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RELIGIOUS CONVICTIONS AND LAWMAKING

Kent Greenawalt*

In this Article, presented as the 1985-86 Thomas M. Cooley Lectures at the University of Michigan School of Law on March 10-12, 1986, Professor Greenawalt addresses the role that religious conviction properly plays in the liberal citizen's political decisionmaking in a liberal democratic society. Rejecting the notion that all political questions can be decided on rational secular grounds, Professor Greenawalt argues that the liberal democratic citizen may rely on his religious convictions when secular morality is unable to resolve issues critical to a political decision. The examples of animal rights and environmental protection, abortion, and welfare assistance illustrate situations where such reliance is appropriate. In a concluding section Professor Greenawalt inquires into the related issues of the use of religious arguments in political dialogue, reliance on religious convictions by legislators and judges, and the limits placed by the establishment clause on religiously motivated lawmaking.

The thoughts I want to share with you concern one aspect of relations between politics and religion in our liberal democracy. I think I can best introduce the underlying issue by putting it in some practical contexts.

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This text represents a very slightly amplified draft of the Cooley Lectures as delivered. It is taken from a much longer manuscript, one that explores a number of subtleties and qualifications not dealt with here, which I am presently revising for publication by the Oxford University Press. I am grateful for the interest of the law review editors in publishing the lectures basically as I gave them. They and I have added only the most essential notes. Readers interested in richer analysis and citations can find them in the published book and in more detailed treatments of aspects of my thesis to be published in other law reviews. An article entitled *Religiously Based Premises and Laws Restrictive of Liberty* will appear with other conference papers in the *Brigham Young Law Review*; an article entitled *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment* will appear with other conference papers in the *William and Mary Law Review*; and a published lecture entitled *Natural Law and Political Choice: The General Justification Defense; Criteria for Political Action; and the Duty to Obey the Law* will appear in the *Catholic University Law Review*.

I am very appreciative of the warm cordiality with which I was received by faculty members and students during the period of the lectures. I learned a great deal about my topic through criticisms and questions during those days; I believe, and hope, that the book will be better as a consequence. Had it not been for the faculty's invitation to deliver the Cooley Lectures, I strongly doubt that I would have undertaken this complex and difficult topic. My work on it was much aided during the summer of 1985 by a research grant from the Samuel Rubin Program for the Advancement of Liberty and Equality Through Law. A leave from Columbia in the fall of 1985, during which I was Visiting Lee Distinguished Professor at Marshall-Wythe School of Law, College of William and Mary, provided the opportunity for further intensive research and thought. I have benefited from the suggestions of faculty colleagues and students at both William and Mary and Columbia.

Jean is a legislator deciding whether she should vote for stringent measures to protect obscure species of fish from extinction. She decides that neither present nor future human interests warrant this strict protection. But she also believes that the natural environment was created by God and that people should not alter it irrevocably if they can avoid doing so.

George is a voter deciding which presidential candidate to support. He believes that the economic programs of the Republican candidate would promote more general prosperity at the expense of the poor; the programs of the Democrat would help the poor at the expense of more general welfare. George belongs to a religious group that teaches that aiding the poor is the first obligation of society.

Doris is a prominent lawyer who is asked to support a proposal to increase imprisonment and reduce probation and parole radically. Doris recognizes that the new regime would involve much pain and unhappiness, but her religiously informed pessimism about human sinfulness leads her to think that more imprisonment is needed to repress selfish inclinations.

The question I address is whether people like Jean, George, and Doris properly rely on their religious convictions in deciding what public laws and policies to support. What do I mean when I say "properly rely?" Certainly no one violates any law by relying on his religious views when he adopts political positions; any law that attempted such a restriction would be an unconstitutional infringement of the free exercise and free speech clauses. So I am not talking about legal propriety. I shall address the question whether laws that derive from religious convictions may be unconstitutional in Part III, but that subject is subsidiary to my major concern.

When I talk about "properly rely," I also do not mean whether such reliance is best overall. Suppose, for example, that George believes God insists that we support candidates who give priority to the welfare of the poor. To say that George would be wrong overall to rely on that religious conviction, one would have to give reasons why his religious judgment itself was incorrect. I try hard to avoid direct claims about theological truth.

My perspectives for evaluation are the premises of liberal democracy and of our particular liberal democratic polity. When I ask whether Jean, George, and Doris properly rely on their religious convictions, I mean to raise a question about the implications of membership in a liberal society. Would a good member of our liberal democracy rely on his or her religious convictions?

Even here, I need to be careful. A central feature of liberal democracy is its tolerance of people who urge illiberal political programs or rely on illiberal reasoning. At least so long as these people accept legal

mechanisms for change, they are not *bad* citizens, to be condemned by the rest of us. So when I ask if people "properly rely" on their religious convictions, I do not mean that improper reliance deserves condemnation. Rather, I am asking about a kind of model of good liberal citizenship.

Understanding of this question is beset with two kinds of confusion. One sort of confusion involves a failure to see clearly what the question is. In one presidential debate Walter Mondale attacked the demand of the Republican platform that prospective judges have a pro-life position on abortion; he claimed that the platform set a religious test for judges. President Reagan responded that abortion was a constitutional, not a religious issue. These rhetorical thrusts exemplified the tendency to oversimplify the question whether a political standard should be based on a moral premise that in turn may be based on religious convictions.

The perception that the question of religious convictions and law-making is a simple subcategory of some other church-state problem represents another sort of confusion. During the presidential campaign Geraldine Ferraro stated that her personal rejection of the morality of abortion had no bearing on her public position. The response that Ferraro had done no more than reiterate the principles of John F. Kennedy's campaign statement to Baptist ministers in Texas that he would not let church affiliation interfere with his performance of public duty reflects this confusion. A large part of my effort in these lectures will be to demonstrate the distinctiveness of this particular issue and to show why no conclusion about it follows easily from common premises about church-state separation.

In Part I, I introduce the subject of liberal democracy, rationality, and religion. I explain briefly why this subject merits our attention. I then indicate variant positions about it and my own summary conclusions. I develop a partial model of our liberal democracy from which the issue can be addressed in context. I next consider two kinds of concrete social issues, consenting sexual acts among adults and the protection of animals and the natural environment. During this treatment I indicate more fully how religious convictions affect judgments about desirable laws, and I analyze the claim that good citizens should not rely on such convictions.

In Part II, I tackle the controversial problem of abortion; consider welfare assistance, a critical issue of distributive justice; and discuss one of the most sensitive of the traditional church-state issues, public aid to sectarian education. These various topics form the basis for generalizations about when reliance on religious conviction is and is

not appropriate. I also offer some glancing comments on the priority of justice, the idea that political issues should be settled on the basis of a shared conception of justice, not on the basis of controversial conceptions of the good.

In Part III, I shift from simple reliance of citizens on religious convictions to a number of closely related issues. I discuss the appropriate grounds of public political discourse and comment briefly on the responsibilities of religious leaders and organizations. I then turn to the role of public officials and ask whether legislators and judges properly rely on religious convictions. Finally, I end with a genuinely legal inquiry: what kinds of religious underpinnings for a law may render it unconstitutional.

I. LIBERAL DEMOCRACY, RATIONALITY, AND RELIGION

My own interest in this subject will hardly surprise you; lecturers rarely pick topics that bore them. My interest is a product of my outlook and experiences. With some uncertainty and tentativeness, I hold religious convictions; but I find myself in a pervasively secular discipline. My convictions tell me that no aspect of life should be wholly untouched by the transcendent reality in which I believe, yet a basic premise of common legal argument is that any reference to such a perspective is out of place. This personal and professional dilemma helps explain my concern with the place of religious convictions in the process by which laws are made.

The thread of my argument, however, is general. I am not relating a personal search for accommodation or explaining where one set of religious convictions leads. My analysis and conclusions do not depend on the truth or falsity of any particular religious position; they lay claim to a broader persuasiveness.

I hope my subject will have immediate appeal for those of you who also have personal questions about how your religious beliefs relate to a secular vocation that involves working toward a better legal order.

Others of you will have religious convictions whose import for political activities is clear. Knowing what those convictions demand in your legal and political life, you may feel impatient with efforts to classify your actions as inside or outside the bounds of liberal democratic premises. But your impatience would be misconceived. You must deal with people who think that religious convictions have little or no proper place in the political life of our country, and you would do well to understand how far your own positions are fairly grounded in our political traditions.

Many of you will hold no religious beliefs or will think that your beliefs are irrelevant to what the law should be. This group likely includes most faculty members at law schools like Michigan and Columbia. Many law professors, like other intellectuals, display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience. Those who regard religious convictions as foolish superstitions, whose impact on our social life should be minimized, may find discussions about the place of religious convictions a most unappetizing theme. Yet this is the very group at which my comments are mainly addressed. Since these skeptics live in a country in which a large number of people are seriously religious, they need to understand how far their wish to reduce the influence of religion in our political life may fairly be based on claims about the premises of liberal democracy and how far that wish must rest on the intrinsic foolishness of religion, a foolishness skeptics may be more comfortable accepting than trying to demonstrate.

The problem of religious convictions and lawmaking differs from many other important questions about religion and government in a liberal society. Problems concerning relations between political and religious organizations, public support for religiously sponsored endeavors, government sponsorship of religious ideas, freedom for religious expression, and exemptions from ordinary rules for those with religious objections continually arise in the political process and in constitutional interpretations. A more abstract and philosophical question about religion and a liberal polity concerns the justification of political institutions. Can governmental authority and the duty to obey the law be persuasively defended in purely secular terms or is a religious underpinning required? A related question concerns the conditions of civic virtue: can a liberal government survive and prosper if its citizens do not understand its authority and law from a religious perspective? Each of these important and interesting issues is different from the proper place of religious convictions in lawmaking.

On that issue we may begin with three major competing positions about the responsibilities of citizens. One is that in a liberal democracy citizens are free to rely on any grounds they please, including religious grounds. The second position is that citizens should not rely on religious grounds for their political actions. A position of this sort may also exclude some other grounds besides religious ones. The third, intermediate, position, the one I take, is that reliance on certain kinds of religious grounds is appropriate but that reliance on other kinds of religious grounds is not.

My main conclusions, baldly stated, are these. Legislation must be justified in terms of secular objectives, but when people reasonably think that rational analysis and an acceptable rational secular morality cannot resolve critical questions of fact, fundamental questions of value, or the weighing of competing harms, they do appropriately rely on religious convictions that help them answer these questions. Not only is such reliance appropriate for ordinary citizens, legislators may rely on their own religious convictions and those of their constituents in similar instances; occasionally such reliance is warranted even for judges. Though reliance on religious convictions is appropriate in these settings, argument in religious terms is often an inapt form of public dialogue. Reliance on conceptions of the good and other "fundamental" beliefs is often also proper. Even if people were ideally motivated in their political behavior and political institutions were ideally constituted, *shared* premises about justice and rational dialogue could not resolve many political issues.

I shall explain, qualify, and defend these conclusions. I take as the major challenge to my position the claim that religious convictions should not count in political activity. But I want to say a few words about the first position, that religious convictions, and any other bases for judgment, are acceptable in a liberal democracy. Remember, what I mean by acceptable reliance is reliance that a model liberal citizen might make. The first position boils down to the view that liberal democracy is a set of procedures for making political decisions, with some understood limits on what the majority can do to the minority. In this view, which we might call an interest accommodation view, the premises of liberal democracy have nothing to say about why people support the political positions they do.

Stated so absolutely, the view is clearly wrong. Within a liberal democracy people are permitted to support illiberal outcomes, such as the legal subjugation of one race by another, but a model liberal citizen does not support illiberal outcomes. So much is obvious. Suppose two alternative outcomes are both within the range of liberal positions and each is supported by substantial liberal arguments. I believe this is true about the present debate over preferential treatment of minorities. Opposing preferences because one thinks any racial classifications are unjust or reinforce racist attitudes is not illiberal. But opposing preferences because one hopes to perpetuate the social inferiority of racial minorities is illiberal. The premises of liberal democracy do have *something* to say about acceptable bases for political positions, as well as about acceptable political outcomes.

But if we put aside motivations that are themselves at odds with

liberal premises, are not people free to decide on any other bases? Isn't liberal democracy *otherwise* indifferent about the bases of personal preferences? This is a more troublesome question, and all I shall do is state my own view succinctly. Some issues properly turn on personal preferences. Were a vote taken, for example, on whether a bear or a snake were to become the state symbol, people could rightly vote in terms of pure preference. For such issues, any mode of deriving a preference is appropriate, including a religiously based view that the bear is a loftier creature. On some other issues, however, a good citizen has a responsibility to decide what is right, not simply to vote his preference. I assume that a model citizen should decide in this way about such matters as abortion, treatment of animals, capital punishment, and foreign affairs. A person would not be justified in voting for capital punishment just because executions give him an emotional kick or increase the sales of his sensational newspaper. We expect something more of the good citizen than these inadequate reasons. As to issues of this sort, the appropriateness of relying on religious convictions needs to be defended. Such reliance cannot simply be lumped together with other bases of personal preference, and justified on the theory that people can vote their preferences.

I turn now to the second major position, that citizens and officials in a liberal democracy should not rely on religious bases for judgment. This position finds fairly frequent expression and occasional systematic defense. In a recent introduction to ethics and law, David Lyons suggests that political morality should be governed by principles and arguments "accessible to all persons." He says that to reject the idea of "a naturalistic and public conception of political morality . . . is to deny the essential spirit of democracy."¹ Under this view, citizens should not publicly press political objectives on religious grounds, nor, we may infer, should they use such grounds to make up their own minds about public issues. Two decades ago in a well-known article on "obscenity as sin," my colleague Louis Henkin wrote, "The domain of government . . . is that in which social problems are resolved by rational social processes, in which men can reason together, can examine problems and propose solutions capable of objective proof or persuasion, subject to objective scrutiny by courts and electors."²

This approach receives systematic explication and defense, if perhaps only incomplete application, in John Rawls' *A Theory of Justice*,³

1. D. LYONS, *ETHICS AND THE RULE OF LAW* 190-91 (1984).

2. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963).

3. J. RAWLS, *A THEORY OF JUSTICE* (1971).

the most important work of political theory in our generation. Rawls imagines people in an original position who have general knowledge but do not know their own personal characteristics, social position, or particular conceptions of the good. Behind this "veil of ignorance" they choose principles of justice that will best serve their own interests. This original position is designed to produce principles that are fair, because everyone chooses without knowing what principles would favor him in his actual place in society with his actual beliefs and abilities. The principles chosen, Rawls asserts, would consist of a combination of the priority of equal liberty, equality of fair opportunity, and a "difference principle" that permits inequalities of incomes and wealth only insofar as these benefit a representative person in the worst off group. Citizens in an actual liberal society should be guided by these principles in their political decisions. Since the standards of justice do not rely in any respect on any particular religious perspective or standard of good, citizens deciding what is just would not rely on religious perspectives or controversial standards of good. Factual judgments, Rawls has said more recently, are to be based on "practices of common sense and science."⁴

The inappropriateness of reliance on religious conviction in politics is stated more clearly and absolutely in Bruce Ackerman's *Social Justice in the Liberal State*.⁵ Regarding constrained dialogue about power as the centerpiece of liberal political theory, Ackerman says:

[N]obody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied to the rest of us. . . .

. . . No reason is a good reason if it requires the power holder to assert:

(a) that his conception of the good is better than that asserted by any of his fellow citizens⁶

Not every political reliance on religious conviction actually amounts to asserting the superiority of one's own "conception of the good," but Ackerman makes plain that the grounds for liberal political decisions should be secular and rational. He talks, for example, about the liberal state "deprived of divine revelation"⁷ in developing a policy toward nature; and, in language that reflects less than enthusiastic sympathy with religious perspectives, he precludes restricting abortions "on the basis of some conversation with the spirit world."⁸ In a

4. Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 539 (1980).

5. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

6. *Id.* at 10-11.

7. *Id.* at 103.

8. *Id.* at 127.

review of his book, Richard Flathman speaks of Ackerman's notion of "neutral dialogue" as a tolerably familiar aspect of liberal theory; the idea of ordering "our interactions by principles neutral among" conceptions of the good is a "self-denying ordinance" which was "historically first or at least most emphatically adopted in respect to religious beliefs. . . ."⁹

The thesis that political decisions should be made on secular rational grounds is a claim about the ethical import of liberal democracy, about what "good citizenship" in that polity entails. My rejection of substantial aspects of that thesis derives from a different view about the ethical import of liberal democratic premises. Some have claimed that a politics devoid of religion will lack coherence, will undermine the moral character of our people, and will open the door to secular totalitarianism. My focus is different. I do not ask if non-religious politics are destructive or dangerous. I concentrate on what one can fairly expect of religious citizens if one accepts the premises that underlie our political institutions.

I now set out what I understand to be some of the premises of our liberal democracy.

In any liberal democracy, political power is dispersed and ordinary citizens have, formally at least, ultimate political authority and the right to express themselves in the process of governance. Either by constitution or by tradition, government power over individual lives is limited. People are free to develop their own values and, at least within limits, styles of life; they are free to express their views not only on political questions but other human concerns; and they are free to develop a wide variety of religious perspectives and practices.

Relations between government and religion in a liberal democracy are not disposed of so simply; but one consistent aspect of liberal democratic political theory has been a secular justification for the state. Under the dominant theory, social contract, government is justified by the consent of the governed and by the government's protection of natural rights. These rights can be understood in nonreligious terms, and the human interests these rights protect are not distinctly religious.

More important for our inquiry than the justifications of government are the proper purposes of government. In our constitutional order, it is clear that the state should not promote the views of any particular religious denomination. Whether governments are warranted in promoting religion generally, or theism, or Judaeo-Christian

9. Flathman, *Equalitarian Blood and Skeptical Turnips*, 93 ETHICS 357 (1983).

beliefs, is more controversial. The major Supreme Court decisions over the past few decades elaborate a basic principle of *nonsponsorship*. For me, this principle that our government should not promote religious truth represents the fullest working out of a sound concept of religious liberty, and it most adequately applies our tradition of religious tolerance and government separation from religion to modern social conditions. I proceed on this assumption, though I do not defend it here. I also assume that laws should rest on some secular objective; they should seek to promote some good that is comprehensible in secular terms.

Some of you, no doubt, will dissent from these assumptions, but I hope that dissent will not deprive the rest of what I say of significance. My remarks should help you to see more clearly which reliances on religious convictions depend on the controversial principle of permissible support that you accept and I reject, and which can be defended as consonant with my model of nonpromotion, the model endorsed by those who favor an unabashedly secular polity.

The question I am addressing is whether these premises of liberal democracy, or their implications, or other reasons relating to the nature of liberal democracy, disqualify religious convictions as an appropriate basis for political positions. Since religious convictions of the sort familiar to us bear pervasively on ethical choices, including choices about laws and government policies, reliance on religious convictions is inapt only if (1) the religious convictions themselves are misguided, or (2) they are disqualified by underlying principles of liberal democracy.

Of course, the ways in which religious beliefs may figure in the development of ethical and political positions are immensely complicated. An authoritative text, like the Ten Commandments, can prescribe behavior or commend attitudes of heart and mind, such as loving one's neighbor. Acknowledged religious leaders may urge similar prescriptions and recommendations. Religions offer broad perspectives on the nature of human beings and society. These involve not only general factual appraisals, such as whether people are intrinsically self-centered, but also a vision about the "ultimate meaning" of human life and its significance in the universe. One's sense of God's nature and of human relations to God are also a source of ethical guidance. A religion may encourage special paths, such as prayer or dialogue with fellow believers, that aid adherents in making moral choices.

Religious people differ in how certain they are about their ethical conclusions. Some feel assured of being right; others doubt that falli-

ble creatures can ascertain ethical truth, but still believe the religious perspective is illuminating. I am going to talk simply about religious convictions influencing political positions, but this phrase is a shorthand for complex and variant interrelations.

This ends my general introductory remarks. I turn now to two particular social issues that illustrate what I regard as a stark difference between proper and improper reliance on religious convictions.

I first address the problem of consenting sexual acts among adults.

Three simple arguments exist against criminalizing acts that directly affect and substantially affect only those adults who freely choose to engage in them, a class of acts into which many consenting sexual acts fall. The first argument is that such matters of individual choice are none of the state's business. The basic idea, going back at least as far as Locke, is that liberal government should protect the rights of individuals against infringements by others. Since consenting acts do not infringe on the rights of others, no occasion for criminal penalties arises. The second argument against restrictions, found most familiarly in John Stuart Mill's *On Liberty*,¹⁰ is utilitarian. If people are denied the power to live their own lives, the inevitable suffering and frustration will be undesirable; successful restraints will stunt capacities for human development that could benefit individuals and contribute to broader enlightenment about fulfilling forms of life. The third argument against prohibition is that enforcement is bound to be ineffective and that occasional rare convictions will fall unjustly on a few unfortunates.

What rational secular arguments can be mounted to the contrary? There is first a paternalistic claim that prohibition is necessary to help people resist their own temptations to engage in acts that are psychologically self-destructive or likely to cause harm to them in their social relations. This claim has some plausibility for adultery, but it rings hollow in respect to most people who want to engage in homosexual acts. They apparently are firmly committed in their sexual preferences and suffer serious frustration if they refrain from sexual relations.

A second ground for prohibition is protection of family life. As a concern about bad effects on family relations, this argument applies most strongly to incest. Sexual involvements among parents and children or brothers and sisters may gravely impair family relations, even when the persons involved are adults; the prospect of such relations in the future could damage relations before children reach maturity. The argument about protecting family life hardly is relevant for homosex-

10. J.S. MILL, *ON LIBERTY* (1859).

ual acts committed by persons who are not married. It reaches extramarital sexual acts with greater force. These may undermine marriages, and failing marriages are bad for children. Extramarital acts may also infringe the rights of spouses. The idea of forbidding adultery founders, however, on the frequency of adultery and the impossibility of effective enforcement.

Another ground for penalizing consenting sexual acts rests on protection of children against the sexual advances of adults; but bars on adult sex do not bear any plausible relation to that protection.

A fourth argument, now applicable most strongly to homosexual acts, concerns the physical dangers of unrestrained sexual relations. In addition to the traditional worries about venereal disease, there is now the grave danger of AIDS, a killing disease passed mainly during male homosexual intercourse.

Finally, a claim may be made that the general moral tone of the community will deteriorate if acts most people regard as morally obnoxious are not treated as illegal. The most plausible version of this claim rests on a connection between sexual morality and parts of morality that are undoubtedly the state's business. If the state fails to enforce powerful sexual mores, the argument goes, people will be so dismayed or alienated they will be less inclined to respect the liberty and property of their fellows and to contribute to the common purposes of all society.

With the exception of the criminal prohibition of incest, and putting aside the threat of AIDS, which one hopes is temporary, my own judgment is that the rational secular arguments against prohibiting private sexual acts among adults are far stronger than the rational secular arguments in favor of prohibition.

For us, the implications of this judgment matter more than its correctness. Imagine that Sam accepts this judgment but also believes that homosexual acts are sins that God wants stopped. Sam thinks that public coercion and the law's symbolic condemnation of these acts are proper devices to curtail these acts.

I believe that the aim to forbid homosexual acts *on this ground* is at odds with basic premises of liberal democracy. A liberal society has no business dictating matters of religious belief and worship to its citizens. It cannot forbid or require forms of belief, it cannot preclude acts of worship that cause no secular harm, it cannot restrict expression about what constitutes religious truth. It takes only a modest extension of these uncontroversial principles to conclude that a liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or cause too little secular harm to war-

rant restriction. Freedom to worship and express opinion may enjoy a special place in a liberal democracy, but freedom to choose one's pattern of life is also important. The curbing of personal activities simply because they conflict with the religiously based convictions of others is unwarranted. If the state should not pursue religious objectives or promote particular religious views, it should not rely on particular religious views to forbid acts whose impact would not warrant restraint on secular bases.

Though I suppose that the balance of secular arguments is substantially against prohibition, that supposition is not critical. My position is that the possible sinfulness of sexual activities is not *by itself* a legitimate consideration. Sam should either refrain from seeking a prohibition or acknowledge that his aim to prohibit is at odds with the model of liberal democracy presented here.

There are various responses Sam might make.

If he urged a paternalistic concern with the spiritual welfare of the actors, his objective would clearly trespass the boundaries of what is left to individuals in a liberal society. If he argued, however, that his religiously informed judgment is that those who commit immoral sexual acts will be less happy and will suffer psychological maladjustments, understood in ordinary secular terms, and that prohibition could reduce these harms, his position would not be subject to the basic and simple objection I have raised. That position would raise questions about factual judgments I discuss in Part II.

Sam might make another kind of response: that his own freedom is involved, that the toleration of sinful sexual activities impinges on the lives of himself and his family. He wants to prevent offense to his own religious sensibilities and to foreclose the presence of dangerous examples. No doubt, toleration of sinful acts may be so viewed by some people, but so also may toleration of sinful beliefs and their expressions. In a liberal society, neither knowledge that others are performing acts that one regards as sinful nor concern about their example should count as a diminishment of socially recognized liberty.

What of the unhappiness that the knowledge of sin causes? Can the prevention of such unhappiness be a permissible secular ground for prohibition? Preventing unhappiness is a secular reason, but that does not mean it will count very heavily, and perhaps it should not count at all. Sam's *actual unhappiness* over the sinful acts of others may not be so great; he has his own life to live. Further, liberal democracy may well be understood to make illegitimate arguments for prohibition that rest simply on the unhappiness that some people feel about *knowing* that others are committing certain kinds of acts, since permitting pro-

hibition on this basis could undermine principles of respect for individual liberty and minority rights.

These observations highlight a profound theoretical difference between nonprohibition and more positive aspects of a program that seeks to eliminate discrimination against those who perform "deviant" sexual acts. If a private employer is told that in hiring he may not discriminate against someone he believes is engaging in sinful practices, his religious liberty is implicated. Religious liberty is also implicated if religious institutions are told they cannot discriminate on grounds they regard as religiously appropriate. Since protection of religious liberty and the promotion of equal opportunity against socially unwarranted discriminations are both legitimate governmental objectives, the model of liberal democracy yields no easy resolution to this legislative dilemma.

If my analysis is sound, at least one kind of religious reason should not count for good citizens in a liberal democracy. The aim to prevent a wrong judged purely from a religious perspective is not a proper ground to legislate a prohibition.

I turn now to animal rights and environmental protection. What do human beings owe to other animals and to the rest of the natural environment? What do we owe to other individual entities in their individual capacities? What should we do about preserving nature in a more general sense?

Plainly a morality may include duties owed to creatures that themselves lack moral capacity. Most people think they have moral duties towards members of the human species who have no moral capacity, and they also think they have duties not to subject higher animals to gratuitous cruelty. Although some philosophers reserve the terminology of justice and rights for interrelations among beings with moral capacity, I shall employ a broader usage that permits talking about the rights of animals. In any event, what is important is whether duties of the type and stringency associated with rights and justice are owed to nonhumans; that question cannot be settled by terminology.

The subjects of animal rights and environmental protection both concern the place of human beings in the world. At one extreme lies the view that nature, including animals, is for human dominion. At the other extreme is the idea that nature is sacred. An intermediate conception is one of stewardship: that we have a responsibility for preserving the welfare and integrity of the natural world, independent of the likely effect on future human beings. Though one might choose a morality that recognizes duties to animals and the environment because the attitudes such a morality engenders will be good for humans,

I shall assume that the issue is the starker one: do we owe something *directly* to other entities besides human beings?

Once one states the major alternatives regarding the relation of humanity to nature, the potential relevance of religious convictions is apparent. Religions interpret the place of human beings in nature. Some attacks on present environmental attitudes have portrayed the Judaeo-Christian view that nature was created for man's dominion as the main villain. It has been responded that major strands of Judaism and Christianity give human beings responsibilities of stewardship. Some eastern religions accord greater respect to nature and animals and conceive a less sharp break between human beings and the rest of nature. Should liberal citizens disregard such religious perspectives in resolving what protection the law should accord animals and nature? The answer depends on the promise of secular rational grounds to resolve matters.

I first look at the moral consideration owed individual entities, loosely the subject of animal rights. Which entities are owed moral consideration in their own right? How does that consideration compare with the consideration owed to human beings? How far should judgments of this sort be embodied in law?

The extreme version of the human dominion view is that other entities exist solely for the benefit of human beings. On behalf of this view it may be claimed that, because the crucial capacities of ordinary humans are unique or so far superior to those of other animals, any action that contributes to human welfare is warranted, whatever the impairment for other creatures.

The uniqueness of some human capacities and the superiority of others, however, is hardly an adequate reason to accord *no moral significance* to the interests of animals; and most people's intuitive sense is that we do owe something to at least some other animals. How is the outer edge of consideration to be drawn? We feel we do not owe anything to a small stone or a dead twig, so entities deserving consideration must have some capacity or characteristic that stones and dead twigs lack. Among the many possibilities are moral capacity, capacity for language, self-consciousness, fear of death, fear of other consequences and anxiety, consciousness, ability to experience pleasure and pain, having interests, having a good, being alive.

Despite our difficulties understanding what the experience of animals is like, we are virtually certain that many of them are conscious and do experience pleasure and pain, and we can be pretty confident that many mammals are also *self-conscious* in some sense. Since avoidance of pain is a dominant aspect of human morality, the idea

that we should not cause unnecessary pain to animals is an appealing starting point, one reflected in statutes forbidding cruelty to animals. If a healthy animal is killed, death cuts off the possibility of future pleasurable experiences; viewed by itself, death is a harm to the animal. What is more troublesome is whether that harm can be effectively canceled by the life of another similar animal. The infliction of death on many animals is often part of practices that permit life for a larger number of animals than would otherwise exist. Were all people vegetarians, many fewer animals of some species would exist; and the painless death of some members of the species might be thought fully justified by the prospects of life for other members.

This problem of "replaceability" exposes a critical distinction between a consequence-oriented approach to the treatment of animals and a genuine rights approach. From the standpoint of utility, painless killing can be cancelled morally by substitution, but if an individual animal has a *right* not to be killed, then its death is a moral wrong, even if the result of "nonkillings" would be a marked decrease in the animal population.

Any judgment about how far the law should be used to protect animals requires some assessment of animal interests against human interests; here the difficulties become even greater. An extreme priority for human interests can now be said to be the import of present law. Animal life per se is not protected; only unnecessary cruelty is forbidden. Virtually any human interest is thought to warrant severe inhibition of the lives of animals. Rules concerning animal experimentation do not bar painful experiments and extensive loss of life, though the products being tested are luxuries; indeed a common test of toxicity is to see how intensive a dosage is needed to kill half of the animals involved. No rules exist against factory farming, which allows animals to do little more than exist in terribly confined conditions so that their growth will be quicker and less expensive and their bodies plumper than if they roamed free. Restrictions on how owners can treat pets are very limited.

Some of those favoring animal rights argue that we should move to a form of equality, one that takes different capacities into account. The simple pain of a cat would count as much as the simple pain of a human being; but the reasons for avoiding human pain might involve people's interest "in being able to have unsullied memories and to form and implement future plans with confidence, and in being spared a sense of humiliation and rejection."¹¹ On this view, pain of the same

11. R. ATTFIELD, *THE ETHICS OF ENVIRONMENTAL CONCERN* 169 (1983).

amount would be worse for a human being because of these correlative elements.

Between near absolute human priority and some version of equality lies an intermediate view that the higher capacities of humans give their interests some greater weight per se. From this standpoint, the pain of a person is worse than the pain of the cat just because the person has greater capacities, quite apart from the ways in which these capacities actually enhance the pain and its effects.

I shall not develop the arguments for and against these various positions. What I have said suggests the tenor of some of the competing assertions. Rational argument can establish that conscious animals capable of experiencing pain and pleasure should receive *some* moral consideration and that the pain or death of any such animal is, viewed by itself, a harm to be avoided. Rational argument cannot establish whether replacement justifies the painless killing of animals as part of a practice in which more animals are able to live; nor can rational argument tell us if animal interests should be counted equal to human interests in some sense, or if not, how much priority should be given human interests.

Skepticism about rational resolution of animal rights is multiplied manifold for environmental protection. As I shall use the term, an environmental ethic concerns itself with safeguarding more inclusive categories of being, such as species, the land, the natural setting, ecosystems, or the biosphere. The worry is not the death or pain of individual entities, but human destruction of, or failure to preserve, the environment. Should the life of one nearly extinct snail darter count for more than the life of one salmon? At least with animal rights, one could proceed by asking what capacities that are thought deserving of moral protection in human beings also exist in animals; here even this exercise in analogy to ordinary moral thinking is unavailable.

Socialized human life inevitably alters the environment; like other species of animals, human beings affect the settings they inhabit. Yet many people feel concern about the extermination of other species. John Rawls, for example, calls destruction of a whole species "a great evil."¹² Environmentalists have talked about diversity as a good in itself, about the well-being of species, wildernesses, and ecosystems, and about the importance of "preserving the integrity, stability and beauty of the biotic community."¹³

Except as a corrective to present ignorance of future possibilities

12. J. RAWLS, *supra* note 3, at 512.

13. This is the view of Aldo Leopold as reported in R. ATTENFIELD, *supra* note 11, at 158.

regarding human welfare, the claim that people should respect nature in its own right is not one that can be successfully grounded in rational argument. People have radically different reactions to what nature in some larger sense is owed by human beings, and neither analogies to ordinary moral constraints nor other forms of rational analysis provide much assistance in settling who is right. Attaching inherent value to the preservation of species, and even to maintenance of the physical environment, is not contrary to reason; but such views do require some nonrational commitment or judgment of value.

I want to pause here to say a little bit more about this distinction between rational and nonrational bases of judgment and where I place religious convictions. I roughly categorize convictions that bear on ethical judgments as rational, irrational, and nonrational. I confess to considerable uncertainty about where rationality ends; but among rational convictions I include those that are apparent to anyone with ordinary rational faculties or that can be demonstrated or persuasively argued on rational grounds. Beliefs that humans have greater ethical capacities than leaves, and that love is more productive of happiness than hate, can be rationally established. An irrational conviction is contrary to what can be established on rational grounds. A nonrational conviction, in my sense, is a conviction that is not irrational but that reaches beyond what rational grounds can settle.

There is much disagreement about what rational thought can establish about religious truth, but few particular religions are claimed to be establishable on rational grounds alone. Most Christians, for example, do not believe that rational argument can persuasively show the special place of Jesus Christ. Something more is needed, a commitment through faith or a personal sense that a special place for Jesus fits with how one apprehends human existence and its meaning.

I must be careful here to avoid misunderstandings. I do not say that rationality *plays no part* in religious conviction. A large number of conceivable religious premises do appear offensive to reason; reason helps us decide what lies within the range of plausible religious positions. Moreover, highly refined rationality is used in the development of particular religious positions and their implications. Belief in the Trinity may be nonrational, but an elaboration of the concept of the Trinity can be highly rational. When I say that ethical judgments based on religious convictions are founded on nonrational premises, I mean only that a critical nonrational element is present.

I also wish to avoid any impression that I perceive a distinct and sharp line between rational and nonrational grounds. Some Christians do believe that only ignorance, sin, and distorted judgment prevent

people from perceiving the persuasiveness of a Christian account. What I am interested in, however, are the rational capacities of actual people. Many people whose rational capacities are very strong and who understand the arguments for and against Christianity do not believe Christian premises. In real conversations about deep religious truth, we must finally say "This is how it seems to me" or "That's what my life and experience tell me"; if we are reasonable, we do not expect our strongest arguments to convince others whose life and experiences are quite different from ours. That is the truth I mean to capture by referring to religious premises as nonrational.

I have suggested that with respect to animal rights and environmental protection, the place of convincing interpersonal argument is decidedly limited. On critical questions, a person must resort to his own sense of life and a reflective view that makes him comfortable. If I am right, people must inevitably rely to a large extent on nonrational judgments in assessing proper legal protections.

If people must rely on nonrational judgments, should not religious believers be able to rely on their religiously informed view of humanity's place in the world as they struggle with moral questions and their political implications? If rational secular morality provides no correct resolutions, or a limited range of possible resolutions, a liberal democrat need not disavow his deeply held religious premises in favor of alternative nonrational assumptions that could yield a starting point.

Rules protecting animals and the environment will constrain the choices of those who possess or use animals and natural settings. If some of those constrained take the human dominion view, they may think environment-protecting regulation infringes on their moral rights to exploit nature. At least if animals are involved, a reverse choice in favor of human dominion may also be understood by some as a violation of the rights of the unprotected animals. Society cannot avoid deciding how far to protect animals and other natural entities. Decisions to protect may not usually work severe impositions on those of differing view, but they will curb liberty in a way some think is unjustifiable. This reality does not make reliance on religious convictions inappropriate, because everyone must make nonrational judgments about entities that deserve protection. Given those judgments, the *nature* of the protection afforded is called for by secular objectives.

Thus, my conclusion about reliance on religious conviction is radically different here than with respect to simple religious notions that actions are offensive to God. Liberal citizens should not impose their religious views of what is simply immoral on their fellows; they should not seek to use the law to implement those views. But liberal citizens

may properly refer to their religious convictions when they decide what entities deserve protection from the political community. I shall develop the reasons for this conclusion somewhat more deeply in the next section after I consider the problem of abortion.

II. ABORTION, DISTRIBUTIVE JUSTICE, AND SECTARIAN EDUCATION

In Part I, I suggested that in our liberal democracy, citizens should not attempt to prohibit activities just because they think they are wrong from a religious point of view; but I also said that religious convictions properly figure in decisions about which entities to protect, when rational morality does not answer such questions and the kind of protection afforded can be justified in terms of secular objectives. To illustrate that point, I used the issues of animal rights and environmental protection. In the first half of this section, I offer another illustration, the controversial problem of induced abortion, and I say a few words about why problems like abortion prove so intractable for rational secular morality. In the second half of Part II, I turn to other issues of value and to factual uncertainties, suggesting that for the good liberal citizen religious conviction has a place in respect to these as well. Both parts of my discussion challenge claims that political issues can be resolved on the basis of shared principles of justice and scientific methods of discovering facts.

Abortion is a tragic problem for our society. What some people sincerely regard as murder others see as the exercise of a fundamental human right. The level of mutual understanding is low. Many of those who favor abortion see the pernicious influence of religious views on the political process; others respond simplistically that abortion is a moral, not a religious, issue.

Some claim that liberal principles require people with religious convictions about abortion to "check them at the door." As with animal rights and environmental protection, the plausibility of that view depends on what can be resolved by rational secular arguments. My aim here is not to make one more contribution to the debate over the proper legal treatment of abortion; but to avoid misunderstanding let me state that my own personal positions are that *Roe v. Wade*¹⁴ was wrongly decided, but that, were they free to decide, legislatures should adopt a permissive approach to abortion, and that a constitutional amendment requiring or allowing restrictive state laws would be undesirable.

14. 410 U.S. 113 (1973).

The nub of the question whether a restrictive abortion law can be justified turns on the point at which a fetus warrants significant protection from society. The issue is so intractable because of the sharp divergence over the fetus' moral status. Those who think, for example, that at the moment after conception a fetus, or more strictly at this early stage a zygote, has moral rights as full as those of a newborn baby tend to regard abortion very differently from those who think that moral rights arise only at a late stage of pregnancy or at birth. If rational secular morality is to resolve public policy about abortion by itself, it must either resolve the stage of development at which the zygote, conceptus, embryo, or fetus warrants protection, *or* show that the propriety of various legal regimes can be answered independently without such a judgment.

At least two basic arguments for permissive abortion laws do not rest on assigning the fetus an intrinsic moral status that is less than that accorded newborn babies. One is associated with Judith Thompson's famous analogy to a violin player who can only survive if connected to another's body.¹⁵ The assertion is that since one individual has a right not to have his body used against his will to sustain the life of another individual, a woman cannot be compelled to use her body to sustain a fetus, *even if* the fetus is valued as highly as a living human being. This basic argument has been richly developed by Donald Regan, in an article defending *Roe v. Wade* on equal protection grounds.¹⁶ The argument is most powerful when pregnancy results from rape; then a woman finds herself pregnant without any responsibility on her part. In ordinary pregnancies, however, the woman has voluntarily acted in a way that she knows risks a dependence relationship between her and a new being, and she has in fact helped generate that relationship. It is not unreasonable to believe that the woman who has chosen to risk giving life to what we are now assuming to be a new human being should have a moral duty not to terminate that life within her body until it can survive on its own.

A different argument in favor of permissive abortion laws starts with present social reality. The essential claim is that enforcing a restriction on people who do not believe in its bases and will not comply is inappropriate. Many women believe they have a moral right to have abortions and many will have them whatever the law says. Abortions will be less safe if they are illegal, and the law will burden poor women much more than those who can travel elsewhere or pay for safe illegal

15. Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

16. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

abortions. These difficulties should give one pause about a prohibition, even if one is convinced that the fetus is morally entitled to protection as a full human being. That is evidenced by Mario Cuomo's thoughtful explanation of why he is presently opposed to a more restrictive legal treatment, though he accepts the Catholic Church's moral teaching about abortion.¹⁷ If one has doubts about the moral entitlement of the fetus, these worries press more strongly in favor of a permissive law.

If a fetal life definitely counts as much as an ordinary human life, however, a legal prohibition of abortion, with minimal enforcement efforts, almost certainly will save some lives; the number of fetuses who will not be aborted will exceed the number of pregnant women who will die because abortions are less safe. Such a law may also influence moral attitudes in the direction of protecting fetal life. Despite strong rational arguments about the rights of pregnant women and the terrible toll of illegal abortions, the person who believes that the fetus is entitled to full protection may reasonably decide that prohibition is warranted to save fetal life in the short and long runs.

I conclude that the appropriateness of a permissive legal approach to abortion cannot be demonstrated if one concedes that the fetus is intrinsically entitled to as much protection as an ordinary human being. But that assumption is not necessary for what I want to claim about reliance on religious convictions. Suppose I am wrong; suppose that rational secular arguments can establish the ill wisdom of a general prohibition of abortion regardless of the moral status of the fetus. Other questions of law and policy will still make that status crucial. Should public financial assistance be given for abortions? Should methods of terminating pregnancies that destroy possibly viable fetuses ever be allowed when other methods might produce live births? Once technology permits, should the fetus of a woman who discontinues a pregnancy be grown outside her womb even if her wish is that it be destroyed? These questions may require decision about the status of the fetus, even if the right to end a pregnancy can be established independently.

And what of the timing of the basic right to terminate a pregnancy? *Roe v. Wade* permits severe restrictions on abortion after the sixth month of pregnancy, and many states impose such restrictions. But even such restrictions may not be warranted if the fetus properly has no moral status prior to birth.

17. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J. L., ETHICS & PUB. POLY. 13 (1984), also published in N.Y. REV. BOOKS, Oct. 25, 1984, at 32 (speech delivered at University of Notre Dame, Sept. 13, 1984).

If the moral status of the fetus is *critical* for appropriate legal protection, rational secular analysis could resolve the issue if it could indicate that status at relevant stages of fetal development, or if it could show what the law should do in conditions of uncertainty.

We need initially to put aside two red herrings. The first is whether the fetus is alive. What one can uncontroversially say is that the fetus is a living, growing entity with the genetic composition of a human being, but one that for most of a pregnancy is incapable of independent life. That appraisal does not settle whether the fetus deserves moral consideration. The second red herring is the hope that science can resolve the moral status of the fetus. Science as a discipline about empirical truth can tell us the characteristics of a fetus and its possibilities for independent life. Science in the form of improving technology can actually advance the point at which a fetus can survive outside the womb. But neither factual knowledge nor technology can establish how much consideration the fetus deserves.

← Our society lacks any shared decisive moral principle that establishes when an entity that will grow into an ordinary human being deserves protection, and rational thought may be incapable of settling upon one among the plausible candidates. Our culture, in its struggles over the status of the fetus, starts with a relatively firm consensus that we do not owe anything to potential individual entities that might be brought into being and that, for most purposes, a newborn baby has a moral status like that of mature people and deserves equal legal protection of its life.

If infants warrant full moral consideration and legal protection and potential zygotes warrant none, how do we determine the moral consideration and legal protection of the fetus? For proper moral consideration, one can distinguish a "sharp break" approach from a gradualist one. A "sharp break" approach posits one or more particular points at which the moral status of the fetus changes drastically. There could be one critical point, often cast rhetorically as the time when one becomes a person, when the change is from no moral consideration to full consideration, or two or more points at which the amount of consideration owed increases dramatically. A gradualist approach would conceive the moral status of the fetus as increasing slowly and steadily over time until it reached that of the newborn infant. In each successive period the balance of contrary interests necessary to override those of the fetus would increase. The law of abortion could not directly embody a gradualist approach, but a law expressed in terms of discrete stages could be justified by a gradualist theory of

moral consideration, it being recognized that the law could only crudely reflect the more subtle moral reality.

There are many possible stages of significance. Complex social practices, including many legal rules, make birth a critical point in the life of a developing human. But it is hard to say that the fetus is owed *no* moral consideration prior to birth. Suppose that a woman's obstetrician has advised that labor should be induced after an unusually long pregnancy, and that hours before the scheduled delivery, the pregnant woman has the fetus's life terminated. Many would regard this as just as wrongful as killing a newborn baby. But if birth is not the obvious place to draw a sharp line, no other stage in the development of a fetus has even that plausible a claim.

The Supreme Court has fixed on the prospect for life outside the womb as being critical for legal protection of the fetus, but that stage is not self-evidently crucial for the moral status of the fetus! If the basic point about abortion were the unfairness of imposing on the pregnant woman, then viability would be obviously significant; at that point a woman wishing to free her body of the fetus should attempt to have it delivered in a manner that it may survive. However, because doctors refuse to induce premature labor without strong medical indications, the import of laws forbidding abortion in the last trimester without medical reasons is that most women must then carry their fetuses to term. This suggests that the viable fetus has an enhanced moral status, but why does it?

Birth involves a kind of organic independence and alters the way in which the fetus is dependent, but survival still depends on the existence and efforts of others. When the fetus becomes viable, it moves from being necessarily totally dependent in one way to being conceivably able to be totally dependent in another way. It is not easy to understand why the capability to be totally dependent in a different way gives the fetus a right to remain dependent organically until natural processes end that dependence.

As with the problem of animal rights, the attempt to fix the moral consideration owed the fetus involves an effort to determine what characteristics give beings inherent value. What makes the inquiry about the fetus special is the particular puzzle about potential capacity and its significance. How far does an entity's potential capacity bear on its present inherent worth?

The intuitive moral sense of most people in our culture is that both potential capacity and present, or past, characteristics count. The felt relevance of present characteristics is shown by the sense that the more a fetus is like a baby, the more consideration it is owed. Yet,

present characteristics alone do not seem determinative. One reason why newborn babies and late fetuses are thought to have so much value is because of what almost all of them will become.

This mix of present characteristics and potential capacity is not very neat as a way to assign value. Various theories avoid its anomalies. Classic utilitarianism makes potential capacity ultimately critical. What is morally good, it asserts, is a maximization of happiness. Given that aim, one's *present* capacity to feel pain and pleasure confers no special status; what counts are one's future possibilities for experiencing pleasure and pain and how one's treatment and actions will affect others. If a present early fetus is capable of experiencing more future happiness than an existing human being, then, other considerations aside, its interests should be preferred.

Both this conclusion and the broader implications of the emphasis on potential capacity are strongly counterintuitive. The utilitarian view that entities should be valued only as potential receptacles for pleasure and pain has the startling implication that one has as much intrinsic reason to bring into being potential entities as to protect existing ones. Could some all-powerful individual increase happiness by wiping out all existing human lives in favor of a new race of beings, that would be morally good.

Of course, a utilitarian might respond that I have disregarded the crucial human capacity to feel fear and anxiety; if mature human life is treated as cheap, everyone will feel insecure. But if fear and anxiety are the critical capacities, newborn infants are indistinguishable from fetuses; future development is needed before either would warrant the protection accorded to more mature humans.

To avoid these difficulties, a utilitarian might suggest that the aim should be a maximization of happiness of entities that now exist or that will, in any event, exist in the future. On this construction, the possible future being of potential entities would not be protected. Such a principle, however, affords no standard to decide *when* the threshold is crossed between potential being and existing being. The utilitarian might respond that no animal counts as an entity until it is born or is viable, but neither of these lines can be drawn out of utilitarian premises.

In contrast to exclusive emphasis on potential capacity, some authors have argued that until actual capacity is acquired, moral status, or at least full moral status, is inappropriate. Killing a fetus, or a newborn baby, is seen either as not inherently wrong at all or as less wrong than killing a mature human being. It is true that fetuses presently engage in *no* moral practices and now totally lack communicative and

moral capacity. But that much is true of newborn infants. There is no convincing reason why a culture should not protect entities that will develop communicative and moral capacity and relate reciprocally with present mature members of the society. John Rawls, indeed, supposes that newborn babies should be protected under a principle defining moral personality "as a potentiality that is ordinarily realized in due course."¹⁸ Once such potentiality is regarded as relevant, no clear basis exists for drawing the line at birth and not extending protection to fetuses.

\ Rational secular analysis cannot resolve the moral status of the fetus at various stages, nor, more generally, can it tell us how far potentiality should matter for the inherent worth of beings already living in some form.

Though I have spoken of inherent unresolvability on rational secular grounds, my thesis requires only the weaker assertion that *most people* cannot settle the status of the fetus on these grounds. If they cannot do so, they will have to turn elsewhere.

These pessimistic conclusions about the power of rationality may be unpalatable to full-blooded rationalists, but they should not surprise us. The borderlines of moral status are among the most intractable questions for those developing comprehensive moral positions. Rationality has an extensive domain concerning the conditions of a moderately peaceful joint social life, and the choice of means to accomplish valued ends. Rational analysis may also suggest what we owe other beings we recognize to be like ourselves and establish standards of coherence for testing whether one moral position is out of line with other positions an individual or culture accepts.

But many borderline questions about moral consideration do not yield easily to these approaches. The question typically is how we are to count the welfare of entities that are in some ways like us and in others not like us. Many different positions on borderline questions will fit comfortably with otherwise similar moral postures, as is shown by sharp disagreements about abortion and animal rights among people who agree across a wide spectrum of other moral issues.

These controversial questions of status expose a serious flaw in claims that shared principles of *justice* can be employed to resolve political issues. Rawls and other writers on this subject assume that the fundamental issue is whether justice takes priority over ideas of "the good"; if justice does take priority, it is supposed that derivations of basic principles of justice plus empirical facts will provide the

18. J. RAWLS, *supra* note 3, at 505.

grounds for resolving political issues. These accounts omit the need for society to resolve matters of status as well. People who agree on what justice to "persons" demands may disagree radically about the minimum conditions of personhood or about what we owe nonpersons. Many political issues implicate these debatable questions of status. What are just legal regimes for farmers and hunters depends on the moral consideration owed animals; the proper liberty of a pregnant woman turns on the moral status of the fetus. Unless the reigning theory of justice itself resolves all borderlines of status, many political issues involving claims of *justice among full human beings* can be resolved only with determinations about debatable claims of status of other entities.

If rational thought cannot settle the status of the fetus at various stages, perhaps it can tell us that the status is uncertain and indicate the right response to this uncertainty. Unfortunately, however, there are competing responses to the possible uncertainty. One is that people should be regarded as morally permitted to do what they think is *probably* morally permissible, especially if powerful reasons support their actions. The contrary response is that the taking of innocent life should not be risked. Because the kind of "risk" involved here is so different from ordinary risks based on uncertain facts, I believe other moral practices provide unsure footing for resolving this issue.

Another possible way to resolve legal policy would be to say that in cases of conflict a rationally grounded claim of right should take priority over a claim of right that rests crucially on a nonrational value judgment.

Put in absolute terms, the asserted priority of rational grounds is implausible. Suppose it were admitted that a regime of protection for the remnants of a species rested on a nonrational judgment, and that the desire to kill members of the species was based on rational economic reasons. Given the minimal impairment of liberty of a protective law, the nonrational judgment should be able to prevail over the rationally grounded economic reason.

The hard question concerns two competing claims of roughly equal power in terms of the premises each asserts. One *might* so view the competing claims on behalf of pregnant women and fetuses, the liberty claim on behalf of the woman, if sound, having roughly the same strength as the fetus' claim to life, if sound. When the claims are of roughly equal power but a widespread consensus exists about the priority of the nonrational claim, liberal democracy does not require that citizens forgo use of the law to protect that claim. Thus, the lives of newborn infants can receive full protection even if the moral status

of infants cannot be established on rational grounds alone. Should the rational claim take priority if it is roughly equal in power *and* if no consensus supports the priority of the nonrationally grounded claim? I would reject even this principle, because I think that it assigns too high a place for the products of rational analysis as opposed to deep-seated feeling; but I do see this principle as a serious competitor to my own position.

— If the moral status of the fetus and desirable legal policy are not resolvable on rational grounds, individuals must decide these questions on some nonrational basis. For many persons, the basis for judgment is supplied in whole or part by religious perspectives, which either indicate the fetus' moral status or gravely influence one's mode of thinking about it.

As I suggested in Part I, no evident basis appears to assign a priority to nonrational, nonreligious judgments over religious convictions. Neither sort of judgment is fully susceptible to critical appraisal and rational discourse. "Only a society that was actually hostile to religion or riven by religious strife could think it preferable for people to rely on nonreligious, nonrational judgments rather than upon religious convictions. "It has been said that Christianity was largely responsible for the growth of the idea that newborn babies should have their lives protected. Whether or not that is true, it certainly is true that our country has a rich religious tradition and traces its cultural roots to a civilization in which religion has been a major element. Even positions that are not consciously religious are often deeply influenced by religion. It would be odd to say that premises can legitimately play a role *only* when an individual does not consciously hold them on religious grounds or when their religious roots have receded far enough into the past to be largely forgotten.

Most religious believers will be hard put to evaluate the status of the fetus or animals in purely secular terms. The matter is not one of weighing evidence pro and con, but of adopting one of a number of debatable perspectives about how to look at a problem. If one believes he already has a clear answer or an overarching perspective on the relevant question of value that is derived from his religion, he may find it impossible to decide what perspective he would otherwise adopt.

Even when the religious believer consciously relies mainly on naturalistic arguments, important religious premises may lurk in the background. For example, the idea that God gives people souls at some point in development may influence someone to look for one critical point, a point where a shift occurs from virtually no moral status to full moral status. When this approach is combined with an emphasis

on strict duty, and in particular the strict duty not to take innocent life, reflected in traditional Christianity and Judaism, the approach is highly unfavorable to any claim that the pregnant woman's interests override those of the fetus when the two conflict.

The inability of most people to perceive the distinctive import of their religious views certainly makes one skeptical that their influence could be eradicated. The proponent of secular bases of judgment may respond that his point is only that citizens should try to decide on secular grounds alone. But asking that people pluck out their religious convictions and take a fresh look, disregarding what they presently take as basic premises of moral thought, is not only unrealistic. It is positively objectionable, because it demands that people try to compartmentalize beliefs that constitute some kind of unity in their approach to life.

We hear frequently that reliance on religious convictions to oppose permissive abortion laws violates the liberal principle that the religious convictions of one segment of society should not be imposed on the rest. But in respect to abortion, the religious perspective informs a judgment of who counts as a member of the community, a judgment that I claim each citizen must make in a nonrational way. Once that judgment is made, a restriction on abortion may be thought to protect life, the most obvious and vital interest that members of the community have. Such restrictions do not violate premises of liberal democracy.

In the remainder of Part II, I contend that the proper place of religious convictions is not limited to unusual borderline questions of status. I suggest that rational secular evaluation is incapable of resolving some other questions of value and conflicts of value and some complex matters of fact. If citizens must rely on nonrational premises in these respects as they decide what laws to support, religious citizens may appropriately rely on their religious convictions. I illustrate these points in connection with welfare assistance, a critical issue of distributive justice. I also use this exercise to comment further on Rawls' thesis that political issues of justice can be resolved on the basis of shared principles of justice. I then turn briefly to a typical church-state issue, and conclude that citizens should not have to decide it independently of their religious premises. Finally I address a possible limit to reliance on religious conviction, that such reliance is inappropriate if the religious convictions yield conclusions that actually are irrational.

Liberal societies must determine how far the government should assist people who cannot provide adequately for themselves. Welfare policies, of course, involve complicated judgments about who will be

recipients, what form assistance will take, and which government shall provide it, but I shall oversimplify matters by talking of more and less.

Secular morality presents two rather sharp theoretical extremes about welfare, as well as intermediate possibilities. One extreme is that the state should perform only those minimal functions that private organizations cannot perform. It should protect people from force and fraud, otherwise leaving resources to be distributed by private ordering. The animating principle here is that persons have some kind of natural right to their own bodies and talents and that this right extends to free exchanges with others. Under this view, the state has no responsibility to improve the lot of those whose incapacity or laziness leaves them poor. The opposite extreme is that the government, as the collective organization of the society, is responsible for the distribution of social resources, that it should treat all persons with equal concern and respect, and that resources should be distributed equally unless people generally (in some sense) will benefit from an unequal distribution.

The distributive view takes many forms. Among the most familiar are the Marxist formula, "From each according to his abilities, to each according to his needs," the utilitarian principle of maximizing average or total welfare, and Rawls' suggestion that distribution should be equal, except as inequality increases social goods even for representative members of the least advantaged economic group.

A choice among various distributive approaches will depend on some initial premise about human equality and upon complex judgments about human nature and real or potential social relations. In some passages Rawls seems, almost arbitrarily, to define the conditions of the original position so that they will yield his "difference principle." His best argument against utilitarianism is that people will feel resentful if they find themselves worse off than others and live in a society in which the gains for the better off are thought to justify losses for the worse off. Rawls' best argument against the Marxist formula is that its adoption would reduce incentives to work and impair productivity.

A utilitarian may respond that Rawls overestimates the resentment that people would feel in a society guided by utilitarian principles; the Marxist may claim that Rawls fails to see the resentment that the difference principle would generate and that he disregards the willingness of people, once free of capitalist social conditioning, to engage their talents for the good of others. From these standpoints, the judgments that divide Rawls from utilitarians and Marxists are largely factual ones about how people will respond to social orders with alternative

principles of justice. In conception, such questions may be resolvable by rational criteria, but the relevant questions are extremely complex; their answers depend on counterfactual judgments about which no one can be confident. In competition are subtly different understandings of the springs of human motivation in radically variant and unrealized social orders.

Rational secular inquiry can demonstrate the unsoundness of certain extreme views. I believe that liberalism does involve a limited commitment to rational modes of thought, that a good liberal citizen should not adopt a political position that is clearly *irrational* according to common sense and scientific evidence. But how is the citizen to choose among plausible accounts when rational thought cannot provide a basis for selection? A person's conclusions about likely facts in this setting will be determined by his personal experience, his peculiar sense of human life, and his nonrational commitments of value. If everyone ultimately relies on some nonrational basis to determine these factual questions, religious premises should not be disfavored in comparison with other nonrational premises as people select among rationally plausible alternatives, especially in a society with a long-standing tradition of serious religious commitment. A person who has a deep sense of original sin, or intrinsic human self-centeredness, derived from his understanding of the Bible should be as free to reject the Marxist formula of distribution as a nonreligious person whose private experience leads him to believe that human beings are irreducibly selfish.

Beyond this basic notion of equality among nonrational judgments, there lies a further reason for permitting reliance on religious conviction, the unrealism of asking people to detach themselves from basic convictions about life's meaning that bear on what they believe is empirically true. Holding out this exercise in detachment as an ideal toward which good citizens should constantly strive would be unwise. Counsels of impossible perfectionism are not well suited to the standards of good citizenship; what makes a good citizen should be reasonably attainable by ordinary people. The strenuous effort to attain detachment would inevitably have psychological costs. As I have already suggested in respect to abortion, demanding that people divide integrated perspectives into compartments would impair their sense of personal unity and integrity.

I now return to the "hands off" position that people are entitled to the fruits of their talents. If that position is defended on the ground that it promotes economic productivity and human growth better than any unmitigated distributive position, then the grounds for its support

are factual in theory. In that event, what I have just said about complex factual judgments applies. Suppose, instead, that a defender of moral entitlement concedes that overall welfare might be higher were a distributive theory adopted; he may still claim that others simply do not have the moral right to treat the fruits of one's talents as up for general distribution. Then the basic disagreement between a distributive and a "hands off" approach is over values, over ultimate categories of moral right.

Rational secular arguments do bear on this fundamental disagreement. A defender of a distributive position may appeal to the social character of humans and to the extent to which our very talents depend on social benefits. The extreme "hands off" advocate can urge that each person's mind and body is his own in an important moral sense. He can claim that viewing each person as having a right to all or part of the fruits of his talents is an easy extension of this basic right to one's person.

Rational arguments point powerfully against the "hands off" approach as a practical standard for public policy. The idea that the state simply has *no* responsibility to care for those who would lack food and shelter if left to private ordering is in tension with ordinary moral standards concerning reciprocal support and the state's unique capacity to coordinate.

Though the "hands off" view is implausible in its pure form, some moral right to the fruits of one's talents has much more attraction as a reason for settling between the two extremes. Many people do feel that the fruits of people's talents are not *wholly* up for distribution in the way of a common benefit that drops on society like manna from heaven. They may believe that a person is entitled by right to a substantial percentage of the fruits of his talents, at least if all minimum needs are met. This intermediate position allows a person to endorse the welfare state without completely forgoing the idea that people have some basic moral rights to the fruits of their talents.

Rational argument cannot settle whether people have any basic moral right to the fruits of their talents and, if so, how far that right should be curbed or qualified in the interests of general welfare. As with other issues we have examined, nonrational judgments of value must determine choices among a number of plausible competitors.

What is the role of religious convictions in the resolution of these basic welfare issues? The Christian and Jewish traditions strongly emphasize duties to care for the poor. A person steeped in the biblical tradition might conceivably think that private charity is the only proper way to help the poor; but the present consensus that an ex-

treme "hands off" position is implausible derives partly from wide acceptance of religious duties of care.

Among the distributive models, "to each according to his needs" may come closest to the Christian ideal of universal loving concern and to the actual organization of early Christian communities. A Christian perfectionist might well think we should all try to live our lives accordingly. On the other hand, traditional Christianity has a powerful strand of realism about the depths of human selfishness and the limits of social organization; most Christians believe that large modern political societies should be organized on principles other than gospel perfectionism.

Once we understand the limits of secular morality and the subtle role of religious conviction, we will be unlikely to say that liberalism somehow requires individuals to try to forgo all reliance on religion in developing their positions about appropriate levels of welfare.

What I have said about welfare assistance provides a vantage point to criticize further the idea that political problems of distributive justice can be resolved exclusively by reference to shared fundamental notions of justice plus factual determinations. The criticism I offer here is not limited to special cases of determining status; it reaches the heart of the very issues John Rawls and others suppose can be determined according to shared principles of justice.

Recognizing that citizens in liberal societies have variant religious beliefs and ideas of the good, Rawls begins with premises that are widely shared by people who disagree on many fundamental questions. From these premises, he aspires to draw principles of justice whose acceptance allows political decisions to be made without reference to the fundamental religious and metaphysical beliefs that divide citizens. As Richard Rorty puts it, our concentrating on questions of social justice will allow subjects such as the "point of human existence, the meaning of human life" to be "reserved to private life."¹⁹

Contrary to what Rawls supposes, he does not provide a theoretical basis for thinking that this ambition is either realizable or desirable.

The critical question for this purpose is the status of Rawls' difference principle, the principle that inequalities must work to the advantage of the worst off group. Let us suppose, as Rawls does, that there is some notion that organizes "familiar intuitive ideas" in a liberal society, and that the notion is "a system of fair social cooperation be-

19. R. Rorty, *The Priority of Democracy Over Philosophy* (paper delivered at Bicentennial Symposium on the Virginia Statute for Religious Freedom, Charlottesville, Va., Sept. 21, 1985).

tween free and equal persons.”²⁰ Many of those who accept *this notion* think that all people have some basic moral right, however qualified, to the fruits of their talents; others accept the idea that the fruits of talents are to be distributed as is best for all. Holders of these divergent views can join in agreement on the organizing intuitive idea about fair cooperation between free and equal persons. Lawyers and politicians are familiar with the way agreement on some common verbal formulation can work. Such agreement often obscures divergent answers to important questions. Agreement on the basic organizing idea of fair cooperation among free and equal persons can unite those who have contrary views about any moral right to the fruits of talents.

Rawls' own principles of justice adopt a purely distributive view about the fruits of talents. But he presents no sound reason why someone who has begun with a contrary sense of a moral right to talents should abandon that position when practical decisions must be made about the level of redistributive transfer payments in a society. It cannot be said that prevailing liberal notions already incorporate the difference principle. Probably most Americans do not now accept an undiluted distributive view. They retain something of the traditional, Lockean, natural rights view, that people have a basic right to enjoy the fruits of their labors. Even if I am wrong about this, people are free in a liberal society to urge shifts in prevailing conceptions and to work for political programs that are in some tension with those conceptions. Superiority cannot be claimed for the difference principle on the ground that it is derivable from, or fits better with, the fundamental concepts of liberal democracy. Within the loose umbrella of the premises of liberal democracy, there is room for more than one rationally sustainable theory of justice. Certainly any derivation from the original position does not demonstrate the rational superiority of the distributive view over the moral rights view, since the conditions of the original position already embody the distributive view. Nor does the elegance and clarity of Rawls' principles establish their rational superiority over some more complex and qualified alternative.

A more realistic view of principles of justice in any liberal society is that different citizens accept different sets of principles, but ones that have critical overlapping parts. When decision falls squarely within the overlapping areas, no reference outside shared assumptions is required. But when a matter is one as to which the truly shared premises do not provide an answer, citizens will revert to their own preferred theories, including whatever religious and metaphysical con-

20. Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229 (1985).

victions underlie them. Religious convictions, therefore, play a proper role in some citizens' decisions about distributive justice in a society that has some important shared ideas about justice.

Religious practices and institutions have not been directly at issue in any of the social problems I have discussed thus far. Here I want briefly to extend what I have said to such obvious church-state questions. The main point that I wish to make could be made in connection with a moment of silence in public schools or accommodations to claims of religious conscience, but I shall focus on aid to religious institutions that confer secular benefits.

Many religious organizations perform social services that have undoubted secular benefit. One thinks of religious hospitals, religious schools, and religious charities for the poor. If the state chooses to help finance private conferrals of such benefits, its failure to assist private religious organizations may compromise its efforts and constitute a discrimination against religion. If the state includes religious organizations, it may end up aiding the religious purposes of the organizations. At this time, financial aid to religious hospitals and charities for the poor is noncontroversial; these enterprises are simply treated like other private organizations. Aid to religious schools, on the other hand, is marked by intense controversy and continuing constitutional litigation. The twofold explanation for the difference concerns the special place of the public school in the United States and the perception that religious instruction pervades parochial education.

Neither liberal principles nor constitutional clauses provide pat answers to the degree of acceptable support for religious organizations that make direct contributions to secular objectives. Assuming that a form of aid is constitutionally permissible, how is an individual citizen to decide whether that aid should be given? Let us concentrate on private schools. Here, if aid is to be given to all private enterprises, the vast majority of beneficiaries will be religious organizations. How does one compare the importance of assisting the schools' secular objectives against the risks of assisting their religious objectives? Judgment will depend partly on how valuable one thinks private parochial education is. Can this judgment be made without reference to one's religious convictions? If someone believes that the best education for children is by religious organizations, a view that does not by itself run afoul of liberal principles, he will be inclined to suppose that giving state support to secular functions warrants the risk of oblique support for religious objectives. If someone believes that religious training is misconceived and harmful or that a state school environment can best promote the attitudes necessary to maintain a liberal pluralist society,

he is likely to take a rather different view of harms and benefits of state aid. One's own religious convictions are bound to figure in one's estimate of the ideal place for religious education, as well as whether one wishes to have one's own children supported in religious schools. It may be at odds with liberal democratic principles to favor a particular law or policy because it will promote one's own religious views or because it will help satisfy one's religious conception of the education children should have, but a good citizen need not disregard his religious convictions in assessing the balance of undeniably relevant secular arguments.

I conclude that reliance on religious convictions is appropriate under any plausible model of liberal democracy *much more often* than is acknowledged by those who claim that only rational secular grounds are proper for political decision. But it does not follow that such reliance is always apt. I suggested in Part I that liberal democrats should not try to prohibit behavior just because they believe it is offensive; they should assess programs in light of their capacities to serve secular objectives, not because of their promotion of separable religious objectives.

I am inclined to accept another qualification whose dimensions and proper import are much harder to discern, a qualification that concerns a conflict between religious conviction and rationality.

The most obvious conflict of religious conviction and rationality occurs if one's religiously based factual conclusions clearly contradict rational estimates. Imagine that Thomas concedes that rational secular analysis yields no plausible basis to suppose that the earth will suffer a cataclysmic flood in three years, but he believes that inerrant scripture indicates the certainty of such a flood. Without doubt, Thomas is warranted in taking steps with cobelievers to minimize the effects of the predicted tragedy, but is he warranted in trying to engage the efforts of the government?

The best theory of liberal democracy may require that people follow rational modes of thought in their political judgments when these lead to solid conclusions; that degree of commitment to a common method of discourse and thought may be owed to others of diverse convictions in a pluralist society. If this is granted, Thomas would not act in accord with the premises of liberal society if he tried to engage the state in a project that would be senseless given any rational secular assessment of the facts.

Value judgments can also contradict rationality. Suppose that Norma acknowledges that gray cats have no scientifically ascertainable capacities greater than other cats and that they have less capaci-

ties than dolphins, but she believes that gray cats are sacred and should be protected above all other animals. She is, of course, perfectly free with her coreligionists to try to obtain as many gray cats as possible and to treat them with great respect and consideration, but if she urges a political program based on the view that gray cats inherently deserve more legal protection than other cats and dolphins, she may depart from the spirit of liberal democracy.

Perhaps reliance on religious grounds *such as these* is inappropriate even when rational thought is inconclusive on an issue, but I shall pass over that more troublesome problem here.

This concludes my remarks about citizens relying on religious convictions to make political decisions. In Part III, I turn to related matters: the terms in which political positions are advocated, official reliance on religious convictions, and possible interpretations of the establishment clause.

III. POLITICAL DISCOURSE, OFFICIAL ACTION, AND CONSTITUTIONAL LAW

In Parts I and II, I have urged that even though a model of our liberal democracy includes a limited commitment to rationality, it leaves considerable room for religious citizens to rely on religious grounds for moral judgments that affect law and public policy. If I am correct, any hope that all political issues can be resolved solely on the basis of commonly shared premises about values and commonly shared approaches to factual knowledge must be abandoned. To abandon this hope is to free oneself from a misguided illusion, not to forfeit any vital premise of liberal democracy.

In this Part, I shall discuss a number of related issues concerning the quality of political dialogue and activity, official choices, and constitutional standards. I turn first to guidelines for the public articulation of political positions and the organization of political interests.

Saying what liberalism implies as to these matters is troublesome. Much depends on how the open discussion of religious grounds for positions will be taken, especially by those who reject the underlying religious convictions. For this reason, one must have in mind a particular stage which this and other liberal societies have reached.

I believe that now in the United States there is (1) a substantial consensus on the organizing political principles for society; (2) a shared sense that major political discussions will be carried on primarily in secular terms; (3) a respect for religious belief and activity and a hesitancy to attack religious practices as nonsensical; and (4) an as-

sumption that one can be a seriously religious person *and* a liberal participant in a liberal society. With these assumptions, we can develop some rough guidelines for political behavior for persons with religious convictions, though prudential assessments must largely supplant clear lines of principle.

A deeply religious person will want to work out the implications of his convictions for his political views and activities. He will rightly discuss political issues in those terms with coreligionists, seeking to gain insight and to persuade. Religious leaders similarly bring their religious convictions to bear when they address members of the faith; a Christian minister appropriately preaches about why the Gospels require pacifism or a nuclear freeze if he believes that they do. When persons of different religions share some common religious conviction, such as the idea that God commands aid to the poor, that conviction is properly invoked in discussions among them.

Open public discussion is more difficult. When a citizen writes a letter to a newspaper, should he now try to persuade on the grounds of religious arguments? Very roughly, my answer is that he should not. The government of a liberal society knows no religious truth and a crucial premise about a liberal society is that citizens of extremely diverse religious views can build principles of political order and social justice that do not depend on religious truth. The common currency of political discourse is nonreligious argument about human welfare. Public discourse about political issues with those who do not share religious premises is properly cast in other terms.

This straightforward conclusion needs to be qualified in various ways. I want initially to introduce four exceptions. One concerns discourse that is one or more steps removed from ordinary political advocacy. An author writes an article on Jewish perspectives on nature for an environmental journal. Most readers of the journal are not Jewish. But the article is not written in a manner that presupposes that most readers accept Jewish perspectives. The article serves at least two purposes for non-Jewish readers. It informs them of the implications of one important religious and cultural perspective in our society; and by introducing a perspective that varies from their own, it may enrich their sense of the significance of their own perspective and of alternative possibilities. Even if the article is about Christian rather than Jewish perspectives, the nonreligious reader, or the reader from another religious tradition, is not likely to feel left out, in the way that he might if public advocacy over welfare assistance seemed to turn on whose interpretation of Christian doctrine was more sound.

The second exception concerns the discourse of religious leaders.

Religious leaders are, in a sense, experts on religious perspectives; they may devote much of their time to figuring out the import of the basic religious convictions they accept. When they speak about public issues, their special competence has to do with their religious understanding. If, for example, a statement by Catholic bishops on the use of nuclear arms looks just like a statement that might be made by any secular political leader, we feel something is missing. We expect a contribution that reflects the unique position of the bishops. Here a delicate balance must be struck. The Catholic bishops' statement should make some effort to root the positions it takes in Catholic understandings about war and military weapons; but if the statement is designed to have general influence, it should also contain language and ideas that have a broader appeal. In part, the effort should be to cast ideas that conform with Catholic understandings in as generalized a form as is possible.

The third exception is already illustrated by the previous examples. Often there will not be a sharp distinction between how one reaches a general audience and how one reaches fellow believers. The bishops' statement on nuclear weapons is not only addressed to the community at large, it is also designed to enlighten Catholics about what their faith implies. A writer whose primary intended audience is Christians concerned with environmental problems may assume he will reach more of this audience in a general journal about the environment than in any specialized religious publication. Because there is no neat way to reach just the audience one intends, the line between communication with cobelievers and the general public cannot be exact.

A fourth exception concerns proselytizing. Suppose a religious speaker's intended audience is a general one, but the main point of his discourse is not to promote a particular political program but rather to convert others to his religious beliefs. A person who is trying to persuade others to religious convictions may understandably wish to convey some of the moral and political implications of those convictions; that may affect their appeal for nonbelievers. People generally are aware that many religious believers seek to proselytize in this manner. Discourse of this sort that develops connections between religious premises and political conclusions does not make nonbelievers feel left out, as does general political advocacy in religious terms.

Is there yet another exception to my general proposition that fully public political discussion should be carried on in nonreligious terms? Are there some religious premises that are *so widely shared* that they are properly a subject of such discourse? What I have in mind are premises like "God loves us all" or "Social justice is a duty to God as

well as to other humans.” Though interpretations differ, these propositions unite virtually all Christians and Jews, as well as adherents of many other religions. Since in the United States relatively few people consider themselves atheists or agnostics, such premises coincide with the religious beliefs of a high percentage of the national population. Are arguments in these terms an appropriate part of general advocacy? That may depend partly on how much of the population does not accept the premises, and that varies considerably in different sections of the country and among subgroups. At major eastern universities, where many students and faculty do not believe in God, a political argument cast on even such broad religious premises would be inapt. But one might reach a different conclusion about a civic speech in Utah or rural North Carolina. A separate reason to eschew reliance on these religious premises is their considerable indeterminateness; they are not likely to be much assistance in resolving genuinely difficult issues of public policy.

Why should it matter if religious premises are shared? Why isn't it all right to advocate political positions in terms of narrower religious convictions? After all, a public speech relying heavily on religious arguments might be expected to reach some coreligionists and others of like view. In a very religious but extremely tolerant society, public airing of particular religious views might work well; but in actuality such discourse promotes a sense of separation between the speaker and those who do not share his religious convictions and is likely to produce both religious and political divisiveness. If public argument is seen to turn on which interpretation of the Christian tradition is sounder, non-Christians may feel left out and resentful.

I need to enter an important caveat here. I have been discussing the use of religious premises to support controversial positions on public policy. Religious terms may also be employed to enjoin divine assistance, to emphasize the fallibility of human efforts, to call people to act on conscience, and to remind us that all we do is subject to some higher judgment. Though even this employment of religious discourse may offend some nonbelievers, it does not involve practical choices being weighed in terms the nonbeliever rejects. Thinking of our country's strong tradition of reference to the divine, and eloquent examples like Lincoln's Second Inaugural Address, I find this sort of use of religious terms appropriate even at the national level.

My basic thesis, that fully public discourse advocating political positions should be nonreligious, is subject to two related objections. The most straightforward objection is that my proposal promotes a degree of concealment that is immoral and unwise. If citizens *rely* on

religious grounds, shouldn't they say so and explain their reasoning? I begin with the assumption that political discourse mainly involves advocacy of positions arrived at, not full revelation of all the bases by which a decision is reached. We do not expect a speaker to reveal all the nonrational judgments that have led him to his position; we expect him to put forward considerations that will appeal to others. Effective argument appeals to grounds that the audience will accept. If the audience includes many people who do not share one's religious convictions, the most effective persuasion will rely on other than narrow religious arguments. Thus, the course I have suggested not only relates to liberal principles; it is also a maxim about effective advocacy for religious persons. Since most religious people will not clearly identify where religious conviction leaves off and other values and factual judgments begin, they will *usually* suppose that the position they take will be the right one, even apart from religious conviction, and they will not be insincere if they make arguments in nonreligious terms.

I am *not* suggesting that someone actually try to conceal the place of religious conviction. Suppose that a speaker has urged protection of the fetus on nonreligious grounds. If asked by a member of the audience "Isn't it true that your religious beliefs inform your judgment that the fetus is entitled to life?" he should answer "yes" if that is the case. Indeed, he might even say at the beginning of his own speech that religious convictions undoubtedly have an effect on one's views of the topic, but that he is going to present an argument that does not rely on such premises. Acknowledging the important place of religious conviction is quite different from developing an argument in narrowly religious terms. What I claim would not be appropriate would be detailed citation of biblical passages or the writings of church fathers, or a full analysis of how a particular religious doctrine is to be understood.

My own sense, particularly sharp with respect to abortion, is that public dialogue would be enriched if the role of *all* nonrational premises, including religious convictions, were more fully revealed, though I am hesitant to say that doing so is a condition of good citizenship in a liberal democracy. Most notably, the result of greater disclosure might be greater tolerance for those who adopt varying nonrational premises.

The argument for full candor might be turned around to mount a second objection — a challenge to my basic thesis that citizen *reliance* on religious convictions is proper. The claim would be that public dialogue should both provide a basis for reasoned resolution of social issues by all citizens *and* reflect actual grounds of individual decisions.

Since discourse about religious convictions fails the first test, only rational secular arguments should be made publicly. Since discourse should reflect actual grounds of decisions, people should try hard to rely on rational secular grounds for their own political positions. We can see now how assumptions about the quality of public discourse can be used to support the claim that rational secular grounds should be the exclusive bases for citizens' decisions.

My response is to repeat that a viable theory of liberal democracy cannot demand the impossible. If rational grounds are radically inconclusive about major social issues, one cannot expect wholly reasoned resolution of those problems. If liberal theory really requires that, then the poverty of liberal theory is shown; but I claim that the principles of liberal democracy are not so rigorously rationalistic.

Before completing discussion of the proper role of religious beliefs in the political discourse of private citizens, I shall comment briefly on a special problem that arises about religious leaders. The problem is whether such leaders should support particular candidates or urge that voters decide which candidates to support on the basis of single issues. The question is, of course, not the indisputable right of religious leaders to take such actions, but whether these actions are desirable and in harmony with the spirit of a liberal policy. In general, such involvement in the political process is unwise, since it tends to link religious leaders and organizations too closely to the government. The broad policy of major religious groups not to support particular political candidates reflects a wise prudential policy not to mix practical religion and practical politics too closely. But on a matter such as this, one cannot be absolute. If the government pursues a policy that is so abhorrent from a religious point of view that it dominates all other issues, or if a candidate strongly supports a set of values that is directly at odds with values a religion takes as preeminent, then a religious leader may make an exception to ordinary principles of restraint. One could not fault religious leaders during the civil rights era if they urged votes against rabid segregationists. The controversy over abortion is more troublesome, but if a religious leader really believes that permissive abortion results in the murder of millions of humans, the issue takes on an understandable preeminence that it does not have for most people.

The organization of political interests and positions along religious lines presents another question. Religious leaders urging political conclusions certainly may aim for coordination within a denomination to develop and disseminate appropriate positions. For example, the adoption of stands on public issues by Roman Catholic bishops and

the direction that these stands be conveyed to Catholics in individual parishes are appropriate activities in a liberal society.

Attempts to organize people along religious lines for overtly political purposes is much more dubious. Here again, effective strategy and observance of the spirit of liberalism largely coincide. A minority religion that creates its own narrow political action group or political party is not likely to promote its political objectives with maximum effectiveness. Such efforts will make its positions seem sectarian, leaving some outsiders indifferent and inducing hostility among others who wish to avoid dictation by religious views they do not accept. Political organization that bridges religious divisions is likely to be more effective and is more consonant with the broad principle that religion and politics should remain roughly separate.

I now turn to public officials. How far may they take religious convictions into account in performing their public roles? I shall concentrate on legislators and judges.

Legislators must vote on proposed legislation. Because they are also leaders of public political opinion and their political positions partly determine whether voters will approve their performance, they must formulate and advocate views on laws and policies in public.

I am going to make four simplifying assumptions. The first is that a prospective legislator running for office is in the same position as a present legislator. Whatever may be true of fringe candidates who have no hope of being elected but wish their candidacies to symbolize something, a person with a realistic chance of being elected should develop his positions in a manner similar to that of legislators in office. However often such bonds may be broken, candidates do have some obligations of fidelity to their constituents to stick to positions asserted during the campaign, and they have a duty of honesty not to misrepresent how they will decide issues once they are elected.

A second assumption is that we can disregard the extent to which legislators may compromise otherwise appropriate standards in the interests of odd constituencies and electability. Suppose that most citizens in a district take a distinctly illiberal view of the proper place of religious conviction in the making of public policy, and will not vote for anyone who disregards their religiously based views. Perhaps a legislator could reasonably compromise ideal principles in the service of his constituents and the interests of being reelected, especially if the likely alternative is election of someone wholly indifferent to liberal principles. How far political actors should adhere to "correct" standards and damn the consequences, and how far they should bend to what is realistically possible, is a pervasive and troubling question, but

one that I avoid. I assume that a legislator's faithfulness to proper liberal principles does not threaten his continuance in office.

A third simplifying assumption is that we can disregard differences between the interests and wishes of a particular legislator's constituents and those of the entire body of citizens. How far a legislator should promote the particular welfare and views of his own district as contrasted with those of the general population is an important question (related to the divergence between "delegate" and "trustee" theories of representation discussed below), but one that by itself is not central for our purposes.

My fourth simplification is to talk about legislators without discussing the role of political parties. In many liberal democracies, party decision effectively determines how individual legislators vote. Parties are not nearly so powerful in the United States, but party influence and loyalty is still an important factor in some votes. To a large extent, the questions I discuss in terms of individual legislative choice could also be addressed in terms of the position that those who control political parties should take.

Once we have eliminated these various complexities concerning what legislators should do, we are left with a rough cleavage in traditional theories of representation. The "delegate" theory, which enjoyed considerable prominence in colonial America, is that the legislator should act according to the views of those he represents. The "trustee" approach, associated with Edmund Burke's famous "Bristol speech,"²¹ is that the legislator is empowered to make up his own mind about what is sound public policy. Both views in extreme form are implausible. The more serious questions are precisely how much and when representatives should be guided by one perspective rather than the other. For our inquiry about the role of religious convictions, we do not have to worry about how much weight in which contexts each perspective should have; we need only understand that legislators often should accord weight to constituency views and often should try to determine for themselves what a sound decision would be.

If proper deference to constituency opinion meant a completely passive reflection of constituents' views, the question about reliance on constituents' religious convictions would answer itself; representatives' indirect reliance on religious convictions would mirror the direct reliance of relevant constituents. But I suppose that legislators, even

21. E. BURKE, *Speech to the Electors of Bristol*, in 2 *THE WORKS OF EDMUND BURKE* 89 (3d ed. Boston 1869).

when acting as "delegates," have *some duty* to screen out political views, or grounds for political views, that are at odds with liberal democratic premises. To revert to an example I used in Part I, a legislator should certainly not vote against minority preferences because of constituent views, if those views are based on desires to perpetuate racial subjugation. Or suppose that citizens rely on religious convictions in some other way that is not consonant with liberal principles; they want to suppress actions just because they are sinful. A courageous legislator who considers liberal principles to be the secure foundation of our political order should refuse to go along. Rather, he should try to persuade voters that policy in a liberal democracy is not properly made on such grounds.

When private individuals rely on religious convictions in a way that is consistent with the liberal spirit, should legislators give views formed in this way any weight at all, and, if so, should they give them the same weight as is given to positions formed in other ways, or less weight?

We have reason to start with an assumption that legislators may properly rely on constituents' positions formed in a proper manner. It would be paradoxical to say that citizens can make up their minds and vote on certain grounds but that legislators may not take the resulting conclusions into account.

Should it be objected that since public officials must represent the entire spectrum of religious views, they should not give weight to positions based on particular religious opinions, my answer resembles what I have already stressed about citizens. When issues cannot be settled on rational secular grounds, it is hard to see why legislators should give weight to nonreligious judgments of value and not to religious ones. Many of the values now reached by a secular consensus are held today because they were earlier held as matters of religious conviction. If these values cannot be established on rational grounds, legitimate legislative reliance should not depend on whether their religious origins are still recognized.

I am contending that legislators must sometimes rely on nonrational grounds *and* that the nonreligious, nonrational judgments of constituents should not be preferred to their religious convictions as bases for political positions. What of the possible argument that legislators should rely on the nonrational judgments of constituents only when those judgments are supported by an overwhelming consensus? There are some obvious difficulties with this suggestion. One concerns premises that are initially shared but begin to be challenged. Suppose that the full legal protection of newborns rests on nonrational judgments.

Legislators are warranted in providing this protection so long as almost everyone agrees that it is appropriate. But if a substantial enough percentage of people, say fifteen or twenty percent, starts to doubt that position, the consensus has disappeared. It would be odd to say that legislators must now disregard the nonrational belief of the great majority that protection should continue. A related difficulty is more general. Often no consensus will exist about a problem that cannot be settled on rational grounds. Legislators must choose to protect or not protect. Their decision is bound to reflect one set of nonrational judgments in preference to another. It would not make sense to say that in such circumstances, the law must remain unaltered; that principle would give too much weight to past practice and inertia. Nor would it make sense to say that in cases of division, legislatures should always refrain from legal prescription; application of that principle might demand that legislators sit by and allow what eighty percent of the people regard as the murder of innocent beings.

I conclude that liberalism does not require legislators to disregard constituent views grounded in religious conviction when these views are themselves formed in accord with liberal principles. Legislators may give some weight to such views whether or not there is a consensus behind them.

The matter of how much weight to give these is more troublesome. Suppose, to present the question starkly, a legislator is considering two issues. On one, a substantial majority of constituents takes a position that it thinks is implied by shared premises underlying the political order. On the second issue, the majority is as great but the ground for the constituents' position is nonrational religious judgments. Reasons for deferring to constituency judgment may be especially powerful when citizens conceive of a position as required by justice, understood in terms shared broadly by society. Perhaps legislators should give less weight to judgments based on religious convictions than to judgments thought to be rationally derived from broadly shared premises.

When we turn to legislators relying on *their own convictions*, the place of religion is more controversial. As a public representative in a state that is separated from religious organizations, perhaps the legislator should forgo reliance on religious premises insofar as he can. Everything I have said so far indicates how hard this might be to accomplish, but nonreliance might at least be held up as an ideal.

Imagine first a situation like that I posed at the outset:

Jean, a member of Congress, must decide in a special vote whether to risk extinction of a species of fish. She must unavoidably rely on her own judgment, because she is unable to ascertain public opinion or

thinks it is evenly divided. She sees the central question as coming down to whether the natural world is to be valued for its own sake. She realizes that her own view that it should be valued in this way is informed by her religious conviction about God's universe. She must make up her mind about how to vote. She is deeply uncertain what she would otherwise think.

Liberalism does not demand that legislators deny the effect of convictions about which they feel deeply and which lead to positions also held by many who do not share their convictions. If a model of liberal democracy has nominal regard for the wholeness and integrity of religious persons, it cannot expect legislators, any more than private individuals, systematically to expunge all religious conviction as a guide to action.

It is more debatable what a legislator should do when he decides whether to rely on his own judgment or those of constituents, and he recognizes the religious roots of his own position. On these occasions, subject to qualifications I shall not address here, I believe the legislator should be very hesitant to override contrary constituent judgments, that is, he should be very hesitant to proceed on his religious convictions when he believes that constituent views are opposed to the political position they yield.

In sum, both constituent views and those of legislators themselves are entitled to greater weight when they are based on secular rational premises or rational applications drawn from shared premises than when they are self-consciously rooted in religious convictions or other unshared nonrational judgments; but legislators often can reasonably take into account nonrational judgments, and religious convictions more particularly.

I need say relatively little about the nature of a legislator's political discourse. He is a public figure, representing people of all religious hues and in a government that is separate from any church. Usually he is speaking to and for a general audience, and his discourse should be in nonreligious terms. The country is so generally religious that vague invocations of religion and the deity may be acceptable — "God willing, we shall do our best"; "we are a religious people unlike the atheist Communists." There is also room in the public discourse of legislators for some expressions of personal outlook and feeling, and these may include reference to one's own religious convictions. But the serious urging of policies on the basis of particularistic religious premises is not proper.

What about judges? Can we comfortably conclude that whatever others may do, judges should not rely on religious convictions in making their decisions? Certainly we do not expect to see religious argu-

ments in judicial opinions, so there is a strong presumption that in a liberal society judicial discourse should not include them. Nevertheless, occasional reliance by judges on religious convictions is not improper. A full discussion of this topic would require a lengthy examination of judicial interpretation; I shall content myself with a few summary comments. I shall not address those instances, such as crèches being placed in city parks, in which religious feelings of citizens figure in an assessment of whether state actions amount to an establishment of religion. Nor shall I address the more general possibility that religious convictions of members of the community may figure in community morality, when community morality is relevant under some legal standard. Rather, I shall talk about judges relying on their own convictions.

Judicial opinions are formalized justifications for decisions. Opinions are supposed to refer only to what is legally relevant. If a distinction, however blurred, exists between decisions that are required by the existing law and decisions that reflect a kind of judicial legislation, the legislative decisions are not fully revealed in the opinions themselves, which tend to mount up the legal sources in favor of a result. What is legally relevant is generally conceived to be the same for all judges, so neither personal religious convictions nor any other personal convictions are legally relevant. Given this understanding about judicial opinions, it follows that opinions should not contain direct references to the religious premises of judges.

But can judges reasonably avoid reliance on their own religious convictions? There is a model of decision according to which judges are always seeking to determine which result would fit best with existing legal materials. If judges could always decide cases in this way, then they would never be in the position of having to rely on personal convictions of any sort. But such a model is implausible. Some legal terms, such as "cruel and unusual punishment" and "good moral character" seem to refer the judge outward to nonlegal domains. Many people believe that in a much broader class of difficult cases, judges must, in a sense, legislate, since no determinate answer can be derived from existing legal materials. Even the most prominent modern spokesman for the law as discovery model, Ronald Dworkin, has made clear in recent writings that in choosing a theory that will best explain existing materials, a judge typically will have to make *independent* judgments of political morality, independent in the sense of not determined by the legal materials themselves.²² So, a wide spec-

22. See, e.g., Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

trum of opinion agrees that on some occasions judges cannot ultimately rely exclusively on legal materials for answers, but must make independent judgments. That judges will have to make such judgments does not necessarily mean that they will realize they are doing so. In actual cases it is very hard to say where the law runs out. But I am going to imagine the stark case in which the judge is fully aware that an independent judgment is needed. Now, one might claim that in all those situations, judges should simply refer to community morality; but community morality will often be nonexistent or undiscoverable, and in any event at least sometimes judges should be deciding what is actually right, not what the community thinks is right.

If this much is granted, judges sometimes will have to decide what is a correct answer to the relevant issue of moral and political philosophy. Let us suppose, for example, that the judge is interpreting an environmental statute and the statutory language is unilluminating for the problem at hand. Resolution of the issue seems finally to turn on how much respect is owed by humans to the natural world, with no clear guidance from the statute itself or legislative history. I see no escape from the proposition that the judge, like the legislator, may in such settings find it necessary to rely on his religiously informed answers to what is right, though the caution I offered about legislators' reliance applies even more strongly here. Each is a representative of a larger public, but the legislator is one of many and can be voted out of office. In some cases an individual judge will have the final say; in others his voice will be proportionately much more influential than that of an individual legislator. Therefore, the judge should be extremely wary of relying on his own religious convictions, especially when he recognizes that his premises or the positions they yield are not widely shared. When a choice is available between standards of decision, a judge who understands that his own preferred resolution rests on a particularistic religious premise should look carefully for some other basis to resolve the case. But when such judgments are genuinely unavoidable, the judge should be able to rely on religious premises in the same manner as the citizen and the legislator.

Finally, I want to address a few comments to the legal problem of constitutional law I have put to the side so far: what reliance on religious convictions in lawmaking amounts to an impermissible establishment of religion? I shall not be concerned with typical church-state issues, such as assistance to religiously connected groups or religious exercises in public settings. These issues present serious constitutional questions quite independent of the particular premises that underlie some piece of legislation. I shall be concerned with legislation

that forbids, requires or authorizes certain noncommunicative acts, when the reason why the acts are treated the way they are is traceable to religious conviction.

I must be careful about what I mean by unconstitutionality, given the difference between legislative and judicial roles and all the complexities of judicial appraisal of legislative action. I begin with the assumption that if every legislator votes for a bill on grounds that are at odds with constitutional premises, the act is in some sense unconstitutional even if alternative permissible grounds could have supported the same piece of legislation. In a more extended sense, a single legislator who votes on such grounds may be acting unconstitutionally, whatever the grounds that determine the votes of others. How far courts may investigate the actual purposes of legislators is a deep problem; and, of course, in typical settings legislative motives will be mixed. But I shall suppose, in conformity with present establishment clause jurisprudence, that a dominant purpose to impose or promote a particular religious view could be relied upon by courts to invalidate legislation if that purpose were readily apparent.

Let us assume that there is an unambiguous connection between religious convictions and resulting legislation. I do not think it matters whether the connection involves the legislator's own convictions or his simple deference to convictions of his constituents, and I shall disregard that distinction here.

If legislation is adopted because behavior is bad, judged from a religious perspective, but without belief that that bad behavior causes secular harm to entities deserving protection, then the legislation should be held to violate the establishment clause. The basic argument is that to demand that other people act in accord with dominant religious beliefs is to promote or impose those beliefs in an impermissible way. The structure of this argument was suggested more than two decades ago by Louis Henkin, who argued that laws suppressing obscenity might be viewed as upholding a religious conception of sin and might therefore be declared invalid under the establishment clause.²³ A similar attack might be made against laws that forbid deviant sexual behavior among adults. Of course, plausible secular objectives might be used to defeat such attacks; and it may even be true that in few or no cases could the requisite findings of connection to religious belief be made. But if the unambiguous connection to religion can be shown to be the main basis for the legislation, the establishment argument should succeed.

23. Henkin, *supra* note 2.

What of laws based on religious convictions that are actually at odds with rationality, laws that afford a protection that is opposed to any conclusion that might be reached by rational thought? Suppose, for example, that gray cats were accorded a protection not given to other cats because of their claimed religious importance. If we put aside a possible claim of permissible accommodation to deeply held religious feelings, that kind of protective legislation should be viewed as an establishment of religion, since treating a cat's fur color as relevant to its moral status is patently unjustified from the standpoint of rational secular morality. A similar conclusion would obtain if a critical factual judgment on which legislation was based was actually irrational. Instances of this sort of legislation are predictably nonexistent or very rare in a culture, such as ours, where religious perspectives are constantly reexamined in light of scientific knowledge and secular morality, and it is recognized that the law must govern people of diverse religious views.

A law should not be treated as unconstitutional if the place of religious conviction is to define the entities that warrant protection or to help resolve conflicts of value when the critical question is not one that rational secular morality can resolve. A law protecting fetuses or aiding the poor is not an establishment of religion, even if it is religious convictions that largely persuade people that fetuses or the poor warrant protection. I have already indicated why reliance on such views by citizens does not constitute an imposition of religion in the ordinary sense and further why such reliance not only is unavoidable and constitutionally protected, but is proper for a good citizen in a liberal society. These same reasons indicate why such reliance does not amount to a constitutionally invalid religious purpose or constitute an establishment of religion. Similar results should obtain when religious convictions figure in a weighing of concededly secular values or in difficult factual assessments. Even if policies on aid to the poor could be traced to religious premises about what society owes to its less fortunate members, or to religious premises about the inflexibility of human nature, they should not be regarded as unconstitutional.

I have indicated that my notions of what laws should be declared unconstitutional track rather closely my understanding of the implications of liberal democracy. I shall now briefly explain my rejection of certain other possible positions.

One possibility is that active involvement by religious organizations in the adoption of legislation would render a resulting statute unconstitutional. Though occasionally rhetoric about the gross threat posed by political activities of religious organizations may suggest

such a constitutional principle, I am not aware of anyone who has seriously proposed and defended it. Two objections are conclusive. One is the unworkability of any test of degree here. How much activity and influence would be needed to make legislation unconstitutional? The second objection concerns the disturbing implications for the political activity of religious groups. Not only are political efforts by these groups constitutionally protected, they should be deemed a healthy part of a liberal democracy. Although the political involvement of religious groups is sometimes divisive, churches and related organizations represent both particular interests that warrant advocacy and deep strains of conscience. The Constitution should not be interpreted to render legislation suspect whenever the activity of religious organizations has helped to promote it.

For reasons that are somewhat more complicated, I also reject the notion that the Constitution requires legislators to give priority to rationally demonstrable values over nonrationally grounded ones when the two conflict. Read straightforwardly, *Roe v. Wade* does not support such a priority; rather it indicates that before viability the woman's interest in having an abortion is simply stronger than the state's interest in preserving the fetus. But *Roe v. Wade* could be reconceptualized to rest on the proposition that the rationally grounded claims of the pregnant woman must prevail for purposes of constitutional law over the claims of the fetus, which rest on nonrational judgments. Would such a principle be sound? What I have said in Part II indicates why I think it would not.

Our social morality is shot through with nonrational judgments, among them that human infants deserve the protection of mature human beings and that we should make some efforts to preserve dying species. It would be absurd to hold unconstitutional every legislative decision to implement one of those values at the expense of some other "rational" interest or value. Often the conflict will be between a widely shared and strongly held nonrational judgment and an undeniably rational but very weak value, such as the economic benefits of killing members of a particular endangered species.

To be plausible, the principle of priority for rational judgments would have to be qualified in some way, perhaps to assure priority only for rationally based values that are important, or are equal in power to competing nonrationally based values, or are in competition with values that are not supported by a consensus. But any distinction between rationally and nonrationally based values would be exceedingly difficult for a court to apply in practice, especially since rational arguments of some power almost always support even those positions

I have claimed rest finally on nonrational judgments. To accord superiority to rationally based values would be inappropriate because of the range and complexity of moral judgments that individuals and societies must make, and because of the uncertain borderlines of what is rational.

Let me now say a few words in conclusion. Like most issues, the question of religion and politics proves much more complicated than appears at first sight and than many people would like to believe. This issue is peculiarly subject to oversimplification because it is obfuscated by rhetoric serving particular political objectives and because many intellectuals who think that religious convictions are foolish superstitions want to minimize their legitimate position in social life without confronting them head on.

I began my investigation believing that the claim that citizens and legislators should rely exclusively on rational secular grounds was definitely wrong. I have found it more difficult than I initially supposed to show that the claim is *definitely* wrong, but increasing familiarity has persuaded me that at the deepest level, the claim is not only wrong but absurd. It invites religious persons to displace their most firmly rooted convictions about values and about the nature of humanity and the universe in a quest for common bases of judgment, a quest that is inevitably quixotic when virtually everyone must rely on nonrational perspectives. Serious efforts by religious people to be model liberal citizens of the sort recommended would produce a frustrating alienation of their whole persons from their political characters.

Rather than asserting any exclusivity for rational secular bases of judgment, sensible thought about a model of liberal democracy focuses mainly on domains of liberty and a more reasonable and constrained commitment to rationality.

Perhaps the most important lesson of this entire exercise is that liberalism demands a high degree of tolerance and understanding — not the tolerance of indifference, but a sympathetic mutual understanding of the place religious premises occupy in the life of serious believers and of the dangers to those of different beliefs if religious convictions and discourse overwhelm the common dialogue of rational secular morality.