

MORALITY AND THE FIRST AMENDMENT

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Moral judgments can and should play an important role in the interpretation of the First Amendment, and the First Amendment should be interpreted to facilitate the leading of moral lives by its people, including its corporate and public officials. These claims are controversial because most scholars would deny that it is appropriate for courts to take into account the moral value of speech in interpreting the First Amendment,¹ or to take into account the impact of its rulings on the moral lives of its people or its impact on the morality of the culture. Moreover, the relationship of the religion clauses to the moral lives of its citizens and the morality of the culture are deeply contested in the scholarly literature and in the public life of American politics. These issues are important now and they have been for many years. I will argue not only that First Amendment doctrine is distorted by its failure to take into account the moral lives of its people, whether in or out of corporate or public office, but also that the public morality encouraged by the interpretations of freedom of speech and religion is defective.²

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¹ That said, in the absence of harm or probable harm, the state should not outlaw speech it regards as immoral. See also Ronald C. Den Otter, *The Place of Moral Judgement in Constitutional Interpretation*, 37 IND. L. REV. 375 (2004).

² An emphasis on moral lives is broader than an emphasis on virtue or civic virtue. The cultivation of virtue should lead to moral lives, but virtues are not a life. Nonetheless, scholarship about civic virtue and the First Amendment obviously overlaps with this essay. With the important exceptions of work by Lee Bollinger and Vincent Blasi (discussed *infra*), the main First Amendment work in that vein has proceeded from a Burkean conservative perspective as opposed to the progressive perspective I take here. Walter Berns, *Freedom, Virtue, and the First Amendment*, 18 LA. ST. L. REV. (1957). Marc O. DeGirolami, *Virtue, Freedom and the First Amendment*, 91 NOTRE DAME L. REV. 1465 (2016) draws from the approach of Berns with sophistication in his discussions of both speech and religion clauses. He and I share a view in the tradition of Isaiah Berlin that is suspicious of grand theories. We agree on the outcomes in many free speech cases. But he embraces conventions and traditions in ways that I do not which leads me to endorse the protection of dissenters more than he does. He places more emphasis on indecency and is more hostile to the expansion of sexual freedoms than I am. I expect that he would support free exercise somewhat more strongly than I would. Finally, I would support a more stringent view of the Establishment Clause than he would. I realize that my sketch of these

These claims are related to even larger questions which I need to discuss as a preliminary matter: Does the Constitution and the government formed by it require a moral citizenry in order to flourish? Is it a proper function of government to promote its conception of moral lives? These questions were very much in the minds of the Framers in developing the Constitution, and that history is relevant to my inquiry. To be sure, in interpreting the Constitution, multiple sources play a role: language, history, intent, structure, precedent, common sense, and policy. After providing a roadmap of the essay and a discussion of neutrality liberalism, I will begin with a discussion of the intellectual traditions leading to the Constitution, and the assumptions of the Framers. I do not mean to suggest that these traditions and assumptions must be binding upon us. Modern courts have to a large extent rejected racism, sexism, and generally the shriveled sense of equality dominant at the time of the founding. Modern courts have also rejected the narrow conception of freedom of speech alive at the time,³ and they have rejected the conception of property that for so long resisted regulation. In addition, I would stress that we need not be bound by the conceptions of moral life encouraged by the Framers. There is room for a broader conception of moral lives and for a more inclusive public morality. Nonetheless, I believe there is much to be learned from the traditions and assumptions that led to the Constitution.

Here is a roadmap of the essay:

- I. The Constitution assumes that government best operates when its people and its officials lead moral lives.

differences is not a rebuttal, but I do not propose to further explore our differences here.

Also well worth reading is Timothy L. Hall's masterful *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L.REV. 87 (1992). Much of the excellent Republican Revival scholarship has only a partial overlap to this essay because it is primarily concerned with the republican themes of deliberative democracy and self-government. I favor deliberative democracy as a means and as a right of the people, but not as a touchstone of what counts as a right. I believe rights exist whether or not they emerge from a deliberative democracy and whether or not they are pre-conditions of a deliberative democracy. See note 47 *infra*. See also CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 173 (Duke University Press, 2004) (development of human rights after World War II is the "clearest expression of our modern idea of a moral order underlying the political, which the political has to respect.") [hereinafter TAYLOR, MODERN SOCIAL IMAGINARIES].

³ For discussion of the early understanding of freedom of speech, see Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L.REV. 2816 (2015).

Specifically, it opposes corruption (including a focus on luxury) and favors virtue. It is structured in the hope that representatives will represent the common good rather than factions. The evidence can be gleaned from the founding, but, as I have just suggested, we need not and should not be bound by the Framers' conceptions of morality;

- II. An appropriate moral vision of the lives of the People would result in substantial changes in free speech doctrine, in particular allowing greater content regulation in matters such as depictions of animal cruelty, gruesomely violent video games, intentional infliction of emotional distress, commercial advertising, campaign finance, and hate speech; moreover, it would give greater emphasis to the importance of freedom of association in the freedom of speech; it would encourage not only toleration, but dissent, the courage to combat evil, the distrust of authority and simplistic solutions, and a spirit of independence.
- III. The Religion Clauses ought to be construed to grant accommodations for claims of conscience—whether rooted in religion or not—and to other sorts of exceptions rooted in religion (in part because the empirical evidence strongly shows that religion generally functions as a positive force in civil society), but need not be construed to grant exceptions from general obligations on other grounds (although there may be other reasons, not rooted in the Religion Clauses, for such accommodations), and liberals need to be more moderate (i.e., respectful of moral freedom) in resisting claims of religious conservatives as strongly as they do. In some cases, their resistance appears to betray prejudice. At the same time, *contra* the Supreme Court, I believe that the principles governing secular associations can for the most part appropriately apply to religious associations. Finally, I think it is appropriate for government to promote moral values, but not theism (In God We Trust). Nonetheless, the government's promotion of theism has a salutary side.

It fits with an attractive national story that promotes moral lives.

I. THE FRAMING OF THE CONSTITUTION

Two political traditions have played an important role in the Constitution's framing. Liberalism, of course, played a significant role. As Louis Hartz famously argued, the American polity has been profoundly influenced by John Locke.⁴ In arguments later echoed in the Declaration of Independence and the Constitution, Locke contended that all men are equal,⁵ that they are endowed by their Creator with basic rights including the rights to life, liberty, and property, and he argued that governments were instituted to secure these rights. From this perspective, it can be argued that government has no role to play in promoting moral lives. In one of its manifestations, it urges that government play a limited role so that free consumers in free markets can allocate resources in a free economy.⁶ In another manifestation, it limits government to guaranteeing the rights of its citizens assuring them freedom, so long as they do not infringe on the rights of others. In neither of these manifestations is it the function of government to abandon its impartial role. Its role is to assure its citizens their freedom of action. Indeed, the Lockean perspective can be seen as relentlessly individualistic. On the other hand, the popular commitment to Locke is so deep seated that it can usefully be described as "atomistic social freedom."⁷ That is, individualism is deeply assumed, but the commitment to Lockean principles is so widespread that individualism in practice becomes conformism.

⁴ LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 4, 9–11 (Harvest, 2d ed. 1991) (1955) [hereinafter HARTZ, *LIBERAL TRADITION*].

⁵ As indicated in the text, the narrow understanding of equality has been improved, albeit not yet what it should be.

⁶ Locke thought that God's natural order promoted mutual service in terms of productive exchange. TAYLOR, *MODERN SOCIAL IMAGINARIES*, *supra* note 2, at 15, 71, 74–75. Although this free market conception rings of Adam Smith, Smith himself worried that too great a division of labor would stupefy workers so that they would be unfit to be self-ruling citizens. *Id.* at 180. He also had a well-developed conception of civic virtue and envisioned that government would play a limited role in promoting it. Samuel Fleischacker, *Adam Smith's Moral and Political Philosophy*, *STANFORD ENCYCLOPEDIA OF PHIL.* (Feb. 15, 2013), <https://plato.stanford.edu/entries/smith-moral-political/>.

⁷ HARTZ, *LIBERAL TRADITION*, *supra* note 4, at 62.

Although the Lockean conception of government is at least in tension with the notion that government might promote its conception of moral lives, Locke himself recognized that the wealth and prosperity of the Nation depended on the moral virtues of its citizenry.⁸ As Peter Berkowitz puts it, from Locke's perspective, "it is not government's job to promote human excellence or save souls, government cannot protect life, liberty, and possessions unless citizens practice virtue in private life and bring specific social and moral virtues to political life."⁹ From Locke's perspective these virtues had to be nurtured in childhood and the parents had primary responsibility in raising and educating their children.¹⁰

A rival tradition placed more emphasis on the relationship of moral—and immoral lives—to the Constitution. This tradition (which includes Republicanism, Classical Republicanism, Civic Republicanism, or Civic Humanism)¹¹ stretches back to Aristotle, through numerous Italian political theorists, including Machiavelli,¹² various English political theorists, and on to those influential in the Constitutional founding including Hamilton, Madison, and Jefferson. Generally, in this tradition, a moral and stable government must treat its citizens as equals belonging to a supportive political community in which they recognize their reciprocal freedom¹³

⁸ JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 129 (John W. Yolton & Jean S. Yolton eds. 1989).

⁹ PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 104 (1999).

¹⁰ *Id.* at 105. For discussion of Locke's views on education together with the relationship between those views and his political theory, see NATHAN TARCOV, LOCKE'S EDUCATION FOR LIBERTY (1984).

¹¹ The tradition is not monolithic. For a concise, but controversial, description of some of the divisions, see Frank Lovett, *Republicanism*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/republicanism/#CivVirCor> (last visited, April 17, 2018). Parsing the differences is not important to my project, so I sometimes make statements about republicanism that are not uniformly held throughout the tradition. Republicanism, of course, has no monopoly on a concern with civic virtue (which has spillover effects on private lives). For an excellent discussion of civic virtue from the perspective of political liberalism, see JAMES E. FLEMING & LINDA C. McCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 81–145 (2013).

¹² See MACHIAVELLI AND REPUBLICANISM (Gisela Bok, Quentin Skinner & Maurizio Viroli eds. 1990) [hereinafter MACHIAVELLI AND REPUBLICANISM]; J.G.A. Pocock, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 88–89 (1975).

¹³ Much of the republican tradition conceives of liberty as negative freedom. Another branch conceives of it as anti-domination. I favor the latter, but the conclusions I draw in this paper are consistent with a negative conception of liberty. For the anti-domination view, see QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 84 (1998);

and responsibility to actively engage in political life,¹⁴ to further the common good,¹⁵ or the public interest. From this perspective, the nature of citizenship in the political community nurtures the civic virtues needed to support the polity.¹⁶ At the same time, there was concern with the possibility that citizens would become corrupt instead of virtuous.¹⁷ As William M. Sullivan observes, republicanism is built around the qualitative contrast between corruption and civic virtue.¹⁸ Finally, the tradition underscored the importance of separation of powers sometimes for moral reasons including fear of corruption,¹⁹ institutional reasons,²⁰ or both.²¹

The Framers of the Constitution addressed the conflict between civic virtue and corruption in decisive, but diverse ways. At the time of the Revolution the dominant view was that the leaders of England²² and the colonies were corrupt²³ and the property holding people possessed civic virtue.²⁴ Although

PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); CÉCILIE LABORDE, *CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY* (2008).

¹⁴ Frank Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 879 (1986) discusses the ways in which self-government might apply in contemporary U.S. society. Richard Fallon, *What is Republicanism and Is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1698 (1989) rightly contests the notion that human purposes can only be fulfilled through participation in political activity.

¹⁵ On the importance of the common good and self-government, see NICCOLO MACHIAVELLI, *THE DISCOURSES* 275–76 (Bernard Crick ed., Leslie J. Walker, S.J. trans. 2003) [hereinafter MACHIAVELLI]. The phrase *common good* papers over the extent to which even in small scale societies typically there are winners and losers when political decisions are made. So, in that sense, a policy can be in the public interest without producing a common good.

¹⁶ Maurizio Viroli, *Machiavelli and the Republican Idea of Politics*, quoted in MACHIAVELLI AND REPUBLICANISM, *supra* note 12, at 143, 146.

¹⁷ MACHIAVELLI, *supra* note 15, at 160–64.

¹⁸ WILLIAM M. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* 182 (1986) [hereinafter SULLIVAN].

¹⁹ POCOCK, *supra* note 12, at 128, 288, 420, 480–81 (fearing corruption of those in power).

²⁰ *Id.* at 364–65.

²¹ *Id.* at 480.

²² In the case of England, the leaders had also corrupted the people. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–87*, at 32–33 (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*].

²³ The nature of corruption with respect to colonial leaders was a failure of independence in attempting to secure the common good resulting in majoritarian factionalism. GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 235–36 (2011) [hereinafter WOOD, *THE IDEA OF AMERICA*].

²⁴ On the theory that property holding was correlated with independence, the vote was confined to property holders. Non-property holders, women, and minors were

property ownership was believed to foster independence, the Framers believed that “if their experiment in Republicanism was to succeed, the American people had to avoid the luxury and corruption that had destroyed ancient Rome.”²⁵ In addition, Bills of Rights were necessary in the new free states to assure that the leaders were reigned in. By the time of the Constitution’s founding, neither the anti-Federalists nor the Federalists had sunny views of the extent of civic virtue in the general population. The anti-Federalists maintained that there was no reason to believe that representatives in Congress would have the civic virtue needed to promote the public interest. They pressed for limited governmental powers and an explicit Bill of Rights.

The Federalists did not abandon a belief in rights. Their initial view was that governmental institutions had no power to violate rights, that attempting to spell out specific rights risked leaving out important rights, and that the courts possessed the power to curb abuses of rights.²⁶ They further believed that separation of powers and checks and balances would make it difficult for government to perpetrate serious abuse. Although they recognized that citizens could be selfish and act out of self-interest, they believed that a certain amount of civic virtue was necessary if a democratic republic was to survive, and they believed that there was enough civic virtue to expect that property holding citizens would possess enough moral independence to elect wise and prudent representatives.²⁷ From the perspective of the Federalists, the government was a democratic republic in that the People distributed governmental powers to various parts of the government while retaining their rights and liberties. From this perspective, the democratic republic secures rights and seeks to limit the effects of the limited civic virtue held by the populace while hoping that governmental

regarded as not independent and were, therefore, excluded from the vote. *Id.* at 192–93.

²⁵ *Id.* at 325.

²⁶ WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 22, at 536–40.

²⁷ This Jeffersonian notion tended to equate property holders with farmers. Given the rise of agribusiness and that wage earners are dependent on employers, the independence assumption is compromised. ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL 117, 131 (The University of Chicago Press 2d ed. 1992) (1975) [hereinafter BELLAH, BROKEN COVENANT]. This supports the view that a safety net and a guaranteed job would further republican values.

leaders will be prudent, wise, and dedicated to the public interest.²⁸

In addition to the political traditions that led to the Constitution, the influence of religion upon the Constitution is worth noting. It would be a mistake to suppose that political leaders at the time were uniformly religious. Thomas Jefferson hoped that religions would fade away, and Thomas Paine's attitudes mirrored the European Enlightenment's anti-religious views. Still less would it make sense to suppose that those who held religious views were homogeneous. To be sure, there were few Catholics and Jews, let alone Muslims, Buddhists, and Hindus.²⁹ The religious demographics were predominantly Protestant, but Protestant of all shapes and sizes, and the differences among Protestants were taken far more seriously than they are today.³⁰ Nonetheless, it is fair to say that Protestant Christianity played a prominent role at the founding.³¹

These Protestants were not typical European Protestants and that made a difference. Many European Protestants did not see politics as important. As Charles Taylor puts it, they took the Augustinian view that politics was not "important in the plan of salvation."³² Instead, it was a "makeshift, a compensation for our fallen condition, saving us from the worst consequences of the Fall."³³ They primarily looked to the next world, not to the

²⁸ WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 22, ultimately emphasizes this understanding of popular rule together with a chastened view of the amount of civic virtue alive in the citizenry. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 346–47, 368 (Belknap Press enlarged ed. 1992) (1967) shows that skepticism about the possibilities of civic virtue in a large polity among anti-Federalists was even greater than that of the Federalists.

²⁹ Will Herberg estimates that there were 25,000 Catholics in the colonies at the time of the Revolution building to 40,000 by 1789. WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* 137 (Rev. ed. 1960). There were approximately 2,500 Jews in the colonies in 1776 and 5,000 in 1826. *Id.* at 172–73. The general population in 1789 was approximately 40,000,000. *Id.* at 137.

³⁰ James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, remarks that the Religion Clauses had the practical intention of reducing the deep and long-standing tensions spawned by the interprotestant rivalries. *ARTICLES OF FAITH*, *ARTICLES OF PEACE* 93, 100 (James Davison Hunter & Os Guinness eds., 1990).

³¹ MARK A. NOLL, *AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* 9 (2002).

³² Charles Taylor, *Religion in a Free Society*, in *ARTICLES OF FAITH*, *supra* note 30, at 100.

³³ *Id.* The religious right took this position in the 1950s before it became a major political player in the late 1970s. GEORGE M. MARSDEN, *THE TWILIGHT OF THE*

government of this one.³⁴ But many European Protestants sought an alliance with government to promote their vision of the truth.³⁵ In contrast, American Protestants had been European dissenters. They fled persecution in Europe and realized they could not ignore the structure of government.³⁶ If in Europe, traditional Protestants could be comfortable with monarchy and other forms of authoritarian rule, dissenting Protestants had to be more careful in the New World. Indeed, quite unlike traditional Protestantism in Europe,³⁷ American religious leaders supported republican principles of government.³⁸ Even the Puritans promoted many republican themes including “popular sovereignty, mixed government, constitutional checks, [the] corrupting influence of wealth and luxury, and the need for virtue in the citizenry.”³⁹ And obviously, they joined in the belief that morality was objective in character.⁴⁰

But the Puritans famously refused to respect religious liberty in the management of the Massachusetts Bay Colony, and that was not consistent with republicanism. As Roger Noll observed republican “language returned consistently to two main themes: fear of abuse from illegitimate government and a nearly

AMERICAN ENLIGHTENMENT: THE 1950'S AND THE CRISIS OF LIBERAL BELIEF 128
(New York: Basic Books, 2014).

³⁴ ROBERT N. BELLAH, *Religion and the Legitimation of the Republic*, in THE ROBERT BELLAH READER 247 (Robert N. Bellah & Steven M. Tipton eds., 2006) [hereinafter BELLAH READER] (Machiavelli, Rousseau, and even Tocqueville wondered whether Christianity could produce good citizens with their attention on the other life).

³⁵ Thus, established churches persisted for centuries. ROGER FINKE & RODNEY STARKE, *THE CHURCHING OF AMERICA* 15–16 (1992).

³⁶ Herberg, *supra* note 29, at 99 (apart from Anglicanism, virtually all of the Protestant churches were dissenting in character and in varying degrees opposed to the established institutions in the old country). On the importance of religion to American culture and politics, see JAMES E. BLOCK, *A NATION OF AGENTS: THE AMERICAN PATH TO A MODERN SELF AND SOCIETY* 184 (2002).

³⁷ See NOLL, *supra* note 31, at 57–63 (discussing the tension between traditional religion and Republicanism).

³⁸ ROBERT N. BELLAH, *To Kill and Survive or to Die and Become*, in BELLAH READER, *supra* note 34, at 101 (Robert N. Bellah & Steven M. Tipton eds., 2006). BELLAH, *BROKEN COVENANT*, *supra* note 27, at 5–53. NOLL, *supra* note 31, at 64–70.

³⁹ PHILIP GORSKI, *AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT* at 47 (2017).

⁴⁰ Philosophers debate whether morality is objective and what objectivity might be. Stephen Darwall, Allan Gibbard, & Peter Railton, *Toward Fin de siècle Ethics: Some Trends*, 101 *PHIL. REV.* 115 (1992); GIDEON ROSEN, ALEX BYRNE, JOSHUA COHEN & SEANA SHIFFRIN, *THE NORTON INTRODUCTION TO PHILOSOPHY* 641–96 (2015). In this essay, I assume that morality is objective and bracket the debates over the meaning of objectivity.

messianic belief in the benefits of liberty.”⁴¹ Although the Religion Clauses are supported by multiple values,⁴² given the diversity just of the Protestants concerns of equality and fairness, not to mention avoiding religious conflict, made those clauses necessary.⁴³

If the Federal government was left without power to deny religious liberty, it is also the case that the constitutional structure itself did little directly to promote virtuous lives.⁴⁴ Nonetheless, some early statesmen recognized that the government could not long survive without a moral citizenry. John Adams maintained that “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁴⁵ And George Washington observed that religion and morality were “indispensable supports” of all the “dispositions and habits which lead to political prosperity.”⁴⁶

Whether religion is as tightly connected to moral lives as Adams and Washington believed, we can safely conclude from this exposition that the Constitution is not a relativist document.⁴⁷ In fact, Adams, Hamilton, Jefferson, Madison and Paine all agreed that republican government needed a spirit of

⁴¹ NOLL, *supra* note 31, at 56.

⁴² STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 20–23, 29–38 (2009) [hereinafter SHIFFRIN, *THE RELIGIOUS LEFT*].

⁴³ See ARTICLE OF FAITH, *supra* note 30.

⁴⁴ It is strongly arguable that the constitutional protection of religion has promoted religious values and moral virtue though clearly many religious persons lack moral virtue and many non-religious people do not. See SHIFFRIN, *supra* note 42, at 34–38.

⁴⁵ John Adams, *Letter from John Adams to a Unit of the Massachusetts Militia* (Oct. 11, 1798), quoted in *THE WORKS OF JOHN ADAMS* 9 (C. Adams ed., photo reprint 1971) (1850–56).

⁴⁶ George Washington, *Farewell Address* (1796), reprinted in JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1908*, at 220 (1908).

⁴⁷ Although Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1554 (1988) denies that his form of republicanism is relativistic, there is reason to doubt this conclusion. He and other deliberative democrats maintain that we know that an outcome is substantively good because it has emerged from an agreement among political equals. On this theory if political equals agree that torture is to be used, that outcome is substantively good. To put it another way, political equals can agree on outcomes that may be procedurally justified by democratic processes, but are affirmatively bad outcomes. The Framers believed, as did John Stuart Mill, JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in J.S. MILL: *ON LIBERTY AND OTHER WRITINGS* 1, 89 (Stefan Collini ed., 1989), and Ronald Dworkin, RONALD DWORBIN, *JUSTICE FOR HEDGEHOGS* 7–8 (2011), that there is an objective moral reality, which is not to deny that discerning what that reality might be is problematic in many circumstances.

virtue and a concern for the public good.⁴⁸ Thus, William Lee Miller refers to the “moral project of the American Founders.”⁴⁹ The product of that project—the Constitution—does not protect freedom and equality because that coincides with an aggregation of preferences.⁵⁰ It does so out of a respect for persons and a belief in the common good. Indeed, they thought it imperative that governmental representatives be oriented toward the public good, not toward the interests of powerful factions, and they recognized that the citizenry had to have a requisite degree of civic virtue to elect representatives that were oriented toward the public good. At the same time, the Constitution is fuzzy as to how civic virtue might be fostered, let alone the government’s role in the process. Nonetheless, many of its Framers recognized that civic virtue was dependent upon private virtue. There is no evidence that they believed civic virtue was hermetically sealed off from the kinds of character citizens displayed in their private lives. Indeed, Washington and Adams were not alone in believing that the existence of a religious people was important to the vitality of a constitutional republic.⁵¹ Even Jefferson thought the moral content of the Christian Bible was important for the living of a good life.⁵²

⁴⁸ They disagreed on the extent to which virtue would primarily come from the people or their leaders. Jefferson and Paine had great trust in the people. *See generally*, WOOD, *THE IDEA OF AMERICA*, *supra* note 23, at 215–17. Adams thought government depended on the people’s virtue (*see supra* text accompanying note 45). Hamilton believed that trust in the virtue of the leaders was vital in a republican government. Robert W. T. Martin, *Reforming Republicanism: Alexander Hamilton’s Theory of Republican Citizenship and Press Liberty*, 25 *J. OF THE EARLY REPUBLIC* 21 (2005). And, of course, Madison depended upon government leaders to rise above factions to implement the common good. *See* WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 22, at 593–615.

⁴⁹ William Lee Miller, *The Moral Project of the American Founders*, in *ARTICLES OF FAITH*, *supra* note 29, at 17. *See also* MARSDEN, *supra* note 33, at xxi. (“The American founders . . . took for granted that there was a Creator who established natural laws, including moral laws, that could be known to humans as self-evident principles to be understood and elaborated through reason.”).

⁵⁰ Sunstein, *supra* note 47, at 1542–47; *see also* SULLIVAN, *supra* note 18, at 182 (“It trivializes life to see all claims to quality as directly comparable on some supposedly neutral and objective scale of satisfaction.”).

⁵¹ This does not mean that the Founders meant our Constitution to stand for the proposition that religion is the foundation of republican government. *See* Miller, *supra* note 49, at 33–39 (recognizing that the perspective favoring religion as the foundation was important, but the Enlightenment and some Radical Republican themes created a complex set of interaction preventing a conclusion that religion was the foundation).

⁵² Thus, he famously produced an edited version of the Bible omitting the miracles, while retaining the moral content. THOMAS JEFFERSON, *THE JEFFERSON BIBLE* (Smithsonian ed. 2015).

I would maintain that the establishment of a Constitution premised on the belief a moral order and a belief that the stability of the Constitution depends upon a citizenry committed to leading moral lives with varying degrees of leeway, is important for the interpretation of the Constitution. I am not saying that we need be constrained by the particular conceptions held by the Framers about the good life. We need not believe that the good life is necessarily bound up with the polity as Aristotle believed, though we do need a critical mass of active citizens. We need not believe with Machiavelli that the good life is a military life or a “manly life,” and we need not denigrate “manly” lives, at least to the extent that the “manly life” does not include the denigration of women. Importantly, we can recognize that there are limits to our ability to separate the moral from the immoral, and that moral lives can include many characteristics and lived experiences without believing that all lives are moral lives. We can support the Framers’ conception of equal citizenship without supporting their conception of who is included in the conception of equality.

Some have argued that this selective approach to the beliefs of the Framers is not defensible. I, on the other hand, see no problem with drawing on the wisdom and authority of the Framers on some issues—but not others. Narratives have more power when they are rooted in traditions rather than abstractions, but those traditions need not be adopted wholesale. Moreover, there is nothing illogical about selecting the sweet and dispensing with the bitter when the two are not logically tied together. G. Edward White argues, however, that this scavenger approach implicates a lack of scholarly discipline and integrity.⁵³ I have no particular stake in whether law is a discipline, though I believe it is, and White’s claim seems off the mark. Law professors not only teach their students the doctrine in particular areas, but they also teach their students how to argue. Much legal scholarship consists of legal rhetoric (in the Aristotelian sense) arguing for a particular legal conclusion. In the area of Constitutional Law, this frequently calls for a persuasive narrative of what the country stands for. This kind of narrative is inconsistent with the positivistic strictures of historical

⁵³ G. Edward White, *Reflections on the “Republican Revival”*: *Interdisciplinary Scholarship in the Legal Academy*, 6 *YALE J.L. & HUMAN.* 1, 2, 22, 26–27, 30, 33 (1994).

scholarship that White apparently holds dear.⁵⁴ White's approach to historical scholarship is narrow, albeit traditional. There is no warrant for his imperial claims.

Many narrations can be told about the meaning of the Constitution and the meaning of the country, and those narratives do not stop with the founding of the Constitution. The narrative I am drawing serves partially as a description and partially as a basis for criticism. So, as I have argued, the Constitution is premised on the existence of a moral order. On that understanding, many of our liberty rights are morally required. Moreover, they have evolved from the original understanding at the time of the framing and the adoption of the Fourteenth Amendment. As is the case with equality, we have a richer understanding of our tradition⁵⁵ supporting liberty and equality. So, our citizens have a privacy right to possess and use contraceptives. Our citizens have a right to engage in same-sex sexual relations.

In addition, citizens are entitled to be treated by the government with equal concern and respect.⁵⁶ From that perspective, the original Constitution was morally compromised. William Lloyd Garrison rightly called it a "covenant with death, and an agreement with hell."⁵⁷ Abraham Lincoln speculated that God had brought us the Civil War because of the country's handling of slavery.⁵⁸ We can now tell a story in which the Constitution's shriveled understanding of equality has been expanded to abolish slavery, and to combat race discrimination, sex discrimination, and discrimination on the basis of sexual orientation. There is much more to be done, but it is not puffery to claim that the country has moved toward greater equality.

The Constitution expects its leaders to act in favor of the common good. This does not mean that political solutions will benefit all. The Framers were not so naïve as to suppose that

⁵⁴ See *id.* at 34–35.

⁵⁵ See GORSKI, *supra* note 39, at 5 (suggesting that the meaning of a tradition is disclosed over time).

⁵⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977).

⁵⁷ Donald Yacovone, *A Covenant with Death and an Agreement with Hell*, MASS. HIST. SOC'Y (June 2005), <http://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01>.

⁵⁸ BELLAH, *BROKEN COVENANT*, *supra* note 27, at 54. See also GORSKI, *supra* note 39, at 93.

legislation would not produce winners and losers. But they did expect that legislation should be based on the public good, not on what a favored few would like independent of the public good. Accordingly, the Constitution is concerned about corruption and civic virtue. It favors checks and balances to minimize corruption in the political sphere. It worries that there might be insufficient civic virtue to provide sufficient support for the framework and values it supports.

In outlining this rendition of our constitutional tradition, I recognize that I have not filled out its implications for the speech, press, association, and religion freedoms protected by the First Amendment, nor have I reckoned with other renditions of the principles of our Constitution together with their implications for the First Amendment. To that I now turn.

II. THE FIRST AMENDMENT

A. Freedom of Speech

The Supreme Court has maintained that, “Under the First Amendment there is no such thing as a false idea.”⁵⁹ It has insisted that content regulation by government is particularly suspect.⁶⁰ These stances comport with a Lockean story about the Constitution. From this perspective, the promotion of good lives is not the responsibility of the government.⁶¹ Indeed, the government should be neutral about the good life.⁶² In

⁵⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

⁶⁰ *See, e.g., Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015); *R.A.V. v. St. Paul*, 505 U.S. 377, 397 (1992).

⁶¹ From this perspective, it can, of course, promote belief in principles of justice and prevent wrongdoing. Charles Taylor has observed that modern philosophy has discussed what we ought to do without sustained treatment of what it is “good to be or what it is good to love.” CHARLES TAYLOR, *DILEMMAS AND CONNECTIONS* 3 (2011) [hereinafter TAYLOR, *DILEMMAS*].

⁶² Ronald Dworkin broadly contended that the “government must be neutral on what might be called the question of the good life.” Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113 (Stuart Hampshire ed.1978). His basic idea was that government does not treat its citizens with equal concern and respect if it takes a position on what the good life might be. *Id.* But that idea is contestable. If I think your life of alcohol addiction is less worthwhile than a life of family, friends, and service to others, I still respect you as a human being worthy of equal concern and respect. If government denigrates addiction, it still regards you as an equal citizen. As a matter of policy, it simply favors some moral choices over others. Important parts of the liberal tradition have taken strong positions on the good life and have

determining whether speech should be prohibited or punished, government cannot take into account the value of speech. As one scholar puts it:

[I]f the First Amendment means anything, it is that the level of constitutional protection cannot vary on the basis of differing viewpoints [and it is] doubtful that an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others.⁶³

In the absence of speech clashing with other rights or causing significant harm, the government is foreclosed from preventing or penalizing the speech.

If one tries to connect the Lockean story to contemporary First Amendment doctrine, it becomes obvious that the story is overdrawn. Government is not required to be neutral about the good life. Compulsory education is not unconstitutional.⁶⁴ Similarly, it is not unconstitutional for the state to develop curricula and select textbooks on the premise that certain means of mental development are better than others.⁶⁵ Nor is it unconstitutional for the state in its educational system to promote some lives over others in educating children as to proper

argued that government rightly takes a role in promoting such lives. See BERNARD SEMMEL, JOHN STUART MILL AND THE PURSUIT OF VIRTUE 1–3, 12–13, 16, 52–53, 82–89, 102–03, 198 (1984). For discussion of the ways in which institutions such as law and public universities promote liberal virtues in a Millian vein, see Steven G. Salkever, “Lopp’d and Bound”: *How Liberal Theory Obscures the Goods of Liberal Practices*, in LIBERALISM AND THE GOOD 167–202 (R. Bruce Douglas, Gerald M. Mara, and Henry S. Richardson eds., 1990). For critical commentary regarding neutrality liberalism, see Steven Shiffirin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L.REV. 1103 (1983). For an attractive Aristotelian alternative to neutrality liberalism, see Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD, 203–52 (R. Bruce Douglas, Gerald M. Mara, and Henry S. Richardson eds., 1990).

⁶³ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 613, 627 (1982).

⁶⁴ In professional legal circles, there is no serious legal question about this. Indeed, the case for compulsory *public* education at some point during a child’s life is surprisingly strong. For discussion, see SHIFFRIN, *THE RELIGIOUS LEFT*, *supra* note 42, at 63–81.

⁶⁵ Amy Gutmann, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE 83 (Nancy Rosenblum ed., 1989) (“The content of public schooling cannot be neutral among competing conceptions of the good life. And, if it could, we would not and should not care to support it.”) [hereinafter LIBERALISM AND THE MORAL LIFE].

behavior, wholesome values, and appropriate ambition.⁶⁶ And the state need not be neutral when it selects books for libraries or art for museums. Indeed, the maintenance of libraries and art museums and general state support for culture and the arts suggests that some forms of life are better than a life of beer guzzling.⁶⁷

Beyond government speech or subsidies of speech, it would be an overstatement to suggest that the First Amendment, as interpreted, prohibits government to take the value of speech into account in determining whether speech should be protected. Obscenity,⁶⁸ fighting words,⁶⁹ commercial advertising,⁷⁰ and some forms of defamation⁷¹ have no protection or less protection because the Court has determined that those types of speech carry no substantial value or comparatively less value. Moreover, the Court makes explicit or implicit decisions about the importance of communications when it determines what communications count as speech within the meaning of the First Amendment,⁷² and what accommodations to make when speech clashes with another interest.⁷³ This is not to say that government should be able to prohibit speech merely because it lacks moral value. It is to say that it is appropriate to weigh the value of the

⁶⁶ See *id.* at 74 (“Honesty is better than deceitfulness, industriousness better than sloth, insight better than insensitivity, kindness better than cruelty – and not just because honest, industrious, insightful, and kind people have more freedom of choice. They may have less, precisely because they are constrained by these virtues. We nonetheless value these virtues because there is more to a good life and to a good society than freedom.”).

⁶⁷ See Ronald Dworkin, *Can a Liberal State Support Art*, in *A MATTER OF PRINCIPLE* 221–33 (1985) specifically denied this. For a convincing rebuttal, see Cécile Laborde, *Liberal Neutrality, Religion, and the Good*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* 249–72 (Jean L. Cohen & Cécile Laborde eds., 2016). On the propriety of subsidies by government that are not neutral about the good life, see generally, Steven H. Shiffrin, *Government Speech*, 27 *UCLA L. REV.* 565 (1979-1980).

⁶⁸ See STEVEN H. SHIFFRIN, JESSE H. CHOPER & FREDERICK SCHAUER, *THE FIRST AMENDMENT* 116–25 (6th ed., 2015).

⁶⁹ *Id.* at 141–44.

⁷⁰ *Id.* at 272–77.

⁷¹ *Id.* at 70–81.

⁷² Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1250–60 (1995).

⁷³ Often the Court woodenly applies a stringent test favoring speech, but it is sometimes more sensitive to context, for example, when it develops rules to accommodate the clash between speech and reputation. For discussion, see STEVEN H. SHIFFRIN, *DISSSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 62–63 (1999).

speech in determining whether the harm it causes should be tolerated.⁷⁴

Although the Court has taken the value of speech into account in making many decisions,⁷⁵ in recent years the Court has protected depictions of animal cruelty⁷⁶ and gruesomely violent video games⁷⁷ without taking into account their comparative lack of First Amendment value. It has also protected other forms of speech without appropriate consideration of their lack of value.⁷⁸

1. Commercial Speech

From a moral lives perspective, one of the most indefensible forms of constitutional protection is commercial advertising. U.S. advertisers spend more than \$200 billion in a single year.⁷⁹ By the end of the twentieth century, according to Thomas Frank, the average American saw approximately one million advertisements a year.⁸⁰ Whatever the individual product promoted, the overall message promoted by this advertising is that happiness is achieved by limitless material consumption.⁸¹ It encourages its audience members to yearn for luxury so that they can afford an increasing amount of products. This is deeply at odds with the promotion of moral lives. As Robert Bellah has observed, corruption is the “opposite of republican virtue. . . . Luxury is that pursuit of material things that diverts us from concern for the public good, that leads us to exclusive concern for our own good, or what we would today call consumerism.”⁸²

Moreover, mass advertising achieves its success by indiscriminately, typically falsely, associating products with

⁷⁴ For a contrary view, see Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory in Constitutional Theory: The Ominous Implications*, 79 CAL. L.REV. 267 (1991).

⁷⁵ I do not endorse all of those decisions.

⁷⁶ *United States v. Stevens*, 559 U.S. 460 (2010).

⁷⁷ *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786 (2011).

⁷⁸ See STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* 25–34 (2016) (pre-trial publicity) [hereinafter SHIFFRIN, *WHAT'S WRONG*]. It also inflates the value of speech by affixing a political label to the activity without peering beneath the abstraction. *Id.* at 14–19 (intentional infliction of emotional distress at funeral).

⁷⁹ A. Guttman, *Advertising spending in the U.S. 2015-2022*, STATISTA, (Mar. 28, 2019), <https://www.statista.com/statistics/272314/advertising-spending-in-the-us/>.

⁸⁰ THOMAS FRANK, *ONE MARKET UNDER GOD* 253 (2000).

⁸¹ BELLAH, *BROKEN COVENANT*, *supra* note 27, at 134.

⁸² *Religion and the Legitimation of the Republic*, quoted in BELLAH READER, *supra*, note 34, at 261.

“love, friendship, neighbourliness, pleasure, happiness and sexual attraction.”⁸³ The acceptance of this multi-billion dollar parade of lies is corrosive to the importance of truth in a democratic culture. Moreover, this barrage of invented images creates a confused culture in which the notions of the moral life promoted in schools⁸⁴ is undermined by appeals promoting consumerism, a life with no answers to the problems of loneliness, frustration, and death. Indeed, it would be the rare religion or philosophy that would claim that the good life is dedicated to the acquisition of goods.⁸⁵ What John Dewey observed is certainly true – at least at funerals, “[w]e praise even our most successful [people], not for their ruthless and self-centered energy in getting ahead, but because of their love of flowers, children, and dogs”⁸⁶

I am not suggesting that commercial advertising should be outlawed. I am suggesting that commercial advertising is overvalued in First Amendment doctrine. Yes, the Court has stated that commercial advertising deserves a measure of protection commensurate with its lower place in the hierarchy of the First Amendment.⁸⁷ Even the Court’s recognition that commercial speech has a subordinate position in the scale of First Amendment values does not go far enough in my view. Yet some justices of the Court have suggested that commercial advertising (that is not deceptive or misleading) deserves protection at the same level as other protected speech,⁸⁸ and the Court has sometimes tested commercial regulations in quite stringent ways.⁸⁹ My claim is that commercial advertising, like other forms of economic regulation, deserves no special constitutional protection. I, for example, see no reason for tobacco advertising to have any First Amendment weight on the

⁸³ GILLIAN DWYER, *ADVERTISING AS COMMUNICATION* 80 (New York: Routledge, 1982), *quoted in* Ronald K.L. Collins & David M. Skover, *Commerce and Communication* 71 *TEX. L.REV.* 697, 709 n. 66 (1993). *See generally* RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* 67–119 (2d ed. 2005). Consider, “Love, it’s what makes a Subaru a Subaru.”

⁸⁴ I do not mean to suggest that such lives are promoted only in schools, nor do I mean to suggest that schools promote a homogeneous conception of the moral life.

⁸⁵ BELLAH, *BROKEN COVENANT*, *supra* note 27, at 134. *See also* GORSKI, *supra* note 39, at 37–38 (although the Puritans might be characterized as a counter example because they are associated with the rise of capitalism, they privileged Christian charity over material consumption).

⁸⁶ JOHN DEWEY, *INDIVIDUALISM OLD AND NEW* 13 (1993).

⁸⁷ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

⁸⁸ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

⁸⁹ *See id.*; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

scales to be balanced against government regulation or prohibition.

Tobacco smoking kills 435,000 U.S. citizens each year, the equivalent of three 747's crashing with no survivors each day for a year.⁹⁰ I am not suggesting that those who risk shortening their life for the pleasure of smoking are engaged in immoral activity.⁹¹ It is worth reflecting, however, on the morality of the practice of encouraging millions to become addicted to a product that leads to so much death and suffering. In my mind, it is indefensible that advertisers encouraging the use of this deadly product warrant any degree of First Amendment protection.

2. Political Spending

If the protection of commercial advertising is problematic, First Amendment protection for unlimited spending by wealthy individuals and corporations casts a blind eye on corruption and undermines democracy.⁹² The structure of the Constitution was designed to produce representatives who could “discern the true interest of their country” and enact legislation consonant with the “public good.”⁹³ But First Amendment protection for unlimited spending by the wealthy and corporations underwrites a daily diet of bribes in the national capital and in state capitals across the country,⁹⁴ all the more worrisome because such bribes are difficult to prove since the participants are rarely foolish enough to leave a paper trail.

In response to this, Justice Kennedy, speaking for the Court, concedes that demonstrable bribes are unacceptable. But he continues: “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: ‘Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected

⁹⁰ ALLEN M. BRANDT, *THE CIGARETTE CENTURY* 13 (2007).

⁹¹ Moral arguments could be invoked, however. Smoking is a vice, not a virtue.

⁹² For discussion, see SHIFFRIN, *WHAT'S WRONG*, *supra* note 59, at 95–112. See also ROBERT KUTTNER, *THE SQUANDERING OF AMERICA* (2007) (The dependence of political parties on large donations includes Republicans and Democrats. Wealthy donors to Democrats are liberal on many issues, but not on the “core issue of how to housebreak capitalism.”).

⁹³ *THE FEDERALIST NO. 10* (James Madison).

⁹⁴ See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 *UCLA L. REV.* 784, 848 (1985) (bribery through campaign contributions is so widespread as to be routine).

representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”⁹⁵ One could be forgiven for believing that buying influence and access is a corrupt practice and not a necessary feature of a representative government. Indeed, as we have seen, an important goal of the Constitution was to achieve a form of government that would not be corrupt in this way. Moreover, corrupt practices can go the other way. Instead of contributors buying influence and access to a representative, a representative will frequently take public stands designed to appeal to the richest of contributors. Sometimes rich contributors want things that are in the public interest. Sometimes rich contributors are public spirited. But there is no reason to believe that these unelected individuals have any privileged insight into the character of the common good. And one need not be a cynic to recognize that wealthy individuals and lobbyists frequently seek profit at the expense of the public interest.

This is especially true of corporations. Leaders of corporations invest in politics to bring larger profits to the benefit of their shareholders wholly apart from the relationship of their position to the public interest.⁹⁶ For the most part, corporations must seek profits even if it is at the expense of the public interest.⁹⁷ Yet these entities are constitutionally entitled to buy influence and access even though they are not entitled to vote.⁹⁸

In response, Justice Kennedy provides an assurance that our citizens’ knowledge that corporations and the wealthy can spend unlimited sums “will not cause the electorate to lose faith in our democracy.”⁹⁹ He supposes that voters know that their fellow citizens will not be influenced by a blizzard of ads unless the ads speak the truth. This is false on two counts. First, the electorate has no such confidence. Our citizens were and are strongly opposed to the First Amendment protections the Court has provided.¹⁰⁰ Second, even if our citizens had such faith, the

⁹⁵ *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (internal citation omitted).

⁹⁶ For insight into how corporations work, see DAN CLAWSON, ALAN NEUSTADT & DENISE SCOTT, *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* (1992).

⁹⁷ C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194–224 (1989).

⁹⁸ 558 U.S. at 358.

⁹⁹ *Id.* at 360.

¹⁰⁰ Christian Farias, *Americans Agree On One Thing: Citizens United Is Terrible*, HUFFINGTON POST (Sept. 29, 2015),

empirical evidence makes clear that the truth does not unerringly emerge in the marketplace of ideas.¹⁰¹ False political ads are often effective. When they are provided by entities structured to promote profits rather than truth, they deserve to be excluded from the marketplace.¹⁰² Even if the electorate were superhuman discerners of truth, the notion that corporations and the wealthy have privileged access to the powerful is indefensible. To be sure, political speech is undeniably important. But its importance is outweighed in this context by the importance of integrity in our elections and the quality of our representatives.

3. Freedom of Association

It is often observed that political speech is centrally important to the First Amendment,¹⁰³ but this unnecessarily and all too casually downplays the importance of other significant speech. The First Amendment is a church with many tabernacles. Of course, political speech is important, but if citizens are to lead moral lives, their daily interactions with others deserve protection.¹⁰⁴ Moral agents rarely live like monks, and even monks are part of a social group in an association. Citizens form their values and live their lives through relationships,¹⁰⁵ and the speech employed in those relationships is crucial to their self-realization.¹⁰⁶ It should be unthinkable that government could prohibit or outlaw that speech except in rare cases. As Seana Shiffrin has argued, associations generally deserve protection so that moral agents can interact and develop

https://www.huffingtonpost.com/entry/citizens-united-john-roberts_us_560acd0ce4b0af3706de129d (in a 2015 Bloomberg poll, 78% of Americans opposed the Court's decision).

¹⁰¹ Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909 (2010).

¹⁰² C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

¹⁰³ The principal champion of this view was ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

¹⁰⁴ A politically centered perspective plagues some forms of modern Republicanism. For example, freedom of religion is generally recognized as a basic human right, but modern Republicans have to strain to admit it as a right on the ground that it is a necessary precondition for democratic deliberation. See Sunstein, *supra* note 47, at 1551.

¹⁰⁵ Of course, many associations can have socially negative results. See Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 949 (2004).

¹⁰⁶ SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 80-81, 96-98, 116-17 (2014).

their values wholly apart from the impact of the association on the political system.¹⁰⁷ Such protection includes the right to determine leaders, members and non-members.

Of course, there are a variety of associations and much debate about freedom of association's scope. That scope seems to depend at least on the strength of the governmental interest, the interest of the association in privacy of interaction or preservation of its message, and the importance of "fair access to material resources and mechanisms of power."¹⁰⁸ Although there are exceptions, factors that generally tend to support some regulation include size large enough or dispersed enough to be incompatible with the kind of interaction that smaller size entails, bureaucracy, and commercialism.¹⁰⁹ In general, intimate associations and ideological associations can discriminate on grounds that would be off limits to many other associations. As Michael McConnell observes, "The Ku Klux Klan, for example, could not be forced to hire black leaders [and] the Boy Scouts do not have to accept openly gay scoutmasters."¹¹⁰ But, as he also observes, "Businesses are subject to anti-discrimination laws,¹¹¹ as are labor unions, political parties, newspapers, [and] private voluntary associations."¹¹² Businesses (including law firms), labor unions, and newspapers are subject to regulation because they are primarily economic organizations. But McConnell's

¹⁰⁷ See generally, *id.*; Seana Valentine Shiffirin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 865–72 (2005) [hereinafter Seana Valentine Shiffirin, *Compelled Association*]; Seana Valentine Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMM. 283, 285–290, 293–294 (2011). On the values of belonging to many groups, see Nancy L. Rosenblum, *Pluralism and Self-Defense*, in LIBERALISM AND THE MORAL LIFE, *supra* note 65, at 221–26. In addition, as Alexis de Tocqueville argued, associations provide an alternative to individualism that saps political institutions of necessary guidance. De Tocqueville characterized individualism as a "calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows [leaving] the greater society to look after itself." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 506 (George Lawrence trans., J.P. Mayer ed., 1969).

¹⁰⁸ Seana Valentine Shiffirin, *Compelled Association*, *supra* note 107, at 878.

¹⁰⁹ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 84 (Cambridge: Harvard University Press, 2017). For excellent discussion of public accommodations and employment discrimination law, see *id.* at 115–63.

¹¹⁰ Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 20 (2000) [hereinafter McConnell, *Singling Out Religion*].

¹¹¹ Small businesses tend to be excluded from employment discrimination laws. Tebbe, *supra* note 109, at 146. But they generally are not free to discriminate against customers.

¹¹² McConnell, *Singling Out Religion*, *supra* note 110, at 20.

reference to private voluntary associations is overbroad.¹¹³ To be sure, the Jaycees cannot discriminate on the basis of sex, but the Ku Klux Klan can discriminate on the basis of race and religion despite the fact that it is a private voluntary association. A basic difference between the two is that the Jaycees play an important role in economic networking and the Klan is primarily an ideological organization. Political parties cannot discriminate on the basis of race because of their important role in the elections process, but they typically can discriminate on the basis of political views because they are ideological organizations.¹¹⁴ Newspapers cannot discriminate on the basis of race, but they could take ideology into account in hiring for the editorial page.¹¹⁵ Large ideological organizations should be able to discriminate on the basis of ideology to the extent their organization functions to advance their ideology. For example, the ACLU should be able to hire according to its mission, and it should be able to confine its members to those who concur with its views.¹¹⁶ But suppose a social conscience libertarian organization forms a large subsidiary company to combat poverty, believing that support of poor people should come from the private sector, not from the government. They should be able to hire libertarians as policy leaders, but they should not have a constitutional right to discriminate against non-libertarians in the selection of their volunteers or employees.

The scope of freedom of association should depend on many factors, but it should and does leave substantial room for moral agents to develop their values and it should balance economic opportunity with an eye to permitting organizations to

¹¹³ A rich literature probes the question of which associations should not be able to discriminate and which should and to what extent. See generally CÉCILE LABORDE, *LIBERALISM'S RELIGION* 160–96 (2017); Seana Valentine Shiffrin, *Compelled Association*, *supra* note 107; TEBBE, *supra* note 109; James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015); Meir Dan-Cohen, *Freedoms of Collective Speech*, 79 CAL. L. REV. 1229 (1991).

¹¹⁴ See Chad Flanders, *Religious Organizations and the Analogy to Political Parties*, quoted in *THE RISE OF CORPORATE POLITICAL LIBERTY* 103 (Micah Schwartzman, Chad Flanders, and Zoe Robinson eds., 2016).

¹¹⁵ Newspapers are not the state and cannot violate the First Amendment, and most civil rights laws do not forbid discrimination on the basis of political ideology, but the possibility of such a law is not just theoretical. See *Protected Traits in DC*, DC OFF. HUM. RTS., <https://ohr.dc.gov/protectedtraits> (last visited Apr. 8, 2018) (D.C. prohibits discrimination on the basis of political affiliation).

¹¹⁶ This, of course, would raise significant practical issues. Determining who supports its policies in most cases would be difficult.

operate in conformity with developed policies about what it means to lead a moral life.¹¹⁷

Leaving the scope of freedom of association aside, many rightly argue that, for a variety of reasons, the United States has become too individualistic.¹¹⁸ Accompanying that individualism is a lack of altruism. For example, work is no longer seen as a calling or a contribution to the common good, but a domain of “utilitarian individualism.”¹¹⁹ As Robert Bellah and his co-authors observe, a life composed mainly of work with little intrinsic meaning without other contributions does not provide “a narrative . . . that links public and private; present, past, and future; and the life of the individual to the life of society and the meaning of the cosmos.”¹²⁰ Cost benefit individualism leaves a void in the lives of its citizens with damaging effects on their connections to our communities and broader public life.¹²¹ To be sure, utilitarianism was initiated as a protest against arbitrary religious and political power, but it has become transformed into a generalized form of instrumental rationality that undermines social relationships.¹²²

This is not to say that Americans are wholly atomized. Associations have declined, but have hardly disappeared.¹²³ Friendships and families, of course, persist. To some extent, however, friends and families make it easy for individuals to withdraw from more public life. But, as Aristotle recognized,

¹¹⁷ For discussion of religious association, see notes *infra* notes 213–224 and accompanying text.

¹¹⁸ See BELLAH, *BROKEN COVENANT*, *supra* note 27; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) [hereinafter PUTNAM, *BOWLING ALONE*].

¹¹⁹ ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 83 (1985) [hereinafter BELLAH, *HABITS OF THE HEART*].

¹²⁰ *Id.* at 83. I recognize that there may be no meaning to the cosmos, but I agree with Bellah and his co-authors that a life of meaningless work and leisure is not productive for the individual or the society.

¹²¹ See, e.g., PUTNAM, *BOWLING ALONE*, *supra* note 118; ROBERT WUTHNOW, *LOOSE CONNECTIONS: JOINING TOGETHER IN AMERICA'S FRAGMENTED COMMUNITIES* 1–8 (1998). See also CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 500, 502 (1989) [hereinafter TAYLOR, *SOURCES OF THE SELF*] (instrumentalism drains life of meaning and passion while undermining community and self-government).

¹²² SULLIVAN, *supra* note 18, at 19–20.

¹²³ See generally ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, *BETTER TOGETHER: RESTORING THE AMERICAN DREAM* (2003) [hereinafter PUTNAM & FELDSTEIN, *BETTER TOGETHER*].

good friends make each in the relationship better persons.¹²⁴ Friendship and its virtues can be both private and public.¹²⁵ Nonetheless, the evidence suggests that the public virtues of friendship can be compromised by everything from long work hours to individualistic diversions including television and smartphones.¹²⁶

This discussion suggests not only that government should ordinarily respect the autonomy of private associations, but also that when government takes measures to strengthen private associations, it nurtures First Amendment values. So, for example, when in late 2017 the Congress passed a bill that is expected to diminish charitable giving,¹²⁷ it aggravated an already serious deficit in the institutions that strengthen First Amendment values.

4. First Amendment Character

Finally, the impact of First Amendment doctrine on the character of individuals is too often neglected.¹²⁸ For example, the First Amendment should welcome and encourage its citizens to speak out against unjust habits, practices, traditions, institutions, and authorities. Yet, the Supreme Court sanctions unduly restrictive rules on demonstrations against injustice,

¹²⁴ ARISTOTLE, *NICOMACHEAN ETHICS*, Book VIII, Ch. 5, § 5, at 125 (Terence Irwin, trans., 2d. ed 1999) (“When a good person becomes a friend he becomes a good for his friend.”). For reflections on the responsibilities of friendship and other attachments, see PHILIP PETTIT, *THE ROBUST DEMANDS OF THE GOOD* 11–42 (2015).

¹²⁵ BELLAH, *HABITS OF THE HEART*, *supra* note 119, at 116.

¹²⁶ TAYLOR, *SOURCES OF THE SELF*, *supra* note 121, at 310 (reporting the view that industrialization, technological change in everyday life, concentration, and mobility undermine all forms of allegiance). Regrettably, so-called social media promote isolation. Katherine Hobson, *Feeling Lonely? Too Much Time on Social Media May Be Why*, NPR (Mar. 6, 2017). <https://www.npr.org/sections/health-shots/2017/03/06/518362255/feeling-lonely-too-much-time-on-social-media-may-be-why>.

¹²⁷ See Howard Gleckman, *21 Million Taxpayers Will Stop Taking Charitable Deductions Under the New Tax Law*, FORBES (Jan. 11, 2018), <https://www.forbes.com/sites/beltway/2018/01/11/21-million-taxpayers-will-stop-taking-charitable-deductions-under-the-new-tax-law/#6107711a238f>. For reflections on how associations are encouraged in the private and public sectors, see PUTNAM & FELDSTEIN, *BETTER TOGETHER*, *supra* note 123, at 269–94.

¹²⁸ Of course, there are limits to the effect of constitutional interpretations on the moral lives of its citizens (see Christopher Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 *FORDHAM L. REV.* 2131 (2001)), but the impact of interpretations on the behavior of public officials and the attitudes of its citizens should not be underestimated.

allows public employers and school principals to smother the dissent of employees and students, and does not give citizens and the press the same leeway to criticize many powerful individuals that fall outside the narrowly and vaguely defined category of public figures.¹²⁹

Beyond the dissent line of cases, the importance of the First Amendment protection for free speech encourages a particular kind of character. Lee Bollinger has argued that this is a good thing. He has argued that our protection of racist speech makes clear that we are a tolerant nation and that protection encourages toleration among our citizens.¹³⁰ When this is taken together with the Court's view that there is no such thing as a false idea, it is fair to suggest that the First Amendment encourages an unacceptable degree of relativism and cynicism.¹³¹ It suggests that the country lacks a public morality. Particularly problematic is our Lone Ranger status as a protector of racist speech.¹³² Most students I have taught over the years casually assume that the United States position is correct. Their faith is not shaken by the recognition that it would not occur to people in other countries we respect to protect this form of racism. Nor does it bother them that if they were born and raised in Paris, London, Berlin, or Toronto, their views would likely be entirely different.¹³³ In fact, it is not at all obvious that toleration of racist¹³⁴ speech by the Klan is a good thing. In fact, zero tolerance

¹²⁹ See SHIFFRIN, *WHAT'S WRONG*, *supra* note 78, at 115–31.

¹³⁰ LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

¹³¹ It breeds the mindless attitude that “you have your opinion; I have mine”—as if flipping coins could be a good solution to any impasse. But this is just a form of sticking heads in the sand. Human beings take positions they believe to be right. Those positions are not equally arbitrary. TAYLOR, *SOURCES OF THE SELF*, *supra* note 121, at 99.

¹³² JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012) discusses the relative merits of the approaches taken by other countries while rejecting the kneejerk absolutism of the United States.

¹³³ See JOHN STUART MILL, *ON LIBERTY* (1859), *reprinted in* J.S. MILL: *ON LIBERTY AND OTHER WRITINGS* 1, 21 (Stefan Collini ed., 1989) where he remarks that an individual defers to that part of the social world with which they come into contact and observes that “his faith in this collective authority [is not] at all shaken by his being aware that other ages, countries, sects, churches, classes, and parties have thought, and even now think, the exact reverse. . . . [I]t never troubles him that mere accident has decided which of these numerous worlds is the object of his reliance, and that the same causes which make him a Churchman in London, would have made him a Buddhist or a Confucian in Peking.” *Id.*

¹³⁴ By racist speech, I have in mind the definition proposed by Mari Matsuda, *infra* note 137.

of racist speech would honor our commitment to equal citizenship. We need not tolerate everything in order to promote tolerance.

It is no longer credible to suppose that racist speech causes no harm.¹³⁵ Those who dismiss it as merely offensive are routinely not part of the targeted group.¹³⁶ Vulnerable citizens rightly observe that our failure to prohibit racist speech is willed action by government that does not take seriously the harm they experience. Our protection of racist speech encourages toleration, but it also encourages racism.¹³⁷ One of the accepted purposes of anti-discrimination law is to send the message that discrimination is morally wrong. Protecting racist speech undercuts that message.¹³⁸

Generally, our studied neutrality is both harmful and excessively pallid. The First Amendment can promote a public morality and it can foster moral character. In a brilliant article, Vincent Blasi argues that it is important to consider the effect of the First Amendment's protection for freedom of speech on the character of its citizens and the society at large.¹³⁹ His approach is far from pallid. It is consciously in the spirit of John Milton, John Stuart Mill, Oliver Wendell Holmes, and Louis Brandeis.¹⁴⁰ Blasi maintains that the First Amendment should be seen to

¹³⁵ See WALDRON, *supra* note 132; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 97 MICH. L. REV. 2320 (1989).

¹³⁶ In my view, they are especially insensitive to the plight of students of color who are away from home for the first time on college campuses. Despite the fact that the First Amendment does not even apply on private campuses, they insist on free speech for racist epithets. Vulnerable minorities know that the university makes a conscious choice to permit racist speech. They believe that the university values the racist speech of twisted human beings over the promotion of a less hostile environment. They doubt that the university has their backs.

¹³⁷ See NADINE STROSSEN, *HATE SPEECH: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 86–88 (2018), for an argument that hate speech laws are used against the very minorities they were passed to protect. To prevent this, Mari Matsuda, proposed that hate speech laws (defined to include speech asserting racial inferiority that is persecutorial, hateful, and degrading) apply only to protecting groups that have been historically discriminated against and ably discusses how her standard would apply. Matsuda, *supra* note 135, at 2357

¹³⁸ I acknowledge that this point is in tension with the position I take on religious objections to gay weddings.

¹³⁹ Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1571 (1999).

¹⁴⁰ For an essay focusing on Milton and Brandeis, see Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 60–95 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

promote “inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil.”¹⁴¹ He continues and mentions an “aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, respect for evidence.”¹⁴²

Blasi does not contend that citizens must possess these virtues to be good citizens, but the presence of such citizens enriches our national dialogue. Blasi does not maintain that his perspective has resolving power for any and all First Amendment issues, but it can inform the resolution of some issues. Instead of a First Amendment that commits us to blind libertarianism and neutrality, we should interpret the First Amendment to promote moral character and public morality.

Even readers who would applaud Blasi's views (and many who do not) believe that it is dangerous for judges to employ moral views in the process of interpretation. They believe this in the face of the position that harm must be present as a necessary condition for the use of moral views.¹⁴³ These readers do not deny that government can express moral views or enact criminal codes, which proceed from moral views. After all, criminal penalties are in large part based on the moral seriousness of the offense. Rather, these readers think it is dangerous for judges to apply moral views in the free speech area.¹⁴⁴ In particular, liberals think it is objectionable to permit a conservative court to take their moral views into account.

It should be acknowledged from the outset that conservatives lead the way in protecting depictions of animal cruelty and gruesomely violent video games. Nonetheless, it seems extremely likely that conservatives protect such speech not because of its perceived morality, but despite its immorality. Nor is it likely that the conservatives protect the intentional infliction

¹⁴¹ Blasi, *supra* note 139, at 1569.

¹⁴² *Id.* at 1571.

¹⁴³ See *supra* text accompanying note 1.

¹⁴⁴ As we will see, ad hoc moral views are not necessary to support morality in interpreting the religion clauses.

of emotional distress¹⁴⁵ because they think such conduct is moral. By and large, conservatives are shifting to a stronger view of protecting speech against content regulation.

But what would liberals have to fear if the conservatives had a more flexible view? If liberals want to protect depictions of animal cruelty, gruesomely violent video games, and intentional infliction of emotional distress despite the harms they cause, they have no sympathy with my position to begin with. Conservatives would undoubtedly permit the state to regulate more sexually oriented speech than liberals would prefer, but the conservatives (with some liberal support) already do that.¹⁴⁶ On the other hand, despite the First Amendment's commitment to protecting dissent,¹⁴⁷ the conservatives might also uphold flag burning statutes.¹⁴⁸ Although European countries also do not sufficiently protect dissent in my view, they do a better job in determining when government regulations of speech are defensible.¹⁴⁹ I do not expect Justices to switch their positions on freedom of speech in response to this essay. I would hope, however, that readers will

¹⁴⁵ *Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment protects the intentional infliction of emotional distress at military funeral).

¹⁴⁶ I have questioned the conservative moral approach to obscenity. Moreover, the supposition that obscenity is harmful is more complicated in my view than conservatives suppose. At the same time, I believe that some forms of pornography are harmful and morally problematic. See SHIFFRIN, *WHAT'S WRONG*, *supra* note 78, at 47–61. Those forms of pornography may overlap with obscene material as sub categories, but they certainly are not anywhere near as broad. It is worth observing that making moral judgments is not a form of prudery, nor is it a practice of political discrimination. I disagree with those who argue for a stronger form of First Amendment absolutism than I do and with those who would protect less dissent than I would, but it would not occur to me to regulate their speech. *But cf.* Robert Corn-Revere, *Certainty and the Censor's Dilemma*, 45 HAST. C.L.Q. 301, 330 (2018) (suggesting that I and others protect only that speech with which we politically agree). Even Floyd Abrams has gone so far as to suggest that, "Hardly anyone really believes that we should protect the speech of those with whom we differ." Quoted in R.K.L. COLLINS, *NUANCED ABSOLUTISM* 146 (2013). Of course, all First Amendment theorizing is based in political conceptions (and one person's political conception is another person's political bias), but no one holds the positions attacked by Corn-Revere and Abrams, and the rhetorical purposes served by these ad hominem attacks cannot be sustained.

¹⁴⁷ This is a commitment that the conservatives fail to honor in the context of time, place, and manner regulations (SHIFFRIN, *WHAT'S WRONG*, *supra* note 78, at 116–18), defamation (*id.* at 119–22), dissent by workers and students (*id.* at 122–24), national security (*id.* at 125), and the press clause (*id.* at 126–27).

¹⁴⁸ This would require overruling *Texas v. Johnson*, 491 U.S. 397 (1989) where the conservatives were divided (striking down a Texas flag desecration statute on a 5-4 decision with Justice Scalia in the majority). Their position here in my view also depends on a constitutionally indefensible conception of harm.

¹⁴⁹ In the last part of Chapters 1-7 of SHIFFRIN, *WHAT'S WRONG*, *supra* note 78, I discuss European approaches to many important free speech issues.

entertain second thoughts about speech relativism and free speech idolatry as the best way to interpret our Constitution.

B. Freedom of Religion

1. Free Exercise

The concern with moral lives should also inform the interpretation of the religion clauses. For example, one much debated constitutional question is the extent to which religious believers and other conscientious objectors should be exempt from laws not designed to discriminate against them.¹⁵⁰ A standard example involves the military draft. Congress provided that those who by reason of religious training and belief were opposed to all wars, such as the Quakers, could not be compelled to be combatants.¹⁵¹ Congress defined religious training and belief to refer to “an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but did not include essentially political, sociological, or philosophical views or a merely personal moral code.”¹⁵²

*Welsh v. United States*¹⁵³ presented the question whether Elliot Welsh, who was morally opposed to all wars, albeit not on religious grounds, qualified for exemption under the statute and, if not, whether the statute as applied was constitutional. Justice Black, joined by Douglas, Brennan, and Marshall, JJ., concluded

¹⁵⁰ An early opponent of religious exemptions was PHILIP KURLAND, *RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT* 18 (1992). Strong supporters have been Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, and Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1000–01 (1990). Laycock, along with many other prominent scholars believes that non-religious conscience should be protected as well. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1838 (2006); 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 56–59 (2008) [hereinafter GREENAWALT, *RELIGION AND THE CONSTITUTION*]; MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 164–74 (2008). The literature here is vast. Much of it is cited in a fair-minded discussion of the issues by KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW* (2015).

¹⁵¹ 50 U.S.C. App. § 456 (j)(1958 ed.).

¹⁵² *Id.*

¹⁵³ 398 U.S. 333 (1970). *See also* *United States v. Seeger*, 380 U.S. 163 (1965) (presenting the question whether Daniel Seeger, who was morally opposed to all wars but had left open the question whether God existed, should be similarly exempt. Justice Clark ruled that the exemption applied to Seeger because his belief occupied a place in his moral life parallel to that of an orthodox belief in God).

that section 6 (j) exempted “all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”¹⁵⁴ Justice Harlan rightly argued that this distorted the clear meaning of the statute, but he concluded that Welsh was nonetheless entitled to an exemption. As a constitutional matter, he maintained that Congress could not discriminate in favor of those whose moral conclusions are based on what they believed to be Divine commands and those who reached the same conclusions without a Divine grounding.¹⁵⁵ Congress could not favor theistic religions over non-theistic religions or over those whose moral conscience was not religiously informed. To privilege those who believe in God would violate the equality dimension of the Establishment Clause.

This conclusion may not comport with the original views of the Framers.¹⁵⁶ Of course, the Framers sought to encourage moral lives. For the most part, however, their conception of moral lives was a well-lived Christian life and a Protestant life at that. There is evidence suggesting that they did not intend to protect non-religious conscience.¹⁵⁷ We need not be confined, however, to the narrow view of the Framers. There are still some who believe that only those of a particular Christian denomination live a moral life. But the dominant constitutional tradition today recognizes the moral life (and the immoral life) can include Protestants, Catholics, Jews, Muslims, Buddhists, agnostics, and atheists.

Harlan’s conclusion in *Welsh* comports with the increased religious pluralism of American society and with considerations of fairness. As Kent Greenawalt rightly observes, pacifist objectors like Welsh have intense convictions that they should not fight in a war machine: “In a society that values equality of persons, making a privilege turn on a person’s religious views is

¹⁵⁴ *Id.* at 356 (Harlan, J., concurring).

¹⁵⁵ 398 U.S. at 356.

¹⁵⁶ GREENAWALT, RELIGION AND THE CONSTITUTION, *supra* note 150, at 23; Michael W. McConnell, *Singling Out Religion*, 50 DEPAUL L. REV. 1, 12 (2000).

¹⁵⁷ GREENAWALT, RELIGION AND THE CONSTITUTION, *supra* note 150, at 23.

intrinsically unfair, when significant numbers of nonreligious persons have similar reasons to be accorded the privilege.”¹⁵⁸

Although Justice Harlan concluded that Congress could not pick and choose those exempt in the way it had, he maintained (wrongly in my view) that Congress could refuse to grant exemptions altogether. In other words, Congress could force Quakers to either violate their deepest beliefs or go to jail. Many values underlie the Free Exercise clause,¹⁵⁹ but if we focus on the nature of moral lives, the cruelty of forcing someone to act against conscience (religious or not) is apparent. This is particularly problematic because moral obligations are at the core of an individual’s identity. It should not be surprising that freedom of conscience is widely recognized as a human right.¹⁶⁰

The “moral lives” case for religious exemptions stretches beyond conscience. Of course, religious traditions are typically associated with a network of rules, principles, and practices. As Thomas Berg states, religion guides or involves many things, the raising and education of children, the marking of births and deaths, meeting weekly for sessions of inspiration and teaching, seeking personal counseling from a leader, receiving moral guidance for her conduct, and devoting time to serving others.¹⁶¹ This list would be even more extensive if it were to account for the detailed practices of Judaism or Islam.¹⁶²

Of course, these practices are not designed exclusively to promote moral lives, but that is certainly an important purpose. And there is substantial evidence that religion is a positive moral force.¹⁶³ Surprisingly, the evidence of success is not associated

¹⁵⁸ GREENAWALT, RELIGION AND THE CONSTITUTION, *supra* note 150, at 56.

¹⁵⁹ STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT, *supra* note 42, at 20–23.

¹⁶⁰ See Nicole Garbin, *Making Room for Religion in the Workplace in a Diverse Society*, in MENTORING COMPARATIVE LAWYERS: METHODS, TIMES, AND PLACES 198–99 (Francesca Fiorentini & Marta Infantino eds., 2020).

¹⁶¹ Thomas C. Berg, “*Secular Purpose*,” *Accommodations, and Why Religion is Special (Enough)*, 80 U. CHI. L. REV. Dialogue 24, 37 (2013). Cf. Alan Brownstein, *The Right Not to be John Garvey*, 76 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN GARVEY, WHAT ARE FREEDOMS FOR? (1996)) (discussing the impact of religion on life defining decisions).

¹⁶² I would guess that non-religious institutions prescribing such comprehensive practices across a life span are relatively rare.

¹⁶³ ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 443–79 (2010) [hereinafter PUTNAM & CAMPBELL]. In addition to Putnam and Campbell, see the evidence detailed in Thomas C. Berg, *Freedom to Serve: Religious Organizational Freedom, LGBT Rights, and the Common Good*,

with particular preaching or religious beliefs, nor is it associated with particular religious denominations or religious traditions¹⁶⁴ Instead, comparative civic virtue is associated with the degree of church attendance regardless of preaching, beliefs, or religious denominations.¹⁶⁵ In their magisterial work, *American Grace*, Robert Putnam and David Campbell suggest that positive effects flow not simply because observers participate in religious services, but because their participation leads to involvement in religious networks with religious friends and associates.¹⁶⁶

Whatever the cause, the evidence that religion is a positive moral force is impressive. First, religious Americans are more generous than their non-religious counterparts. They are more generous in volunteering time. Forty-five percent of weekly churchgoers report non-religious volunteering (leaving aside their religious volunteering) as compared to 26% of nonchurchgoers.¹⁶⁷ Regular churchgoers are more than twice as likely to help the needy as those who rarely, if ever, attend church.¹⁶⁸ The same trend shows up in philanthropic giving. Regular churchgoers, of course, give money to churches, but they are more likely to give to secular causes than nonchurchgoers and they give a larger fraction of their income to secular causes than nonchurchgoers.¹⁶⁹ Although churchgoers give to many secular causes, organizations serving the needy are disproportionately served by the religiously observant.¹⁷⁰ Religious Americans are more civically active as well. They are more likely to belong to community organizations, attend to community problems and projects, take part in local political life, and press for local social or political reform.¹⁷¹ We have seen that

in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 307 (Robin Fretwell Wilson & William N. Eskridge eds., 2018); STEPHEN V. MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY 16–19 (2011).

¹⁶⁴ PUTNAM & CAMPBELL, *supra* note 163, at 467–68.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 471–79. There is good reason to believe that this is not mere correlation, *id.* at 461–71, and that thick non-religious networks do not ordinarily have the same effects (though, of course they could). *Id.* at 471–79.

¹⁶⁷ *Id.* at 446.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 448.

¹⁷⁰ *Id.* at 450.

¹⁷¹ *Id.* at 454–55. The evidence is not altogether on the side of religion. Although religious and non-religious Americans steadily become more tolerant of dissent over a thirty-six-year period, religious Americans are less tolerant of dissenting speech. *Id.* at 481. So, eighty-eight percent of non-churchgoers oppose library censorship and

our citizens are exposed to an avalanche of corporate messages encouraging the living of individualism and materialist lives. Religious organizations for the most part serve as a counter force to those profit driven messages. Despite their many failures, religious organizations promote moral lives.¹⁷²

This fact and other considerations¹⁷³ suggest that religious associations and practices deserve protection in many circumstances from state regulation even when freedom of conscience (religious or not) is not at stake. Moreover, it seems clear to me that non-religious associations and practices deserve protection when they serve similar functions. Unfortunately, the Supreme Court interprets the First Amendment to offer little protection even for religious liberty. The principal case, *Employment Division v. Smith*,¹⁷⁴ presented the question whether Native Americans could ingest peyote as a part of a religious ceremony despite a law prohibiting the ingestion of peyote.

In a break with precedent, the Court, led by Justice Scalia, refused to recognize a constitutional exemption.¹⁷⁵ Indeed, he argued that no question of constitutional liberty was presented. The law was not directed against religion; its impact on religion was incidental. Scalia conceded that the state could not discriminate against religion, but a non-discriminatory law burdening religion was not problematic¹⁷⁶ (at least in the absence of a burden on other constitutional rights as well).¹⁷⁷ As written, the decision would apply even if conscience were at stake. The primary focus of the decision was the purpose of the state rather than the impact on the victim's religious liberty. As the decision was written, the state could prevent children from ingesting wine

sixty-six percent of non-churchgoers would support the speech rights of those who would have defended Osama bin Laden. *Id.* at 483. Among frequent churchgoers, the support for speech drops to seventy-three percent and fifty-six percent. *Id.* Looking at the evidence overall, Putnam and Campbell conclude that religious Americans support free speech for despised minorities, but by slimmer margins. *Id.*

¹⁷² For strong support for the view that religious associations deserve protection on civic virtue grounds, see Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992) (arguing that concern for civic virtue requires support of the structures that support civic virtue).

¹⁷³ See SHIFFRIN, *supra* note 159.

¹⁷⁴ 494 U.S. 872 (1990).

¹⁷⁵ *Id.* at 882.

¹⁷⁶ *Id.* at 878–82.

¹⁷⁷ *Id.* at 881–82.

at communion services provided the law applied to children generally. It simply ran roughshod over religious liberty.

In addition, its equality perspective was crabbed. Clearly, a state would never pass a law interfering with Protestant or Catholic sacramental communion services. But the state of Oregon fought hard to maintain its law against the religion of Native Americans. So, the decision struck a blow against religious liberty and equality. Given the long tradition of respect for religious liberty, it should not be surprising that Scalia's decision was widely condemned at the time, resulting in the Religious Freedom Restoration Act, a law designed to provide religious liberty exemptions for religious believers.¹⁷⁸

In a major article published four years after *Smith*, Christopher Eisgruber and Lawrence Sager ignited a major scholarly controversy when they argued that the constitutional protections of religion and conscience should be confined to equality.¹⁷⁹ In short, they agreed with *Smith's* conclusion that religious liberty should not be protected from non-discriminatory legislation. On the other hand, they argued for more robust equality protection for religion than *Smith* provided (along the lines discussed in the last paragraph), and that the Oregon law as applied to the Native American ingestion of peyote was unconstitutional.¹⁸⁰

Their principal line of argument against exemptions for religious liberty was one of fairness. They argued that it is unfair to grant religious and moral exemptions while denying exemptions to those with other deep and valuable commitments.¹⁸¹ They ask us to consider an artist who is as committed to his way of life as any religious person.¹⁸² This argument at best would suggest that an artist might deserve an exemption in some circumstances though the authors deny the artist should prevail. Whether an artist should be granted an exemption or not, however, does not speak against a religious

¹⁷⁸ 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

¹⁷⁹ Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

¹⁸⁰ *Id.* at 1285–90.

¹⁸¹ *Id.* at 1245, 1255.

¹⁸² *Id.* at 1255–56, 1261.

exemption.¹⁸³ It would be unfair only if an unjust decision was made on the religious side or the non-religious side.¹⁸⁴ As Eisgruber and Sager would concede, it would not make sense to grant an exemption to an artist in the context of *Welsh* or *Smith*. Granting an exemption in *Welsh* to someone who is opposed as a matter of conscience to assuming the status of a combatant, but not to an artist who is not opposed as a matter of conscience to fighting in a war seems entirely reasonable. If we imagine in the *Smith* context that an artist wants to ingest peyote to brainstorm about her project, it is again likely that the artist will not prevail with a free speech claim. But that also does not speak against the religious exemptions.¹⁸⁵

The same point applies to another example Eisgruber and Sager provide. They maintain it would be unfair to grant a religious exemption but not an exemption based on disability.¹⁸⁶ That, of course, would be true in some circumstances, but it does not provide grounds for undermining moral exemptions. Here, too, applying the disability example to *Welsh* and *Smith* deserves discussion. Assume the military draft context. In the unlikely event that the government sought to compel someone with disabilities to fight in ways that were incompatible with his physical condition, a constitutional exemption might well be founded on liberty or equality grounds. In the vast majority of cases, persons could serve in the military in some capacity if the military so chose. This does not speak against moral exemptions.

What about the ingestion of peyote? It is difficult to imagine a sincere disability claim that would underwrite the ingestion of peyote. On the other hand, one could posit a

¹⁸³ Christopher C. Lund, *The Propriety of Religious Exemptions: A Response to Sager*, 60 ST. LOUIS U. L. J. 601, 605 (2016).

¹⁸⁴ Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006).

¹⁸⁵ I also resist the claim that forcing someone to compromise their chosen path of life is just as bad as forcing someone to violate his or her deep religious or moral convictions. I would observe that the structure of the argument put forward by Eisgruber and Sager seems to be morally based. It appears to be deontologically based rather than utilitarian. In that tradition, the right is favored over the good. It seems foreign to that tradition to maintain that a view of the good life is on a par with the right. Admittedly, I do not believe that philosophers have offered a satisfactory answer to the question, "Why be moral?" There are points where arguments in support of important truths just run out. In any event, as I argue in the text, even if their parity claim is correct, it does not justify jettisoning religious liberty or freedom of conscience exemptions.

¹⁸⁶ Eisgruber & Sager, *supra* note 179, at 1263–67.

circumstance in which a terminally ill patient could benefit from marijuana to relieve pain. A liberal court might well uphold the claim of the person with disabilities if medications were not available that could achieve the same task. In either case, granting or denying an exemption would not cast doubt on the wisdom of granting a religious exemption in *Smith*.

As I have indicated, Eisgruber and Sager would provide substantial protection for religious liberty by applying robust equality protections. Of course, they are not prepared to provide equality protections of this sort to all forms of human activity. All human commitments, deep or otherwise, are not worthy of protection. A deep commitment to consuming heroin would not deserve equality protection because it is not a valuable life.¹⁸⁷ Eisgruber and Sager have to determine which forms of life are valuable enough for equality protection and apply those conclusions in a wide variety of contexts. Importantly, they have concluded that religion and conscience are valuable and worthy of equality protection which leads to the question: if religion and conscience are valuable enough for equality protection, why are they not valuable enough for liberty protection?

As we have seen, it is no answer to maintain that other deep commitments are equally valuable or worthy of protection. Eisgruber and Sager do offer an administrative argument. They argue that prior to *Smith*, religious and conscience-based exemptions were rare and that the doctrine was chaotic.¹⁸⁸ The number of exemptions in the Supreme Court was small, but the proper database would include the lower courts. In my view, it is fair to say that the courts could have done more to protect religious liberty. As to the claim of chaos, of course, the decisions do not fall in place as if it were a system of legal geometry. No area of doctrine does. Eisgruber and Sager, for example,

¹⁸⁷ For discussion of the addiction issue, see LABORDE, *supra* note 113 at 99–103. Laborde recognizes that government need not be neutral about many deep commitments, *id.* at 131, 207–38, but in my view mars a brilliant discussion by, however grudgingly, protecting too many deep commitments. *Id.* at 207 (neutrality toward deep commitment to a football team). Even more problematic is William Galston’s breathtaking claim that the state in its education system cannot prefer examined lives over unexamined lives. William Galston, *Civic Education in the Liberal State*, in LIBERALISM AND THE MORAL LIFE, *supra* note 62, at 99–100.

¹⁸⁸ Eisgruber & Sager, *supra* note 179, at 1246–47. This contention makes it odd that they would characterize a freedom of religion liberty regime as “unimpaired flourishing.” *Id.* at 1254. Although they may exaggerate the limitations, religious liberty was never unimpaired.

recognize that freedom of speech should be protected as a liberty right, yet free speech doctrine is equally chaotic.¹⁸⁹ Moreover, Eisgruber and Sager's equality regime would likely be chaotic as well because it would not be administered by them but by a multiplicity of judges. And even if the equality regime were administered exclusively by them, there is reason to believe that difficult contestable judgments would have to be made.¹⁹⁰ I generally support the Eisgruber/Sager approach to equality, but it should be a complement to religious liberty, not a substitute.

Although Eisgruber and Sager's approach would provide considerable protection for religion, it has now become clear that many progressives have become hostile to religious claimants.¹⁹¹ Although the Religious Freedom Restoration Act was overwhelmingly passed in 1993, similar laws at the state level are now opposed by the same progressive associations that previously supported the state legislation.¹⁹² This is a dramatic about face. As Nancy Rosenblum writes, "Liberalism has . . . been seen as inseparable from security for religious faith as an essential element of moral life . . . [and] inseparable from the affirmation of secular moral purposes."¹⁹³ If religious freedom issues today involved the use of peyote by Native American in religious ceremonies or compelling Quakers to fight in wars, the ACLU would not have retreated from its strong support of religious liberty. Two main factors drive this change: First, the religious right has emerged as a strong force in American politics,¹⁹⁴ and their religious liberty claims have become more salient. It is not difficult to understand why a substantial body of progressives might entertain hostile views toward religion. All

¹⁸⁹ This should not be surprising because speech clashes with other values in a wide variety of contexts and it is administered by hundreds of judges, though the Supreme Court will sometimes intervene to address a disputed area sometimes further muddying the waters. Many First Amendment scholars have offered proposals to bring more order to the chaos, but their views are also diverse.

¹⁹⁰ For persuasive discussion of the difficulties, see Koppelman, *supra* note 184, at 596–98; Kent Greenawalt, *How Does "Equal Liberty" Fare in Relation to Other Approaches to the Religion Clauses?*, 85 *TEX. L. REV.* 1217, 1240–46 (2007).

¹⁹¹ See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 *U. ILL. L. REV.* 839 (2014).

¹⁹² *Id.*

¹⁹³ Rosenblum, *Introduction*, quoted in *LIBERALISM AND THE MORAL LIFE*, *supra* note 62, at 5.

¹⁹⁴ For discussion of the factors that caused the religious right to enter the political sphere, see MARSDEN, *supra* note 33, at 136–50. I do not suggest the rise of the religious right without more was a sufficient condition, but it has been a significant factor. That their claims have been in the forefront has been a driving force.

too many on the religious right believe that those who succeed are the elect and those who are low in the hierarchy deserve to be there.¹⁹⁵ They manifest harsh punitive views toward those who they regard as deviant.¹⁹⁶ Conservative class-based religion is obviously contrary to a society in which all citizens are considered equal. It leads to the view that disproportionate poverty in communities of color is not the product of systematic racism, but the product of laziness and moral failure. In addition, conservative forms of religion cling to forms of patriarchy. The father is the ruler of the home. Same-sex relations are sinful. Nor are these views easily shaken. To depart from them is to risk hell and to admit that a traditional way of life is deeply flawed. The modern world is at odds with the will of God and the day of reckoning will come.

These views are squarely incompatible with the deepest views of progressives. But they know that conservative religion is not all there is. As progressives know, religious leaders were at the forefront of the battle against slavery, the social gospel movement, the drive for civil rights, the movement for women's suffrage,¹⁹⁷ opposition to unjust wars, and advocacy (and the

¹⁹⁵ This harks back to the doctrine of predestination. That doctrine created pervasive fear and a yearning for a sign that one was a member of the elect. It loosened bonds with the community and the family. TAYLOR, *SOURCES OF THE SELF*, *supra* note 121, at 194. Although predestination themes reach back to Augustine, DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 110 (2003), the evangelical movement to a large extent has muffled its appeal. *Id.* at 701. In addition to predestination, anxiety whether an individual's faith is strong enough, or pride that it is, can lead to scapegoating those who clearly lack the demanded faith.

¹⁹⁶ BELLAH, *BROKEN COVENANT*, *supra* note 27, at 72–73, 75. This is not new in the American context. In fact, the Puritans severely punished those they deemed to be sinners. *Id.* at 100–04. *See also* GORSKI *supra* note 39, at 126 (detailing that Puritans saw material prosperity as a sign of moral virtue); *Poverty, Puritanism, Politics, and Predestination*, ANOTHER HOPE ENTIRELY (May 16, 2014), <https://anotherhopeentirely.wordpress.com/2014/05/16/poverty-puritanism-politics-and-predestination>. The prosperity gospel was not just a Puritan phenomenon or a modern conservative religious phenomenon. Consider BLOCK, *supra* note 36, at 451–54 (discussing the legitimation of wealth by Protestant leaders in the post-Civil War period). This became a path to the utilitarian focus on the maximization of self-interest, which compromises charity, community, and pleasure. Indeed, to a substantial extent, utilitarian individualism played a role in corrupting religion in this way. Robert N. Bellah & Charles Y. Glock, *The New Religious Consciousness and the Crisis of Modernity in* BELLAH READER, *supra* note 34, at 268. On the other hand, many, probably most Christian conservatives believe their churches have a responsibility to help the poor though they share the view that government should play no role or a minimal role. James Midgley, *The New Christian Right, Social Policy and the Welfare State*, J. OF SOCIOLOGY & SOC. WELFARE 89, 96, 102 (1990).

¹⁹⁷ NOLL, *supra* note 37, at 221.

provision) of services for the poor.¹⁹⁸ Moreover, religious denominations often do not easily fit into the categories of left and right. Millions of white evangelicals do not consider themselves member of the religious right.¹⁹⁹ The Pope, in harmony with traditional Catholics, has provided a powerful voice against poverty, unjust wars, and the abuses of capitalism while not straying far from the Church's stance on sexual issues and the role of women. Jews may be divided on what the stance of the U.S. should be towards Israel and Palestine, but the social justice teachings of Judaism regarding obligations to the poor are deeply ingrained. Although most national attention is paid to religious conservatives, religious liberalism is not an oxymoron. Indeed, in discussing volunteerism, philanthropy and the like, Putnam and Campbell observe, "[t]he civic 'good guys' are more often religious liberals, not religious conservatives."²⁰⁰

We are often told that we should afford free speech protection for the speech we hate. This was never an absolute. If the speech we hate provides unjustifiable harm, then protection should not be afforded. But the free speech clause has gone quite far by protecting gruesomely violent video games, depictions of animal cruelty, and the intentional infliction of emotional distress.

It may be difficult to provide protection for the religion we hate. But it cannot be the position of government under the Establishment Clause that conservative Christianity is officially disfavored. That conservative evangelicals have substantial political power should play no role in freedom of religion disputes. Religious rights should not turn on the popularity of the religion or the lack of it nor should they turn on the political perspective of the claimant. Nonetheless, I think the hostility of the left toward the religious right is a factor informing the writing of scholars and the positions of some institutions.

¹⁹⁸ It should also be noted that the Protestant Reformation's emphasis on ordinary life was hostile to hierarchy and helped to pave the way for democratic movements. TAYLOR, *SOURCES OF THE SELF*, *supra* note 121, at 394–95.

¹⁹⁹ For discussion of divisions within the evangelicals, see FRANCES FITZGERALD, *THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA* 535–84 (2017).

²⁰⁰ PUTNAM & CAMPBELL, *supra* note 163, at 458. In fairness, evangelicals fare far better than seculars, and most Evangelical Christians take seriously the Biblical call to be stewards of resources for the poor.

Sexual equality and marriage rights for LGBTQ citizens have been constitutionalized, and a fighting issue is whether the religious liberty rights of evangelicals will give way to the equality rights of LGBTQ citizens. Concern that the courts will not properly balance these claims plainly underwrites opposition to religious freedom restoration acts.²⁰¹

Although employment and consumer discrimination against LGBTQ citizens on religious grounds should generally be forbidden, the cases in which evangelicals refuse to provide services for same-sex weddings or commitment ceremonies are more complicated. In my view, these cases present a tragic choice.²⁰² Experiencing a refusal of service on the basis of who you love is stigmatizing, embarrassing, humiliating, unfair, and frequently accompanied by emotional distress.²⁰³ But it is also deeply problematic for the state to compel citizens to perform actions that are contrary to their deepest religious beliefs. It might be argued that a photographer or a cakemaker need not violate his or her religious convictions. Instead, he or she could just find another occupation. In addition to the large fines that have been imposed in these cases,²⁰⁴ withdrawal from a chosen occupation involves a significant material loss – a high price to pay for one’s religious beliefs. Indeed, as Douglas Laycock has observed, exclusion from occupations on the basis of religion formed a part of the backdrop for the adoption of the Free

²⁰¹ See Laycock, *supra* note 191; see also Michael Dorf, *Supreme Court Oral Argument Shows How Religious Freedom Claims Have Become Ideologically Charged*, VERDICT (Mar. 26, 2014) <https://verdict.justia.com/2014/03/26/supreme-court-oral-argument-shows-religious-freedom-claims-become-ideologically-charged> (the gay rights versus religious liberty practically defines the difference between contemporary liberals and conservatives).

²⁰² Many commentators favor a standard that does not regard with sufficient seriousness the religious claims of wedding photographers, for example, when their refusal to participate in a gay wedding would burden private parties (such as gay couples who wish to be married without discrimination). See TEBBE, *supra* note 109, at 49–70, sources cited in pp. 211–12, and in particular favoring a standard that appears to permit only comparatively negligible harms to burdened parties. *Id.* at 62. If only negligible harms to such parties were permitted, pacifists could not be protected from a military draft. But accommodating religious liberty does not establish a religion or indicate that the religion is favored. It simply honors our commitment to religious liberty. I believe that harm to third parties should be taken into account in a serious way, but the harm to the religious claimant should be more seriously balanced against that harm.

²⁰³ On the other hand, the couples involved suffer no material loss, and other service providers have been readily available in the cases that have arisen.

²⁰⁴ *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507, 564-65 (2017) (upholding damage award of \$130,000).

Exercise Clause: “The English Test Acts and penal laws long excluded Catholics from a range of occupations, including . . . solicitors, barristers, notaries, school teachers, and most businesses with more th[a]n two apprentices. These occupational exclusions are one of the core historic violations of religious liberty, and of course this history was familiar to the American Founders. In light of this history, it is simply untenable to say . . . that exclusion from an occupation is not a cognizable burden on religious liberty.”²⁰⁵

I understand the position of those who believe that LGBTQ citizens should be entitled to a discrimination-free market.²⁰⁶ I do not understand the failure of so many on the left to see that this is a hard case. I would reluctantly side with the religious claimants in the wedding cases despite my disagreement with their views.²⁰⁷ If I am right that some on the

²⁰⁵ Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY* 201 (Douglas Laycock, et al. eds., 2008). *But cf.* TEBBE, *supra* note 109, at 119 (suggesting that a free speech argument by a private business, like a wedding vendor, fails because the vendor could always close its doors). But there are better reasons to contest a free speech claim. *See* Steven H. Shiffrin, *What is Wrong with Compelled Speech?*, 29 *J.L. & POL.* 499 (2014) (discussing *Elane Photography, LLC v. Willock*). I agree with Kenneth Karst that it was a mistake to lump the right to pursue an occupation in the catchall category of economic due process. The right to pursue an occupation should be regarded as a human right, albeit subject to regulation for competency. Such regulation should be scrutinized with more care than it is at present, particularly when the regulators are gatekeepers with something to gain by keeping others out.

²⁰⁶ I, for example, support the view that Title VII does and should prohibit discrimination against gay, lesbian, and transgender employees. The Court, however, is presented with three cases that could overturn that view. For discussion of the three cases, see Amy Howe, *Argument preview: Justices to consider federal employment protection for LGBT employees*, SCOTUSBLOG (Oct. 1, 2019, 11:15 AM) <https://www.scotusblog.com/2019/10/argument-preview-justices-to-consider-federal-employment-protection-for-lgbt-employees/>.

²⁰⁷ I do not believe this position commits me or anyone else to protect those who would discriminate against interracial couples on religious grounds, let alone against customers of another race. Our whole constitutional history has finally led us to the point that race discrimination is officially “odious” and that those who would promote white superiority are constitutional outlaws. *Cf.* Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 *J.L. & POL.* 91, 108, 111–13 (2013) (discussing why racial discrimination claims differ from claims of discrimination based on sexual orientation). I realize that the current President of the United States employed racist appeals during his campaign and since then, but I see this as all the more reason to defend the best in our Constitution as it has developed through a civil war, three constitutional amendments, the civil rights movement, a unanimous Supreme Court opinion condemning racial segregation, and the election and reelection of an African-American President. *See* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (referring to the “unique historical, constitutional, and institutional concerns” implicated by racial bias). For discussion of this issue and the clash between religious

left are influenced by their hostility to the views of the religious claimants, I cannot help but see the irony that the same members of the left urge in the speech context that we tolerate depictions of animal cruelty,²⁰⁸ gruesomely violent video games,²⁰⁹ intentional infliction of emotional distress at funerals,²¹⁰ and racist speech.²¹¹ In the end, the question in this context is not just the relationship between the state and religion, but how to handle diversity,²¹² and a polarized diversity at that. Conservative evangelicals are a substantial minority of the population and they are surely in the process of losing the culture wars.²¹³ I think this is a limited context in which a compromise honoring religious liberty for the religion with which we profoundly disagree has merit.

2. Freedom of Religious Association

As I argued earlier, from the perspective of cultivating moral lives, freedom of association is an important right. But the scope of the right should not be unlimited. I do not think, for example, that the so-called ministerial exemption is justified. To be sure, like non-religious associations, religious associations ordinarily ought to be able to choose their members and their leaders according to their ideology. So, just as the Ku Klux Klan can exclude those of particular races and religions from their leadership, so the Catholics can exclude women from the priesthood. But that should not mean that a religious denomination should be interpreted to have a constitutional right to discriminate, for example, on the basis of race, gender, disability, or sexual orientation in circumstances where their religious ideology does not call for the discrimination. So,

liberty and gay rights generally, see Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y. 206, 235 (2010). By contrast, the Court in *Obergefell v. Hodges* treated those who had a traditional view of marriage with respect. 135 S. Ct. 2584, 2594, 2602, 2607 (2015). Our society may get to the point that tens of millions of conservative Catholics and evangelicals are constitutional outlaws, but we are not there yet.

²⁰⁸ See *supra* note 76.

²⁰⁹ See *supra* note 77.

²¹⁰ See *supra* note 78.

²¹¹ See *supra* notes 132–38 and accompanying text.

²¹² TAYLOR, DILEMMAS, *supra* note 61, at 310.

²¹³ Given the composition of the Supreme Court, we might expect some conservative judicial wins, but the Justices are not the culture, and those wins are likely to be cultural losses.

suppose the Episcopal Church in downtown Ithaca was searching for a minister and the search committee decided to discriminate on the basis of race or sex²¹⁴ despite the fact that its religious principles called for no such thing. The ministerial exemption would authorize such discrimination,²¹⁵ but, in my view, the anti-discrimination interest outweighs the interest in religious association.

Similarly, I believe that Section 702 of the Civil Rights Act of 1964 has been applied to permit too much religious discrimination by religious organizations. For example, a unanimous Supreme Court in *Corporation of the Presiding Bishop v. Amos*,²¹⁶ went too far in holding that a non-profit corporation owned by the Mormon Church operating a gymnasium open to the public had a constitutional right to discriminate in employment on the basis of religion with respect to an employee performing a secular function. Justice Brennan, concurring, did not think it prudent for courts to determine what was secular and what was religious. But the case involved a gymnasium open to the public and an employee who had been a building engineer for 16 years. Clearly, the work of the engineer was not religious in character.²¹⁷ Moreover, courts frequently are required to draw the line between the religious and the secular. Indeed, the statute itself (along with many others) requires the courts to distinguish between religious and secular organizations.²¹⁸ And among other things, the courts must determine what religion means in both of the Religion clauses. But I agree with Cécile Laborde. The

²¹⁴ It is generally agreed that Catholics can engage in sex discrimination for the priesthood because their ideology requires it.

²¹⁵ For criticism of the exemption, see Caroline Mala Corbin, *The Irony of Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*, 106 N.W. U. L. REV. 951 (2012). For a defense, see Christopher C. Lund, *In Defense of the Ministerial Exemption*, 90 N.C. L. REV. 1 (2011). Meanwhile Lawrence Sager would extend the exemption to other “close” associations. Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 77, 100-01 (Micah Schwartzman et al. eds., 2016). But it is difficult to see large churches, where the hierarchy, not the congregation selects priests. LABORDE, *supra* note 113, at 60.

²¹⁶ 483 U.S. 327 (1987).

²¹⁷ The Court’s ruling puts an incentive on workers to fake religion in order to keep their jobs.

²¹⁸ The circuits are split on the issue. See Emily S. Fields, *VII Divided by Four: The Four Way Split over the Title VII “Religious Organization” Exemption*, 63 WAYNE L. REV. 55 (2017); Roger Dwyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545 (2011). If the court interpreted Section 702 less broadly, the need to determine which organizations are religious and which are not would arise less frequently.

decisive fact for me is that the gymnasium is open to the public.²¹⁹ Of course, churches and temples are open to the public in the sense that anyone can attend. But an important purpose of worship services is to create a community of believers, unlike gymnasiums, hospitals, and soup kitchens. Even if one assumes that a gymnasium serves a religious function, like hospitals and soup kitchens that are open to the public, I interpret the Establishment Clause²²⁰ to permit a religious organization to discriminate with respect to the leadership, but not for positions like building engineers and janitors.

There are circumstances, in my view, where religious associations need to be treated differently so that they can have the same right as other associations. In one such case, the Ninth Circuit Court of Appeals lost its way. *Alpha Delta Chi-Delta Chapter v. Charles B. Reed*,²²¹ upheld a state university requirement that university organizations not have membership requirements based on religion as applied to a religious sorority.²²² It strikes me that this requirement should be regarded as appropriate for the Sierra Club, but as wholly inappropriate for a religious organization. Discrimination on the basis of religion is unrelated to the ideology of the Sierra Club, but it was quite relevant to the ideology of the sorority. A ruling that respected this would not give special rights to a religious organization. Instead, it would permit the religious organization to limit membership to those who subscribe to its mission, a mission which happens to be religious.

²¹⁹ LABORDE, *supra* note 113, at 185–86. For additional criticism of *Amos*, see Nancy L. Rosenblum, *Amos: Religious Autonomy and the Moral Uses of Pluralism*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 165–95 (Nancy L. Rosenblum ed., Princeton: Princeton University Press, 2000).

²²⁰ For cogent analysis of the difficulties associated with Section 702, see *King's Garden, Inc. v. FCC*, 498 F.2d 51, 56–58 (D.C. Cir. 1974).

²²¹ 648 F.3d 790 (9th Cir. 2011).

²²² *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 802–03 (9th Cir. 2011). Likewise, in *Christian Legal Society v. Martinez*, the Court required campus organizations to be open to all students as a prerequisite to receive funding, facilities, channels of communication, and the name and logo of the school. 561 U.S. 661, 687–88 (2010). According to the Court, those organizations that were unwilling to adopt an open membership policy still had access to campus facilities for meetings and activities and were further entitled to use campus chalkboards and bulletin boards, but not to funding or the right to use the name and logo of the school. In my view, the policy raised serious constitutional issues. *Id.* at 690. But it was not so obviously unconstitutional as the policy upheld in *Reed*.

3. Government Religious Speech

The emphasis on moral lives needs to be applied to government religious speech in a pluralistic way. From an early point in our history, conservative Christians sought to promote the notion that the United States was founded as a Christian nation.²²³ That Christian nationalist perspective underwrites the “War on Christmas” rhetoric, the drive to have government promote Christian religious symbols, and the position that Government should enforce discrimination against LGBTQ persons because God demands it. These demands fly in the face of Establishment Clause values. Among other things, government has no theological competence; politicians are too likely to make decisions based on what is good for them as opposed to what is good for religion, and it should be remembered that the Establishment Clause was supported by religious groups who feared that Government intervention to “help” religion risked corrupting religion.²²⁴

Clearly the effort to have government promote Christian religious symbols promotes inequality. Indeed, to some extent that is their point. Moreover, the notion that government should pass legislation based on a theological premise is indefensible. The Establishment Clause is not only designed to promote equality; as I have already suggested, it recognizes that government has no theological expertise.²²⁵ It prohibits the justification of state policies by public officials on religious grounds. This does not mean that religious citizens should not promote public policy for religious reasons. They have done so since the beginning of the Republic, and that practice continues for good or for ill to the present day.²²⁶ Those who confine

²²³ This Christian nationalism is well contrasted with secularism and republicanism in GORSKI, *supra* note 39, at 13–36, 220–22.

²²⁴ Roger Williams placed emphasis on this concern as did many eighteenth-century American Baptists. There is substantial historical evidence that this concern was well placed. See STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT*, *supra* note 42, at 32–34. For substantial development of the corruption argument, see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 46–77 (2013). From this perspective, religion is a public good that is worthy of protection from distortion by government.

²²⁵ McConnell, *supra* note 110, at 23–24; Kent Greenawalt, *supra* note 190, at 1233–34.

²²⁶ On the importance of religious contributions to public discourse, see DAVID TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* 12, 28–31 (1998).

themselves to “public reason” will not change American political discourse. On the other hand, government cannot adopt policies urged by religious citizens in the absence of fully adequate secular reasons, and religious citizens typically promote policies that are so supported.

Nonetheless, we do not have a perfect Constitution. Our nation supports a pledge of allegiance to the flag that maintains we are under God and currency stating that we trust in God.²²⁷ Many progressives have rightly observed that these slogans wrongly discriminate against Buddhists, Hindus, atheists, and agnostics. Others observe that these slogans are counterproductive. No one looks at their money and is spiritually moved. Indeed, Justice Brennan argued in support of these slogans that the phrases have been drained of spiritual meaning.²²⁸ One would think this would undermine the constitutional case instead of supporting it. It certainly fits with the claims of those who thought that government involvement with religion corrupts religion.

I wish we lived in a country where people did not feel the need to express their religious values through government advertising on money. But we do not. And those progressives who argue that the slogans are unconstitutional are running up against the pull of history and the need for constitutional compromise. In addition, while the downside of this religious imperialism is obvious, there is one consolation.²²⁹ The meaning of “under God” stretches far back in religious history in ways that undermine the Christian conservatives’ understanding of what it means to be a chosen people.

²²⁷ The public belief in God is of early standing as the Declaration of Independence makes clear. American Presidents have invoked God (but not Jesus Christ) from the beginning of the Republic. This includes Washington, Adams, and Jefferson. ROBERT N. BELLAH, *Civil Religion in America*, in BELLAH READER, *supra* note 34, at 225–45 (Steven M. Tipton, ed., 2006). And “God Bless America” is the standard conclusion of contemporary Presidential addresses.

²²⁸ *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

²²⁹ The former Chief Rabbi of the United Kingdom has argued that the weak establishment of the Anglican Church has helped to make other religions welcome and accepted. See Perry Dane, *A Tale of Two Clauses: Search and Seizure, Establishment of Religion, and Constitutional Reason*, 26 WM. & MARY BILL RTS. J. 939, 962.

Like the conservative Christians,²³⁰ the Puritans understood themselves to be a people chosen by God. But this did not mean that God necessarily favored their endeavors. John Winthrop warned in his famous “City on a Hill” speech that if the chosen people worshipped “other Gods, our pleasures and [profits] and serve them ... [we] shall surely perish[] out of the good Land.”²³¹ The Puritans understood not that God promised they would triumph in the end, but they had special responsibilities and that divine judgment demanded they lead moral lives.²³²

As Robert Bellah understood, a nation needs a narrative that stands as a regulative ideal of what the country stands for. It is “not only the way we understand our personal and collective identities, it is also the source of our ethics, our politics, and our religion.”²³³ Many Americans support a purportedly Christian nationalist perspective, a narrative that tells an old-time story of Biblical fundamentalism, white privilege, patriarchy, unbridled market freedom, and a prosperity gospel.

This story captures part of our history. But it is hardly a regulative ideal. Indeed, the old-time story is at odds with the deepest traditions of our country and our Constitution. In fact, our best national narrative is a different form of constitutional patriotism.²³⁴ As Josiah Royce maintained, it strives for a

²³⁰ Their conception of themselves as a chosen people also supported their sponsoring not only the treatment of Native Americans, but imperialism abroad as well. See ROBERT N. BELLAH, *Civil Religion in America*, in BELLAH READER, *supra* note 34, at 232–33, 241 (Steven M. Tipton, ed., 2006). See also GORSKI, *supra* note 39, at 2 (noting that religious nationalists support imperialism to overcome evil and usher in the Second Coming). See RICHARD NIEBUHR, *THE KINGDOM OF GOD IN AMERICA* 179 (1937) (“The old idea of American Christians as a chosen people who had been called to a special task was turned into the notion of a chosen nation especially favored.”).

²³¹ BELLAH, *BROKEN COVENANT*, *supra* note 27, at 15. See also GORSKI, *supra* note 39, at 41.

²³² BELLAH, *BROKEN COVENANT*, *supra* note 27, at 41–43. See also *Civil Religion in America*, in BELLAH READER, *supra* note 34, at 225 (conceiving of civil religion “as the subordination of the nation to ethical principles that transcend it in terms of which it should be judged,” not a form of national self-worship).

²³³ ROBERT N. BELLAH, *Introduction*, in BELLAH READER, *supra* note 34, at 10. See also TAYLOR, *SOURCES OF THE SELF*, *supra* note 121, at 47–51 (asserting life seen as a narrative framework).

²³⁴ See JURGEN HABERMAS, *Struggles for Recognition in the Democratic Constitutional State*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 203, 225–26 (Ciaran Cronin & Pablo De Greiff eds., Die Einbeziehung des Andren trans., 1998) (explaining how constitutional patriotism can unite diverse citizens). For discussion of the concept as used by Habermas (it is used more generally here) together with the

community rooted in memory, reverential yet critical of the past, searching for the best in the tradition with an eye on the future.²³⁵ Our best narrative invokes the kind of inclusive democratic culture that best fits with the First Amendment and the Equal Protection Clause, but constitutional principles and doctrine are not enough. A narrative needs flesh and blood human beings to inspire.²³⁶ To be sure, no human being is unflawed, even heroic figures. Great leaders help to establish a motivational source of what our commitment to national unity should be. It is possible to tell a story about our country that reads the Constitution in light of the Declaration of Independence²³⁷ and moves from John Winthrop, Thomas Jefferson, James Madison, and George Washington through Abraham Lincoln, Ralph Waldo Emerson, Walt Whitman, Frederick Douglass, Susan B. Anthony, Elizabeth Cady Stanton, John Dewey, Franklin Delano Roosevelt, Eleanor Roosevelt, and Martin Luther King²³⁸ among others. It is a story that honors the kind of people we should be. It is a story that resonates with the message of the Statue of Liberty: “Give me your tired, your poor, Your huddled masses yearning to breathe free.”²³⁹

question whether it can legitimize the state in the eyes of all reasonable citizens, see Frank Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 DENV. U. L. REV. 1009 (1999).

The political right does not have a monopoly on patriotism. It motivated progressives in the Watergate controversy and it underpins the resistance against Donald Trump. For discussion of patriotism among U.S. progressives and the extent to which it is needed as a supplement to liberalism, see Charles Taylor, *Cross Purposes: The Liberal-Communitarian Debate*, in LIBERALISM AND THE MORAL LIFE, *supra* note 65, at 174–79.

²³⁵ “Let us bury the natural body of tradition. What we want is its glorified body and its immortal soul.” ROBERT N. BELLAH, *Citizenship, Diversity, and the Search for the Common Good*, in BELLAH READER, *supra* note 34, at 313 (quoting JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 12 (1918)).

²³⁶ TAYLOR, DILEMMAS, *supra* note 61, at 9.

²³⁷ See GORSKI, *supra* note 39, at 91–92 (chronicling that Lincoln read the Constitution in light of the Declaration), 150 (noting that King cited Declaration and the Constitution for the view that all men are created equal).

²³⁸ See, e.g., *id.* at 151 (citing King for the view that our diverse country is under God’s judgment and we will “live together as brothers or we are all going to perish as fools.”).

²³⁹ *Statue of Liberty*, NAT’L PARK SERV, <https://www.nationalparks.org/explore-parks/statue-liberty-national-monument>.