CONSTITUTIONAL RIGHTS AS HUMAN RIGHTS: FREEDOM OF SPEECH, EQUAL PROTECTION, AND THE RIGHT OF PRIVACY

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I was privileged to be Michael Kent Curtis's colleague during the six years I was a member of the law faculty at Wake Forest University (1997-2003). I am honored to join the other contributors to this special issue of the Wake Forest Law Review *in celebrating Michael's distinguished scholarly career. One of the three constitutional rights I discuss in this essay—the constitutional right to freedom of speech—has been a principal focus of Michael's outstanding scholarship.*[1]

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1. *See generally* MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 23–24 (2000) ("American revolutionaries saw the history of seventeenth-century England as a guide to the meaning of liberty. As one scholar has noted, they 'argued their case against Parliament and the King largely in the language of Whig history and the supposedly ancient Anglo-Saxon rights of Englishmen.' This tradition of dissent, which developed in England in the seventeenth and eighteenth centuries, shaped the later American story of free speech.").

INTRODUCTION

Much of my recent scholarly work has addressed questions concerning the political morality—the *global* political morality—of human rights.[2] This essay continues in that vein; I focus on a relationship I began to discuss almost forty years ago, in my first book: the relationship between (some) constitutional rights and (some) human rights.[3] My overarching claim here: *There is a significant interface between the constitutional law of the United States and the political morality of human rights.*[4] My principal aim in this Essay is to defend (and illustrate) that broad claim by defending three narrower claims:

1. The constitutional right to freedom of speech is closely related to the human right to intellectual freedom[5]: The former

2. Michael J. Perry, *The Morality of Human Rights*, 42 HUM. RTS. Q. 434, 435 (2020) ("I begin with this fundamental question: What reason (or reasons) do we have, if any, to live our lives . . . in accord with the morality of human rights?") [hereinafter Perry, *Morality*]. *See, e.g.*, MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM 15–16 (2017) [hereinafter PERRY, GLOBAL]. An earlier version of some of the material in this essay appears in the two works just cited.

3. *See* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 117 (1982):

> In the human rights cases that have come before the Court in the modern period, has noninterpretive review served, on balance, as an instrument of moral growth or an impediment? Of the three substantive areas of constitutional doctrine that are serving as the principal points of reference for our discussion—freedom of expression, equal protection, and substantive due process—only one, substantive due process, is the focus of significant controversy.

4. *Id.* at 2 ("Virtually all of modern constitutional decision making by the Court—at least, that part pertaining to questions of 'human rights,' which is the most important and controversial part, and that part with which I am mainly concerned in this book—must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented.").

5. A particular right, such as the right to intellectual freedom, is a "human right," in the sense in which I use the term in this essay, if the right is part of the morality of human rights, by which I mean the morality embodied in the

right protects against the same kinds of government action that the latter right protects against.[6]

2. The constitutional right to equal protection is closely related to the human right to moral equality: The former right protects against the same kinds of government action that the latter right protects against.[7]
3. The constitutional right of privacy—aptly described by legal scholar Reva Siegel as "one of the most fiercely contested rights in the modern constitutional canon"[8]—is closely related to the human right to moral freedom: The former right is best understood as a version of the latter right and, so understood, is legitimately regarded as a constitutional right.

I hope that the title of this essay—"Constitutional Rights as Human Rights"—does not mislead. I do not contend that every constitutional right—every right that is part of the constitutional law of the United States—is closely related to a human right. Let us assume that, as a majority of the U.S. Supreme Court has ruled,[9] the right to bear arms is legitimately regarded as a constitutional right.[10] The constitutional right to bear arms is not closely related to any human right: There is no human right to bear arms; no right to bear arms is part of the morality of human rights.[11] Nor do I contend that the three constitutional rights on which I focus in this essay are the only constitutional rights that are closely related to a human right. I have argued elsewhere that the constitutional right not to be subjected to cruel and unusual punishment is closely related to the human right not to be subjected to "cruel, inhuman or degrading" punishment.[12]

Before beginning my defense of the three claims set forth above, I want to emphasize that in defending the claims, I rely on a particular answer to this fundamental question: *What criteria should we apply to determine whether a right (or other norm) claimed to be*

Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties that have entered into force in the period since the adoption of the Universal Declaration, in 1948, by the U.N. General Assembly. *See* Perry, *Morality*, *supra* note 2, at 435–46.

6. This is not to deny that the constitutional right protects against one or more kinds of government action that the human right does not protect against; nor is it to deny that the constitutional right protects fewer human beings, and that it protects them against fewer governments, than does the human right.

7. The caveat in the preceding note applies here as well.

8. Reva B. Siegel, *How Conflict Entrenched the Right of Privacy*, 124 YALE L.J. F. 316, 316 (2015).

9. *See* PERRY, GLOBAL, *supra* note 2, at 112.

10. I have argued elsewhere to the contrary. *See id.* at 113.

11. *See id.*

12. *See id.* at 115 n.53.

part of the constitutional law of the United States is legitimately regarded as such? That five or more justices of the U.S. Supreme Court have ruled that a right is part of the constitutional law of the United States does not entail that the right is *legitimately* regarded as such. This is the answer on which I rely:

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

> By enactors, I mean the human beings whose approval gave the Constitution the force of law. In the case of the original establishment of the United States Constitution that means the people comprising the majorities in the nine state conventions whose ratification preceded the Constitution entering into force. With respect to the amendments that means the people comprising the majorities in the houses of Congress proposing the amendments and in the ratifying legislatures of the necessary three-quarters of the states.[13]

Second. R is a constitutional right if R is an inescapable inference (a) from the structure of government established by the Constitution, which consists of (i) a separation of powers among the three branches—legislative, executive, and judicial—of the national government and (ii) a division of powers between the national government and state government,[14] or (b) from the kind of government ("representative democracy") presupposed by the Constitution; and if no norm that supersedes R has been entrenched in the Constitution or become constitutional bedrock.

Third. R is a constitutional right if R is constitutional bedrock—if R is a bedrock feature of the constitutional law of the United

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

14. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 25 (1969) ("The concept of interference with national governmental function shades off into the concept of interference with rights created and protected by the national government. These concepts are bound together by the fact that the creation and protection of individual rights is the highest function of any government. Even the carriage of the mails moves toward delivery of the letter as its final cause, and therefore toward the right to receive it."). *See also* Thomas C. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1299–30 (2019); Michael Ramsey, *Thomas Colby: Originalism and Structural Argument*, THE ORIGINALISM BLOG (Apr. 25, 2019, 6:00 AM), https://originalismblog.typepad.com/the-originalism-blog/2019/04/thomas-colby-originalism-and-structural-argumentmichael-rmasey.html.

States—in this sense: R has become, in the words of Robert Bork, "so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions," that the U.S. Supreme Court should and almost certainly will continue to deem R constitutionally authoritative even if it is open to serious question whether enactors ever entrenched R in the Constitution.[15] As Michael McConnell has put the point: "[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled . . . . This overwhelming public acceptance constitutes a mode of popular ratification . . . ."[16]

No answer to the "what criteria" question—a question that, in one or another version, has long been contested among constitutional theorists[17]—can escape controversy. Nonetheless, no answer, I submit, is less contentious than the foregoing threefold answer, which is the answer on which I rely in this essay.[18]

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

16. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006). For a more recent, nuanced statement of Professor McConnell's position that "stare decisis, at least in its moderate form, is essential to any system of fair adjudication, including constitutional law," see Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1765–76 (2015). For an argument that "[i]t is not necessarily unoriginalist to adhere to an unoriginalist precedent," see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015). It is not inconsistent to affirm an originalist response to the question what it means, or should mean, to interpret the constitutional text while also affirming that the constitutional text is not the sole legitimate basis of constitutional adjudication. *See* Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1311–12 (2013); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1555–56 (2012).

17. *See generally* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 209 n.16 (1994) (demonstrating the skepticism with which constitutional scholars regard the status of constitutional rights). *See also* PERRY, *supra* note 3, at 9–11; MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 15–16 (2001) [hereinafter PERRY, THE FOURTEENTH AMENDMENT]; PERRY, GLOBAL, *supra* note 2, at 95–164.

18. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–39 (Amy Guttman ed., 1997):

> Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether

I. THE CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH AS THE HUMAN RIGHT TO INTELLECTUAL FREEDOM

A. On the Shoulders of Robert Bork:[19] Freedom of Speech as an Inferred Constitutional Right

In a well-known and oft-cited 1971 lecture, "Neutral Principles and Some First Amendment Problems,"[20] Bork, then Professor of Law at Yale, observed that historical inquiry into what the enactors of the First Amendment meant by "the freedom of speech, [and] of the press"[21] had yielded little if any useful information: "The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject . . . . The first amendment, like the rest of the bill of rights, appears to have been a hastily drafted document upon which little thought was expended."[22] Bork hastened to add that this state of affairs was not problematic because, he reasoned, "the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies."[23] Such freedom "could and should be inferred even if there were no first amendment."[24] According to Bork, then, whatever the enactors of the "hastily drafted" First Amendment meant, if indeed they even "had [any] coherent theory of free speech," a constitutional right to freedom of speech "should be inferred" from the kind of government—"representative democracy"—established by the Constitution of the United States.[25]

> *Marbury v. Madison* was decided correctly . . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.

19. *Cf.* ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT 1 (1965) ("In it, I refer to 'Newton's remark—"if I have seen farther, it is by standing on the shoulders of giants."'").

20. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 n.* (1971) (explaining "[t]he text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harriss lecture series").

21. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

22. Bork, *supra* note 20, at 22.

23. *Id.* at 23.

24. *Id.*

25. *Id.* In his 1971 lecture, Bork argued that the inferred constitutional right to freedom of speech should be understood to protect "only . . . speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." *Id.* at 20. However, Bork later revised his position: In

Although in his lecture Bork did not defend the claim that the Constitution "creates a representative democracy,"[26] it is not difficult to do so. The Guarantee Clause of the Constitution states that "[t]he United States shall guarantee to every State in this Union a Republican form of Government . . . ,"[27] and by a "republican" form of government, as legal scholar Carolyn Shapiro has explained, the Framers meant "self-government, in the form of representative democracy," although they "did not always call an elected government 'democracy,' as we do today."[28] Moreover, Article 1, section 2, of the Constitution presupposes that the states have elected legislatures, stating that the members of the House of Representatives shall be elected "by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature."[29] And, finally, no fewer than six times since the end of the Civil War the Constitution has been amended either to extend voting rights to persons to whom they had been denied or to broaden the domain of voting rights—beginning in 1870, with the Fifteenth Amendment, which forbade states to deny the vote to any person on the basis of race.[30]

1984, he wrote that "I do not think . . . that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative . . . . As a result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes." Robert H. Bork, *Judge Bork Replies*, 70 AM. BAR ASS'N J. 132, 132 (Feb. 1984).

26. *Cf.* Bork, *supra* note 20, at 1 ("The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.").

27. U.S. CONST. art. IV, § 4.

28. Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 185 (2020). Shapiro reminds us that James Madison, in *Federalist No. 39*, defined a republic as:

> [A] government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable portion, or a favored class of it . . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people.

Id. at 191.

29. U.S. CONST. art. I, § 2.

30. U.S. CONST. amends. XV, XVII (providing for direct election of U.S. Senators in each state), XIX (extending suffrage to women), XXIV (prohibiting poll taxes as a condition prior to voting), XXIII (giving the District of Columbia

> The Seventeenth Amendment [1913] eliminated state legislative selection of United States Senators in favor of a popular vote; the Nineteenth Amendment [1920] granted women the right to vote; the Twenty-third Amendment [1961] gave the District of Columbia electoral votes for President; the Twenty-fourth Amendment [1964] eliminated poll taxes for federal elections; and the Twenty-sixth Amendment [1971] lowered the national voting age to eighteen.[31]

As I said, it is not difficult—indeed, it is easy—to defend Bork's claim that "the entire structure of the Constitution creates"[32]—or, more precisely, presupposes—"a representative democracy"[33]: A representative democracy at the level of state government as well as at the level of the federal government, a representative democracy that in the beginning was narrow but that over time has become increasingly broad.[34]

Nor is it difficult to defend Bork's further claim that "a representative democracy [is] a form of government that would be meaningless without [the] freedom to discuss government and its policies."[35] Because freedom of speech is undeniably an essential aspect of democratic governance, a commitment to democratic governance entails a commitment to freedom of speech. As one of the principal American founders, James Madison, put the point in a communication to W. T. Barry on August 4, 1822: "A popular government, without popular information, of the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[36]

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electoral votes for President), XXVI (guaranteeing eighteen-year-olds the right to vote in state and federal elections).

31. Shapiro, *supra* note 28, at 207.

32. Bork, *supra* note 20, at 23.

33. *Id.*

34. *But cf.* Malka Older, *The United States Has Never Truly Been a Democracy*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/opinion/democracy-electoral-college.html.

35. Bork, *supra* note 20, at 23.

36. 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). It is noteworthy that in Nationwide News Pty. Ltd. v. Wills (1992) 177 CLR 1 (Austl.) and Austl. Cap. Tel. Pty Ltd v. Commonwealth (1992) 177 CLR 106 (Austl.), the majority of the High Court of Australia held that an implied freedom of political communication exists as an incident of the system of representative government established by the Constitution. This was reaffirmed in Unions NSW v. New South Wales [2013] HCA 58 (Austl.).

B. Specifying the Inferred Constitutional Right to Freedom of Speech: The Human Right to Intellectual Freedom

The right to freedom of speech that we should understand to be part of the constitutional law of the United States is, as Bork explained, an *inferred* right: a right inferred from the kind of government ("representative democracy")[37] presupposed by the Constitution of the United States. Therefore, it does not make sense to try to discern the precise contours of the right on the basis of an originalist decoding of one or more pieces of the constitutional text. Instead, we must determine the precise contours of the right. We must "specify" the right on the basis of what legal scholar Michael Ramsey has called "non-textualist" reasoning.[38] In the present context, we must specify the right so that resulting right—the right *as specified*—optimally facilitates the functioning—the *well-functioning*—of democratic governance.[39]

That the constitutional right to freedom of speech (a) is best understood as an inferred right and (b) should be specified so as optimally to facilitate the well-functioning of democratic governance does not necessitate any fundamental reorientation in the Supreme Court's general approach to freedom of speech controversies, which has not been textualist.[40] As a careful look at the Court's principal freedom of speech rulings from the 1940s to the present day—the rulings featured in constitutional law casebooks[41]—confirms, the

37. Bork, *supra* note 20, at 23.

38. Ramsey, *supra* note 14. Ramsey's blog post is commentary on this excellent article: Colby, *supra* note 14.

39. Justice Clarence Thomas recently faulted the Supreme Court's landmark ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for failing to comply with his textualist theory of constitutional reasoning. *See* Adam Liptak, *Justice Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html. However, the inferred constitutional right to freedom of speech must be specified (and then applied to the case at hand) not on the basis of textualist reasoning—including textualist reasoning of Justice Thomas's originalist sort—but, as Robert Bork understood, *on the basis of non-textualist reasoning*. This is not to say that the Court's ruling in *New York Times v. Sullivan* is immune to criticism. Of course, it is not. *Cf.* KEVIN W. SAUNDERS, FREE EXPRESSION AND DEMOCRACY: A COMPARATIVE ANALYSIS 201–34 (2017). But it *is* to say that any criticism of a freedom-of-speech ruling by the Court is misconceived if and to the extent the criticism fails to acknowledge, as Justice Thomas's criticism failed to acknowledge, that the inferred constitutional right to freedom of speech must be specified on the basis of non-textualist reasoning.

40. *See* Christopher M. Dailey, The Tempting of Originalism 27–28 (2017) (M.A. thesis, Boston University) (on file with Boston University).

41. *See, e.g.*, MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 1021–1381 (4th ed. 2018); JESSE CHOPER & FREDERICK SCHAUER, THE FIRST

Court's general approach has not rested on an originalist decoding of any part of the text of the First Amendment.[42] Instead, the Court's general approach has been non-textualist.[43]

In trying to discern—or construct—the optimal specification of the inferred constitutional right to freedom of speech, we can do no better than to consider the following internationally recognized human rights:

> Article 19 of the Universal Declaration of Human Rights (UDHR): "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[44]
>
> Article 20(1) of the UDHR: "Everyone has the right to freedom of peaceful assembly and association."[45]
>
> Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which is a multilateral human rights treaty to which the United States has been a party since 1992:
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It

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AMENDMENT: CASES-COMMENTS-QUESTIONS (7th ed. 2019); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS (7th ed. 2020).

42. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 307–09 (2017) (discussing the absence of textual support for original meaning).

43. This is not to deny that the Court's non-textualist general approach has sometimes yielded closely divided, controversial rulings.

44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 19 (Dec. 10, 1948) [hereinafter UDHR].

45. *Id.* art. 20. According to Article 29(2) of the UDHR: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id.* art. 29.

> may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[46]
>
> Article 21 of the ICCPR: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."[47]
>
> Article 22 of the ICCPR: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests, . . . [n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others . . . ."[48]

The foregoing UDHR and ICCPR provisions set forth rights the principal aspects of which constitute an overarching right, which we may call, for want of a better term, the right to intellectual freedom: *The right to "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"—and the freedom to do so not only by oneself but also in concert with others of one's choosing.*[49]

The right to intellectual freedom is not—as a practical matter it cannot be—unconditional ("absolute"). The right, like some other internationally recognized human rights—such as the right to moral freedom, which I explicate below—is a conditional right; the right

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46. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights art. 19 (Dec. 16, 1966) [hereinafter ICCPR]. According to Article 20 of the ICCPR: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." *Id.* art. 20.

47. *Id.* art. 21.

48. *Id.* art. 22. As stated, the United States ratified the ICCPR in 1992, albeit with five written reservations, five understandings, and four declarations by the United States Senate. *See* S. EXEC. REP. 102-23, at 10–21 (1992), *reprinted in* 31 I.L.M. 645, 653–58.

49. ICCPR, *supra* note 46, art. 19(2).

forbids government to ban or otherwise impede conduct protected by the right unless each of three conditions is satisfied:

1. ***The legitimacy condition:*** The government action (law, policy, etc.) must be aimed at achieving, and actually achieve, a legitimate government objective: "[N]ational security or public safety, public order (ordre public),[50] the protection of public health or morals or the protection of the rights and freedoms of others."[51]
2. ***The least-restrictive alternative condition:*** The government action must be necessary ("in a democratic society"),[52] in the sense that there is no less restrictive way to achieve the objective.[53]
3. ***The proportionality condition:*** The overall good the government action achieves—the "benefit" of the government action—must be sufficiently important to warrant the gravity of the action's "cost," which is a function mainly of the importance of the conduct the government action bans or otherwise impedes and the extent to which there is an alternative way (or ways) for the aggrieved party (or parties) to achieve what she wants to achieve.[54]

50. ICCPR, *supra* note 46, art. 12(3).

51. The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, . . . [and] (c) pursues a legitimate aim . . . ." U.N., Econ. & Soc. Council, Comm'n on Hum. Rts., The Siracusa Principles on the Limitation and Derogation Principles in the ICCPR, U.N. Doc. E/CN.4/1985/4, annex (Sept. 28, 1984), *reprinted in* 7 HUM. RTS. Q. 3, 4 (1985) [hereinafter Siracusa Principles].

52. ICCPR, *supra* note 46, arts. 14(1), 21, 22(2).

53. "11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation." Siracusa Principles, *supra* note 51, at 4.

54. There obviously would be little or no meaningful protection for conduct covered by a conditional human right, such as the right to intellectual freedom, if the consistency of government action with the right was to be determined without regard to whether the benefit of the government action is proportionate to the cost of the government action. Indeed, the relevant articles of the ICCPR are authoritatively understood to require that the benefit be proportionate to the cost. Hence, the Siracusa Principles provide: "10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: . . . (b) responds to a pressing public or social need, . . . and (d) is proportionate to that aim." *Id.*

Government action that *implicates* the right to intellectual freedom also *violates* the right if, and only if, the government action fails to satisfy any of the foregoing three conditions.[55]

The right to freedom of speech that we should understand to be part of the constitutional law of the United States is, as Robert Bork explained fifty years ago, an inferred right. No specification of the inferred right is as defensible as the foregoing human right to intellectual freedom—as defensible, that is, given the aim of optimally facilitating the well-functioning of democratic governance.[56] The constitutional right to freedom of speech, *thus specified*, protects—conditionally, not unconditionally—against the same kinds of government action that the human right to intellectual freedom protects against.

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

The Fourteenth Amendment of the Constitution of the United States provides, in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[57] What did the enactors of the Fourteenth Amendment mean by "the equal protection of the laws"; that is, precisely what is the right to equal protection that the enactors constitutionalized? That question has long been, and remains, contested,[58] but, as it happens, the controversy matters

55. Said conditions require that the limitation: (a) is based on a justification recognized by the relevant article of the ICCPR; (b) responds to a pressing public or social need; and (c) pursues a legitimate aim (while being proportionate to that aim or governmental object). *See id.*

56. Bork, *supra* note 20, at 22–23.

57. U.S. CONST. amend. XIV, § 1.

58. The literature is voluminous. For a small sampling, see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1919 (1995); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 5–12 (2011). *Cf.* Adam Gopnik, *How the South Won the Civil War*, THE NEW YORKER, Apr. 1, 2019:

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

For my own effort, years ago, to discern what rights the Fourteenth Amendment's enactors entrenched when they added section one of the Fourteenth Amendment, including the Equal Protection Clause, to the Constitution of the United States,

little: Even if we assume that it is not the particular right to equal protection that the enactors constitutionalized, a right to equal protection is now constitutional bedrock, and that right—the bedrock constitutional right to equal protection—protects against the same kinds of government action that the human right to moral equality protects against.

A. The Human Right to Moral Equality

Article 1 of the Universal Declaration begins by affirming that "[a]ll human beings are born free and equal in dignity and rights" and then goes on to state that all human beings "should act towards one another in a spirit of brotherhood."[59] According to Article 1, then, every human being is as worthy as every other human being—no human being is less worthy than any other human being—of being treated "in a spirit of brotherhood."[60] Thus, the right to moral equality—the right of every human being to be treated as the moral equal of every other human being, in this sense: *Equally entitled with every other human being to be treated no less worthy than any other human being—of being treated "in a spirit of brotherhood."*[61]

The most common grounds for treating some human beings as morally inferior, as less worthy than some other human beings, if worthy at all, of being treated "in a spirit of brotherhood"—have been, as listed both in Article 2 of the Universal Declaration and in Article 26 of the International Covenant on Civil and Political Rights, "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[62]

Under the right to moral equality, government may not disadvantage any human being based on the view that she—or

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see PERRY, THE FOURTEENTH AMENDMENT, *supra* note 17, at 48–87. Ilan Wurman reaches conclusions that are very close to my own. ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 36–37 (2020) ("The protection of the laws is the concept that requires government to protect these same rights from *private interference*. It is the protection the government accords its subjects and citizens, primarily through physical protection and judicial remedies, so they may exercise and enjoy their rights without the interference of others.").

59. UDHR, *supra* note 44, art. 1.

60. *Id.*

61. PERRY, GLOBAL, *supra* note 2, at 56.

62. UDHR, *supra* note 44, art. 2; ICCPR, *supra* note 46, art. 26. *See also* DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE AND EXTERMINATE OTHERS 11–26 (2011); David Livingston Smith, *The Essence of Evil*, AEON (Oct. 24, 2014), https://aeon.co/essays/why-is-it-so-easy-to-dehumanise-a-victim-of-violence.

someone else, for example, someone to whom she is married[63]—is morally inferior.[64] Similarly, government may not disadvantage any human being based on a sensibility to the effect that she is morally inferior—a sensibility such as "racially selective sympathy and indifference," namely, "the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[65] Or, analogously, a sensibility such as sex-selective sympathy and indifference. Government is disadvantaging a human being based at least partly on such a view or sensibility if but for that illicit, demeaning view or sensibility, government would not be disadvantaging her.

The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to *equal* citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior.[66] So, for example, government may not abridge nor dilute—much less, deny—any citizen's right to vote based on the view that she is morally inferior.[67]

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63. *See* Loving v. Virginia, 388 U.S. 1, 2–3 (1967). In response to "a now-discredited argument in defense of antimiscegenation laws"—namely, "that whites can marry only within their race; nonwhites can marry only within their race; therefore, antimiscegenation laws do not deny 'equal options'"—John Corvino has written:

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

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

64. SMITH, *supra* note 62, at 28.

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

66. SMITH, *supra* note 62, at 22 ("Collections of twentieth-century political posters confirm that visual propaganda from the United States, Germany, Britain, France, the Soviet Union, Korea, and elsewhere have often portrayed 'the enemy' as a menacing nonhuman creature. But you don't need to sift through historical archives to find examples of dehumanization in the popular media. All that you need to do is open a newspaper or turn on the radio.").

67. *Cf.* Mathias Risse, *Human Rights: The Hard Questions*, NOTRE DAME PHILOSOPHICAL REVS. (Jan. 27, 2014), https://ndpr.nd.edu/reviews/human-rights-the-hard-questions/ (book review):

> [I]t would not be helpful to appeal to [the human right to democratic governance] under many of the typical circumstances that prevent the

The right to moral equality obviously does not require that government treat every human being the same as every other human being—indeed, no sensible right does. Government need not permit children to vote or to drive cars. Nor need government distribute food stamps to the affluent. The examples are countless. But what government may *not* do is deny a benefit to anyone or impose a cost on anyone—government may not disadvantage any human being—based on the view (or on a sensibility to the effect) that she is morally inferior: less worthy than someone else, if worthy at all, of being treated "in a spirit of brotherhood."

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

1. Article 26 of the International Covenant on Civil and Political Rights: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[68]
2. The African Charter on Human and People's Rights states, in Article 2, that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;"[69] the Charter then states, in Article 3: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."[70]

> emergence of democracy. In particular, if there are substantial concerns that the racial or ethnic constellation in a country would, under the political conditions that one could reasonably expect to obtain, lead to a kind of excessively populist politics that might generate or exacerbate violent conflict, the sheer fact that there is a human right to democracy should not be decisive for anything.

For a concrete example of a situation of the sort to which Risse is referring, see Thomas Fuller, *In Myanmar, the Euphoria of Reform Loses Its Glow*, N.Y. TIMES (July 5, 2014), https://www.nytimes.com/2014/07/05/world/asia/in-myanmar-democracys-euphoria-losing-its-glow.html.

68. ICCPR, *supra* note 46, art. 26.

69. Org. of African Unity, African Charter on Hum. and Peoples' Rts. art. 2, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter].

70. *Id.* art. 3.

3. Article 24 of the American Convention on Human Rights: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."[71]
4. Article 15(1) of the Canadian Charter of Rights and Freedoms: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[72]
5. Article 9 of the South African Constitution: "1. Everyone is equal before the law and has the right to equal protection and benefit of the law . . . . 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[73]

And the Fourteenth Amendment, too, speaks of "the equal protection of the laws."[74]

B. The Constitutional Right to Equal Protection

Again, the right to equal protection that is now constitutional bedrock protects against the same kinds of government action that the human right to moral equality protects against. Assume, for the sake of discussion, that the Fourteenth Amendment's enactors did not constitutionalize the right to moral equality. Now imagine a law—any law—that fits this profile: "[B]ased on one or another view to the effect that some persons (members of a racial minority, for example, or women, or children born out of wedlock) are morally inferior."[75] The Supreme Court would not dream of ruling that any such law—or any other government action based on any such view—complies with

71. Org. of Am. States, Am. Convention on Hum. Rts, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter Pact of San José].

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

73. S. AFR. CONST., 1996.

74. U.S. CONST. amend. XIV, § 1.

75. Michael J. Perry, *Two Constitutional Rights, Two Constitutional Controversies*, 52 Conn. L.R. 1597, 1609 (2021). *See also* SMITH, *supra* note 62, at 15 ("Thinking sets the agenda for action, and thinking of humans as less than human paves the way for atrocity. The Nazis were explicit about the status of their victims. They were *Untermenschen*—subhumans—and as such were excluded from the system of moral rights and obligations that bind humankind together.").

the constitutional right to equal protection.[76] Not even in its notorious "separate but equal" opinion in *Plessy v. Ferguson*[77]—decided nearly one hundred and twenty-five years ago—did the Supreme Court deny that a law or other government action based on the view that one or more persons are by virtue of their race morally inferior violates the Fourteenth Amendment.[78] Instead, the Court implausibly denied that the law at issue in the case was based on such a view:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[79]

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

> [I]n view of the [C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here . . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[80]

Sixteen years before its decision in *Plessy*, just twelve years after ratification of the Fourteenth Amendment, the Supreme Court, in *Strauder v. West Virginia*,[81] wrote:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration

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

77. 163 U.S. 537 (1896).

78. *Id.* at 543–44.

79. *Id.* at 551.

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

81. 100 U.S. 303 (1879).

> of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their *inferiority*, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[82]

The human right to moral equality, in the guise of the constitutional right to equal protection, is clearly a bedrock feature (and has long been a bedrock feature) of the constitutional law of the United States.[83] It is also constitutional bedrock that the right to equal protection applies to the federal government as well as to the states.[84]

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82. *Id.* at 308 (emphasis added).

83. For a collection of the relevant caselaw, see, for example, JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 1359–1551 (12th ed. 2015); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 616–767 (18th ed. 2013). A question for constitutional historians: How is it that the human right to moral equality, in the guise of the constitutional right to equal protection, became a bedrock feature of the constitutional law of the United States? *Cf.* David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL RTS. J. 1183, 1241–48, 1254–56 (2019); David L. Sloss, *How International Human Rights Law Transformed the US Constitution*, 38 HUM. RTS. Q. 426, 445–49 (2016).

84. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 500 (1954). The so-called "rationality" (or "rational basis") requirement is one of the most familiar aspects of the Supreme Court's equal protection doctrine. *See, e.g.*, CHOPER ET AL., *supra* note 83, at 1332–51; SULLIVAN & FELDMAN, *supra* note 83, at 602–16. That requirement is best understood as an implication of the right to moral equality: if it is not "rational"—reasonable, plausible—to believe that a particular instance of government's disadvantaging some persons relative to some other persons serves a "legitimate" government interest; and if it is not "rational" to believe that a particular instance of such disadvantaging serves, in other words, any aspect of the common good; then presumably government, even if it is not doing anything *otherwise* constitutionally problematic, is simply "playing favorites" (by disfavoring some persons relative to some others) and thereby violating the right to moral equality. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985). As a federal appeals court put the point in 2008, "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review . . . . [E]conomic protectionism for its own sake, *regardless of its relation to the common good,* cannot be said to be in furtherance of a legitimate governmental interest." Merrifield v. Lockyer, 547 F.3d 978, 991–92 n.15 (9th Cir. 2008) (emphasis added); *see also* St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."). *Cf.* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997) ("[Equal protection forbids] the state to single out any person or group of persons for special benefits or burdens without an

Like the human right to moral equality, the constitutional right to equal protection protects against more than racist government action: It forbids any government action that fails to treat some persons as the moral equals of some other persons—any government that fails to treat some persons as entitled to the same respect and concern to which other persons are entitled. For example, the Supreme Court has struck down many laws based on what the Court recently described as "overbroad generalizations about the way men and women are[,] . . . about the different talents, capacities, or preferences of males and females."[85] Government action based on such a generalization violates the constitutional right to equal protection if in the Court's judgment, government, by relying on the generalization, treats some persons—often (some) women, but sometimes (some) men[86]—in a demeaning way—a way that, all things considered, does not respect, that discounts if not disregards, their welfare or abilities, thereby failing to treat them as moral equals.[87] Demeaning government action of a sexist sort no less than that of a racist sort violates the constitutional right to equal protection.[88]

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adequate 'public purpose' justification."). For a recent discussion of how the rationality requirement is being applied in the federal courts, see Recent Cases, *Rational Basis Review—Substantive Due Process—Eighth Circuit Upholds Licensing Requirement for African-Style Hair Braiders*—Niang v. Carroll, 879 F.3d 870 (8th Cir. 2018), 131 HARV. L. REV. 2453, 2453–56 (2018). That the human right to moral equality is the core of the constitutional right to equal protection does not mean that, as a matter of existing constitutional doctrine, the former right exhausts the content of the latter right. The Supreme Court has struck down some laws on the basis of the constitutional right to equal protection without regard to whether the law was based on the view that some persons are morally inferior. CHOPER ET AL., *supra* note 83, at 1551–1644; SULLIVAN & FELDMAN, *supra* note 83, at 767–809. That aspect of the Court's equal protection doctrine—the so-called "fundamental interests" aspect—is not my concern here. For a collection of the relevant caselaw, see CHOPER ET AL., *supra* note 83, at 1551–1644; SULLIVAN & FELDMAN, *supra* note 83, at 767–809.

85. Sessions v. Morales-Santana, 137 S. Ct. 1692, 1698 (2017). For insightful commentary on Justice Ginsburg's majority opinion in *Morales-Santana*—an opinion that spoke for six members of the Court: herself, Chief Justice Roberts, and Justices Kennedy, Breyer, Kagan, and Sotomayor—see Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supreme-court.html?searchResultPosition=1.

86. *See, e.g.*, *Sessions*, 137 S. Ct. at 1678, 1697–98.

87. *Id.* at 1692, 1698.

88. *Id.* Because, as historical experience teaches, government reliance on "overbroad generalizations about the way men and women are" is so often demeaning, it makes sense for the Supreme Court to do what it does with respect to every instance of such reliance at issue before the Court: presume that government's reliance on the generalization is demeaning and require

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

The constitutional right of privacy—the right of privacy that has played an important, albeit controversial, role in several modern constitutional decisions of the U.S. Supreme Court[89]—is best

government, if it is to succeed in rebutting the presumption, to provide the Court with "an exceedingly persuasive justification." *Id.* at 1683 (citing United States v. Virginia, 518 U.S. 515, 531 (1996)). That is a justification which persuades the Court the government's reliance on the generalization is not demeaning: that it does not disrespect, that it does not discount, the welfare or abilities—the "talents, capacities, or preferences"—of any women or men. Consider the implications of the fact that:

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

PERRY, GLOBAL, *supra* note 2, at 61 (quoting Robin Bradley Kar & John Lindo, *Race and the Law in the Genomic Age: A Problem for Equal Treatment Under the Law*, *in* THE OXFORD HANDBOOK OF LAW, REGULATION & TECHNOLOGY 874, 902 (Roger Brownsword et al. eds., 2017)); *see also* DANIEL M. WEGNER & KURT GRAY, THE MIND CLUB: WHO THINKS, WHAT FEELS, AND WHY IT MATTERS 125–55 (2016). Kar and Lindo conclude—*rightly* conclude—that the Supreme Court should "revise its interpretation of the Equal Protection Clause [so as to allow] for broader and more vigorous constitutional protection against disparate impact caused by either intentional discrimination *or psychological processes that regularly function to cause disparate treatment*." Kar & Lindo, *supra* note 86, at 905 (emphasis added). I reached the same conclusion in two of my earliest writings: Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 UNIV. PA. L. REV. 540, 588–89 (1977); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1040–42 (1979). *Cf.* Osagie K. Obasogie, *The Supreme Court Is Afraid of Racial Justice*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/07/opinion/the-supreme-court-is-afraid-of-racial-justice.html.

89. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that "specific guarantees in the Bill of Rights have penumbras," one of which is privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the right of privacy was that of "the individual, married or single, to be free from

understood as a version of the human right to moral freedom and, so understood, is legitimately regarded as a constitutional right.

A. The Human Right to Moral Freedom

The articulation of the human right to moral freedom in Article 18 of the International Covenant on Civil and Political Rights ("ICCPR")—which is an elaboration of Article 18 of the Universal Declaration[90]—is canonical: As of June 2021, 173 of the 197 members of the United Nations (88%) are parties to the ICCPR, including, as of 1992, the United States.[91] Article 18 states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[92]
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.[93]
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[94]

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unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

90. UDHR, *supra* note 44, art. 18. Article 18 of the Universal Declaration states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.*

Another international document merits mention: The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, formally adopted by the U.N. General Assembly on November 25, 1981. *See* Symposium, *The Foundations and Frontiers of Religious Liberty*, 21 EMORY INT'L L. REV. 1, 2–3 (2007) (commemorating the 25th anniversary of the 1981 U.N. Declaration on Religious Tolerance).

91. Multilateral Treaties Deposited with the Secretary-General, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited July 20, 2022).

92. ICCPR, *supra* note 46, art. 18(1).

93. *Id.* art. 18(2).

94. *Id.* art. 18(3).

> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[95]

Note the breadth of the right that according to Article 18 "[e]veryone shall have": the right to freedom not just of "religion" but also of "conscience."[96] The "right shall include freedom to have or to adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching."[97] Article 18 explicitly indicates that "belief" centrally includes moral belief when it states that "[t]he State (States Parties?) parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious *and moral*

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95. *Id.* art. 18(4). Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is substantially identical:

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

Council of Europe, Convention for the Prot. of Hum. Rts. and Fundamental Freedoms, art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights]; *see also* Recent Case, *International Law—Human Rights—European Court of Human Rights Rules That British Military's Discharge of Homosexuals Is Illegal*, 113 HARV. L. REV. 1563, 1563 n.1 (2000) (discussing the European Convention on Human Rights and its effects on forty-one contracting member states). Article 12 of the American Convention on Human Rights is also substantially identical:

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

Pact of San José, *supra* note 71, art. 12.

96. ICCPR, *supra* note 46, art. 18(1).

97. *Id.* (emphasis added).

education of their children in conformity with their own convictions."[98]

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by one or more individuals alleging that a state party is in violation of the ICCPR—has stated that "[t]he right to freedom of thought, conscience and religion . . . in article 18.1 is far-reaching and profound . . . ."[99] *How* "far-reaching and profound?" The right protects not only freedom to practice one's religion, including, of course, one's religiously-based morality; it also protects freedom to practice one's morality—freedom "to manifest his . . . belief in . . . practice"—*even if one's morality is not religiously-based.*[100] As the Human Rights Committee has explained:

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief . . . . Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[101]

In deriving a right to conscientious objection to military service from Article 18, the Human Rights Committee observed that "the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" and emphasized that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs . . . ."[102]

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98. *Id.* (emphasis added). *But see* Barbara Bennett Woodhouse, *Religion and Children's Rights*, *in* RELIGION AND HUMAN RIGHTS 299 (John Witte, Jr., & M. Christian Green eds., 2012).

99. Hum. Rts. Comm., *General Comment No. 22: Art. 18, (Forty-eighth session, 1993)*, *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 194 (1994), https://digitallibrary.un.org/record/576098?ln=en [hereinafter HRC Commentary on Article 18].

100. ICCPR, *supra* note 46, art. 18(1).

101. HRC Commentary on Article 18, *supra* note 99, at 195.

102. *Id.*; *see* Yoon and Choi v. Republic of Korea, CCPR/C/88/D/1321–1322/2004, Hum. Rts. Comm., ¶ 9 (Nov. 3, 2006) https://juris.ohchr.org/en/Search/Details/1323 (ruling that Article 18 requires that parties to the ICCPR provide for conscientious objection to military service).

It is misleading, though common, to describe the right we are discussing here as the right to *religious* freedom.[103] Given the breadth of the right—the "far-reaching and profound" right of which the ICCPR's Article 18 is the canonical articulation—the right is more accurately described as the right to *moral* freedom. As the Supreme Court of Canada has emphasized, it is a broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously-based.[104] Referring to section 2(a) of Canada's Charter of Rights and Freedoms, which states that "[e]veryone has . . . freedom of conscience and religion,"[105] the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[106] Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[107] Therefore, I call the right we are discussing here the human right to moral freedom. But whatever one calls the right—whether one calls it, as many do, the right to freedom of conscience, in the sense of the right to live one's life in accord with the deliverances of one's conscience, or, instead, the right to moral (including religious) freedom—it is the right to the freedom to live one's life in accord with one's moral convictions and commitments, including one's religiously based moral convictions and commitments.

Moreover, that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing does not entail that the choice is

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In 2018, the Korean Constitutional Court ruled that conscientious objection to military service is "justifiable" under the law and that it is inappropriate to punish "people who have refused mandatory military service on conscientious or religious grounds." Article, *South Korea: Supreme Court Finds Conscientious Objection to Military Service Justifiable*, LIBR. OF CONG. (Nov. 16, 2018), https://www.loc.gov/item/global-legal-monitor/2018-11-16/south-korea-supreme-court-finds-conscientious-objection-to-military-service-justifiable/.

103. *See* Christopher McCrudden, *Catholicism, Human Rights and the Public Sphere*, 5 INT'L J. PUB. THEOLOGY 331, 333 (2011) ("Freedom of religion, seen from the point of view of the individual, can be viewed as encompassing two dimensions: the freedom to believe what one's religion teaches and the freedom to manifest that belief in certain actions, such as wearing a turban if one is a Sikh man or wearing a veil if one is a Muslim woman.").

104. Mouvement laïque québécois v. City of Saguenay, [2015] 2 S.C.R. 3 (Can.).

105. Canadian Charter, *supra* note 72, § 2(a).

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

107. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337 (Can.). *See* Howard Kislowicz et al., *Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom*, 48 ALTA. L. REV. 679, 707–13 (2011).

not protected by the right to moral freedom.[108] As the Canadian Supreme Court has explained, in a case involving a religious practice:

> [T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is required . . . would disregard the value of non-obligatory religious experiences by excluding those experiences from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may personally deny the modern relevance of literal biblical "obligation" or "commandment," be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[109]

"It is the religious or spiritual essence of an action," reasoned the Court, "not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."[110]

But by the same token—that is, because "[i]t is the religious or spiritual essence of an action . . . that attracts protection"[111]—not every choice one makes or wants to make qualifies as a choice protected by the right to moral freedom. A choice to do or not to do something is protected by the right if, and only if, the choice fits this profile: animated by what Jocelyn Maclure and Charles Taylor, in

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108. *But see Kant's Moral Philosophy*, STAN. ENCYC. OF PHIL. (Jan. 21, 2022), https://plato.stanford.edu/entries/kant-moral/ ("Immanuel Kant (1724–1804) argued that the supreme principle of morality is a principle of practical rationality that he dubbed the 'Categorical Imperative' (CI). Kant characterized the CI as an objective, rationally necessary and unconditional principle that we must follow despite any natural desires we may have to the contrary.").

109. Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 588 (Can.) (passages rearranged).

110. *Id.* at 553.

111. *Id. Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022) (Alito, J.) ("While individuals are certainly free to think and to say what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free to act in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of 'liberty,' but it is certainly not 'ordered liberty.'").

their book *Secularism and Freedom of Conscience*, call "core or meaning-giving beliefs and commitments" as distinct from "the legitimate but less fundamental 'preferences' we display as individuals."[112]

> [The] beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict "moral harm."[113]

Although, as Maclure and Taylor are well aware, "it is difficult to establish in the abstract where the line between preferences and core commitments lies,"[114] I'm inclined to concur in what Maclure and Taylor have argued:

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

112. JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 12–13 (2010). For Maclure and Taylor's elaboration and discussion of the distinction, see *id.* at 76–77, 89–97. For a functionally similar distinction, see ROBERT AUDI, DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE 42–43 (2011).

113. MACLURE & TAYLOR, *supra* note 112, at 77.

114. *Id.* at 92.

> a person's commitment to a given conviction or practice that constitutes the similarity between religious convictions and secular convictions.[115]

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

> [A] Muslim nurse's decision to wear a scarf cannot be placed on the same footing as a colleague's choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague.[116]

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

A generous application of the right—more precisely, a default rule according to which the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right—is much more feasible than it would be were the protection provided by the right unconditional ("absolute"). However, the protection provided by the right to moral freedom is only *conditional*.[117] The protection provided by some ICCPR rights—such as the Article 7 right not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[118]—is unconditional, in the sense that the rights forbid (or require) government to do something, *period*.[119] The protection provided by some other ICCPR rights, by contrast, is conditional, in the sense that the rights forbid government to do something *unless certain conditions are satisfied*.[120] As Article 18 makes clear, the protection provided by the right to moral freedom is—as a practical matter, it must be—conditional: The right forbids

115. *Id.* at 92–93, 96–97.

116. *Id.* at 77.

117. Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 J.L. & RELIG. 124, 132–33 (2014) (discussing the conditional qualities of the right to moral freedom).

118. ICCPR, *supra* note 46, art. 7.

119. Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Id.*

120. Perry, *supra* note 117, at 132 (discussing the conditional aspect of ICCPR).

government to ban or otherwise impede conduct protected ("covered") by the right, thereby interfering with one's freedom to live one's life in accord with one's moral convictions and commitments, unless each of three conditions is satisfied—the legitimacy, least-restrictive alternative, and proportionality conditions—each of which I discussed earlier in this essay, in the course of explicating the human right to intellectual freedom.[121] Government action that *implicates* the right—which might be the refusal by government to provide an exemption (e.g., conscientious objection) from an otherwise unobjectionable law or policy (military conscription)—also *violates* the right if, and only if, the government action fails to satisfy any of those three conditions.

Consider the first of the three conditions that government must satisfy under the right to moral freedom, lest its regulation of conduct protected by the right violate the right: The government action at issue (law, policy, etc.) must serve a legitimate government objective.[122] Article 18 sensibly and explicitly allows government to act for the purpose of protecting "public safety, order, health, or morals or the fundamental rights and freedoms of others."[123] Clearly, then, for purposes of the legitimacy condition, protecting "public morals" is a legitimate government objective.

But what morals count as *public* morals? In addressing that question, consider the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, which were promulgated by the United Nations in 1984,[124] and which state, in relevant part:

> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
>
> 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
>
> 4. All limitations shall be interpreted in the light and context of the particular right concerned.[125]

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

> [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the

121. ICCPR, *supra* note 46, art. 18.
122. *See id.*
123. *Id.*
124. Siracusa Principles, *supra* note 51, at 3.
125. *Id.* at 4.

> freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition . . . . If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[126]

As the editors of a casebook on the ICCPR have put the point, in summarizing several statements by the Human Rights Committee concerning protection of "public morals" under the right to moral freedom: "'[P]ublic morals' measures should reflect a pluralistic view of society, rather than a single religious culture."[127]

The position of the Human Rights Committee—the Committee's application of the relevant Siracusa Principles in the context of the Article 18 right to moral freedom—is quite sound, given what Taylor and Maclure call "the state of contemporary societies"[128]: Such societies—more precisely, contemporary democracies—are typically quite pluralistic, morally as well as religiously.[129]

> Religious diversity must be seen as an aspect of the phenomenon of "moral pluralism" with which contemporary democracies have to come to terms . . . . Although the history of the West serves to explain the fixation on religion . . . the state of contemporary societies requires that we move beyond that fixation and consider how to manage fairly the moral diversity that now characterizes them. The field of application for secular governance has broadened to include all moral, spiritual, and religious options.[130]

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126. HRC Commentary on Article 18, *supra* note 99, at 196.

127. SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 510 (2d ed. 2004).

128. MACLURE & TAYLOR, *supra* note 112, at 106.

129. *Id.*

130. *Id.* at 10, 106. "'Moral pluralism' refers to the phenomenon of individuals adopting different and sometimes incompatible value systems and conceptions of the good." *Id.* at 10. *See also* Charles Taylor, *Democratic Exclusions: Political Identity and the Problem of Secularism*, ABC RELIGION & ETHICS (Sept. 27, 2017) (Austl.), https://www.abc.net.au/religion/democratic-exclusions-political-identity-and-the-problem-of-secu/10095352:

> Everyone agrees today that modern, diverse democracies have to be secular, in some sense of this term. But in what sense? . . . [T]he main point of a secularist regime is to manage the religious and metaphysical-philosophical diversity of views (including non- and anti-religious views) fairly and democratically. Of course, this task will

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

Crediting the protection of sectarian morals as a legitimate government objective under the right to moral freedom would be antithetical to the goal of enabling contemporary democracies to meet the challenge of "manag[ing] fairly the moral diversity that now characterizes them."[131] We can anticipate an argument to the effect that managing such diversity is only one of the challenges that contemporary democracies face, that nurturing social unity is another, and that from time to time, in one or another place, meeting the latter challenge may require the political powers that be to protect some aspect of a sectarian morality.[132] However, such an argument is belied by the historical experience of the world's democracies, which amply confirms—as Maclure and Taylor emphasize—not only that a society's "unity does not lie in unanimity about the meaning and goals of existence but also that any efforts in the direction of such a

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> involve setting certain limits to religiously-motivated action in the public sphere, but it will also involve similar limits on those espousing non- or anti-religious philosophies.

For this view, religion is not the prime focus of secularism.

131. MACLURE & TAYLOR, *supra* note 112, at 106.

132. In 1931, the fascist *duce* of Italy, Benito Mussolini, proclaimed that "religious unity is one of the great strengths of a people." JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 155–56 (2005). Had Mussolini read Machiavelli? "Machiavelli called religion 'the instrument necessary above all others for the maintenance of a civilized state,' [and who] urged rulers to 'foster and encourage' religion 'even though they be convinced that is it quite fallacious.' Truth and social utility may, but need not, coincide." Michael W. McConnell, *Establishment and Disestablishment at the Founding*, *Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2182 (2003) (quoting NICCOLÒ MACHIAVELLI, THE DISCOURSES 139, 143 (Bernard R. Crick ed. Leslie J. Walker trans., Penguin 1970) (1520)). *Cf. Atheist Defends Belief in God*, THE TABLET (London), Mar. 24, 2007, at 33:

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

uniformization would have devastating consequences for social peace."[133] The political powers that be do not need—and under the legitimacy condition, properly construed, they do not have—discretion to ban or otherwise regulate conduct based on a sectarian belief that the conduct is immoral.[134]

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

> [T]he practice [contraception], undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence . . . .[135]

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133. MACLURE & TAYLOR, *supra* note 112, at 18. *See generally* BRIAN J. GRIM AND ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2011). "[T]he core thesis [of this book] holds: to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase." *Id.* at 222. *See also* Paul Cruickshank, *Covered Faces, Open Rebellion*, N.Y. TIMES (Oct. 21, 2006), https://www.nytimes.com/2006/10/21/opinion/21cruickshank.html. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states: "[T]he disregard and infringement of . . . the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind . . . ." G.A. Res. 36/55, 3 (Nov. 25, 1981).

134. That the coercive imposition of sectarian moral belief violates the right to moral freedom does not entail that the noncoercive affirmation of theistic belief invariably does so. Examples of the latter, from the United States: the phrase "under God" in the Pledge of Allegiance, "In God We Trust" as the national motto, and "God save this honorable court" intoned at the beginning of judicial proceedings. I've addressed elsewhere the question whether the noncoercive affirmation of theism violates the Establishment Clause of the First Amendment to the U.S. Constitution. MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY 100–19 (2010) ("Chapter 6: Religion as a Basis of Lawmaking").

135. Memorandum from John Courtney Murray, S.J. to Cardinal Richard Cushing (c. 1960), *in* BRIDGING THE SACRED AND THE SECULAR 81, 83 (J. Leon Hooper ed., 1994); *see also* John Courtney Murray, S.J., Toledo Talk (May 5, 1967), *in* BRIDGING THE SACRED AND THE SECULAR, *supra*, at 334, 336–40 . Murray's influence on Boston's Archbishop, Cardinal Richard Cushing, and Cushing's influence on the repeal of the Massachusetts ban on the sale of contraceptives, is discussed in Seth Meehan, *Legal Aid*, BOSTON COLL. MAGAZINE

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

Of course, it will not always be obvious which side of the line a particular moral belief falls on—sectarian or nonsectarian—but often it *will* be obvious. As Murray understood and emphasized to Cardinal Cushing, the belief that contraception is immoral had clearly become sectarian.[136] By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in contemporary democracies.[137] Consider, in that regard, what Maclure and Taylor say about "popular sovereignty" and "basic human rights":

> [They] are the *constitutive* values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others' right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.[138]

B. The Constitutional Right of Privacy

Again, the constitutional right of privacy is best understood as a version of the human right to moral freedom. Consider the following rulings by the U.S. Supreme Court in the period since the mid-1960s:

(2011), and in Seth Meehan, *Catholics and Contraception: Boston, 1965*, N.Y. TIMES (Mar. 15, 2012), https://archive.nytimes.com/campaignstops.blogs.nytimes.com/2012/03/15/catholics-and-contraception-boston-1965/. *See also* Joshua J. McElwee, *A Cardinal's Role in the End of a State's Ban on Contraception*, NAT'L CATH. REP., Mar. 2, 2012, at 9. For the larger context within which Father Murray wrote and spoke, see generally LESLIE WOODCOCK TENTLER, CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY 130–204 (2004). For a recent reflection on Murray's work by one of his foremost intellectual heirs, see David Hollenbach, *Religious Freedom and Law: John Courtney Murray Today*, 1 J. Moral Theology 69, 75 (2012).

136. Memorandum from John Courtney Murray, S.J. to Cardinal Richard Cushing, *supra* note 135, at 83.

137. *See* MACLURE & TAYLOR, *supra* note 112, at 12.

138. *Id.* at 11.

- According to a 1965 ruling and a 1972 ruling, read in conjunction with one another, government may ban neither the use nor the distribution of contraceptive devices or drugs.[139] In the 1972 ruling, the Supreme Court declared: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[140]
- In 1973, the Court ruled that restrictive abortion legislation implicated, and that some such legislation violated, "the right of privacy."[141] In 1992, in reaffirming the 1973 ruling, the Court explained:

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

139. *See* Griswold v. Connecticut, 381 U.S. 479, 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 438 (1972).

140. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

141. *Compare* Roe v. Wade, 410 U.S. 113, 120–21 (1973) (Blackmun, J.) ("James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action . . . . He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring) ("Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In *Roe v. Wade*, the Court divined a right to abortion because it 'fe[lt]' that 'the Fourteenth Amendment's concept of personal liberty' included a 'right of privacy' that 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'"); *see also Griswold*, 381 U.S. at 510 (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.").

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[142]

- In 1978, in ruling that "the decision to marry [is] among the personal decisions protected by the right of privacy,"[143] the Court stated:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships . . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society . . . .
>
> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed . . . . [However, w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.[144]

142. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850–51 (1992); *see also Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion . . . . For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

143. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

144. *Id.* at 386, 388; *see also* Turner v. Safley, 482 U.S. 78, 99 (1987) ("It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place . . . . On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.").

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

> Liberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct . . . . [Government should be wary about attempting] to define the meaning of [an adult, consensual] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects . . . . [A]dults may choose to enter upon this relationship . . . and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice . . . .
>
> [F]or centuries, there have been powerful voices to condemn homosexual conduct as immoral. [This does not] answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." . . . "[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . . [I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[145]

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

However, that the constitutional right of privacy is a version of the human right to moral freedom does not entail that the right of privacy—"one of the most fiercely contested rights in the modern

145. Lawrence v. Texas, 539 U.S. 558, 562, 567, 571, 577–78 (2003) (citations omitted) (first quoting *Casey*, 505 U.S. at 850; then quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

constitutional canon"[146]—is legitimately regarded as a constitutional right.[147]

The case for accepting the right of privacy as part of the constitutional law of the United States is both simple and compelling:

1. The right to the free exercise of religion that the First Amendment's enactors constitutionalized,[148] correctly interpreted,[149] protects one's freedom to live one's life in accord with one's religious convictions and commitments, including one's religiously based moral convictions and commitments.[150] Of course, the right is, as it must be, conditional, not unconditional: A law or other government action may interfere with one's freedom to live one's life in accord with one's religious convictions and commitments, but only if there is a sufficiently weighty justification for the government action.[151]
2. It is well settled—so well settled as to be constitutional bedrock—that the domain of the constitutional right to the free exercise of religion extends beyond normative

146. *See* Siegel, *supra* note 8, at 316. That the original understanding neither of the Fifth Amendment Due Process Clause nor of the Fourteenth Amendment Due Process Clause supports the Supreme Court's right-of-privacy jurisprudence seems clear. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672, 1677 (2012).

147. *Lawrence*, 539 U.S. at 578.

148. The First Amendment states, in relevant part: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. It is constitutional bedrock that the constitutional right to the free exercise of religion applies not just to Congress, but to all of the federal government; and not just to the federal government, but to the states as well. The Supreme Court first applied the right of free exercise to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

149. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415–16 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 UNIV. CHI. L. REV. 1109, 1110–11 (1990); DOUGLAS LAYCOCK, 2 RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 47–230 (2011); Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, PUB. DISCOURSE (Apr. 17, 2015), http://www.thepublicdiscourse.com/2015/04/14844/; KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 151–82 (2015). *See also* Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at *5–15, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

150. Perry, *supra* note 117, at 128.

151. For a recent, thoughtful discussion of what should replace the Supreme Court's present—and arguably incorrect—interpretation of the constitutional right to free exercise, see Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 267–68 (2021) (asking, like Justice Barrett, what should replace *Smith*?); *see also Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

> worldviews that are theistic to those that, such as Buddhism, are nontheistic.[152] Like the human right to moral freedom, the constitutional right to free exercise protects moral choices rooted in and nourished by one or another nontheistic worldview as well as those rooted in and nourished by one or another theistic worldview.[153]

Therefore, the right of privacy—*understood as a version of the human right to moral freedom*—is legitimately regarded as part of the constitutional law of the United States.

Given the foregoing rationale for concluding that the right of privacy is legitimately regarded as a constitutional right, the question arises whether, as a matter of constitutional terminology, it wouldn't be better—nor clearer—to refer to the right as the right to free exercise, understanding that the right to free exercise protects moral choices grounded on a nontheistic worldview as well as those grounded on a theistic worldview.[154]

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152. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 489–96 (1961) (Black, J.):

> The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God . . . . This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.

In *Torcaso,* the Supreme Court wrote that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11.

153. *Id.* at 495. For an informative discussion of efforts, judicial and scholarly, to explain how the term "religion," as used in the First Amendment, should be understood, see DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 60–69 (2016). According to religious liberty scholar Douglas Laycock, "we have to understand religion broadly, so that nonbelievers are protected when they do things that are analogous to the exercise of religion . . . . Nonbelievers have consciences, and occasionally, their deeply held conscientious beliefs conflict with government regulation." Douglas Laycock, *McElroy Lecture: Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 431 (2011). *See also* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 336–37 (1996).

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

> By the standards of late twentieth-century law, the public regulation of morality [in the United States] is increasingly suspect. The burgeoning public/private distinction, the jurisprudential separation of law and morality, and the expansion of constitutionally protected rights of expression and privacy have yielded a polity whose legitimacy theoretically rests on its ability to keep out of the private moral affairs of its citizens. As the American Law Institute declared in the 1955

CONCLUSION

In their article, *Universal Human Rights and Constitutional Change*, legal scholars David Sloss and Wayne Sandholtz, adopt a term I used in my most recent book—"a global political morality"—and argue that "[t]he global diffusion of the political morality of human rights was an important causal factor that contributed to the internationalization of human rights, the constitutionalization of human rights [in many countries throughout the world], and the federalization of human rights in the United States."[155] Sloss and Sandholtz conclude their article with this observation about what they call "the nature of American constitutional identity":

> [T]he "constitution" that commands the loyalty of most Americans is not the text adopted in the eighteenth century: a document that authorized slavery and denied women the right to vote . . . . [Rather, it is] the modern, human rights constitution [that has come to embody] the universal values expressed in the Universal Declaration of Human Rights, which have been incorporated into national constitutions throughout the world in the past several decades.[156]

I began this essay by proposing that there is a significant interface between the constitutional law of the United States and the global political morality of human rights. My principal aim in this essay has been to defend (and illustrate) that broad claim by defending three narrower claims—three claims about "constitutional rights as human rights"—claims concerning, respectively, freedom of speech, equal protection, and the right of privacy. My defense of the three claims, now complete, supports this revised version of Sloss and Sandholtz's observation about American constitutional identity: The "constitution" that commands the loyalty of most Americans is, in part, the constitution some of whose most important provisions, including the three on which I've focused in this essay, represent

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> Model Penal Code, "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor."

Novak goes on to illustrate that "[t]he relationship between laws and morals in the nineteenth century could not have been more different. Of all the contests over public power in that period, morals regulation was the easy case." *Id.* at 149–89.

155. Sloss & Sandholtz, *supra* note 83, at 1184. Reporting that "[w]e borrow the term ['a global political morality'] from Professor Perry," Professors Sloss and Sandholtz then cited my book, *A Global Political Morality*, *supra* note 2. *Id.* at 1184 n.6.

156. *Id.* at 1260.

values expressed in the Universal Declaration of Human Rights, values that are prime constituents of the morality of human rights.[157]

157. I have discussed elsewhere the implications of two of the constitutional rights on which I've focused in this essay—the right to equal protection and the right of privacy—for the constitutional controversies concerning, respectively, race-based affirmative action, abortion, physician-assisted suicide, and same-sex marriage. *See* PERRY, GLOBAL, *supra* note 2, at 132–64.