 1700–01 (explaining that the Constitution “requires the Government to respect the equal dignity and stature of its male and female citizens”).

and require government, if it is to succeed in rebutting the presumption, to provide the Court with “an exceedingly persuasive justification.”⁴⁵ a justification that persuades the Court that government’s reliance on the generalization is not demeaning, that it does not disrespect or discount, the welfare or abilities—the “talents, capacities, or preferences”—any women or men.⁴⁶

III. THE CONSTITUTIONAL RIGHT OF PRIVACY AS THE HUMAN RIGHT TO MORAL FREEDOM

I explained in the preceding section of this Article that the constitutional right to equal protection is, at its core, the human right to moral equality. I explain in this section that the constitutional right of privacy—by which I mean the particular “right of privacy” (as it’s called) that is protected by the constitutional law of the United States—is best understood as a version of the human right to moral freedom, which, like the human right to moral equality, is a fundamental part of the global political morality of human rights.

⁴⁵ *Id.* at 1683.

⁴⁶ *Id.* at 1684. Consider the implications of the fact that:

[U]nder the human right to moral equality, government may not disadvantage any human being based either on the view that she is morally inferior or on a *sensibility to that effect*—a sensibility such as “racially selective sympathy and indifference,” namely, “the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.” Government action can violate the right to moral equality—and, therefore, the right to equal protection—unintentionally. As Robin Kar and John Lindo have explained: “Many people who treat each other differently . . . exhibit unconscious patterns of attention, inference and concern, which make it easier for them to identify the interests of their in-group while overlooking those of out-groups. This explains why democratic processes cannot be relied upon to guarantee the equal treatment of persons under the law.”

PERRY, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 61 (quoting Robin Bradley Kar & John Lindo, *Race and Law in the Genomic Age: A Problem for Equal Treatment under the Law*, in THE OXFORD HANDBOOK OF LAW, REGULATION & TECHNOLOGY 874, 902 (Roger Brownsword, Eloise Scotford & Karen Yeung eds., 2017)). For further discussion about minds and “us versus them” perception, see DANIEL M. WEGNER & KURT GRAY, THE MIND CLUB: WHO THINKS, WHAT FEELS, AND WHY IT MATTERS 125–31, 152–55 (2016). Kar and Lindo conclude—*rightly* conclude—that the Supreme Court should “revise its interpretation of the Equal Protection Clause [so as to allow] for broader and more vigorous constitutional protection against disparate impact caused by either intentional discrimination or *psychological processes that regularly function to cause disparate treatment*.” Kar and Lindo, *supra*, at 905 (emphasis added). I reached the same conclusion in two of my earliest writings: Perry, *Modern Equal Protection*, *supra* note 14, at 1040–42; Perry, *The Disproportionate Impact Theory of Racial Discrimination*, *supra* note 14, at 588–89. Cf. Osagie K. Obasogie, *The Supreme Court Is Afraid of Racial Justice*, N.Y. TIMES (June 7, 2016) <https://www.nytimes.com/2016/06/07/opinion/the-supreme-court-is-afraid-of-racial-justice.html> (discussing the “intent doctrine” created by the Supreme Court beginning with *Washington v. Davis*).

I begin by explicating the human right to moral freedom, which is the right to the freedom to live one's life in accord with one's moral convictions and commitments—including, of course, one's religiously-based moral convictions and commitments (if one has such convictions and commitments).

A. *The Human Right to Moral Freedom*

The articulation of the human right to moral freedom in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) is canonical: As of July 2019, 173 of the 197 members of the United Nations (87%) are parties to the ICCPR, including, as of 1992, the United States.⁴⁷ Article 18 states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.⁴⁸

⁴⁷ International Covenant on Civil and Political Rights, *supra* note 21, art. 18.

⁴⁸ *Id.* Article 18 of the ICCPR is an elaboration of Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18 (Dec. 10, 1948).

Another international document merits mention: The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the U.N. General Assembly on November 25, 1981. G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981). See John Witte, Jr., *Introduction: The Foundations and Frontiers of Religious Liberty*, 21 EMORY INT'L L. REV. 1, 2–5

Note the breadth of the right that according to Article 18 “[e]veryone shall have the right to freedom” not just of “religion” but also of “conscience.”⁴⁹ The “right shall include freedom to have or adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching.”⁵⁰ Article 18 explicitly indicates that “belief” centrally includes moral belief when it states that “[t]he State parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious *and moral* education of their children in conformity with their own convictions.”⁵¹

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional

(2007) (discussing the 1981 U.N. Declaration and its impact on religious rights and liberties).

Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is substantially identical:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

Article 12 of the American Convention on Human Rights is also substantially identical:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

American Convention on Human Rights art. 12, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴⁹ International Covenant on Civil and Political Rights, *supra* note 21, art. 18.

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.* (emphasis added). Cf. Barbara Bennett Woodhouse, *Religion and Children's Rights*, in RELIGION AND HUMAN RIGHTS 300–04 (John Witte, Jr. & M. Christian Green eds., 2012) (discussing the emerging concept of children's rights as human rights and the religious rights of children within international law).

Protocol to the ICCPR, adjudicates cases brought by one or more individuals alleging that a state party is in violation of the ICCPR⁵²—has stated that “[t]he right to freedom of thought, conscience and religion . . . in article 18.1 is far-reaching and profound.”⁵³ How “far-reaching and profound?” The right protects not only freedom to practice one’s religion, including, of course, one’s religiously-based morality; it also protects freedom to practice one’s morality—freedom to “to manifest his . . . belief in . . . practice”—*even if one’s morality is not religiously-based*. As the Human Rights Committee has explained:

The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. . . . Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.⁵⁴

In deriving a right to conscientious objection to military service from Article 18, the Human Rights Committee observed that “the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief” and emphasized that “there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs.”⁵⁵

It is misleading, though common, to describe the right we are discussing here as the right to *religious* freedom.⁵⁶ Given the breadth of the right—the “far-reaching and profound” right of which the ICCPR’s Article 18 is the canonical articulation—is more accurately described as the right to *moral* freedom. As the Supreme Court of Canada has emphasized, it is a

⁵² ALEX CONTE & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 8 (2d ed. 2009).

⁵³ O.H.C.H.R., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, general cmt. 22, at 35 (July 29, 1994), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/PDF/G9418963.pdf?OpenElement> [hereinafter *General Comment 22*].

⁵⁴ *Id.*

⁵⁵ *Id.* at 38; see *Yoon and Choi v. Republik of Korea*, CCPR/C/88/D/1321-1322/2004, Views of the Human Rights Committee, ¶ 8.3 (Nov. 3, 2006), <http://www.wri-irg.org/node/6221> (ruling that Article 18 requires that parties to the ICCPR provide for conscientious objection to military service). For relevant discussion, see JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 89–91 (Jane Marie Todd trans., 2011).

⁵⁶ For an example of such a description, see Christopher McCrudden, *Catholicism, Human Rights and the Public Sphere*, 5 INT’L J. PUB. THEOLOGY 331, 333–35 (2011).

broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously-based. Referring to section 2(a) of Canada's Charter of Rights and Freedoms, which states that "[e]veryone has . . . freedom of conscience and religion,"⁵⁷ the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."⁵⁸ Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."⁵⁹ Therefore, I call the right we are discussing here the human right to moral freedom. But whatever one calls the right—whether one calls it, as many do, the right to freedom of conscience, in the sense of the right to live one's life in accord with the deliverances of one's conscience, or, instead, the right to moral (including religious) freedom—it is the right to the freedom to live one's life in accord with one's moral convictions and commitments, including one's religiously-based moral convictions and commitments.

Moreover, that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing does not entail that the choice is not protected by the right to moral freedom. As the Canadian Supreme Court has explained, in a case involving a religious practice:

[T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is required . . . would disregard the value of non-obligatory religious experiences by excluding those experiences from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may

⁵⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁵⁸ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 759 (Can.).

⁵⁹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 337 (Can.); *see also* Howard Kislowicz, Richard Haigh & Adrienne Ng, *Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom*, 48 ALTA. L. REV. 679, 707–13 (2011) (discussing the intersection of "freedom of conscience" and freedom of religion in the decisions by the Supreme Court of Canada).

personally deny the modern relevance of literal biblical “obligation” or “commandment”, be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.⁶⁰

“It is the religious or spiritual essence of an action,” reasoned the Court, “not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.”⁶¹

But by the same token—that is, because “[i]t is the religious or spiritual essence of an action . . . that attracts protection”—not every choice one makes or wants to make qualifies as a choice protected by the right to moral freedom. A choice to do or not to do something is protected by the right if, and only if, the choice fits this profile: animated by what Jocelyn Maclure and Charles Taylor, in their book *Secularism and Freedom of Conscience*, call “core or meaning-giving beliefs and commitments” as distinct from “the legitimate but less fundamental ‘preferences’ we display as individuals.”⁶²

[The] beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict “moral harm.”⁶³

Although, as Maclure and Taylor are well aware, “it is difficult to establish in the abstract where the line between preferences and core commitments lies,”⁶⁴ I am inclined to concur in what Maclure and Taylor have argued:

Whereas it is not overly controversial to classify beliefs stemming from established philosophical, spiritual, or religious doctrines as meaning-giving, what about the more fluid and fragmented field of values? Should the person who

⁶⁰ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 588 (Can.).

⁶¹ *Id.* at 553.

⁶² MACLURE & TAYLOR, *supra* note 55, at 12–13. For Maclure and Taylor’s elaboration and discussion of the distinction, see *id.* at 76–77, 89–97. For a functionally similar distinction, see ROBERT AUDI, *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE* 42–43 (2011).

⁶³ MACLURE & TAYLOR, *supra* note 55, at 77.

⁶⁴ *Id.* at 92.

has her heart set on attending to a loved one in the terminal stage of life be classified with the . . . Muslim who is intent on honoring her moral obligations? The answer to that question is likely yes. It is unclear why a hierarchy ought to be created between, on one hand, convictions stemming from established secular or religious doctrines and, on the other, values that do not originate in any totalizing system of thought. Why, in order to be “core,” “fundamental,” or “meaning-giving,” must a conviction originate in a doctrine based on exegetical and apologetic texts? Moreover, attending to an ailing loved one is for some people an experience charged with meaning, one that leads them to face their own finitude and incites them to reassess their values and commitments A man may very well come to believe that if he cannot devote himself to his gravely ill wife or child, his life has no meaning, but he may not necessarily conduct a sustained metaphysical reflection on human existence [W]e believe it is rather the intensity of a person’s commitment to a given conviction or practice that constitutes the similarity between religious convictions and secular convictions.⁶⁵

Wherever “in the abstract” the line “between preferences and core commitments” is drawn, there will be cases in which the distinction is relatively easy to administer. For example:

[A] Muslim nurse’s decision to wear a scarf at work cannot be placed on the same footing with a colleague’s choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague.⁶⁶

And there will be cases in which there is room for reasonable doubt about which side of the line a choice falls on. Wouldn’t a generous application of the right to moral freedom involve resolving the benefit of the doubt in favor of the conclusion that the choice at issue is animated by “core or meaning-giving beliefs and commitments”—and is therefore protected by the right?

A generous application of the right—more precisely, a default rule according to which the benefit of the doubt is resolved in favor of the

⁶⁵ *Id.* at 92–93, 96, 97.

⁶⁶ *Id.* at 77.

conclusion that the choice at issue is protected by the right—is much more feasible than it would be were the protection provided by the right unconditional (“absolute”). However, the protection provided by the right to moral freedom is only conditional. The protection provided by some ICCPR rights—such as the Article 7 right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment”—is unconditional, in the sense that the rights forbid (or require) government to do something, *period*.⁶⁷ The protection provided by some other ICCPR rights, by contrast, is conditional, in the sense that the rights forbid government to do something *unless certain conditions are satisfied*.⁶⁸ As Article 18 makes clear, the protection provided by the right to moral freedom is—as a practical matter, it must be—conditional: The right forbids government to ban or otherwise impede conduct protected (“covered”) by the right, thereby interfering with one’s freedom to live one’s life in accord with one’s moral convictions and commitments, unless each of three conditions is satisfied.⁶⁹

- ***The legitimacy condition:*** The government action (law, policy, etc.) must be an effort to achieve, and actually achieve, a legitimate government objective: “public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁷⁰ The particular government action at issue might be not the law (policy, etc.) itself but that the law does not exempt the protected conduct.
- ***The least-restrictive-alternative condition:*** The government action—which, again, might be that the law does not exempt—must be necessary, in the sense that there is no less restrictive way to achieve the objective.⁷¹
- ***The proportionality condition:*** The overall good the government action achieves—the “benefit” of the government action—must be sufficiently important to warrant the gravity of the action’s “cost,” which is a

⁶⁷ International Covenant on Civil and Political Rights, *supra* note 21, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

⁶⁸ See, e.g., *id.* art. 18 (providing a right to freedom of religion subject to enumerated conditions).

⁶⁹ *Id.*

⁷⁰ See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3, 4 (1985) [hereinafter *The Siracusa Principles*] (“10. Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, . . . [and] (c) pursues a legitimate aim . . .”).

⁷¹ *Id.* (“11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”).

function mainly of the importance of the conduct the government action bans or otherwise impedes and the extent to which there is an alternative way (or ways) for the aggrieved party (or parties) to achieve what she wants to achieve.⁷²

It is an essential aspect of the *conditional* human right to moral freedom that government action that *implicates* the right also *violates* the right if, and only if, the government action fails to satisfy any of those three conditions.

Consider the first of the three conditions that government must satisfy, under the right to moral freedom, lest its regulation of conduct protected by the right violate the right: The government action at issue (law, policy, etc.) must serve a legitimate government objective.⁷³ Article 18 sensibly and explicitly allows government to act for the purpose of protecting “public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁷⁴ Clearly, then, for purposes of the legitimacy condition, protecting “public morals” is a legitimate government objective.⁷⁵

But what morals count as *public* morals? In addressing that question, let’s begin with *The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, which were promulgated by the United Nations in 1984, and which state, in relevant part:

2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.⁷⁶

⁷² The right to moral freedom, obviously, would not provide meaningful protection for conduct covered by the right if the consistency of government action with the right was to be determined without regard to whether the benefit of the government action is proportionate to the cost of the government action. And, indeed, Article 18 is authoritatively understood to require that the benefit be proportionate to the cost. *See id.* (“10. Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation: . . . (b) responds to a pressing public or social need, . . . and (d) is proportionate to that aim.”).

⁷³ *Id.*

⁷⁴ International Covenant on Civil and Political Rights, *supra* note 21, art. 18.

⁷⁵ *Id.*

⁷⁶ *The Siracusa Principles*, *supra* note 70, at 4.

With respect to “public morals,” therefore, the Human Rights Committee has emphasized:

[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. . . . If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.⁷⁷

As the editors of a casebook on the ICCPR have put the point, in summarizing several statements by the Human Rights Committee concerning protection of “public morals” under the right to moral freedom: “[P]ublic morals’ measures should reflect a pluralistic view of society, rather than a single religious culture.”⁷⁸

The position of the Human Rights Committee—the Committee’s application of the relevant Siracusa Principles in the context of the Article 18 right to moral freedom—is quite sound, given what Taylor and Maclure call “the state of contemporary societies.”⁷⁹ Such societies—more precisely, contemporary democracies—are typically quite pluralistic, morally as well as religiously:

Religious diversity must be seen as an aspect of the phenomenon of “moral pluralism” with which contemporary democracies have to come to terms . . . Although the history of the West serves to explain the fixation on religion . . . the state of contemporary societies requires that we move beyond that fixation and consider how to manage fairly the moral diversity that now characterizes them. The field of application for secular governance has broadened to include all moral, spiritual, and religious options.⁸⁰

⁷⁷ General Comment 22, *supra* note 53, at 35.

⁷⁸ SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 379 (2000).

⁷⁹ MACLURE & TAYLOR, *supra* note 55, at 106.

⁸⁰ *Id.* at 10, 106. “Moral pluralism” refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good.” *Id.* at 10. See also Charles Taylor, *Democratic Exclusions: Political Identity and the Problem of Secularism*, ABC RELIGION & ETHICS (Sept. 17, 2017, 2:13 PM), <https://www.abc.net.au/religion/democratic-exclusions-political-identity-and-the-problem-of-secu/10095352> (illustrating the goal of a modern, secular democratic government and resulting societal implications).

If in banning or otherwise regulating (impeding) conduct *purportedly* in order to protect “public morals,” government is acting based on—“based on” in the sense that government almost certainly would not be doing what it is doing “but for”—a sectarian belief, whether religious or secular (nonreligious), that the conduct is immoral, government is not truly acting to protect *public* morals. Instead, government is acting to protect *sectarian* morals, *and protecting sectarian morals—as distinct from public morals—is not a legitimate government objective under the right to moral freedom.*

Crediting the protection of sectarian morals as a legitimate government objective, under the right to moral freedom, would be antithetical to the goal of enabling contemporary democracies to meet the challenge of “manag[ing] fairly the moral diversity that now characterizes them.”⁸¹ We can anticipate an argument to the effect that managing such diversity is only one of the challenges that contemporary democracies face, that nurturing social unity is another, and that from time to time, in one or another place, meeting the latter challenge may require the political powers-that-be to protect some aspect of a sectarian morality.⁸² However, such an argument is belied by the historical experience of the world’s

Everyone agrees today that modern, diverse democracies have to be *secular*, in some sense of this term. But [in] what sense? . . . [T]he main point of a secularist regime is to manage the religious and metaphysical-philosophical diversity of views (including non- and anti-religious views) fairly and democratically. Of course, this task will include setting certain limits to religiously-motivated action in the public sphere, but it will also involve similar limits on those espousing non- or anti-religious philosophies. . . . For this view, religion is not the prime focus of secularism.

Id. (emphasis in original).

⁸¹ MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 76.

⁸² In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that “religious unity is one of the great strengths of a people.” JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 155–56 (2005). Had Mussolini read Machiavelli? “Machiavelli . . . called religion ‘the instrument necessary above all others for the maintenance of a civilized state,’ [and who] urged rulers to ‘foster and encourage’ religion ‘even though they be convinced that it is quite fallacious.’ Truth and social utility may, but need not, coincide.” Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2182 (2003) (quoting NICCOLO MACHIAVELLI, THE DISCOURSES 143 (Bernard R. Crick ed., Leslie J. Walker trans., Penguin 1970) (1520)). *Cf. Atheist Defends Belief in God*, TABLET [London], Mar. 24, 2007 (quoting a former Communist praising the Pope).

A senior German ex-Communist has praised the Pope and defended belief in God as necessary for society . . . “I’m convinced only the Churches are in a state to propagate moral norms and values,” said Gregor Gysi, parliamentary chairman of Die Linke, a grouping of Germany’s Democratic Left Party (PDS) and other left-wing groups. “I don’t believe in God, but I accept that a society without God would be a society without values. This is why I don’t oppose religious attitudes and convictions.”

Id. at 33.

democracies, which amply confirms, as Maclure and Taylor emphasize, not only that a society's "unity does not lie in unanimity about the meaning and goals of existence but also that any efforts in the direction of such a uniformization would have devastating consequences for social peace."⁸³ The political powers-that-be do not need—and under the legitimacy condition, properly construed, they do not have—discretion to ban or otherwise regulate conduct based on a sectarian belief that the conduct is immoral.⁸⁴

When is a belief, including a secular belief, that X (a type of conduct) is immoral, a sectarian belief? Consider what the celebrated American Jesuit John Courtney Murray wrote, in the mid-1960s, in his "Memo to [Boston's] Cardinal Cushing on Contraception Legislation:"

[T]he practice [contraception], undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence . . .

⁸⁵

⁸³ MACLURE & TAYLOR, *supra* note 55, at 18. See also Paul Cruickshank, *Covered Faces, Open Rebellion*, N.Y. TIMES, Oct. 21, 2006 (exploring why, according to the op-ed contributor, the rise in number of Muslim women wearing the niqab was "a symptom and not a cause of rising tensions" in Britain at the time, which were driven by the Muslim community's "sense of besiegement"); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981) (stating "the disregard and infringement of . . . the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind"). See BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 222 (2011) (arguing "to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase").

⁸⁴ That the coercive imposition of sectarian moral belief violates the right to moral freedom does not entail that the non-coercive affirmation of theistic belief invariably does so. See MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 103–04, 106 n.19 (2010) (providing examples from the United States of the latter: the phrase "under God" in the Pledge of Allegiance; "In God We Trust" as the national motto; and "God save the United States and this honorable court" intoned at the beginning of judicial proceedings. I also address the question whether the non-coercive affirmation of theistic belief violates the Establishment Clause of the U.S. Constitution).

⁸⁵ John Courtney Murray, S.J., *Memo to Cardinal Cushing on Contraception Legislation*, WOODSTOCK THEOLOGICAL LIBR. GEO. U. 83, <https://www.library.georgetown.edu/woodstock/murray/1965f>. See also John Courtney Murray, S.J., Toledo Talk 344 (May 5, 1967), <https://www.library.georgetown.edu/woodstock/murray/1967g> (reproducing a speech delivered in Toledo on May 5, 1967 that reflected Murray's later views on contraception); Seth Meehan, *Legal Aid: When the Massachusetts Legislature Voted in 1966 to End the Last All-Out Ban on Contraceptives in the Nation, It Was With the Approval and Assistance of the Boston Archdiocese*, B.C. MAG. (2011) (discussing Murray's influence on Boston's Archbishop and Cardinal Richard Cushing, and Cushing's

We may generalize Murray's insight: A belief that X is immoral is sectarian—sectarian in the context of contemporary democracies, which are typically quite pluralistic, morally as well as religiously—if the claim that X is immoral is one that is widely contested, and in that sense sectarian, among the citizens of such a democracy.

Of course, it will not always be obvious which side of the line a particular moral belief falls on—sectarian or nonsectarian—but often it *will* be obvious: Murray understood and emphasized to Cardinal Cushing the belief that contraception is immoral had clearly become sectarian. By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in contemporary democracies. Consider, in that regard, what Maclure and Taylor say about “popular sovereignty” and “basic human rights:”

[They] are the *constitutive* values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others' right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.⁸⁶

B. *The Constitutional Right of Privacy*

I said at the beginning of this section of the Article that the constitutional right of privacy is best understood as a version of the human right to moral freedom. Consider the following rulings by the Supreme Court of the United States in the period since the mid-1960s:

influence on the repeal of the Massachusetts ban on the sale of contraceptives); Seth Meehan, *Catholics and Contraception: Boston, 1965*, N.Y. TIMES (Mar. 15, 2012), <https://campaignstops.blogs.nytimes.com/2012/03/15/catholics-and-contraception-boston-1965/> (discussing the same); Joshua J. McElwee, *A Cardinal's Role in the End of a State's Ban on Contraception*, NAT'L CATH. REP. (Feb 28, 2012), <https://www.ncronline.org/news/politics/cardinals-role-end-states-ban-contraception> (noting once Cushing gave a tacit go-ahead to state legislators, the bill was signed into law on May 10, 1966); LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* 2–3 (2004) (providing a larger context within which Father Murray wrote and spoke); David Hollenbach, S.J., *Religious Freedom, Morality and Law: John Courtney Murray Today*, 1 J. MORAL THEOLOGY 69, 70, 74–75 (2012) (providing a recent reflection on Murray's work by one of his foremost intellectual heirs).

⁸⁶ MACLURE & TAYLOR, *supra* note 55, at 11.

- A 1965 ruling and a 1972 ruling, read in conjunction with one another, establish that government may ban neither the use nor the distribution of contraceptive devices or drugs.⁸⁷ In the 1972 ruling, the Supreme Court declared: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁸⁸
- In 1973, the Court ruled that restrictive abortion legislation implicated, and that some such legislation violated, “the right of privacy.”⁸⁹ In 1992, in reaffirming the 1973 ruling, the Court explained:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps [where] the pregnancy is itself a danger to her own life or health, or is the result of rape or incest. . . .

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about

⁸⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the state of Connecticut’s forbidding of contraceptives unconstitutionally intruded upon the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (finding “[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible” and “if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons”).

⁸⁸ *Eisenstadt*, 405 U.S. at 453.

⁸⁹ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

these matters could not define the attributes of personhood were they formed under compulsion of the State.⁹⁰

- In 1978, in ruling that “the decision to marry [is] among the personal decisions protected by the right of privacy,” the Court stated:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. . . . [H]owever, w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.⁹¹

- In 2003, the Court ruled that government may not criminalize adult, consensual sexual intimacy and that therefore a criminal ban on same-sex sexual intimacy was unconstitutional:

Liberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct [Government should be wary about attempting] to define the meaning of [an adult, consensual] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. . . . [A]dults may choose to enter upon this relationship . . . and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice. . . .

⁹⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850–51 (1992).

⁹¹ *Zablocki v. Redhail*, 434 U.S. 374, 384, 386, 388 (1978) (citations omitted).

[F]or centuries, there have been powerful voices to condemn homosexual conduct as immoral. [This does] not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.” . . . “[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice [I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”⁹²

The constitutional right of privacy, as the wording in the preceding passages confirms, is best understood as a right that protects certain fundamental aspects of one’s moral freedom—of one’s freedom, that is, to live one’s life in accord with one’s moral convictions and commitments. In that sense, and to that extent, the constitutional right of privacy is a version of the human right to moral freedom.

However, that the constitutional right of privacy is a version of the human right to moral freedom does not entail that the right of privacy is properly regarded as a constitutional right. It has been and remains greatly controversial whether the right of privacy is properly regarded as a constitutional right.⁹³

Recall from the first section of this Article that a right, *R*, is properly regarded as a constitutional right if one of the two following conditions is satisfied: (1) Constitutional enactors entrenched *R* in the Constitution of the United States; other, later enactors did not entrench a norm that supersedes *R*; and no norm that supersedes *R* has become constitutional bedrock; or (2) *R* is constitutional bedrock. Recall, too, that in deciding whether a norm is properly regarded as a constitutional norm, the Supreme Court should rule in the affirmative if (a) the norm in question is a part of

⁹² *Lawrence v. Texas*, 539 U.S. 558, 562, 567, 571, 577–78 (2003) (quoting *Planned Parenthood*, 505 U.S. at 850); *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (citation omitted).

⁹³ That the original understanding neither of the Fifth Amendment Due Process Clause nor of the Fourteenth Amendment Due Process Clause supports the Supreme Court’s “right of privacy” jurisprudence seems clear. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1792, 1795 (2012) (discussing how from an originalist perspective, it is difficult to extract a fundamental right of privacy from the Constitution).

the morality of human rights; and (b) the judgment is reasonable that at least one of the two foregoing conditions is satisfied.⁹⁴ The norm at issue here—the right of privacy, understood as a version of the human right to moral freedom—is a part of the morality of human rights. The serious question is whether one (or both) of the two foregoing conditions is satisfied.

Consider the two following propositions:

1. It is reasonable to conclude that the right to the free exercise of religion that constitutional enactors entrenched⁹⁵ is not what, in 1990, a bare majority of the Supreme Court said it is⁹⁶ (*i.e.*, a narrow right that protects against only government action that discriminates on the basis of religion).⁹⁷ Rather, it is a broad right that protects against any government action that, without adequate justification, impedes one's ability to live one's life in accord with one's religious convictions and commitments.⁹⁸
2. It is well settled—so well settled as to be reasonably regarded as constitutional bedrock—that the free exercise right covers not only normative worldviews that are theistic but also those that, such as Buddhism, are nontheistic.⁹⁹ Like the human right to moral freedom, the constitutional right to the free exercise of religion covers moral choices rooted in and nourished by one or another

⁹⁴ *Supra* Part I.

⁹⁵ U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

⁹⁶ *Emp’t Div. v. Smith*, 494 U.S. 872, 872 (1990).

⁹⁷ For a defense of the antidiscrimination interpretation of the free exercise right as historically accurate, see Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–48 (1992) (outlining how the exemption-focused interpretation of the free exercise clause is not supported).

⁹⁸ KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 301 (2015); 2 DOUGLAS LAYCOCK, *RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE* 52–53, 61 (2011) (citations omitted); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115–16 (1990); Michael Stokes Paulsen, *Justice Scalia’s Worst Opinion*, PUB. DISCOURSE (Apr. 17, 2015), <http://www.thepublicdiscourse.com/2015/04/14844/>. It is constitutional bedrock that the free exercise right applies to the states as well as to the federal government. The Supreme Court first so ruled in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁹⁹ Indeed, including even worldviews that are anti-theistic. See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (explaining that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others”).

nontheistic worldview as well as those rooted in and nourished by one or another theistic worldview.¹⁰⁰

Given those two propositions, the right that the Supreme Court has (misleadingly) named “the right of privacy”—the right of privacy *understood as a version of the human right to moral freedom*—is properly regarded as a constitutional right.¹⁰¹

IV. ABORTION

*[In the Abortion Cases (1973), the Supreme Court should not have] gone beyond a ruling on the extreme [Texas] statute before the Court. . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.*¹⁰²

What are the implications of the constitutional right to equal protection and the constitutional right of privacy? (The implications of the two rights, that is, understood as I have argued here they should be understood.) For the two constitutional controversies I address in this Article, which are

¹⁰⁰ See DANIEL O. CONKLE, *RELIGION, LAW, AND THE CONSTITUTION* 60–69 (2016) (discussing efforts, judicial and scholarly, of how the term “religion,” as used in the First Amendment, should be understood). According to religious liberty scholar Douglas Laycock, “we have to understand religion broadly, so that nonbelievers are protected when they do things that are analogous to the exercise of religion. . . . Nonbelievers have consciences, and occasionally, their deeply held conscientious beliefs conflict with government regulation.” Douglas Laycock, *McElroy Lecture: Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 431 (2011) (footnote omitted). See also Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 336–37 (1996) (arguing that the state should not be drawing lines across a series of religious choices or religious commitments because such lines would be inconsistent with religious liberty).

¹⁰¹ Cf. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149 (1996):

By the standards of late twentieth-century law, the public regulation of morality [in the United States] is increasingly suspect. The burgeoning public/private distinction, the jurisprudential separation of law and morality, and the expansion of constitutionally protected rights of expression and privacy have yielded a polity whose legitimacy theoretically rests on its ability to keep out of the private moral affairs of its citizens. As the American Law Institute declared in the 1955 Model Penal Code, “We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor.”

Novak goes on to illustrate that “[t]he relationship between laws and morals in the nineteenth century could not have been more different. Of all the contests over public power in that period, morals regulation was the easy case.” *Id.*

¹⁰² Ruth Bader Ginsburg, *Some Thoughts on Equality and Autonomy in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985) (footnote omitted). In 1985, Justice Ginsburg was a judge on the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 375.

among the most divisive constitutional controversies of our time: the controversies concerning, respectively, abortion and same-sex marriage.¹⁰³

Let's begin with the controversy concerning abortion: specifically, the controversy over the constitutionality of laws that ban pre-viability abortions. I first consider an extreme such ban: the Texas statute at issue, and struck down, in *Roe v. Wade*,¹⁰⁴ I then consider a ban that, in comparison to the Texas statute, was *relatively* permissive: the Georgia statute at issue, and struck down, in *Doe v. Bolton*.¹⁰⁵

The Texas statute at issue in *Roe v. Wade* criminalized all abortions except those necessary to save the life of the mother.¹⁰⁶ The statute criminalized even abortions necessary to protect the physical health of the mother from a serious threat of grave and irreparable harm, abortions to terminate a pregnancy that began with rape, and abortions to terminate a pregnancy that will yield a child who, because of a grave defect, is "born into what is certain to be a brief life of grievous suffering,"¹⁰⁷ or a child who, because of the congenital brain disorder known as anencephaly, is missing a major portion of its brain and is destined to die—if not before birth, when most such children die—then shortly after birth.¹⁰⁸ The Texas statute was, in a word, extreme. Only a statute that criminalized even those abortions that the Texas statute exempted—abortions necessary to save the

¹⁰³ In *A Global Political Morality*, I pursue the implications of the constitutional right of privacy for laws banning physician-assisted suicide; I conclude that although they clearly *implicate* the right of privacy, such laws do not *violate* the right. See PERRY, *A GLOBAL POLITICAL MORALITY*, *supra* note 1, at 153–56.

¹⁰⁴ 410 U.S. 113, 164 (1973).

¹⁰⁵ See 410 U.S. 179, 182–83, 201 (1973) (detailing the exceptions for Georgia's ban on abortions, including if "the pregnancy resulted from forcible or statutory rape").

¹⁰⁶ *Id.* at 117–18.

¹⁰⁷ John Schwartz, *When Torment Is Baby's Destiny, Euthanasia Is Defended*, N.Y. TIMES (Mar. 10, 2005), <https://www.nytimes.com/2005/03/10/health/when-torment-is-babys-destiny-euthanasia-is-defended.html>. See *Roe*, 410 U.S. at 117–18 (explaining that the only permissible exception under the Texas statute was for the purpose of saving the life of the mother).

¹⁰⁸ *Brazil: Supreme Court Abortion Ruling a Positive Step*, HUM. RTS. WATCH (Apr. 19, 2012, 4:09 PM), <https://www.hrw.org/news/2012/04/19/brazil-supreme-court-abortion-ruling-positive-step>.

Anencephaly, often diagnosed when the fetus is *in utero*, is a neural tube defect in which a major portion of the brain, skull, and scalp fail to develop. An infant born with this disorder lacks a cerebrum, and will usually be born blind, deaf, and unconscious. If an anencephalic infant is not stillborn, the baby will often die within hours or days. In a rare case, the infant may survive longer, as in the well-known case in Brazil of Marcela Ferreira, who lived for 20 months. But infants with anencephaly do not gain consciousness and cannot survive infancy.

Id. See Eduardo Soares, *Brazil: Criminalization of Some Abortions Ruled Unconstitutional*, LIBR. CONGRESS (Apr. 19, 2012), <http://www.loc.gov/law/foreign-news/article/brazil-criminalization-of-some-abortions-ruled-unconstitutional/> (explaining that the Brazilian Federal Supreme Court ruled unconstitutional a portion of Brazil's penal code that criminalized abortion of anencephalic babies).

mother's life—would be more extreme. The Texas statute was so extreme that it violated the right to equal protection.

As I explained earlier in this Article, a law based on sex-selective sympathy and indifference—based, that is, on a failure to extend to women *the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men*—violates the human right to moral equality; such a law therefore violates the constitutional right to equal protection. Even if, from some perspectives, it is admirable (or even heroic) for a woman to continue with a pregnancy that poses a serious threat of grave and irreparable harm to her physical health, a law that coerces her to do so, like a law that bans abortions necessary to protect the mother's life, is so extreme as to be fairly judged to be based on sex-selective sympathy and indifference.¹⁰⁹ Even if, from some perspectives, it is admirable for a woman to continue with a pregnancy that began with rape, a law that coerces her to do so is so extreme as to be fairly judged to be based on sex-selective sympathy and indifference.¹¹⁰ And even if, from some perspectives, it is admirable for a woman to continue with a pregnancy that will yield a child who, because of a grave defect, is “born into what is certain to be a brief life of grievous suffering”¹¹¹—or a child who is missing a major portion of its brain and is destined to die in utero or shortly after birth—a law that coerces her to do so, in spite of the fact that the child will die not long after it has been born, is so extreme as to be fairly judged to be based on sex-selective sympathy and indifference.¹¹² It is not within what Justice Souter called “the zone of

¹⁰⁹ Terminating a *post-viability* pregnancy that threatens the mother's life or that poses a serious threat of grave and irreparable harm to her physical health does not require that the life of the unborn child be terminated. Randy Beck, *Overcoming Barriers to the Protection of Viable Fetuses*, 71 WASH. & LEE L. REV. 1263, 1268–69 (2014); Jeffrey Kluger, *A Premie Revolution: Cutting-Edge Medicine and Dedicated Caregivers Are Helping the Tiniest Babies Survive—and Thrive*, TIME, June 2, 2014, at 26–27, 30 (discussing the medical advances surrounding premature birth). In 1998, the *New York Times* reported that because of advances “in neonatology, most experts place the point of fetal viability at 23 or 24 weeks.” Sheryl Gay Stolberg, *The Nation; Shifting Certainties in the Abortion War*, N.Y. TIMES (Jan. 11, 1998), <https://www.nytimes.com/1998/01/11/weekinreview/the-nation-shifting-certainties-in-the-abortion-war.html>.

¹¹⁰ This is not to suggest that the law must give a woman whose pregnancy began with rape the option of waiting until late into her pregnancy to decide to have an abortion. In any event, and as I said in the preceding footnote, terminating a *post-viability* pregnancy does not require that the life of the unborn child be terminated.

¹¹¹ Schwartz, *supra* note 107.

¹¹² Consider, in that regard: In *Mellet v. Ireland*, the UN Human Rights Committee ruled that in the circumstances of the case, Ireland's forcing a woman to choose between continuing with her pregnancy and travelling to another country to terminate her pregnancy violated three articles of the International Covenant on Civil and Political Rights: Article 7 (the right not to be subjected to cruel, inhuman, or degrading treatment), Article 17 (the right to privacy), and Article 26 (the right to be free from sex-based discrimination). Human Rights Comm., CCPR/C/116/D/2324 (Mar. 31, 2016); see Fiona de Londras, *Introductory Note to Mellet v. Ireland (H.R. Comm.)*, 56 INT'L LEGAL MATERIALS 217, 229–30 (2017) (explaining the Committee's findings). In this case, Ms. Mellet “was

reasonableness”¹¹³ to deny that a law that coerces a woman to continue with a pregnancy that falls into one of the three categories just described is based, in part, on a failure to extend to women the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men.¹¹⁴ The Texas statute was so extreme that had it not already been on the books in 1973, it is unlikely that it would have been put on the books. In any event, because it was so extreme, the statute was based on sex-selective sympathy and indifference—and therefore violated the right to equal protection.

A clarification is in order here: To say that a law is based on X—in the sense that the law would not have been enacted, or would not be maintained, but for X—is not to deny that the law might also be based on Y. There can be more than one “but for” rationale for a law. In particular, to say that the Texas statute was based in part on a failure to extend to women the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men—and therefore violated the right to equal protection—is not to deny that the statute was also based in part on a view to the effect that even at the earliest gestational stage, an unborn human being has the same moral status as a newborn infant.

informed by public medical professionals, in the twenty-first week of her pregnancy, that fetus had congenital defects and would die in utero or shortly after birth.” *Id.* at 231. *See also* Sarah E. Levin, *I Shouldn't Be Forced to Give Birth to a Baby Who Won't Live*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/opinion/abortion-hyde-amendment.html?searchResultPosition=1> (explaining how federal health insurance refused to cover an abortion).

¹¹³ *See infra* note 126 and accompanying text.

¹¹⁴ *See* Marc Santora & Joanna Berendt, *Polish Women Protest Proposed Abortion Ban (Again)*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/world/europe/poland-abortion-women-protest.html?searchResultPosition=1>:

WARSAW — To Magda, giving birth would have meant inflicting a slow death. Her unborn child had a rare genetic syndrome that causes severe, fatal birth defects.

“I would feed it, hug it, love it, get attached to it, and then, when it would be 3 or 4 months old, it would suffocate while in my arms,” she recalled, explaining her decision a decade ago to have an abortion. “It would scar me for life. I don’t know if I would be capable of giving birth to another child and not look at it as if it were the one that had died in my arms.”

She asked that her surname not be used, fearing that the agonizing decision she made could be used to shame her. But even in Poland, an overwhelmingly Roman Catholic country with some of the strictest anti-abortion laws in Europe and a government seeking to curb reproductive rights, it is a decision she could still make legally — at least for now.

Lawmakers from the governing Law and Justice party, who have previously tried to ban all abortions, are making a renewed push to outlaw them, even when the fetus is sure to die in infancy.

The Georgia statute at issue in *Doe v. Bolton*¹¹⁵ was more permissive than the Texas statute. The statute exempted abortions if “(1) a continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) the pregnancy resulted from forcible or statutory rape.”¹¹⁶ For some, the conclusion that the Texas statute was based on sex-selective sympathy and indifference is too speculative and contentious to have warranted a ruling against the statute. Although I disagree, I concur that the conclusion that the Georgia statute—which, again, was more permissive than the Texas statute—was based on sex-selective sympathy and indifference is too speculative to have warranted a ruling against the statute. It bears mention, in that regard, that the Georgia statute was a reform measure, patterned, as the Court explained in *Doe v. Bolton*:

upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962) . . . The ALI proposal has served [as of 1973] as the model for recent legislation in approximately one-fourth of our States. The new Georgia provisions replaced statutory law that had been in effect for more than 90 years. . . . The predecessor statute paralleled the Texas legislation considered in *Roe v. Wade* . . . and made all abortions criminal except those necessary “to preserve the life” of the pregnant woman.¹¹⁷

The conclusion (or assumption) that the Georgia statute was not based on sex-selective sympathy and indifference and so did not violate the right to equal protection leaves open the question whether the statute violated any other constitutional right. The statute obviously implicated the right of privacy: “the right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹⁸ However, that the Georgia statute *implicated* the right of privacy does not entail that it *violated* the right; a law (or other policy) violates the right if, and only if, the law is not necessary to serve a very weighty (“compelling”) government objective.

That the Georgia statute served such an objective is clear: Protecting human life is a paramount government objective, and that the life being protected is unborn does not *ipso facto* render the government objective less weighty. It is noteworthy that U.S. law makes it a crime to injure or

¹¹⁵ 410 U.S. 179, 181 (1973).

¹¹⁶ 1968 Ga. Laws 1277–78.

¹¹⁷ 410 U.S. at 182–83 (citations omitted).

¹¹⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

kill a “child in utero”—defined as “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb”—while committing one or more of over sixty different federal crimes.¹¹⁹

No government objective is legitimate, much less compelling, under the right of privacy, as I explained earlier in this Article, if government’s pursuit of the objective is based on—in the sense that government would not be pursuing the objective but for—a sectarian moral belief. Government’s pursuit of the objective of protecting unborn human life is based partly on the premise that human life is worthy of protection, and partly on the premise that unborn human life *is* human life. Although the former premise is a moral premise, it is not at all sectarian; the latter premise is not a moral premise, nor is it sectarian: That unborn human life is human life—that an unborn human being is a member of the human species, not of some other species—is an uncontested biological fact. Even though “many describe the status of the embryo imprecisely by asking when human life begins or whether the embryo is a human being. No one seriously denies that the human zygote is a human life. The zygote is not dead. It is also not simian, porcine, or canine.”¹²⁰ Philosopher Peter Singer, who is famously pro-choice, has acknowledged that “the early embryo is a ‘human life.’ Embryos formed from the sperm and eggs of human beings are certainly human, no matter how early in their development they may be. They are of the species *Homo sapiens*, and not of any other species. We can tell when they are alive, and when they have died. So long as they are alive, they are human life.”¹²¹ Similarly, constitutional scholar Laurence Tribe, a staunch pro-choice advocate, has written that “the fetus is alive. It belongs to the human species. It elicits sympathy and even love, in part because it is so dependent and helpless.”¹²² It is beyond serious debate that unborn human life *is* human life.

Moreover, that the Georgia statute was necessary to serve the weighty objective it was designed to serve is also clear: Just as there is no reason to doubt that there are fewer infanticides in consequence of a criminal ban on infanticide than there would be if there were no such ban, there is no reason to doubt that there are fewer abortions under a criminal ban on

¹¹⁹ The law is codified in two sections of the United States Code. See 18 U.S.C. § 1841 (2012) (outlining the protection of unborn children); 10 U.S.C. § 919(a) (2012) (outlining death or injury of an unborn child).

¹²⁰ H. Tristram Engelhardt, Jr., *Moral Knowledge: Some Reflections on Moral Controversies, Incompatible Moral Epistemologies, and the Culture Wars*, 10 CHRISTIAN BIOETHICS 79, 84 (2004).

¹²¹ PETER SINGER, *THE PRESIDENT OF GOOD AND EVIL: THE ETHICS OF GEORGE W. BUSH* 37 (Open Road Media ed. 2004).

¹²² Laurence H. Tribe, *Will the Abortion Fight Ever End: A Nation Held Hostage*, N.Y. TIMES (July 2, 1990), <https://www.nytimes.com/1990/07/02/opinion/will-the-abortion-fight-ever-end-a-nation-held-hostage.html>.

abortion—indeed, significantly fewer—than there would be if there were no such ban.

But even if the Georgia statute was necessary to serve a very weighty government objective, there remains this concern: A ban on abortion—even a ban, such as the Georgia statute, of a *relatively* permissive sort—imposes a heavy burden on the women who, but for the ban, would choose to have an abortion. As the concurrence stated in *Roe v. Wade*:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹²³

Notwithstanding the heavy burden it imposed on (some) women, many conclude that a ban on abortion—at least, a ban, such as Georgia's, that exempted several categories of abortion—is warranted: in particular, those who discern no good reason to distinguish, along the dimension of importance, among (a) the welfare of newborns and infants, (b) the welfare of unborn human beings at a late gestational stage, and (c) the welfare of unborn human beings at an early gestational stage. That position is not unreasonable. “[N]o stage of nascent development . . . is so significant that it points to a major qualitative change: not implantation, not quickening,

¹²³ 410 U.S. 113, 153 (1973). In his justly famous critique of the Supreme Court's rulings in the Abortion Cases, John Hart Ely wrote that we must “not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life.” John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923 (1973). According to Richard Posner, the Court in the Abortion Cases *understated* the weight of the burden:

No effort is made to dramatize the hardships to a woman forced to carry her fetus to term against her will. The opinion does point out that “maternity, or additional offspring, may force upon the woman a distressful life and future,” and it elaborates on the point for a few more sentences. But there is no mention of the woman who is raped, who is poor, or whose fetus is deformed. There is no reference to the death of women from illegal abortions.

not viability, not birth.”¹²⁴ By contrast, many others conclude that the heavy burden that even the *relatively* permissive Georgia statute imposed on women is too great: In particular, those whose concern for the welfare of the women who bear, or would bear, the burden dominates their concern for the welfare of unborn human beings at an early gestational stage. Such persons typically believe that there *is* good reason to distinguish, along the dimension of importance, between the welfare of newborns and infants and the welfare of unborn human beings at an early gestational stage—for example, at the stage prior to the emergence of what philosopher David Boonin has called “organized cortical brain activity,” which, Boonin explains, emerges no earlier than approximately the twenty-fifth week of gestation.¹²⁵ That position, too, is not unreasonable.

However, it is not proper business of the Supreme Court to resolve disagreements like that described in the preceding paragraph. As Justice Souter wrote in his concurring opinion in *Washington v. Glucksberg*, in which the Court unanimously rejected a constitutional challenge to a ban on physician-assisted suicide:

[This Court] has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside *the realm of the reasonable*. . . . [We should] respect legislation within *the zone of reasonableness*. . . . It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.¹²⁶

¹²⁴ RICHARD A. MCCORMICK, S.J., CORRECTIVE VISION: EXPLORATIONS IN MORAL THEOLOGY 183 (1994). Cf. Michael J. Wreen, *The Standing Is Slippery*, 79 PHILOSOPHY 553, 571–72 (2004) (emphasis added):

The Abortion Argument offers an indirect argument for its conclusion, one that simply piggybacks on the claim that a given being, a two-year-old, is a human being/person/etc. The fundamental grounds for, say, possession of a right to life are not mentioned, much less explored, in the argument. What this means is that it’s a secondary, indirect argument, one that attempts to carry the day *without itself tackling any of the weightier issues, both metaphysical and moral, that surround humanity, personhood, moral status, and the right to life*. It could be that such an argument is the best that can be done as far as the issue of fetal status and the morality of abortion is concerned.

¹²⁵ DAVID BOONIN, A DEFENSE OF ABORTION 115 et seq. (2002).

¹²⁶ *Washington v. Glucksberg*, 521 U.S. 702, 764–65, 768 (Souter, J., concurring) (emphasis added).

Under the right of privacy, the Court has no business striking down—it acts too aggressively in striking down—a law or other policy that is necessary to serve a weighty government objective just because the Court can “identify [and prefers] a reasonable resolution of contending values that differs from the terms of the legislation under review.”¹²⁷ If the law at issue is necessary to serve a weighty government objective, it should be enough to uphold the law that the lawmakers’ resolution of the contending values is, in Justice Souter’s phrasing, “within the zone of reasonableness.”¹²⁸

For the foregoing reasons—reasons that presuppose the theory of judicial review set forth at the beginning of this Article—I conclude that the Texas statute struck down by the Supreme Court in *Roe v. Wade*, but not the Georgia statute struck down in *Doe v. Bolton*, was unconstitutional.¹²⁹ My conclusion is, of course, controversial: many insist that *both* statutes were unconstitutional; many others insist that *neither* statute was unconstitutional. Although controversial, my conclusion brings me into alignment with the position espoused by Justice Ruth Bader Ginsburg in 1985, when she was a judge of the United States Court of Appeals for the District of Columbia Circuit.¹³⁰

¹²⁷ PERRY, *WE THE PEOPLE*, *supra* note 35, at 157.

¹²⁸ *Washington*, 521 U.S. at 702, 764–65, 768. Cf. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 50–51 (1993):

[T]hink what we might say to some public-spirited citizen who wishes to launch a campaign or lobby her [representative] on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But—like her suffragette forbears—she wants a vote; she wants her voice and her activity to count on matters of high political importance.

[I]magine ourselves saying to her: “You may write to the newspaper and get up a petition and organize a pressure group to lobby [the legislature]. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view . . . does not accord with the judges’ view. When their votes differ from yours, theirs are the votes that will prevail.” It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.

¹²⁹ To say that the Texas statute struck down by the Court in *Roe v. Wade* was unconstitutional is not to say that the statute was unconstitutional for the reasons the Court gave; it is not to say that the Court’s opinion in *Roe v. Wade* was adequate to its judgment.

¹³⁰ See Ginsburg, *supra* note 102, at 381–82 (stating that the Supreme Court “properly invalidated the Texas [law]” in *Roe*, but that the change encapsulated in the decision went too far); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 n.83 (1992) (suggesting that if

V. SAME-SEX MARRIAGE

Now, the constitutional controversy concerning same-sex marriage: Does excluding same-sex couples from civil marriage—the exclusion policy—violate the Constitution? In *Obergefell v. Hodges* a sharply divided Supreme Court ruled it does,¹³¹ which does not entail that the ruling was correct. Nor does the ruling, even if correct, entail that the reasoning the Court deployed in support of its ruling was sound. Although in my judgment the ruling was correct, my rationale in the following pages differs from the rationale on which the Court in *Obergefell* relied.¹³²

The inquiry I will pursue here: Does the exclusion policy violate either the constitutional right to equal protection or the constitutional right of privacy?

The exclusion policy obviously disadvantages some same-sex couples—those who want access to civil marriage—and the more extreme the policy, the more severe the disadvantage. The most extreme version of the policy: refusing to grant to same-sex couples any of the legal benefits that accompany access to civil marriage. A less extreme version: granting to same-sex couples some, but not all of the legal benefits that accompany access to civil marriage. The least extreme version: granting to same-sex couples all of the legal benefits that accompany access to civil marriage, but refusing to honor the same-sex union—refusing to dignify it—with the title “marriage.”¹³³ However, that the exclusion policy disadvantages same-sex couples does not mean that the policy violates the right to equal protection. Whether the policy violates the right to equal protection depends on whether the policy is based on the demeaning view that

the Supreme Court had only struck down the extreme Texas law in *Roe* and left the Georgia law in *Doe*, the rulings may have “reduce[d] rather than . . . fuel[ed] controversy”).

¹³¹ *Obergefell v. Hodges*, 138 S. Ct. 2584, 2591 (2015) (writing the five-person majority is Justice Kennedy, with four Justices filing four dissents).

¹³² The Court, in an opinion by Justice Anthony Kennedy, relied at some points on the Equal Protection Clause and at other points on “substantive due process” doctrine. *Id.* at 2602–03. The opinion is not the model of clarity. For a collection of alternative *Obergefell* opinions, some of them dissenting, by several legal scholars, see, for example, Jeremy Waldron, *What a Dissenting Opinion Should Have Said in Obergefell v. Hodges* 1, 16 (N.Y. Univ. Sch. of Law: Public Law & Legal Theory Research Paper Series, Working Paper No. 16–44, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844811 (concluding that it is not the “proper role of the federal judiciary to effect such a change”); Douglas NeJaime & Reva Siegel, (*Concurring*), in *WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID* 112 (Jack M. Balkin ed., 2020) (writing separately to emphasize the broad protections under the Due Process Clause for same-sex couples who similarly “have liberty interests in family formation and recognition [like] different-sex couples”).

¹³³ Refusing to honor the same-sex union—refusing to dignify it—with the title “marriage” does disadvantage same-sex couples. See Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 2004–13 (2012) (discussing that there are no substitutes for recognition of marriage because of the rights that marriage confers and the symbolic importance of marriage); Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184, 199 (2013) (noting that LGBT rights advocates seek marriage as the “only true mark of equality”).

LGBTQ+ persons are morally inferior human beings.¹³⁴ Is the policy based on that view? Government action is based on a view if, but for the view, the government would not be doing what it is doing. Is the demeaning view that LGBTQ+ persons are morally inferior a “but for” predicate of the exclusion policy?

The view that LGBTQ+ persons are morally inferior is sadly familiar. Judge Richard Posner, writing about the “irrational fear and loathing of” LGBTQ+ persons, has observed that they, like the Jews with whom they “were frequently bracketed in medieval persecutions[,] . . . are despised more for what they are than for what they do”¹³⁵ The Connecticut Supreme Court has echoed that observation, noting that LGBTQ+ persons are often “‘ridiculed, ostracized, despised, demonized and condemned’ merely for being who they are”¹³⁶ Legal scholar Andrew Koppelman has rehearsed some grim examples, including “the judge’s famous speech at Oscar Wilde’s sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, [which] ‘treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people.’”¹³⁷ Koppelman continues:

From this it is not very far to Heinrich Himmler’s speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs “was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them.”¹³⁸

¹³⁴ See *Obergefell*, 138 S. Ct. at 2604 (discussing that unequal policy “serves to disrespect and subordinate [same-sex couples]”).

¹³⁵ POSNER, *supra* note 123, at 346. As history teaches, the “irrational fear and loathing” of any group often has tragic consequences. The irrational fear and loathing of gays and lesbians is no exception. There is, for example, the horrible phenomenon of “gay bashing.” ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 164 (1996).

The coordinator of one hospital’s victim assistance program reported that “attacks against gay men were the most heinous and brutal I encountered.” A physician reported that injuries suffered by the victims of homophobic violence he had treated were so “vicious” as to make clear that “the intent is to kill and maim”

Id. at 165 (citations omitted). As “[a] federal task force on youth suicide noted[,] because ‘gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from family and peers,’ young gays are two to three times more likely than other young people to attempt and to commit suicide.” *Id.* at 149.

¹³⁶ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 446 (Conn. 2008) (quoting *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 454 (Mont. 2004) (Nelson, J., concurring)).

¹³⁷ Andrew Koppelman, *Are the Boy Scouts Being as Bad as Racists?: Judging the Scouts’ Antigay Policy*, 18 PUB. AFF. Q. 363, 372 (2004).

¹³⁸ *Id.* (citation omitted).

So we should not discount the possibility that some laws and policies that disadvantage LGBTQ+ persons do indeed violate the right to equal protection. Until 2010, an ugly example remained on the books in Florida: “No person eligible to adopt under [the Florida Adoption Act] may adopt if that person is a homosexual.”¹³⁹ Under the Florida law, which is fairly described as homophobic, ex-felons of all sorts may adopt a child; even a convicted child abuser may adopt a child.¹⁴⁰ But until 2010, no “homosexual” could do so.¹⁴¹ The Florida judiciary was right to rule that the statute violated the right that “[u]nder the Florida Constitution, each individual person has . . . equal protection of the laws.”¹⁴²

But that some laws and policies that disadvantage LGBTQ+ persons violate the right to equal protection does not mean that every law and policy that disadvantages LGBTQ+ persons violates the right to equal protection. And, as it happens, it is questionable whether in the contemporary United States, the view that LGBTQ+ persons are morally inferior is a “but for” predicate of the exclusion policy. “In the United States, this is, for many and perhaps most who support the exclusion policy, the dominant and sufficient rationale for the policy: [*Same-sex sexual conduct is immoral.*] *Admitting same-sex couples to civil marriage would . . . legitimize—‘normalize’—and thereby incentivize [immoral] conduct. This we must not do . . .*”¹⁴³ However, the claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that, say, theft is immoral asserts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, “the very point” of laws that criminalized interracial marriage was “to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites.”¹⁴⁴

¹³⁹ FLA. STAT. § 63.042(3) (West, Westlaw through 2019 1st Regular Sess.). However, this law was declared unconstitutional by Florida’s Third District Court of Appeals because it had “no rational basis.” *Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So.3d 79, 91 (Fla. Dist. Ct. App. 2010). Florida stopped enforcing the adoption ban in 2010, but the state legislature did not repeal the law until 2015. Bill Cotterell, *Governor Signs Law Repealing Gay Adoption Ban*, TALLAHASSEE DEMOCRAT (June 11, 2015, 7:00 PM), <https://www.tallahassee.com/story/news/politics/2015/06/11/governor-signs-law-repealing-gay-adoption-ban/71092762/>; John Schwartz, *Florida Court Calls Ban on Gay Adoptions Unlawful*, N.Y. TIMES (Sept. 22, 2010), <https://www.nytimes.com/2010/09/23/us/23adopt.html> (noting that the Florida law was thirty years old).

¹⁴⁰ See FLA. STAT. § 63.042 (West 2003) (excluding only “homosexual[s]” and persons with a physical disability or handicap from adopting).

¹⁴¹ *Id.*

¹⁴² *Adoption of X.X.G. & N.R.G.*, 45 So.3d at 83.

¹⁴³ Michael J. Perry, *Obergefell v. Hodges: An Imagined Opinion, Concurring in the Judgment 6* (Emory Sch. of Law Legal Studies Research Paper Series, Paper No. 15-356, 2015), <https://ssrn.com/abstract=2624022>.

¹⁴⁴ John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 509 (2005).

This is not to deny that some “of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it bespeaks and the hatred that it directs towards those who are its objects.”¹⁴⁵ Again, some laws and policies that disadvantage LGBTQ+ persons violate the right to equal protection. But “[n]ot all antigay views . . . deny the personhood and equal citizenship of gay people.”¹⁴⁶ As legal scholar Robert Nagel has emphasized, “[t]here is the obvious but important possibility that one can ‘hate’ an individual’s behavior without hating the individual.”¹⁴⁷ The pope and bishops of the Catholic Church insist that same-sex sexual conduct is immoral and are prominent—indeed, leading—opponents of “legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”¹⁴⁸ Nonetheless, the pope and bishops also insist that all human beings, LGBTQ+ persons no less than others, are equally beloved children of God: “[Our teaching] about the dignity of homosexual persons is clear. They must be accepted with respect, compassion, and sensitivity. Our respect for them means we condemn all forms of unjust discrimination, harassment or abuse.”¹⁴⁹

¹⁴⁵ Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 145 (2006).

¹⁴⁶ *Id.*

¹⁴⁷ Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS 34, 35 (May 1998), <https://www.firstthings.com/article/1998/05/004-playing-defense-in-colorado>.

¹⁴⁸ U.S. Catholic Bishops’ Administrative Committee Calls for Protection of Marriage, U.S. CONF. CATH. BISHOPS (Sept. 10, 2003), <http://www.usccb.org/news/2003/03-179.cfm>.

¹⁴⁹ *Id.* See also Helen M. Alvaré, *A “Bare . . . Purpose to Harm”? Marriage and Catholic Conscience Post-Windsor* 27–28 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 14-14, 2014), <http://ssrn.com/abstract=2433741> (“[A]uthoritative Catholic sources repeat the imperative to respect homosexual persons and to condemn unjust discrimination.”). Cf. William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 697, 704 (2011) (footnotes omitted):

The Vatican’s 1975 Declaration *Persona Humana* announced that “homosexual acts” are “disordered,” but also acknowledged the modern distinction between sexual orientation and sexual acts. The next year, the National Conference of Catholic Bishops responded with a more gay-tolerant document, “To Live in Christ Jesus,” which said this: “Homosexuals, like everyone else, should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice. They should have an active role in the Christian community.” Different dioceses adopted slightly different readings of these documents. For example, the Church in the state of Washington interpreted the pronouncements to support the conclusion that “*prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual orientation or activity.*” . . .

[R]eflecting a strong turn in public opinion toward toleration for gay people, the American Catholic Church was subtly readjusting its doctrinal stance toward homosexuality. According to the Vatican, men and women with homosexual tendencies “must be accepted with respect, compassion, and sensitivity. Every sign

Predictably, many will be quick to claim that government may not adjudge—that it is no part of government’s legitimate business to adjudge—same-sex sexual conduct to be immoral. However, if it is true that government may not adjudge same-sex sexual conduct to be immoral, it is not because government’s doing so violates the right to equal protection. Again, adjudging same-sex sexual conduct to be immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings. Therefore, if government may not exclude same-sex couples from civil marriage, or otherwise disadvantage LGBTQ+ persons, based on the premise that same-sex sexual conduct is immoral, it is because government’s doing so violates a constitutional norm other than the right to equal protection.

Let’s consider, in that regard, the constitutional right of privacy, which, as I explained earlier in this Article, protects certain fundamental aspects of moral freedom: the freedom to live one’s life in accord with one’s moral convictions and commitments. A core aspect of the moral freedom covered by the right of privacy is the freedom to live one’s life in an intimate association with another person—an intimate association, that is, of the sort many¹⁵⁰ regard as marital. As the Massachusetts Supreme Court emphasized in 2003, “the decision whether and whom to marry is among life’s momentous acts of self-definition.”¹⁵¹

A clarification of the scope of the right of privacy—a clarification by way of analogy—is useful here:

- The *religious* freedom that is constitutionally protected (the right to the free exercise of religion) obviously entails freedom from government action punishing one for making a particular choice in exercising one’s religious freedom. But it also includes freedom from government action discriminating against one for making

of unjust discrimination in their regard should be avoided.” After fighting the antidiscrimination law in Massachusetts through the 1980s, Catholic dioceses acquiesced in similar laws adopted by Catholic Connecticut in 1991 and Catholic Rhode Island in 1995. Archbishop John Francis Whealon of Hartford, Connecticut said this in 1991: “The Church clearly teaches that homosexual men and women should not suffer prejudice on the basis of their sexual orientation. Such discrimination is contrary to the Gospel of Jesus Christ and is always morally wrong.” Many Connecticut legislators took the Archbishop’s statement as tacit approval of the antidiscrimination measure (adorned with religious liberty-protective exemptions). The Roman Catholic shift in emphasis—not necessarily a shift in precise doctrine—was representative of organized religion in America, as public opinion shifted strongly toward toleration of gay Americans and same-sex couples.

¹⁵⁰ But, of course, not all. *See, e.g.*, SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 17–21 (2012) (refuting the revisionist view that marriage is distinguished by emotional union and activities that foster it).

¹⁵¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

a particular choice in exercising one's religious freedom—in particular, by withholding from one benefits that are bestowed on others who make a different choice in exercising their religious freedom.

- Similarly, the *political* freedom that is constitutionally protected (e.g., the right to the freedom of speech) includes not only freedom from government action punishing one for making a particular choice in exercising one's political freedom, but also freedom from government action withholding benefits bestowed on others who make a different choice in exercising their political freedom.
- As with constitutionally protected religious freedom and constitutionally protected political freedom, so too with constitutionally protected moral freedom: it includes not only freedom from government action punishing one for making a particular choice in exercising one's moral freedom, but also freedom from government action withholding benefits bestowed on others who make a different choice in exercising their moral freedom.

So, by withholding benefits from a same-sex couple who choose to live their lives in an intimate association (of the sort many regard as marital) with one another while bestowing benefits on a heterosexual couple who choose to live their lives in an intimate association with one another, the exclusion policy implicates the right of privacy.

However, that the exclusion policy *implicates* the right of privacy does not entail that the policy *violates* the right. Like the right to religious freedom and the right to political freedom, the right of privacy is not unconditional (absolute), but conditional. A policy that implicates the right does not violate the right if the policy satisfies this condition. The policy serves a weighty government objective and there is no other way to serve the objective, or to serve it nearly as well. Does the exclusion policy satisfy that condition?

The government objectives that have been asserted in defense of the exclusion policy are of two sorts: morality-based and non-morality-based. By “non-morality-based” objectives, I mean objectives whose pursuit by government does not presuppose that same-sex sexual conduct is immoral.

As I noted earlier, the dominant defense of the exclusion policy, in the United States and elsewhere, involves a morality-based government objective: “[*Same-sex sexual conduct is immoral.*] *Admitting same-sex couples to civil marriage would . . . legitimize—‘normalize’— and thereby*

incentivize [immoral] conduct. *This we must not do . . .*”¹⁵² For example, in 2003, the Vatican—specifically, the Congregation for the Doctrine of the Faith, whose Prefect at the time, Joseph Cardinal Ratzinger, later became Pope Benedict XVI—argued that admitting same-sex couples to civil marriage would signal “the approval of deviant behaviour, with the consequence of making it a model in present-day society.”¹⁵³

Excluding same-sex couples from civil marriage obviously serves the government objective of not taking a step that would legitimize conduct that many believe to be immoral: same-sex sexual conduct. The serious question is whether that government objective—that *morality-based* government objective—qualifies as a *legitimate* government objective, much less a weighty one, under the right of privacy. The answer depends on the reason or reasons lawmakers have for believing that same-sex sexual conduct is immoral. If the only reason lawmakers have is a religious reason—for example, and in the words of one evangelical minister, same-sex sexual conduct is “in direct opposition to God’s truth as He has revealed it in the Scriptures”¹⁵⁴—then the government objective is clearly

¹⁵² Perry, *supra* note 143, at 6. In his letter to the Congress, U.S. Attorney General Eric Holder stated: “[T]he legislative record underlying DOMA’s passage contains . . . numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships” Press Release, Eric H. Holder, Jr., Attorney Gen., Dep’t of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>. In a footnote attached to that sentence—note vii—the Letter states:

See, e.g., H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”); *id.* at 16 (same-sex marriage “legitimizes a public union, a legal status that most people . . . feel ought to be illegitimate” and “put[s] a stamp of approval . . . on a union that many people . . . think is immoral”); *id.* at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality”); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are “in accord with nature and hence have a moral component”); *id.* at 31 (favorably citing the holding [of the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] that an “anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable”); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer v. Evans*, 517 U.S. 620 (1996)] that “[t]his Court has no business . . . pronouncing that ‘animosity’ toward homosexuality is evil”).

Id. (first through third, seventh, ninth, and tenth alterations in original).

¹⁵³ Joseph Card. Ratzinger & Angelo Amato, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, Congregation for the Doctrine of the Faith, VATICAN (June 3, 2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

¹⁵⁴ Peter Slevin, *33 Pastors Flout Tax Law with Political Sermons*, WASH. POST (Sept. 29, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802365.html>. For many Christians, even many evangelical Christians, the belief that same-sex sexual conduct is contrary to the will of God is no longer credible. *See, e.g.*, DAVID A. MYERS & LETHA DAWSON SCANZONI,

not legitimate. Although government's acting to protect *public* morals is undeniably a legitimate government objective, government's acting to protect *sectarian* morals, as I explained earlier, is not a legitimate government objective. *The right of privacy leaves no room for the political-powers-that-be to ban or otherwise impede conduct, such as contraception, based on a religious or otherwise sectarian belief that the conduct is immoral.*

Of course, a religious reason is not the only reason lawmakers have for believing that same-sex sexual conduct is immoral. Indeed, the path of reasoning runs in the opposite direction for many religious believers, whose position is not that same-sex sexual conduct is immoral because it is contrary to the will of God, but that same-sex sexual conduct is contrary to the will of God because it is immoral.¹⁵⁵

Again, the pope and bishops of the Roman Catholic Church—the “magisterium” of the Church—are leading opponents of “legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”¹⁵⁶ The magisterium's reason—its rationale—for believing that same-sex sexual conduct is immoral is a nonreligious reason: a reason that does not assert, imply, or presuppose that God—or any other transcendent reality—exists.¹⁵⁷

According to the magisterium, it is immoral not just for same-sex couples but for anyone and everyone—even a man and a woman who are married to one another—to engage in (i.e., pursuant to a knowing, uncoerced choice to engage in) any sexual conduct that is “inherently nonprocreative,” and same-sex sexual conduct—like contracepted male-female sexual intercourse, masturbation, and both oral and anal sex—is inherently nonprocreative.¹⁵⁸ Because “[w]hat are called ‘homosexual unions’ . . . are inherently non-procreative,” declared the Administrative

WHAT GOD HAS JOINED TOGETHER: THE CHRISTIAN CASE FOR GAY MARRIAGE (2005) (arguing in support of marriage for all—including same-sex couples—while maintaining a traditional defense of marriage).

¹⁵⁵ It is not always clear which of two different positions one is espousing when one says that X is contrary to the will of God: (1) X is contrary to the will of God and *therefore* immoral, or (2) X is immoral and therefore contrary to the will of God. According to the first position, the reason for concluding that X is immoral is theological: “X is contrary to the will of God.” But according to the second position, the reason for concluding that X is immoral is unstated and not necessarily theological, even though the “therefore” is a theological claim.

¹⁵⁶ *U.S. Catholic Bishops' Administrative Committee Calls for Protection of Marriage*, *supra* note 148.

¹⁵⁷ *See id.* (stating that “homosexual unions” cannot be given the status of marriage because “they are inherently non-procreative”).

¹⁵⁸ *See* LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* 264 (2004) (“Sexual intercourse, a gift ‘proper and exclusive’ to marriage, was—in the ‘objective moral order established by God’—inseparably bound up with the begetting of new life.”).

Committee of the U.S. Conference of Catholic Bishops, they “cannot be given the status of marriage.”¹⁵⁹ As Joseph Cardinal Ratzinger stated in 2003, speaking for the Congregation for the Doctrine of the Faith, because they “close the sexual act to the gift of life,” “homosexual acts go against the natural moral law.”¹⁶⁰

The pope and bishops’ position that inherently nonprocreative sexual conduct is, as such—as inherently nonprocreative—immoral is a conspicuously sectarian moral position. It bears emphasis, in that regard, that the position is extremely controversial *even just among Catholic moral theologians*,¹⁶¹ not to mention among the larger community of religious ethicists.

In the United States, the exclusion policy, now defunct because of the Supreme Court’s decision in *Obergefell v. Hodges*, was based on—the policy almost certainly would not have remained on the books in those states where it remained on the books but for—the affirmation by many citizens of a religious (e.g., biblical) rationale and/or the bishops’ nonreligious rationale for holding fast to the belief that same-sex sexual

¹⁵⁹ *U.S. Catholic Bishops’ Administrative Committee Calls for Protection of Marriage*, *supra* note 148. See also Ratzinger & Amato, *supra* note 153 (“Homosexual unions are totally lacking in the biological and anthropological elements of marriage Such unions are not able to contribute in a proper way to the procreation and survival of the human race.”).

¹⁶⁰ Ratzinger & Amato, *supra* note 153. See also Hollenbach, *supra* note 85, at 75 (“The United States Catholic Bishops have adopted particularly pointed public advocacy positions on . . . resistance to gay marriage and public acceptance of the legitimacy of same sex relationships. The Bishops’ 2007 statement *Forming Consciences for Faithful Citizenship* was a formal instruction by the U.S. hierarchy covering the full range of the public dimensions of the Church’s moral concerns. In this document, . . . echoing the affirmation by the Catechism of the Catholic Church that homosexual acts ‘are contrary to the natural law’ and that ‘under no circumstances can they be approved,’ the bishops oppose[d] ‘same-sex unions or other distortions of marriage.’”).

¹⁶¹ See, e.g., MARGARET A. FARLEY, *JUST LOVE: A FRAMEWORK FOR CHRISTIAN ETHICS* 286, 288 (2006) (arguing that “absolute prohibition of same-sex relationships” cannot be maintained on the “basis of sheer human rationality”); TODD A. SALZMAN & MICHAEL G. LAWLER, *SEXUAL ETHICS: A THEOLOGICAL INTRODUCTION* 180–82 (2012) (“Nothing we have argued . . . proves that *all* homosexual acts are morally right[,] . . . only that the arguments advanced by the Church’s Magisterium to sustain the judgment that *all* homosexual acts are morally wrong are unsound and need to be revisited.”); Stephen J. Pope, *The Magisterium’s Arguments Against “Same-Sex Marriage”: An Ethical Analysis and Critique*, 65 *THEOLOGICAL STUD.* 530, 562–64 (2004) (criticizing the magisterium’s stance on same-sex marriage, calling it “flawed”). Moreover, “[a] report by Washington-based Public Religion Research Institute found that 74 percent of Catholics favor legal recognition for same-sex relationships, either through civil unions (31 percent) or civil marriage (43 percent). That figure is higher than the 64 percent of all Americans, 67 percent of mainline Protestants, 48 percent of black Protestants and 40 percent of evangelicals.” Religion News Serv., *Catholics Supportive of Gay Unions*, NAT’L CATH. REP., Apr. 1, 2011, at 16. “What’s more, even among Catholics who attend services weekly or more, only about one-third (31%) say there should be no legal recognition for a gay couple’s relationship, a view held by just 13% of those who attend once or twice per month and 16% of those who attend less often.” Nick Sementelli, *New Poll: Nuance on Same-Sex Unions Drives Up Catholic Support*, FAITH PUB. LIFE (Mar. 22, 2011, 11:05 AM), http://blog.faithinpubliclife.org/2011/03/new_poll_highlights_catholic_s.html [https://web.archive.org/web/20111123013731/http://blog.faithinpubliclife.org/2011/03/new_poll_highlights_catholic_s.html].

conduct is immoral. But, again, the right of privacy leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on a sectarian moral belief. Recall from earlier in this Article what Catholic moral theologian John Courtney Murray wrote, in the mid-1960s, in his *Memo to [Boston's] Cardinal Cushing on Contraception Legislation*:

[T]he practice [of contraception], undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence¹⁶²

We may say about the exclusion policy much the same thing Father Murray said to Cardinal Cushing about Massachusetts's anti-contraception policy:

*Same-sex marriage has received official approval by various religious groups within the community.*¹⁶³ *It is difficult to see how the state can refuse to countenance, as contrary to public morality, a relationship that numerous religious leaders and other morally upright people approve as morally good. The stand taken by these religious groups and others may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of the right to moral freedom, articulated in the constitutional law of the United States as "the right of privacy."*¹⁶⁴

¹⁶² See Murray, *supra* note 85.

¹⁶³ Samuel G. Freedman, *Push Within Religions for Gay Marriage Gets Little Attention*, N.Y. TIMES (July 24, 2015), <https://www.nytimes.com/2015/07/25/us/push-within-religions-for-gay-marriage-gets-little-attention.html>. See also Eskridge, Jr., *supra* note 149, at 707–08 (noting that gay marriages are recognized by various religious groups); Laurie Goodstein, *Unions That Divide: Churches Split Over Gay Marriage*, N.Y. TIMES (May 13, 2012), <https://www.nytimes.com/2012/05/14/us/gay-marriage-issue-divides-churches.html> ("But in the clash over homosexuality, the battle lines do not simply pit ministers against secular advocates for gay rights. Religion is on both sides in this conflict."); Maggie Astor, *Illinois Clergy Members Support Same-Sex Marriage in Letter Signed by 260*, N.Y. TIMES (Dec. 23, 2012), <https://www.nytimes.com/2012/12/24/us/260-in-illinois-clergy-call-for-legal-gay-marriage.html> ("More than 250 religious leaders in Illinois have signed an open letter in support of same-sex marriage"). Cf. Samuel G. Freedman, *How Clergy Helped a Same-Sex Marriage Law Pass*, N.Y. TIMES (July 15, 2011), <https://www.nytimes.com/2011/07/16/us/16religion.html> (noting the efforts of liberal Christian and Jewish clergy advocating for the passage of same-sex marriage in New York).

¹⁶⁴ For original quote, see Murray, *supra* note 85.

Is there a non-morality-based government objective—an objective whose pursuit by government does not presuppose that same-sex sexual conduct is immoral—that fares better, under the right of privacy, than the foregoing morality-based government objective? The principal such objective that has been asserted in defense of the exclusion policy is this: *Excluding same-sex couples from civil marriage serves to decrease the number of future children who will be born and raised in single-parent families (where typically the single parent is a mother), which, as a general matter, is not the optimal way for children to be raised.*¹⁶⁵ The idea here is that the exclusion policy diminishes the continuing erosion of the institution of traditional (i.e., heterosexual) marriage, an institution that benefits society in numerous ways, but most importantly by decreasing the number of future children who will be born and raised in single-parent families.¹⁶⁶

Granting that decreasing the number of future children born and raised in single-parent families is not merely a legitimate government objective but a sufficiently weighty one,¹⁶⁷ under the right of privacy, this fundamental problem remains: the absence of evidence—evidence, as distinct from speculation about possible future scenarios—to support the proposition that there is a cause-effect relationship between excluding same-sex couples from civil marriage (cause) and decreasing the number of future children who will be born and raised in single-parent families (effect).¹⁶⁸ And given the absence of any evidence to support that proposition, how can we reasonably conclude that the exclusion policy serves the non-morality-based objective it is claimed to serve?

Other non-morality-based objectives that have been asserted in defense of the exclusion policy fare no better. Consider, for example, the case, *Varnum v. Brien*, in which the Iowa Supreme Court ruled that Iowa's exclusion policy violated the Iowa Constitution.¹⁶⁹ After considering several non-morality-based objectives—including “promotion of optimal environment to raise children,” “promotion of procreation,” and

¹⁶⁵ For an elaboration (and critique) of the argument, with citations to and quotations from prominent writings making the argument, see Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431, 434–44. For a recent variation on the argument, see Helen M. Alvaré, *A Children's Rights Perspective Dissent from Obergefell* 1–10 (George Mason Univ. Legal Studies Research Paper Series, Paper No. LS 18-06, 2018), <http://ssrn.com/abstract=3149912>.

¹⁶⁶ *Id.*

¹⁶⁷ See Koppelman, *supra* note 165, at 437 (referencing “data that shows . . . that single motherhood is especially hard on children”).

¹⁶⁸ See *id.* at 440 (“The causes of these patterns [of increasing single motherhood] are not well understood. One survey concludes that the most widely cited papers are ‘those that disprove a popular explanation, not those that support one.’” (quoting David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for Answers?*, in SOCIAL INEQUALITY 3 (Kathryn M. Neckerman ed., 2004))).

¹⁶⁹ *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

“promoting stability in opposite-sex relationships”¹⁷⁰—the court concluded: “We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.”¹⁷¹ The court then went on to say:

Now that we have addressed and rejected each specific interest advanced by the County to justify the [exclusion policy], we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County’s silence reflects, we believe, its understanding [that] this reason cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage.¹⁷²

Nor can that reason—religiously based moral opposition to same-sex marriage—justify the exclusion policy under the constitutional right of privacy, as I have explained.

In his dissenting opinion in *United States v. Windsor*, in which the Supreme Court ruled unconstitutional the Defense of Marriage Act’s exclusion of same-sex marriages from the federal definition of “marriage,”¹⁷³ Justice Scalia, joined by Justice Thomas, objected to what he perceived in the majority opinion to be an accusation that supporters of the statutory provision at issue in the case were prejudiced bigots.¹⁷⁴ Justice Scalia complained that according to the majority, “only those with hateful hearts could have voted ‘aye’ on [the Defense of Marriage Act (DOMA)].”¹⁷⁵ He goes on to say that the majority treated DOMA’s “supporters as unhinged members of a wild-eyed lynch mob” and as “enem[ies] of human decency.”¹⁷⁶ “In the majority’s telling,” lamented Scalia, “this story is black-and-white: Hate your neighbor or come along with us.”¹⁷⁷ In his dissenting opinion in *Obergefell v. Hodges*, Chief Justice Roberts, joined by Justices Scalia and Thomas, stated:

Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people

¹⁷⁰ See *id.* at 897–904 (analyzing the proffered governmental objectives).

¹⁷¹ *Id.* at 906.

¹⁷² *Id.* at 904.

¹⁷³ *United States v. Windsor*, 570 U.S. 744, 775 (2013).

¹⁷⁴ *Id.* at 795–98 (Scalia, J., dissenting).

¹⁷⁵ *Id.* at 795.

¹⁷⁶ *Id.* at 796, 800.

¹⁷⁷ *Id.* at 802.

who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. By the majority’s account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States’ enduring definition of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. . . . It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray every-one who does not share the majority’s “better informed understanding” as bigoted.¹⁷⁸

Given the foregoing passages, it merits emphasis that the right-of-privacy route I have taken to the conclusion that the exclusion policy is unconstitutional does not involve claiming, or implying, nor does it presuppose, that the exclusion policy is based on homophobic bigotry or that supporters of the policy are homophobic bigots.¹⁷⁹ Where such a route is available—a route that steers clear of what legal scholar Steven Smith has called “the jurisprudence of denigration”¹⁸⁰—surely it should be preferred to a route according to which supporters of the challenged policy are prejudiced bigots.

I have now completed the task I set for myself: to present in a single article my reflections on two constitutional rights—two that are among the

¹⁷⁸ *Obergefell v. Hodges*, 138 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (internal citations omitted).

¹⁷⁹ Cf. Linda C. McClain, *The Rhetoric of Bigotry and Conscience in Battles Over “Religious Liberty v. LGBT Rights”*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* 213, 216 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (“The mere step of drawing analogies between past and present forms of discrimination to point out how evolving understandings lead to recognition that such treatment lacks justification is not—in itself—a charge of bigotry.”).

¹⁸⁰ See generally Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 678 (2014) (describing Justice Kennedy’s opinion in *United States v. Windsor* as a “recent and egregious instance” of the “discourse of denigration”).

most important rights protected by the constitutional law of the United States—and two constitutional controversies—two that are among the most divisive of our time.