Distinguishing Secular and Theological Justifications of the First Amendment: Implications for Pro-Life Legislation

Eric Manchester[*]

ABSTRACT: The contention of the First Amendment of the U.S. Constitution that government may neither establish any religion nor prevent the free exercise of religion allows for these restrictions to be conceptually justified on either theological or secular terms. Consequently, there is no *prima facie* reason to insist that the enactment of laws, including those concerning "life issues," cannot be motivated by particular religious convictions so long as the legislation does not mandate religion as such. This is even more evident when one considers that (1) any attempt to prohibit such influence would illicitly stipulate that one is not free to exercise one's religious convictions in this way, and (2) that the coupling of clauses on religious liberty with further clauses in the Bill of Rights protecting free speech, assembly, and petition suggests a presumption that religious convictions will be able to play a role in the formation of public policy. Given this, I propose a principle of equitability whereby laws can reflect pro-life religious convictions so long as legislation reflecting contrary convictions remains possible, with certain occupational protections built in for cases where judicial rulings prevent pro-life legislation. Finally, I argue that insofar as the First Amendment itself may be thought to be justified on theological grounds, it is reasonable to form laws protecting human life at all stages based on the conviction that rights are rooted in the divine creation of human biological nature directed toward rational self-awareness and freedom, rather than simply on the actual exercise of such awareness in humans who have reached certain stages of development.

[*] At the time this paper was presented, Eric Manchester was an associate professor of Philosophy at Caldwell College in New Jersey. At the time of its publication in this volume, he is a professor of philosophy at St. Charles Borromeo Seminary for the Archdiocese of Philadelphia.

In a 2009 televised interview, political commentator Chris Matthews criticized Catholic Bishop Thomas Tobin of Providence, Rhode Island for his declaration that Rep. Patrick Kennedy's defense of abortion rights requires the latter to be barred from Holy Communion.[1] Even though there was no sign that either the political commentator or the bishop appreciated the irony, Matthews invoked Christ's admonition from Matthew 22:21 that one should "render unto Caesar that which is Caesar's, and render unto God the things which are God's" in accusing the bishop of failing to properly distinguish a politician's legal-political judgments from his or her personal faith convictions. The irony, of course, is that if theological convictions are to remain independent of policy-making, then this independence should not itself be motivated by Scriptural injunctions.

Such inconsistencies aside, however, Matthews's rejoinder sheds a certain light on the basis of disagreements about the manner in which faith should or should not guide one's political activities. Later in this essay I will explore the particular relevance of this issue in respect to various political positions on so-called "life issues." For now, speaking simply of the conceptual bases for maintaining some distinction between religious belief and civil law, it is worth noting that the conviction that political positions and theological convictions should in some sense operate independently of one another can presumably be rooted in either particular religious convictions or in so-called secular reason. At the same time, just how one understands this independence is itself a product of certain convictions about particular views of religion (which includes secular views) as well as about the nature of religion in general.

I will here argue that the wording of the First Amendment of the U.S. Constitution (leaving historical analyses to others) allows for a variety of interpretations, including some that are motivated by diverse theological and secular assumptions. In particular, I argue that the prohibition against "establishing religion" and the protection of the "free exercise" of religion at least permit, and arguably favor, understanding the relation between religion and government to rest on grounds that presume God's existence, or at least acknowledge the importance of recognizing its possibility. This is especially evident when one considers some of the Amendment's other clauses, such as those addressing the right to free speech and press, to hold assembly, and to

---

[1] A Youtube video of this event can be found at https://www.youtube.com/watch?v=vUTPhZmkIDI.

petition government. While the distinction between religious conviction and civil law can be plausibly based on either theological or secular grounds, I contend that the choice of the specific grounds that one favors will likely influence how one judges the alleged constitutionality of laws touching upon life issues.

Specifically, I maintain that the most reasonable basis for according recognition to religious liberty is the presumption that a deity exists who ought to be given worship. If one at least presumes the existence of such a deity to be a distinct possibility, it follows that, if true, the giving of proper worship would constitute a matter of fundamental importance. Beyond this, acknowledging the (at least possible) supreme relevance of God's existence further implies that the nature of human life, and the rights associated with it, is (possibly) determined by God (or to a divinely supported natural order),[2] and not merely by human convention. Given this, I will argue that it is more tenable to ascribe rights to all organisms with a biological human nature ordered toward the development of self-awareness rather than only to those organisms that manifest actual self-awareness as such. On the former view, rights are ascribed to even pre-natal biological humans, whereas on the latter, rights pertain only to human beings already self-aware. In addition, I will show why rooting rights in biological nature rather than in the exercise of self-awareness alone is more consistent with classically liberal egalitarian and democratic principles.

Once it is granted that the First Amendment itself permits defending its principles on either religious or secular grounds, the case for claiming that legislation on life issues in either the pro-choice or pro-life directions cannot be religiously motivated is undermined. As a way in which to consider how this should be practiced, I propose a principle of equitability, whereby particular theological or secular motivations may be instrumental in choosing legally to prohibit or to mandate particular practices that happen to overlap with the tenets of a given religion, so long as (1) the person who acts on motivations grounded in particular secular or theological convictions to influence legislation respects that contrary motivations leading to different laws must

---

[2] This parenthetical takes into account, for example, an Aristotelian-type view of a God who is the prime mover and sustainer of processes endemic to the natural world, upon which are based human nature and the "rights" derived from facts about what properly fulfills it, but who does not necessarily create the world or the rights that accrue to it by some divine fiat.

also be deemed acceptable in legislative deliberation and (2) the legislation in question does not interfere with clear-cut constitutional rights. (This notion of "clear-cut constitutional rights" will be addressed in a bit more detail later. For example, one could not legitimately pass a law requiring or prohibiting citizens to join a church.)

It should be mentioned here that to assert that religious or secular motives are acceptable for influencing the enactment and the interpretation of law does not necessarily legitimize specifically citing such justification in the written wording of such laws themselves. While I do not object to the idea that particular laws might reflect values that can be associated with particular religious convictions and that some laws can even be demonstrated to be motivated by such convictions in particular cases, I would generally agree with the view that laws should be at least theoretically compatible with a wide range of religious views, and perhaps even with no religion at all, whether or not such motivation was actually in place for those who enacted the legislation. This qualification is important in order to distinguish religiously-motivated values in legislators from the outright promotion of particular religious practices, which could easily go too far toward establishing particular religious practices. While the principle of equitability that I advance allows for religiously motivated legislation so long as a democratic process that allows legislation reflecting other values is preserved, this is not the same as legislating any particular religious practice. That type of legislation is prohibited by the First Amendment even when we understand it to allow diverse motivations (religious and secular) to operate freely.

Certainly, there are notable counter-arguments that one might use to challenge (1) and (2) above. Consequently, in the relevant sections below I will address these points and will qualify the above two principles in an important way. While my position in theory allows for legislation, for instance, requiring medical providers to provide abortions or abortifacient contraception (while also allowing for the prohibition of these practices), it is my view that allowing such things cannot be maintained without abandoning certain principles presupposed in *Roe v. Wade* and related cases. There have been appeals to allegedly implied constitutional rights such as privacy and the like in juridical decisions forbidding states to ban abortion or contraception, but my principle of equity asserts that this position can only be maintained if laws requiring the provision of abortion and contraception are judicially barred to the same extent. In any case, more will be said later on the specifics of these principles.

To be sure, the First Amendment clearly forbids mandating or prohibiting adherence to a particular religion as such, as the qualification of the two principles addresses. My position is designed to contest the relatively common view that pursuing legislation on the basis of moral positions commonly associated with particular religious perspectives constitutes the "establishment" of a religion. On my view, such a position is inequitable in that the standard for determining what constitutes the "establishment" of religion must be commensurate with that for determining what constitutes an inhibition of its free exercise. Simply put, if pursuing a legislative proposal on the basis of particular religious convictions is construed as an effort at establishing religion, then in the same respect prohibiting such pursuit must be construed as inhibiting its free exercise. To deny the principle of equitability would amount to maintaining that one is not free to exercise his or her religious convictions in the realm of shaping public policy.

The promotion of religiously motivated values can bearly be construed as a very partial effort at the "establishment" of religion, and even then in only the most strained sense of the word. On my view, any possible trace of policies motivated by religious values aiming at an "establishment" is offset by the equitability of permitting the pursuit of legislation on the basis of contrary values. I contend that whatever minute degree of desire to enact something that others might regard as "establishment" is no greater than the degree of desire for the "prohibition of free exercise" that might be implied by aiming for restrictive legislation that reflect particular values that are at odds with religion. In effect, this approach balances allowing a particular degree of "free exercise" of religion in forming legislation with a freedom to limit this exercise (i.e., to prevent its establishment) to an equal degree. Because it allows for both approaches, it is equitable in a way in which the outright prohibition of religious influence on legislation is not, for this approach essentially favors the principle of anti-establishment of religion over that in favor of the free exercise of religion.

In general, I hold that pro-lifers (and, for that matter, "pro-choicers") tend to err if they try to defend their position (or reject contrary positions) primarily on constitutional grounds. Rather, pro-lifers should focus mainly on legislation, with confidence that the First Amendment does not preclude, and may even subtly favor, the possibility of enacting certain laws that happen to be in accord with their basic theological motivations on these matters. Nevertheless, it is likely that many people may be reticent to accept legislation that seems to be

primarily theologically motivated. Given this, it behooves pro-lifers to reflect on ways in which their positions can also find meaningful support apart from their particular faith convictions, even as they hone their case that such convictions do not constitutionally illegitimize such legislation. I would certainly defend this approach in respect to federal law, but I think it especially true in respect to state and local laws.

Once again, my main defense for the principle rests largely on the grounds that the First Amendment itself allows for accepting it on either secular or religiously-inspired grounds, such that it is inconsistent to forbid religious or secular motivations in respect to other public policies. With this in mind, it is now time to examine the possible theological bases of the First Amendment itself, with the purpose of then assessing the implications of this assessment for legislation on life issues.

I. Theology and the First Amendment

A. Comparing Theological and Secular Justifications

On the surface, it may seem counterintuitive to speak of supporting a distinction between religion and law on theological grounds, or to say that secular assumptions manifest religious convictions. Nevertheless, a modicum of reflection reveals that this assessment is not as peculiar as one might think.

For example, one could embrace a view of the divine that maintains that belief should be rooted in love and hence be free of coercion, including the force of law. Likewise, one might hold to a theological position that takes both the existence of God as well as moral principles to be discernible by natural reason and experience apart from (perhaps reinforced by) particular faith commitments that are taken to be accepted only on the basis of grace-aided belief in certain purportedly supernaturally-revealed truths. In this case, the common secular view that all convictions related to a belief that a divine being exists are particularly religious in nature indicates that the religious traditions that distinguish philosophical notions of morality and God's existence from supernatural revelation are presumed to be in error. Such a position, however, presumes one particular conception of theology while rejecting others, thereby violating its own maxim that policy should be formed independently of particular theological convictions.

This assessment further reveals that the anti-establishment and free exercise clauses of the First Amendment of the U.S. Constitution suggests that neither theological nor secular motivations for accepting a distinction between

ecclesial authority and civic law may be either precluded or required. To the point, the view that the basis for this distinction must be essentially secular in nature amounts to a impinging upon the "free exercise" of religion insofar as this view asserts that one is not free to exercise his or her religious convictions by maintaining a distinction between ecclesial life and government on theological grounds. Indeed, given the intrinsic unreasonableness of prohibiting particular positions on grounds that are in fact true, this secularist view essentially assumes that the theological beliefs that define these grounds are false.

Inasmuch as a belief that particular religious beliefs are false in itself amounts to a belief about religion, the secularist position therefore shows itself to be inconsistent in maintaining that legal perspectives cannot be based on particular views concerning religion. On the other hand, the wording of the First Amendment also precludes mandating that the basis of the distinction between law and religion (or perhaps "church") be understood theologically, as this amounts to an unwarranted "establishment" of a particular religious belief into law.

It appears, then, that the free exercise and anti-establishment clauses of the First Amendment preclude both prohibiting and mandating a theological basis for understanding the distinction between religious belief and civic law. If neither a theological nor secular basis for accepting the distinction between religious belief and civic law can be precluded or mandated, it then follows that both of these approaches are permissible but that neither one is obligatory.

Put differently, the Constitution apparently does not concern itself with *why* one accepts this distinction, as long as he or she accepts it for *whatever* reason. The difficulty with this conclusion, however, is that one's presumption that particular religious positions are true or not true (or that a belief in God generally is true or false) almost certainly influences the manner in which one interprets, applies, and discerns the constitutionality of certain laws. This is, of course, the case with both the pro-life and pro-choice positions on the life issues.

While abortion, euthanasia, and even capital punishment are not expressly mentioned in the Constitution, the legislation that one favors on these matters as well as one's assessment of whether particular legislation implicitly advances or prohibits particular religious or secular perspectives is likely to reflect one's own particular religious or secular beliefs. What one must be mindful of here, however, is that the fact that one's interpretation and

application of law is guided by particular convictions about religious matters does not necessarily in itself amount to "establishing" or prohibiting the "free exercise" of religion. Certainly, the influence of religion (or irreligion) in moral matters is not the exact equivalent of mandating or prohibiting attendance at religious services, particular religious practices, and so on.

The above assessment conveys that the question as to what types of influence constitute an effort to legislate an "illicit" establishment or to enact an "illicit" restraint on the free exercise of religion is itself open to debate, and in fact it may be answered differently by people of various religious convictions. As Philip Hamburger (Professor at the University of Chicago Law School) attests, a wide range of opinions existed early on in American history regarding the implications of the distinction between civil and ecclesiastical authority. These ranged from the view that clergymen should refrain from speaking on political subjects altogether (e.g., Thomas Jefferson even surmised at one point that doing such constituted a breach of business contract, since clergymen were paid to expound expertise on matters of religion alone),[3] to the view that only the prohibition of an explicit legal mandate for a particular religion was intended by this distinction.

The analysis offered here in effect suggests that there is no entirely "theologically neutral" distinction between religious belief and law. Given this, one may rightfully wonder how the distinction between religious belief and law can be coherently maintained at all. As mentioned previously, the particular implications of this analysis for attempts at legislation concerning life issues will be elucidated shortly.

In any case, other clauses within the Amendment itself provide room for a moderate interpretative position that can elucidate more or less detectable parameters about the extreme limits of religious establishment and free exercise. These limits still allow for a range of interpretations and practical applications concerning where the line of religious influence and its inhibition should be drawn within these extremes. In elucidating this range, I will later argue that the anti-establishment and free exercise clauses in principle permit both pro-life and pro-choice positions to be justified within civil law, on principles guided by either secular or religious motivations. Accordingly, I contend that in general one should not oppose particular legislative proposals

---

[3] See Philip Hamburger, *Separation of Church and State* (Cambridge MA: Harvard Univ. Press, 2002), pp. 152-54.

on the life issues on the grounds that contrary views are unconstitutional. Rather, one should accept their legitimacy in principle on the grounds that it is constitutionally permissible to support particular legislation for religiously and for secularly motivated reasons. At the same time, this position calls for some important qualifications, which will also be touched upon shortly.

To return to the point about relatively clear parameters for interpreting broader views of the anti-establishment and free exercise clauses, it can be said first that it is certainly evident from the other clauses of the Amendment that people are to be free to express, in speech and in writing, particular views about religion. Likewise, the freedom of assembly makes it clear that people are free to join with like-minded individuals to advance or counter public support for particular perspectives. Given that such rights to free expression and free association are regarded as important for democratic representative government, it therefore needs to be asked to what extent people are constitutionally allowed to petition government to support or prevent legislation that manifests values in keeping with the particular expressed convictions of those with whom they freely associate. What else could be the point of coupling clauses regarding the right to free exercise of religion with rights to assembly and to petition government if were assumed that religious belief should not be involved n this process?

Of course, the inclusion of the anti-establishment clause suggests that it cannot be taken to require wholesale adherence to any particular religious practices and beliefs. Nevertheless, if we suggest that this caveat precludes the influence of religion on law altogether, the inclusion of religious protections in the same Amendment with rights to assembly and petition becomes unintelligible.

B. Influence vs. Establishment and the Principle of Equitability

What the above analysis reveals is that the central question concerns where the line is to be drawn between legitimate religious *influence* and illicit religious *establishment* in matters of law. In acknowledging that at least *some* kind and degree of influence is allowable, however, it is apparent that the view that law must be formed without any consideration of religious values is unacceptable.

At the same time, it is also evident that no particular religious perspective can be strictly codified into law. Even so, there appears to be no basis for asserting an absolute rule as to what degree of influence can be permitted, or precluded, within these conceptual limits. Consequently, the fairest principle

to follow in this regard, as mentioned above, is to maintain that religious and secular motivations can be present in those proposing legislation to the extent that contrary motivation, resulting in different laws, must also be regarded as permissible. Hence, if it is acceptable to pursue laws outlawing abortion on the grounds of religious motives (without conceding by any means that such laws are the establishment of religion), it would for the same reason be acceptable on secular grounds to pursue legislation allowing for abortions (without conceding that such laws are infringements on the free exercise of religion).

Indeed, one might surmise that the extent or limits of particular religious or secular influence may carry as far as the sentiments of the electorate wish to go, as long as the result of this influence falls short of mandating or prohibiting particular explicit practices of any religion (at least as long as these laws are not intentionally aimed at practitioners of particular religions).[4] For example, in the past, the Supreme Court has upheld Sunday closure laws as well as laws forbidding the use of hallucinogenic drugs like peyote, even though these laws impinged indirectly on non-Christians in causing their businesses to be closed twice a week rather than just once,[5] and directly on members of certain Native American tribes whose religious practice historically incorporated a quasi-sacramental use of peyote.[6] Similarly, the free exercise of a democratically

---

[4] See, for example, the 1993 U.S. Supreme Court case *Church of LukimiBabula Aye v. City of Hialeah.* In this case, a law against animal cruelty specified that it was designed largely with religious rituals and sacrifices in mind. This fact led the Court to regard it as illicitly targeting religion rather than merely passing an ordinance that happen to have consequences for a particular religion. On my view, one has the religious liberty to exercise religious (or secular) values against particular kinds of animal killing so long as these laws can be legislatively overturned since the same liberty that grants one a right to kill animals also permits others to legislate against this practice. At the same time, the fact that this mutual allowance recognizes religious liberty as a paramount value suggests that while religious values should be able to shape law, they should not be allowed to shape law specifically for the purpose of suppressing the practice of another religion. In this respect, my view is essentially in agreement with the verdict of the above case.

[5] See, for example, the 1961 Supreme Court cases *McGowan v. Maryland* and *Braunfield v. Brown.*

[6] See the 1990 Supreme Court case *Oregon v. Smith*. Relative to what I hold, the Smith case is tricky because if a religious tradition takes adherence to certain practices to be essential, then the distinction between making particular practices illegal and making the practice of that religion as a whole illegal outright practically breaks down. At the same time, my view wishes to preserve the right of individuals to support

defined extent of religious influence on law cannot extend to a point where these religious sensibilities prohibit practices that are clearly constitutionally protected. Thus, for example, there could be no religiously-inspired law that prohibited criticism of (or required one to express agreement with) a particular religion, or one that denied a right to a fair trial, mandated searches and seizures apart from demonstrable evidence of danger to the safety of others, and so on.

It may be that this qualification precludes the influence of certain theoretically conceivable religions, where such religions are interpreted as requiring the violation of these guaranteed protections. In other words, the right to exercise religion is not absolutely unconditional. Only religious practices that do not violate unarguably protected constitutional rights are to be allowed free exercise. Nevertheless, the word "unarguably" (or, as I say earlier, "clear-cut" rights) here is crucial. The point of underscoring the permissibility of a wide range of religious and secular motivations for law is to indicate that the application of legislation on life issues is ultimately properly left to legislators and not to courts.

Along these lines, the principle of equity that I have advanced allows one to qualify the notion of "clear-cut" constitutional rights. For example, on my view, there is no clear-cut right to abortion, so that religiously (or even secularly) motivated legislation against it is permissible. On the other hand, secularly (or religiously) motivated laws such as those requiring physicians to provide abortions or abortifacients (or whatever) would also be procedurally permissible on the view that I develop here even though I personally would stringently support legislatively (though not judicially) overturning such laws on moral grounds. Where judicial judgments take there to be allegedly "clear cut" (or at least clearly implied) constitutional rights where I would not acknowledge them (such as *Roe v. Wade*'s judgment that abortion cannot be

---

legislation that may happen to lead, practically (though unintentionally) to preventing a religion from being properly practiced. The question then reduces to that of how to balance the right to support such legislation with the right to freely exercise religion. If one assumes that a right to vote is constitutionally protected to the same extent as the right to free exercise, then it seems that in a scenario where one side or other suffers the diminution of a constitutional right, to allow a democratic resolution of the matter seems best so long as the law and courts permit citizens to work toward overturning this law so as to allow the currently banned activity associated with a particular religious practice.

legally prohibited), the principle of equity that I propose demands by the same reasoning that a proportionate judicial protection must be in place against mandating the performance of these protected practices. On my view, it would be legally permissible to require physicians to perform abortions, but it would not be permissible to both require the performance of abortions *and* to judicially block legislation that would reverse this requirement (or banning practices of the opposite sort).

Some comment should be given here to a more troubling potential criticism of the view of principality of equitability that I propose here. To the point, one might contend that this principle would not only open the possibility of doctors being required to provide abortions and euthanasia (on the condition emphasized above that the alleged constitutional right to abortion intimated by *Roe v. Wade* was overridden, such that legislation forbidding abortion was also possible), but that it would, in fact, also make it in theory possible to require *women themselves* to have abortions (on the equitability condition that abortion could also be outlawed).

At first glance, this might seem hard to reconcile with the Fourth Amendment's "clear cut" right for one to be "free in their persons" from "unreasonable searches" without "probable cause," or the Fifth Amendment's right to not be deprived of "life, liberty, or property" without "due process of law." Nevertheless, it must be remembered that these Amendments were not successfully (if even at all) invoked against laws upheld by the Courts for mandatory sterilization in certain cases (e.g., *Buck v. Bell,* 1927, never explicitly overturned). Likewise, one could contend that mandating abortions would not violate these Amendments as long as there was probable cause for imposing on the women's body in this way (e.g., the evidence that she was pregnant), or as long as she was accorded the "due process of law" and just compensation (per the wording of the Fifth in depriving her of liberty and bodily "property" (though one could certainly ask how the compensation for the loss of a pre-born offspring could be reasonably assessed).

On the other hand, the wording of particular Amendments aside, a *requirement* to terminate pregnancy would be hard to square with the Pregnancy Discrimination Act of 1978 (along with its various updated additional later protections), whereby women are protected from being treated unequally on the basis of their being pregnant. In addition, while *Skinner v. Oklahoma* (1942) did not declare laws requiring sterilization to be unconstitutional *per se* (holding only that they violated the Fourteenth

Amendment in singling out certain groups of criminals while excluding others), it is commonly held that *Skinner* is part of a cluster of cases establishing a sufficient general constitutional basis for so-called procreative rights. The other cases include *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972),[7] and, ironically, *Roe v. Wade.* Though these are typically invoked in order to illegalize contraception and abortion, a general right for a woman to decide for herself matters whether or not to procreate would also mean that the government could not decide for her that she could not procreate (i.e., that she must abort if pregnant).

In contrast to this, at least one scholar, Carter J. Dillard, maintains that the above cases establish only a right to *not* procreate, which does not (as many think) imply a right *to* procreate, or at least to not procreate beyond having one child by person to replace one's own presence in society.[8] However, the principle of equitability I propose demands that if a right to not procreate is read into the Constitution (this obviously not being an explicit clear-cut constitutional right), then a law mandating abortion (or, for that matter, sterilization) is unsupportable because it bars contrary legislation reflecting other values on these subjects.

Moreover, Dillon's position does not merely reflect that one has a right to not procreate, but that one has a right to engage in sexual relations without necessarily having a right to procreate (especially in cases where one already has more than one child). This essentially codifies particular values about

---

[7] The Dillard article cited below notes, for example, the passage in Eisenstadt that "if the right to privacy means anything, it means the right of the individual, married or single, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Leaving aside the notorious question as to whether a right to privacy can be reasonably derived from the Constitution, it is worth noting how the reasoning in *Griswold* conceptualized sexual intimacy as a privacy right predominantly in respect to the relationship between husband and wife, whereas the language in the passage here from *Eisenstadt* tends toward regarding rights in respect to procreation as being rights that can be reasonably assigned to individuals apart from the marriage relationship. That said, it should also be noted that *Eistenstadt's* equation between prohibiting contraception and requiring someone to bear a child is spurious insofar as this is only true if one presumes a fundamental right to sexual intimacy irrespective of child bearing; i.e. if one is not forced to engage in sexual relations by law, then the law is not requiring anyone to bear children simply by prohibiting contraception.

[8] See "Rethinking the Procreative Right," *Yale Human Rights and Development Journal* 10/1 (February 14, 2018): 1-63.

sexuality without any recourse to other values being legally supportable. This would be especially true in a case where one was *required* to abort (or having pregnancy avoided, in the case of sterilization) while still having an alleged right to engage in sexual relations. Similarly, if a right to sexual relations is taken to be one the state cannot override for any compelling reason, then it is inconsistent to say that a woman's right to decide to give birth could be overridden by a state's right to demand abortion if it judges there to be a compelling interest. To the point, the state could argue that it has an interest against mandating abortion (even if it were theoretically permissible for it to do so), such that it therefore has a compelling interest to prohibit sexual relations (at least among fertile persons) in order to avoid having to consider applying its alleged compelling interest to mandate abortion?

In general, then, the more citizens are judicially barred from legislatively pursuing particular policies according to their convictions, the more they must also be judicially protected from having to perform the practices that are judicially protected from the possibility of being legislatively overturned. Thus, on this principle the promotion of legislation requiring physicians to perform abortions or to supply abortifacients (or to perform euthanasia, and so on) would only be equitable if the legislative means for overturning such practices remain intact. To both support the reasoning of *Roe v. Wade* as well as to mandate abortion and abortifacients for caregivers is to inequitably want one's cake and eat it, too.

In respect to permissible limits (and allowances) for religious and secular influence on the shaping of law, then, we can say that where laws are allowed to be passed that restrict religious liberty by requiring certain professions to perform tasks that may violate their religious convictions, this restriction on the influence/exercise of religion is only justified if the freedom to work to overcome this restriction legislatively remains. That is, one cannot be stripped of both a certain degree of the exercise of religious freedom *and* the freedom to work to pass laws to overturn this restriction on free exercise.

C. Possible Objections to the Equitability Principle

This principle of equitability does, to be sure, lend itself to challenges from certain provocative counter-examples. For instance, a proponent of this principle might well be uneasy with a situation where states were judicially barred, say, from passing segregation laws, but at the price of not being legally able to require individual citizens to provide services (or jobs) to members of

other races. On the other hand, these challenging counter-examples might be resisted by qualifying the equitability principle so that it would not obtain in situations where clear-cut constitutional rights (such as those present in the Fourteenth Amendment) would be allowed to be violated in applying it. Of course, the question of whether or not permitting that individuals business owners and the like could choose not to provide services to certain races violates the Fourteenth Amendment would have to be explored further for this caveat to be successful.

In any case, the fact that the principle may not be theoretically able to resist certain what are today almost uniformly denounced practices does not necessarily invalidate it, for one could argue that the inequity of the current legal situation allows for injustices that are comparably egregious. In addition, one might reasonably contend that a coherent constitutional argument could be formulated to protect against the theoretical situations of permitting racial discrimination, so as to justify inequitable legal scenarios that judicially bar the legislative overturning of abortion while also legally requiring caregivers to participate in practices that violate their personal convictions (e.g., by restricting their free exercise of religion).

Simply put, in most cases neither those who support pro-life nor those who support pro-choice legislation can claim that the legislation favored by the other is unconstitutional.[9] Indeed, it is the permissibility of either position that underscores the significance of the First Amendment's protection of free religious exercise, free speech and press, free assembly, and the right to petition government. With this and the related points above in mind, we can now turn to consider how the First Amendment's anti-establishment and free exercise clauses can be permissibly interpreted as supporting (or, more precisely, can be reconciled with support for) pro-life legislation, without insisting that this interpretation is the only constitutionally defensible one.

For the sake of consistency, it must be pointed out that this approach also, in theory, permits legislation contrary to the pro-life cause. For example, it would theoretically allow for legislation requiring hospitals to provide abortions, or pharmacists to sell abortifacients. Nevertheless, it should be remembered in light of the points just raised that legislation requiring such practices violates the principle of equity in the current legal context of *Roe v.*

[9] This would understandably be rejected by those who hold that a sufficient case for constitutional fetal personhood can be adduced, though obviously the Courts do not currently accept this position. This issue cannot be further examined here.

Wade and related cases (i.e., where laws forbidding abortion or contraception are judicially barred on allegedly “constitutional” grounds). (One might ask an even more provocative question as to whether or not equitability demanded that the ability to outlaw abortion also entails the permissibility of mandating it *for the woman*, and not just the doctor.

2. Pro-Life Legislation and Theological Justifications for the First Amendment

I argued above that the First Amendment’s anti-establishment and free exercise clauses can be accepted on either religious or secular grounds. At the same time, I urged that favoring one of these grounds rather than the other will in all likelihood influence one’s way of judging whether the positions that one takes on the life issues are in conformity with, or at odds with, the Constitution. The catch here is that, on my view, one must acknowledge that legislation that one takes to be “at odds with” the Constitution is often really only at odds with a particular permissible (but not obligatory) interpretation of constitutional principles. Hence, what one is often arguing when saying that certain legislation is “unconstitutional” is that there are constitutionally acceptable ways of interpreting constitutional principles that do not cohere with the legislation in question. What is overlooked, however, is that there may also be constitutionally acceptable ways of interpreting these principles that *do* cohere perfectly well with this same legislation.

Simply put, the Constitution does not specify to which religious or secular principles one must adhere in embracing its rules. It is interesting to contrast this view with the decision of *Planned Parenthood vs. Casey*, which asserts that states can pass laws upon matters on which reasonable people can disagree but that this does not extend to matters of fundamental liberty. What this assertion fails to recognize, however, is that one of the areas of reasonable disagreement frequently concerns what is, and what is not, a matter of fundamental liberty. Because the principles by which one embraces the Constitution are neither mandated nor prohibited by the Constitution itself, one should not invoke the Constitution in defending or arguing against such legislation. Rather, one should argue for the constitutional acceptability, but not obligation, of the principles by which he or she defends (or argues against) particular legislation.

In general, the Constitution allows for its rules to be reconciled with a wide range of laws motivated by an equally wide range of religious and secular convictions. One may read the First Amendment as implying that God, and not

society, is the definer of human life. Once again, it is worthwhile to contrast this with *Casey*'s claim that "at the heart of liberty is a right to define one's own concept of existence, of meaning, of the universe, etc." This judicial view essentially declares unconstitutional the view that such matters are defined by God, or nature, and not the individual. On my view, this decision essentially amounts to holding a particular view about religion in its own right, for it amounts to rejecting the view that the meaning and purpose of individuals comes from God or nature, and not simply themselves.

A. Two View of Rights: Social Conventions, or Given By God?

The above considerations have implications for the even more basic question as to whether the rights listed in the Constitution should be interpreted primarily as mere social conventions (i.e., as rights that the American Founders simply chose to value) or as reflecting rights grounded in "ontological reality." To the point, it makes little sense to give particular and prominent attention to a right to exercise religion freely unless one believes (or at least considers it entirely possible) that the supreme object of religious belief – in most cases, an eternal divine being – actually exists.

One might try to claim that religious rights are prominently recognized only because people happen to value them highly. But to do this simply begs the question as to *why* this particular value is singled out for mention. People may and do value all kinds of things, but singling out religion tacitly acknowledges that this value is the one particular thing that may actually correspond to an especially important reality beyond mere human convention. In fact, in light of the analysis of the previous section, even if it is possible to interpret the First Amendment as mentioning religion only because people choose to value it, the position that it should receive prominent value because there actually is a God cannot be ruled out.

Having said this, if the most plausible explanation for the protection of religious freedom is that acknowledgment that there could actually be a God whose existence likely renders religious liberty a basic right (realizing, of course, the hypothetical possibility of a religiously indifferent God), then one can surmise that the existence of such a Being would also have implications for other human rights as well. Presumably, such rights would correlate to what this Being intended, or at least supported (if one considers the possibility of a non-creative Prime Mover) as being proper for human beings. In this case, human rights generally would be defined by reference to God or to the natural

order sustained by God.

One might contend that even if the existence of a God who defines human life and rights is presumed, this point would not by itself reveal at what stage of development or under what conditions these rights apply. Is it at the point of biological conception, or at the point of quickening, or at the point of self-awareness, or at some other point? Careful reflection indicates, however, that tracing rights to life all the way back to conception is the most cogent position. A brief explication demonstrates why this is the case.

B. Problems with Attributing Rights to Consciousness

For the sake of discussion, let us consider the implications of the position that rights begin with the onset of human self-awareness. If this were the case, then while we could say nature was ordered toward humans developing such awareness, and hence rights, we could not say without contradiction that one had *a right* to develop rights, for in this case one would already have rights and would not be developing them (though one might be developing additional rights). But if there can be no right to develop rights, then on a strict rights-based morality there would be nothing wrong with interfering with the naturally-ordered development of rights (that is, where "wrong" actions are defined as actions that violate rights).

The position that rights only exist where there is actual self-awareness thus suggests that one has a right to prevent biological humans from developing the rights toward which they are naturally ordered. This would further mean that humans did not have even this right until after they had developed self-awareness. Hence, on this view it would be naturally proper (i.e., it would conform with the course of natural development) but not a right for pre-self-aware humans to develop the right to interfere with the development of rights in other pre-self-aware humans. But insofar as this ability for interference arises from a naturally-proper process, it must therefore be held that it is both naturally proper for self-aware humans to develop (as well as to be prevented from developing) these rights.

Put differently, if self-aware humans were to prevent the development of rights in pre-self-aware humans, they would be acting according to their proper nature to develop such interference-capable activity. At the same time, it would be proper to the nature of these later pre-self-aware humans to develop rights, *unless* the naturally proper ability of currently self-aware humans to prevent this development were put into action. In effect, then, defining rights in terms

of self-awareness amounts to saying that two contrary actions (the development of rights and the failure to develop rights) are both "natural." This renders the concept of "natural" entirely equivocal, however, and thus conceptually problematic.

One might attempt to sidestep the above equivocation by suggesting that while it is naturally proper for pre-self-aware human beings to develop rights in respect purely to themselves, it is not necessarily ("naturally") proper for them to develop them in respect to the activity of already self-aware humans who have rights. In this case, it might be argued that equivocation is avoided because the "naturality" of the development or interference of rights is defined in different respects. This rebuttal, however, is inadequate, in that this amounts to saying that nature (or perhaps "God") defined what was naturally proper for the first pre-self-aware humans, but that the designation of natural propriety then shifted from God to self-aware humans.

Beyond this, the view that human rights obtain only for humans who have developed self-awareness, and not to the nature that is properly ordered toward this development, also undermines fundamental classically liberal and democratic egalitarian sensibilities. This is true in that it takes one class of human beings to be fundamentally different than others, for it almost suggests that they are altogether different classes of beings.

I stress the word "fundamentally" here because while we accept inequalities for certain rights based on age (including the right to vote), we typically hold that younger subjects *have a right* to develop these later age-based rights. In the case described above, though, there are allegedly *no rights at all* for biological humans who are not yet self-aware. The inequality, then, does not merely concern an inequality of degree (i.e., of how many, and which particular rights, various humans have), but of kind (those who have certain rights from those who do not yet have any rights at all). Considered in this light, it is clear that rather than exemplifying liberal democratic egalitarian government, a right to deny life to pre-self-aware humans actually betrays an entrenchment of fundamentally inegalitarian, illiberal values, which are only conditionally egalitarian and liberal.

Finally, the peculiarity of ascribing rights to self-aware human beings alone is further realized in that on this view, one cannot strictly speak of being aware that he or she has rights, for to say this would be to imply that the rights are based on something other than the awareness itself, i.e., something that awareness discovers. But if "having rights" were simply equivalent to being

self-aware, then one's awareness "of" rights would simply be akin to being aware of one's awareness itself. Such "awareness of awareness" might convey a reflectivity that distinguishes humans from other sentient creatures. To be sure, it is the ability to reflect on awareness that is often spoken of distinctly as *self*-consciousness. Nevertheless, this appeal to "awareness of awareness" as the basis of self-consciousness prompts the further question as to what it is that one is conscious of when one is conscious of one's "self."

Specifically, it seems that one is conscious either of oneself as a having a particular kind of nature (most characterized by a nature capable of self-consciousness), or of whatever ephemeral mental phenomena may happen currently to constitute the "contents" of consciousness. In the former case, it is this nature itself that thus becomes the basis of rights. Such a nature includes its ability to be self-conscious but is not rooted simply in the consciousness alone. In the latter case, it seems that the basis of rights becomes simply the contents of consciousness itself. Because we associate rights with desires, it would seem that "right" in this case specifically pertains to desires. At the same time, in this case it is difficult to see what fundamentally prevents other creatures with desires from also having rights. Why would the ability to realize oneself reflectively as having desires be more essential as the basis for rights than simply the desires themselves?

If desires as such are the basis of rights, then insofar as one might have desires that interfere with the interests of others, it seems that there is no basis in this case for saying that one has a fundamental right to be protected from the pursuits of others that interfere with his or her own interests. At most, one can make a Hobbesian pragmatic appeal that generally speaking, we realize that it is prudent to forgo pursuing certain desires that may interfere with the interest of others, in order to persuade others to act in the same manner toward us. But of course, Hobbes's position is notorious for acknowledging only the right to mere survival as absolute, while minimizing all other rights. Ironically, Hobbes explicitly denies the right to religious liberty and free speech,[10] i.e., the precise claim at the center of the current discussion about the First Amendment.

On the other hand, there is good reason to regard rights as being attributed to the ability to reflect upon our desires rather than simply to the desires

[10] See, for example, *Leviathan,* chapter XVIII, sec. 6, as well as XXIX against a right to conscience that is contrary to the judgment of the sovereign. Precisely speaking, Hobbes maintains that the sovereign has the right to demand whatever he or she deems fit for outward signs of worship, the publication of books, and so on.

themselves if one considers that such reflection is needed for deciding between various possible courses of action, based on diverse desires. Such reflection, in other words, is the necessary condition for freedom of will. The question then becomes whether rights are based simply on the already-developed capacity for reflection or on a nature ordered toward developing this capacity.

A case for basing rights on nature can be made by considering both the advantages of exercising freedom of will rooted in reflection. Simply put, one is able not simply to reflect on one's various desires, but also to make judgments as to the benefits of satisfying certain desires over others, and so on. This implies something very close to a reflection on one's *nature* – that is, a reflection on what *kind* of being a human is and what this claim entails in terms of the propriety or impropriety of pursuing various desires. In this case, reflection and freedom of will are not the basis of rights simply for their own sake, but insofar as they correlate to a nature that thereby serves as the ultimate foundation of rights. To be sure, this nature provides the basis of rights precisely because it is ordered toward the development of rational self-awareness. Nevertheless, if rights originate from this nature rather than its success in developing the capacities toward which it is ordered, then humans have a right to this development prior to its actual occurrence, regardless of whether one is aware or ever will be aware of the fact that he or she may one day achieve it.

This explication of rights is at least more easily reconciled with – and I would argue more intrinsically congruent with – the interpretation of the First Amendment as valuing religion precisely because it is realized that we might actually be created by God. In this case, allowing legislation to be influenced by this belief, whether held on explicitly theological or mere philosophically theistic grounds, is perfectly acceptable, and even eminently reasonable. At the same time, this view presumes that the natural order indicates that the exercise of religion is of value only where it is free from the coercive force of legal punishment.

Furthermore, on the above assessment, the First Amendment's conjunction of religious liberty with the freedoms of speech, assembly, and petition reasonably suggests the permissibility, and even propriety, of forming laws guided by religious sentiments. In theory, to hold this also allows for freedom to challenge religious beliefs, and to work to form legislation according to secular rather than religiously favorable motives. Even so, as long as the fundamental right to work toward laws that counter such secular-based laws with laws

compatible with a belief that there is a fundamental right to life rooted in a divinely-supported human nature are protected, pro-lifers can hope to succeed not simply by changing the face of law but by working to change the hearts of their fellow citizens and representatives whose values are reflected in the law.

Conclusion

Once it is evident that the First Amendment's protections against the governmental establishment of religion, as well as against the prevention of its free exercise, can themselves be accepted on either religious or secular grounds, it is clear that there is no *prima facie* reason to consider legislation motivated by religious convictions to be automatically illicit. While a religious practice as a whole cannot be legally mandated, a distinction must be made between the influence of religion and its "establishment." Indeed, the position that religious convictions cannot motivate legislation constitutes an excessive limit on the free exercise of religion. In fact, if anything a theological justification for the Amendment is arguably more plausible than a non-theological one inasmuch as these clauses on religion are combined with protections on free speech, assembly, and legal petition, which presumably includes activities that could well be guided by religious convictions.

Given that the First Amendment itself can be theologically justified, a principle of equitability may be proposed whereby it is legitimate to legislate on the basis of particular religious convictions (falling short of the outright mandate or of the prohibition of a religious practice, at least insofar as the latter does not involve any violation of clear-cut constitutional rights) as long as those with contrary convictions are able to pursue legislation with equal force. In addition, the view that law can reflect particular values also allows for it to reflect particular views about the origin of rights. Accordingly, a case can be made that the prominent position of the First Amendment in the U.S. Constitution assumes that a divine being likely exists, such that rights would be rooted in God's creation of biological nature directed toward rational self-reflection and freedom, and not limited to the actual operation of such reflection. In this case, it is reasonable for law to reflect religious convictions that presume a right to existence for all biological humans, at whatever stage of development and capability of reason and self-awareness. At the same time, it must be conceded that the wording of the Constitution does not demand this interpretation, so that the pursuit of legislation reflecting contrary conceptions of rights is also possible.