Sex, Politics, and Morality

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INTRODUCTION

Exit polls conducted after the 2004 election revealed that “moral values” was the single most important issue that determined people’s votes. The country was still recovering from the most deadly foreign attack it had ever sustained and fighting a war that had already claimed over a thousand lives and cost over one hundred billion dollars; the economy was faltering; the national debt skyrocketing; public education in disarray; Social Security heading toward collapse and health care in a widely acknowledged state of crisis. But something called “moral values” managed to trump all these issues as the leading source of concern. In the survey, 22% of respondents listed it as their leading issue, compared with 20% for the economy, 19% for terrorism, and 15% for Iraq. As commentators quickly pointed out, much depends on the way polls’ questions and answers are framed, but the result is still striking enough to merit serious consideration.

What exactly are moral values, or, more precisely, what did the people who declared it to be their leading issue mean? Morality is a rather general term, after all, and it is not difficult to characterize people’s concerns about the economy, education, health care, and Iraq as essentially moral in nature. But the people whose votes were determined by “moral values” certainly knew what they meant, and everybody else does too. They meant gay marriage and abortion, and perhaps birth control methods, stem cell research, and sex education. The theme that unifies all these various issues and, more significantly, distinguishes them from other issues that might lay claim to the mantle of morality, is that they involve sex—not sex in some general sense that includes gender, modes of

2. Id.
4. See Meyer, supra note 3.
5. See Muste, supra note 3.
thought, and all the Mars and Venus stuff that has become popular of late—6—but sex itself: sexual intercourse and sexual reproduction.7

Sexual reproduction, of course, has been around for a long time—several billion years, according to most scientists. It is found among simple, one-celled organisms, including bacteria, and it is the exclusive mode of reproduction for chordates like ourselves. But it has not been a particular source of political controversy until a period that can be characterized as very recent, on a historical as well as geological scale. If one thinks back to the issues that animated political debate over the course of American history, sexual reproduction does not play much of a role. It is hard to bring to mind any definitive position that George Washington, James Madison, Thomas Jefferson, Abraham Lincoln, or Woodrow Wilson espoused about this subject. To be sure, there have been a reasonable number of sex scandals in American history. Grover Cleveland's illegitimate child was a major issue in the rancorous campaign of 1884,8 and the marital infidelities of John F. Kennedy and many other presidents were known, at least among insiders.9 But only in the past thirty years or so has sex moved to the forefront of political debate. Bill Clinton's escapade with Monica Lewinsky was probably transformed from an excusable peccadillo to the mother of all American sex scandals by the increased political valence of the subject.10 And the 2004 elections seem to suggest


7. This is not to suggest that Dr. Gray is unaware of his theory's implications for physical sex. See JOHN GRAY, MARS AND VENUS IN THE BEDROOM: A GUIDE TO LASTING ROMANCE AND PASSION (1995).

8. See H. PAUL JEFFERS, AN HONEST PRESIDENT: THE LIFE AND PRESIDENCIES OF GROVER CLEVELAND 94-123 (2000). Cleveland, who was unmarried, admitted his paternity of the child. Id. at 108.


that, to quote Cole Porter, "sex is here to stay" \(^\text{11}\) as a political issue, at least for the foreseeable future.

This Essay has two principal goals. The first is to explain the newfound political significance of this age-old issue by placing current attitudes toward sex in historical perspective. The argument is that a major shift in morality has occurred in the Western world during the past two hundred years, and that the political mobilization around moral values represents a last-ditch resistance to this change as its full implications become apparent. The second goal is to use this historical perspective to provide guidance to constitutional courts when confronted with cases involving sexual intercourse. History suggests that opposition to gay marriage, abortion, birth control, sex education, and stem cell research is based on Christian doctrine, more specifically, on one contestable interpretation of Christian doctrine. It follows that legislation effectuating such opposition should be invalidated under the Establishment Clause of the First Amendment.

I. SEX AND MORALITY

A. Politics and Morality (Lakoff)

American political attitudes fall into some odd but distinctive patterns. If a person strongly opposes gay marriage, one can be fairly certain that the person also favors using just deserts or retribution as the basis for criminal punishments, and rejects rehabilitation. If a person strongly favors abortion rights for

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\(^{11}\) There's an oil man known as Tex
Who is keen to give me checks,
And his checks, I fear, mean that sex is here to stay!
But I'm always true to you, darlin', in my fashion
Yes, I'm always true to you, darlin', in my way.

women, that person is probably opposed to the war in Iraq. There is no logical connection between these pairs of positions, but the correlations are apparent to any observer, and shape the topography of our current political scene.

Professor George Lakoff argues that these connections, and the general clusters of attitudes that characterize American politics, are determined by two conceptual metaphors, rather than by logic. The organizing principle for both metaphors is the nation as a family, and specifically, that relations between parents and children are reiterated in the relationship of government and society. Conservatives, Lakoff argues, adopt a Strict Father model, where the world is regarded as a threatening, dangerous place, and the parent, typically but not necessarily the father, prepares children for this world, and teaches them “right from wrong by setting strict rules for their behavior and enforcing them through punishment.” Liberals adopt a Nurturant Parent model, viewing the world as capable of growth toward compassion and equality, and encouraging their children to “become responsible, self-disciplined, and self-reliant through being cared for and respected, and through caring for others.”

Lakoff argues that these conceptual metaphors account for the particular cluster of beliefs that conservatives and liberals maintain. Those motivated by Strict Father morality oppose gay marriage because it conflicts with their model of the family; they oppose abortion because they believe that people should be responsible for the consequences of their actions. They support just deserts in punishment for exactly the same reason, and they would likely support the war in Iraq because it adopts a punitive stance to those who make the world dangerous for us. In contrast,
people motivated by Nurturant Parent morality adopt a caring, empathetic attitude toward others, whether they are gays, pregnant women who do not want a child, criminals, or citizens of Iraq.\textsuperscript{21} Their attitude is based on either acceptance of the other's differences or on a desire to correct wrongful conduct through respectful assistance.\textsuperscript{22} Lakoff points out that these conceptual metaphors possess greater explanatory power than traditional explanations.\textsuperscript{23} For example, it is often said that conservatives oppose big government and extensive government expenditures.\textsuperscript{24} Yet they favor the war in Iraq, increased incarceration of criminals, and various other policies that involve extensive expenditures and a large governmental apparatus.\textsuperscript{25} What they really oppose is expenditures on social programs, that is, government initiatives designed to nurture people rather than to make them responsible for the consequences of their actions.\textsuperscript{26} Liberals, on the other hand, favor big government for social programs, but express horror about state deficits incurred to build more prisons, or federal deficits incurred to fight wars of aggression.\textsuperscript{27}

Lakoff's theory is insightful and illuminating, and it represents an important advance in thinking about social attitudes. It displays some deficiencies for present purposes, however. First, it does not use sexual intercourse as a conceptual category. In fact, Lakoff's idea that the state's relationship to citizens reiterates models of child-rearing breaks down with respect to sex, because virtually all parents, whether strict or nurturing, will want to restrict their children from engaging in sexual intercourse, a policy that is not really reflected in the state's attitude toward its adult citizens. In addition, the theory is ahistorical; Lakoff presents his two models of child-rearing as static conceptions, existing at present without having evolved over time. These models have no obvious relationship to the course of Western history. As recently as the early twentieth century, all parents probably fit the Strict Father model

\textsuperscript{21} See id. at 165-66.
\textsuperscript{22} Id. at 114-16, 125-26.
\textsuperscript{23} Id. at 27-32.
\textsuperscript{24} Id. at 144-45.
\textsuperscript{25} See id.
\textsuperscript{26} Id. at 180-85.
\textsuperscript{27} Id. at 179-80, 207.
by contemporary standards, but this observation provides little insight into the interplay of liberal and conservative, or Whig and Tory sentiment, in this earlier period.  

B. Sex and Politics (Elias, Foucault, and Giddens)

In order to apply Lakoff's very promising conceptual analysis to the subject of sexual intercourse, and to do so in a historically contextual manner, it is necessary to combine it with more specific theories of sexuality, particularly those that describe changes in attitudes about sex over time. Such theories are numerous and varied; three well-known ones considered here, as exemplary but far from comprehensive, are those of Norbert Elias, Michel Foucault, and Anthony Giddens.

Elias regards sexuality, together with eating, excreting, and the slaughter of animals, as one of those earthy, visceral aspects of life that become progressively more private and more subject to restraint as Western society evolves. The causal engine in this process, according to Elias, is the increasing complexity of society, and the specialization and interdependence that accompanies it.

Western people must internalize greater and greater levels of restraint in order to function in this environment; they must, in his terms, become more civilized. As a result, sexual intercourse, which was once regarded as an integral and readily observable aspect of existence, is sequestered as a dangerous, forbidden activity that is seen, or felt, as a threat to the established social order.

Foucault, in contrast, sees sexuality as an emanation of the social order. The entire concept of sexuality, as opposed to eroticism, is

28. In fact, Philippe Ariès argues that the concept of childhood itself did not exist until relatively recent times. See PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 15-133 (Robert Baldick trans., 1962) (describing the various ways in which the concept of childhood has developed over time).

It might be possible to trace the model that Lakoff describes to the development of social attitudes, but a great deal of additional research and analysis would be required.


30. 2 id. at 443-56.

31. 2 id. at 457-65.

32. 1 id. at 160-68.

a creation of the modern "power-knowledge" complex in his view. Scientific study of sexuality simultaneously establishes sex as a matter of public discourse and as a clandestine activity that needs to be confessed, although perhaps to a researcher or a therapist rather than a priest. As a result, it becomes integrated into modern systems of social control. Society does not simply repress sexuality, but creates it, channels it, studies it, and sequesters it, thereby enlisting it as part of its technology for meticulous control of the human body. Unlike Elias, Foucault does not see a unidirectional evolution toward greater self-restraint or internalized repression of sexuality. Foucault can therefore account for the increasingly open discussion of sex, and availability of sex-related materials, that characterizes contemporary culture. Like Elias, however, he perceives social attitudes toward sex as part of a process by which people within modern society become more disciplined, more regimented by the impersonal forces of modernity itself.

According to Giddens, modern technology has created what he describes as plastic sexuality, a sexuality that has been severed from its prior biological link to reproduction. Most important, sexual intercourse no longer leads to pregnancy unless the participants, and more specifically the woman, so desire; thus, young women now have the freedom that was previously reserved for men of having sex without physical consequences. In addition, pregnancy no longer depends on sex, but is increasingly the result of medical procedures. The liberating effect that this produces for women, and secondarily for men, is then accompanied by a liberating effect for nonheterosexuals, whose sexual activities can no longer be defined as deviant because they do not lead to reproduc-

34. Id. at 92-102.
35. See id. at 51-73.
36. Id. at 65-73.
37. Id. at 75-114.
38. Id. at 90, 105-14.
40. Id. at 26-28.
41. Id.
tation. Sexuality thus becomes a means of defining oneself, a conscious choice available to men and women, straights and gays, marrieds and singles. This freedom brings with it responsibilities regarding our behavior to each other, but also frees us to establish relationships of real intimacy. In contrast to both Elias and Foucault, Giddens sees sex as a means of liberation, rather than something that must be controlled or a mechanism of control. He agrees with Foucault in recognizing the increased attention to sexuality in modern society, but also with Elias in noting its increasing absorption in a private realm. In contrast to radicals like Herbert Marcuse and Wilhelm Reich, Giddens does not see sexual freedom as a path to political liberation, but more as individual liberation from the political structures of the collectivity.

C. Sex and Morality (Higher Purposes and Self-Fulfillment)

Elias, Foucault, and Giddens provide content for constructing conceptual metaphors of politics that focus on the issue of sex, but there remains a significant omission, one that is signaled by the slogan of moral values that contemporary Americans use to describe sex-related issues. Sex inevitably implicates morality, and morality invariably addresses sex. It is difficult to think of any system of beliefs, in history or theory, that we would be willing to describe as a moral system unless it included rules governing sexual conduct. While morality is not entirely absent from sociological theories of the sort discussed above, it does not appear as an independent causal factor, and it certainly lacks the centrality in these theories that its intimate connection with sex would seem to warrant. Direct

42. Id. at 13-16, 26-28, 32-34.
43. Id. at 184-203.
44. See id. at 3.
45. HERBERT MARCUSE, EROS AND CIVILIZATION 55-76, 197-274 (1955); HERBERT MARCUSE, ONE-DIMENSIONAL MAN 72-78 (1964); WILHELM REICH, LISTEN, LITTLE MAN! (Ralph Manheim trans., 1974) (depicting, through the trials of the “little man,” how sexual repression is part of political oppression); WILHELM REICH, THE SEXUAL REVOLUTION 21-33 (Theodore P. Wolfe trans., 4th ed. 1962) (arguing that sexual “moral regulation” creates “the very chaos which it professes to control” and should be replaced with more liberating “sex-economic morality”).
consideration of morality, therefore, promises to provide additional insights that can be used to explain prevailing political attitudes.

1. The Morality of Higher Purposes

The moral system that existed from the Middle Ages through the Enlightenment can be characterized as a morality of higher purposes. Its central idea was that people's actions were supposed to secure their salvation, and were moral when directed to this goal. This moral system was directly derived from Christianity of course, which, as Weber famously observed, is a religion based on rejection of the material world. Christian doctrine taught that every person was born in original sin, resulting from Adam's fall from grace, and could achieve salvation only through faith in Jesus Christ. Because of original sin, all human desires were temptations to turn away from Christ, thereby exposing people to the danger of damnation. The seven deadly sins—pride, envy, anger, sloth, avarice, gluttony, and lust—were a popular depiction of behaviors that were to be avoided. The solution was to devote oneself to God and redirect one's desires toward this higher purpose. Thus, people must eat, but gluttony should be avoided, and food should be used to maintain the body so that one could do good works and seek salvation. People must sleep and rest, but the purpose of doing so...

46. 2 MAX WEBER, ECONOMY AND SOCIETY 399, 541-76 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968). “Therefore, any sensuous surrender to the world's goods may imperil concentration upon and possession of the ultimate good of salvation, and may be a symptom of unholiness of spirit and impossibility of rebirth.” 2 id. at 543; see also ROBIN LANE FOX, PAGANS AND CHRISTIANS 336-74 (1987) (describing early Christian attitudes toward sex, virginity, marriage, and homosexuality).

47. For the more comprehensive statement of medieval doctrine, see ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., 1981) (1265-1273).

48. 2 id. at 951-73 (Pt. I-II, Q. 81-86); 4 id. at 1859-64 (Pt. II-II, Q. 164). An act of faith, such as martyrdom or confession and repentance, could secure salvation to a sinner at the time of death, wiping away the sins that the person committed during life. But opportunities for martyrdom were generally rare in the Christian West, and there was always the danger that the sinner might die before having had the opportunity to receive absolution. Beyond this, the church fashioned the doctrine of purgatory, which maintained that the saved were required to expiate their sins before they entered heaven. See DANTE ALIGHIERI, THE DIVINE COMEDY 152 (Melville Best Anderson trans., 1944) (Purgatorio, Canto III, ll. 136-41).

49. See 3 AQUINAS, supra note 47, at 1339-45 (Pt. II-II, Q. 35-36); 4 id. at 1791-1855 (Pt. II-II, Q. 149-62).
should be to restore oneself for virtuous action, not to subside into lassitude or sloth. The anchoritic and ascetic traditions urged as much self-denial as possible in these areas, together with the affirmative infliction of pain through flagellation, wearing hair shirts and the like.50 By the early Middle Ages, religious athleticism of this sort had fallen out of favor, but was revived in the eleventh century by the Gregorian reforms of the monastic orders.51

Unlike food and rest, sex is not absolutely necessary for human beings. But sex is necessary for the continuation of human life, and was thus regarded as acceptable, as part of God's creation. Complete self-denial in this area was not even obligatory for monks or priests in the early Middle Ages.52 Until the Gregorian reforms, priests were allowed to marry and have children.53 Marriage was one of the sacraments, after all, and childbirth was celebrated, particularly after the cult of Mary became prevalent.54 According to the morality of higher purposes, however, sex was not to be enjoyed for its own sake, but used for the purposes that God intended.55 Sophisticated thought, or, perhaps more precisely, thought directed toward sophisticated people, portrayed sex as a means of uniting two individuals with each other on a spiritual plane, and thus of learning how to unite oneself with God, the Creator of all people.56 But its primary justification, as St. Augustine taught, was to provide for reproduction.57 The continuation of Christian society on

50. See Fox, supra note 46, at 601-04.
52. Id. at 251-52.
53. Id.
56. A crucial text here is Paul's letter to the Ephesians, where he says:
Husbands, love your wives, just as Christ also loved the church and gave Himself up for her .... So husbands ought also to love their own wives as their own bodies. He who loves his own wife loves himself .... For this cause a man shall leave his father and mother, and shall cleave to his wife; and the two shall become one flesh.
57. St. Augustine of Hippo, De Bono Coniugali and De Sancta Virginitate 13-15 (P.G. Walsh ed. & trans., 2001); see Henry Chadwick, Augustine 114-15 (1986) ("And while the sexual act was primarily intended for procreation, Augustine judged it 'pardonable' if
earth was the higher purpose toward which sexual intercourse should be directed; sex was rescued from sin to the extent that it fulfilled God's command to Noah to "[b]e fruitful and multiply, and fill the earth."59

The Protestant Reformation challenged the Catholic idea that a person could be saved through good works,60 placing greater emphasis on faith and striving toward a more personal relationship with God.61 In theory, this shift could have undermined the morality of higher purposes by generating a more interior religion focused on one's own enlightenment, perhaps along the lines of Christian Gnosticism in the early church.62 Instead, Protestants maintained that a virtuous life was evidence of faith, or grace. They thus reversed the causal arrow—salvation led to good works, rather than good works leading to salvation—but retained the correspondence. Protestants wanted to believe that they were saved, either by faith or by God's inscrutable selection, but given the inevitable absence of metaphysical certainty, they felt compelled to engage in moral behavior as evidence of their salvation. Thus, their beliefs reinforced, rather than undermined, the morality of higher purposes—the need to direct one's actions toward a transcendental goal.63 The most dramatic version of this somewhat counterintuitive

married people enjoyed conjugal union without the intention to procreate.

58. See Georges Duby, *Medieval Marriage: Two Models from Twelfth-Century France* 15-17 (Elborg Forster trans., 1978) (describing the church model of marriage); Gudorf, supra note 55, at 81-83; 2 Weber, supra note 46, at 604-07 (noting that medieval Christian thought regarded sex in marriage as a "legitimate sin" that God tolerated). For this reason, voluntary sterilization was considered a more serious sin than abortion in the Middle Ages; abortion only separated one act of sexual intercourse from procreation, while sterilization effected this separation for all future acts of intercourse. See Christine E. Gudorf, *Contraception and Abortion in Roman Catholicism, in Sacred Rights: The Case for Contraception and Abortion in World Religions* 55, 60-62, 69 (Daniel C. Maguire ed., 2003); John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* 222-23, 233-37 (enlarged ed. 1986).


61. See id. at 111-16, 128-32.


63. See MacCulloch, supra note 60, at 572-644.
concatenation of ideas, as Weber pointed out, was Calvinism. The Calvinist belief in predestination was the most extreme form of the view that grace, not works, determined ultimate salvation. Yet the Calvinists, in their anxiety to demonstrate that they had been elected for this blessed state, practiced the most complete self-abnegation, and directed their actions most resolutely toward a higher purpose.

2. The Morality of Self-Fulfillment

It is hardly novel to note that the twentieth century produced a massive change in sexual morality. The prohibitions that figured so prominently in former times seem to have lost their hold on most members of society. Of course, those earlier prohibitions were often disobeyed, particularly by men, and more generally by anyone who could get away with it. What is notable about modern times, however, is not simply that disobedience has become more frequent, but that the prohibitions themselves seem to be rapidly disintegrating. Sex is no longer regarded as a sin, but rather as a natural and inherently enjoyable part of life; in fact, being sexually active is now regarded as something of a social and personal obligation. This view is now reflected in innumerable sex manuals advising their readers how to have healthy, passionate sex lives, and in the attitudes of


65. Id.


67. The classic is THE JOY OF SEX: A CORDON BLEU GUIDE TO LOVEMAKING (Alex Comfort ed., 1972) [hereinafter THE JOY OF SEX]. The number of such books published since then defies citation, but two books that capture the ubiquity of both the phenomenon and its recommendation are SARI LOCKER, THE COMPLETE IDIOT'S GUIDE TO AMAZING SEX (2d ed. 2002); RUTH K. WESTHEIMER, SEX FOR DUMMIES (2d ed. 2001). Reflecting the sense that having a good sex life is regarded as obligatory, National Lampoon published a parody of Comfort's book entitled THE JOB OF SEX: A WORKINGMAN'S GUIDE TO PRODUCTIVE LOVEMAKING (Brian McConnachie ed., 1974).
ordinary individuals, as reported to sociological researchers. A 1993 MTV special on the seven deadly sins, using the data collection technique of interviews with various entertainment figures, concluded that there was nothing particularly wrong with any of them.

The natural instinct is to treat these attitude changes as evidence that morality is in decline, that our society has entered a morally, if not generally, decadent era. This instinct is amplified by contemporary proponents of the morality of higher purposes, who have draped the word "moral" over their position like a flag over a podium. From a sociological perspective, however, this is not a particularly plausible position. Morality is a means of regulating human conduct, and Western societies are exceptionally orderly and well regulated, particularly given their complexity and the interdependence of their inhabitants. They are much better regulated than their more religious predecessors; the repeated famines, frequent breakdowns of social services, rampant crime, and virtually continuous internal conflict that characterized premodern society are currently found in failed, third world states, but not in major Western nations. This is even true of the United States, despite its public hysteria about crime and the relative privation of its poorest citizens. Any doubt on this matter can be erased by considering other Western nations, such as Sweden or the Netherlands, which are much better managed than the United States, and indeed than any societies that preceded them, and certainly are no more committed to the traditional morality of higher purposes.

Given the orderliness and functionality of modern society, the evident changes of morality are better interpreted as transformation than as decadence. The prior morality of higher purposes has not simply declined, leaving a moral void; rather, it has been replaced by a new morality, and the more permissive attitudes

toward sexual behavior are among its most distinctive features. This morality can be described as a morality of self-fulfillment. Its central idea is that each person should be able to lead a life that makes use of that person's distinctive abilities and satisfies his or her particular aspirations and desires. In a recent book, Alan Gewirth distinguishes between these two modes of self-fulfillment, identifying them as aspiration-fulfillment and capacity-fulfillment. But the two theoretically distinguishable notions are connected both psychologically and sociologically in the modern world. Psychologically, people's capacities tend to determine their aspirations, both because the modern world's social mobility encourages talented people to aim high, and because its competitiveness and relative lack of entrenched privilege cautions less talented people to be realistic. Sociologically, the modern world allows for a wide range of roles, ideologies, and life experiences, so that individuals tend to construct their aspirations and develop their capacities as part of a unified experience of maturation. The result is a unified ethos centered around the concept of self-fulfillment.

Self-fulfillment, like higher purposes, is a principle that can serve as the basis of morality because it yields general rules for human interaction. If people believe their behavior should serve higher purposes, they can unite around those purposes, and treat each other in ways that are consistent with those purposes. Similarly, a belief in self-fulfillment counsels people to act in a manner that enables them to fulfill themselves, that is, to secure their own self-fulfillment and to allow others to do the same. This is the origin of the political principle that each person should be allowed as much freedom as he or she can exercise without impinging on the freedom of others. But it also extends to more personal principles that, for both moral and administrative reasons, we place beyond the reach of politics, such as an obligation to provide positive assistance in achieving self-fulfillment to certain others, such as intimate relations. Conversely, the principle leads to a set of moral proscriptions on conduct that are designed to protect each person's opportunity for self-fulfillment from being precluded or impaired by others.

Modern attitudes toward sex certainly result, in part, from the collapse of the premodern morality of higher purposes. More precisely, it is the breakdown of this morality that makes modern attitudes toward sex a possibility. But such attitudes do not arise spontaneously from this collapse; rather, they are generated by the new morality that is arising in place of its predecessor, that is, the morality of self-fulfillment. While the intellectual history of self-fulfillment morality is too complex to be traced in the present discussion, a few themes are worth noting. British Empiricism, whose general spirit and explicit theory of the \textit{tabula rasa} rejected original sin and stressed both the innate sociability and long-term ameliorability of human beings, was an important initial step.\textsuperscript{71} To this may be added the long process of rationalization and secularization that characterizes the advent of the modern sensibility.\textsuperscript{72} Perhaps the crucial figure in this process, however, is Sigmund Freud.\textsuperscript{73} For Freud, the source of unhappiness was not sin, but

\begin{itemize}
  \item \textsuperscript{72} \textit{2 Elias, supra} note 29, at 491; \textit{1 Jürgen Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society} (Thomas McCarthy trans., 1984); \textit{1 Weber, supra} note 46, at 212-26; 2 id. at 809-31.
\end{itemize}
guilt, and the solution was not salvation but mental health. In Freud's entirely secular conception of the human psyche, the sense of guilt is an instrument that the punishing superego employs to control the tumultuous id, afflicting the ego with neuroses or more severe disturbances. Mental health can be achieved through therapy, which enables individuals to overcome this sense of guilt, and to learn to integrate the id's sexual drive with the ego. In modern therapy, whether Freudian or not, a major goal is generally to conquer one's guilt, doubts, and inhibitions about sex so that one can have a rewarding sex life. Studies and manuals about sex explicitly pronounce this same objective. They do not urge wild promiscuity or self-abandonment, as proponents of the morality of higher purposes might have imagined would result from the abandonment of their beliefs, but rather an integration of sexuality into an overall pattern of individual self-fulfillment.

The transformation of attitudes toward sex from the premodern to the modern Western world can thus be explained by a corresponding transformation of morality. The morality of higher purposes treated sexual desire as part of people's fallen, sinful nature, and treated the satisfaction of that desire as moral only when performed for the higher purpose of perpetuating human life. According to the morality of self-fulfillment, however, satisfying sexual desire is an intrinsic good, and one essential component of complete, productive, and fulfilled existence. The story, then, is not one of moral decadence but moral dynamism, not

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74. EYSENCK, supra note 73, at 42-43.
75. Even the subject of consideration undergoes a transformation in the transition to the modern world. Beginning with Descartes and the British empiricists, attention shifts from the study of the soul to the study of the mind. “Psychology” is now used only for the latter subject, but “psyche” still retains both meanings.
76. EYSENCK, supra note 73, at 168-70; FISHER & GREENBERG, supra note 73, at 19-21.
77. See EYSENCK, supra note 73, at 42-91, 168-70.
78. Therapy of this kind has become the dominant mode of advice seeking and counseling in modern society, replacing the confession or pastoral counseling of the prior era. See MARTIN L. GROSS, THE PSYCHOLOGICAL SOCIETY 3-17 (1978); CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM 3-30 (1979); EVA S. MOSKOWITZ, IN THERAPY WE TRUST: AMERICA'S OBSESSION WITH SELF-FULFILLMENT 1-9 (2001); PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 232-61 (1966).
80. See discussion supra Part I.C.1.
the demise of an established morality but the substitution of a different one.

The idea of moral development or moral evolution, with its implicit message that subsequent events are superior to prior ones, is explicitly avoided here. Any judgment of this sort requires a set of norms, a morality of sorts, and the question then is where such a morality would come from. Morality, the basis by which we make judgments about good and bad, is the subject under discussion. According to the morality of higher purposes, the morality of self-fulfillment is bad.\(^\text{81}\) According to the morality of self-fulfillment, that morality is, by definition, good, and the morality of higher purposes is bad. These moralities are comprehensive systems that provide members of the society they characterize with the terms of judgment. The account of social change from one to the other provides no basis for making transcendent judgments about which is better or worse, more or less evolved. Such judgments would require extensive philosophic argument that is not being attempted here and that, in my opinion, would lead nowhere.\(^\text{82}\)

\textit{D. Morality and Politics (Giddens, Foucault, and Elias)}

This account of moral transformation as the source of changing attitudes toward sex is generally consistent with the more specific accounts of sexual attitudes that have been advanced by many

\(^\text{81}\) But the claim that the morality of self-fulfillment is no morality at all, from the perspective of the morality of higher purposes, is explicitly argued against here. Such a claim is a confusing use of language, just as it would be a confusing use of language for a believing Christian to assert that Jews or Muslims have no religion, as opposed to having the wrong one. The argument is that the morality of self-fulfillment possesses the same indicia of a moral system that the morality of higher purposes possesses.

\(^\text{82}\) This is, admittedly, a claim of moral relativism, a position that is much discussed and often criticized. It is not, however, the vulgar claim that something is objectively right because society approves it, but rather the skeptical stance that we can never perceive transcendent, culture-independent values. This position has much broader support. See HANS-GEORG GADAMER, TRUTH AND METHOD, at xii (2d ed. 1984) (describing philosophy, art, and history as "modes of experience" outside scientific verification); ALASDAIR MACINTYRE, \textit{Whose Justice? Which Rationality?} 349-69 (1988); J.L. MACKIE, \textit{Ethics: Inventing Right and Wrong} 15-49 (1977) (arguing there are no objective values); HILARY PUTNAM, \textit{Reason, Truth and History}, at x-xii (1981); RICHARD RORTY, \textit{Philosophy and the Mirror of Nature} (2d prtg. 1980).
social theorists, including the ones discussed above. It is most obviously consistent with Giddens; his notion of plastic sexuality describes the separation of sexual intercourse from reproduction in essentially the same manner as the morality of self-fulfillment. While Giddens emphasizes technology as a causal factor in effecting this separation, he clearly recognizes that technological developments are accompanied by related social changes. Giddens's discussion of the greater possibilities for intimacy that plastic sexuality produces is also clearly consistent with the morality of self-fulfillment. Part of having a fulfilled life—a very large part, in most modern people's view—is having a truly intimate relationship, which means a relationship where the participants communicate and share their essential and private selves with one another. According to the morality of self-fulfillment, a good sex life is enjoyable and fulfilling in itself, and its only higher purpose is to contribute to the even more fulfilling experience of a truly intimate relationship.

Foucault's more negative assessment of modern sexuality is equally consistent with the account of moral change. The therapeutic attitude toward sex that Foucault regards as central to the modern experience can be readily regarded as one part of the more general therapeutic attitude generated by Freud's view of human beings, a view that is central to the morality of self-fulfillment. Foucault's connection between sex and power, although somewhat ambiguous, suggests that sex in modern society becomes an essential element of relations among people, and between citizens and government. A morality that focuses on individual self-

83. See supra Part I.B.
84. See GIDDENS, supra note 39, at 26-28.
86. 1 FOUCAULT, supra note 33, at 92-114. He describes modern sexuality as:
   an especially dense transfer point for relations of power: between men and women, young people and old people, parents and offspring, teachers and students, priests and laity, an administration and a population. Sexuality is not the most intractable element in power relations, but rather one of those endowed with the greatest instrumentality: useful for the greatest number of maneuvers and capable of serving as a point of support, as a linchpin, for the most varied strategies.

1 id. at 103.
realization is, therefore, one that must embrace sexuality rather than confine it and instrumentalize it, as the previous morality had done. Because people want to fulfill themselves, and because sex, as an essential element in many relationships, is seen as central to such self-fulfillment, it becomes a mechanism of control, something that reinforces the power network by which society is governed, rather than a potentially anarchic or disruptive force that must be suppressed.  

Accordingly, from a position within the modern morality of self-fulfillment, Foucault is more critical of that morality than Giddens because he does not believe that modern people will be able to achieve their own objectives. But Foucault agrees with Giddens that a new, more accepting attitude toward sexuality has become central to people's sense of their position in the world, and this claim is essentially the same as the one advanced by the idea of moral transformation.

Foucault's emphasis on social control provides a link between the idea of moral transformation and Elias's theory of the civilizing process. A theory that views the enjoyment of sex for its own sake as characteristic of modernity might appear, at first, to conflict with Elias's observation that the violent and visceral aspects of life have been increasingly controlled and privatized as Western society develops. But the engine that drives the civilizing process is the increasing specialization of society and the consequent need for higher levels of internal self-control that will enable people to coordinate their actions in this complex setting. The crucial question, therefore, is not whether sex is openly discussed, or whether sexual practices are relatively less restrained, but whether

87. Foucault thus rejects Reich's notion that sexuality can be a source of liberation. See Reich, The Sexual Revolution, supra note 45. His observations on this point are astute. The fact that so many things were able to change in the sexual behavior of Western societies without any of the promises or political conditions predicted by Reich being realized is sufficient proof that this whole sexual "revolution," this whole "antirepressive" struggle, represented nothing more, but nothing less—and its importance is undeniable—than a tactical shift and reversal in the great deployment of sexuality.

1 Foucault, supra note 33, at 131.

88. See supra notes 29-30 and accompanying text.

89. Interestingly, Giddens makes the same point in a different work. See Anthony Giddens, The Consequences of Modernity (1990).
people's sexual impulses are expressed in a manner consistent with the levels of internal self-control that are required by modern society's high demand for coordinated action.

At this point, the morality of self-fulfillment can be invoked as a means of defending Elias's illuminating theory from the disconfirming fact that expressions and descriptions of sex have become more public and more explicit in the last few decades. Because sexuality fits comfortably within the morality of self-fulfillment, and is not viewed as a dangerous force that must be disciplined by higher purposes, it no longer poses a threat to self-control and social coordination. Specifically, the morality of self-fulfillment developed in the context of an industrialized, technological Western society, and, not surprisingly, is consonant with that society. It takes hold among a population that has become highly skilled and disciplined, and for whom the habits of living in a complex, specialized society have become ingrained. The potential grimness of this historically high level of regimentation is relieved by the social mobility of modern society, the enormous range of opportunities it makes available, and the material benefits that it confers, such as copious food, high quality shelter, substantial vacation time, and a range of consumer products that are beyond what earlier societies could conceive, even as necromancy. The morality of self-fulfillment enables and encourages people to take advantage of these countervailing features, all of which exist within the context of the discipline and regimentation that modern society demands. This morality is thus analogous to the social welfare state, which provides material benefits in exchange for the demanding conditions of industrial production, thereby forestalling social revolution.

Giddens and Foucault reach essentially the same conclusion through their own distinctive visions of society. Giddens observes that the increased intimacy that plastic sexuality facilitates serves as a means of personal, but not political emancipation.  

90. Giddens charges Elias with an analytic error he calls "homological compression," that is, imagining "that there is a homology between the stages of social evolution and the development of the individual personality." Anthony Giddens, The Constitution of Society 239 (1984). But the connection that Elias asserts between society and individual personality is causal, not analogical, and he is generally careful to restrict that analysis to
regards the increased emphasis on sexuality as a means of social
control in itself, an emanation of the power grid that binds the
individual to modern society. Both argue, in effect, that modern
people can become more sexually explicit and permissive without
becoming less disciplined or, in Elias's terms, less civilized. Thus,
the advent of a new morality has altered the relationship between
sexuality and disorder. When morality no longer requires people to
direct their actions toward a higher purpose, but rather encourages
them to fulfill their own purposes and aid others in fulfilling theirs,
the tension between sex and discipline is dissipated. In the most
literal terms, this means that a person with an active or lurid sex
life is just as capable as anyone else of being a conscientious and
effective worker; in more general terms, it means that sexual
activity, now valued as a source of pleasure, adventure, or intimacy,
is entirely consistent with a vision of individual self-fulfillment that
also includes success in a career.

II. SEX AND POLITICS

A. Morality and Sex

Social transformations, of course, never take place all at once;
they invariably occur over extended periods of time, at different
rates among different subsets of the population, and with innume-
rable crosscurrents, hesitations, and temporary retrenchments. Like
modernity in general, the advent of self-fulfillment morality has
been subject to all these variations. It seems to have been enthusi-
astically embraced among those portions of the population where
modernity has taken hold most fully—educated urbanites such as
professionals, entertainers, academics, and the like. It has spread
to urban populations generally, and to suburbs, college towns, and
other localities allied to urban centers. It seems weakest among
more traditional populations, often rural, sometimes less educated,
and often in more localized occupations, that is, occupations that

91 Again, this contests Reich's view that sexuality can serve as a source of social
revolution. See Reich, THE SEXUAL REVOLUTION, supra note 45.
are not as connected to a nationwide network of information or associations.

Another important variable is religion. The morality of higher purposes is explicitly Christian. Its attitude toward human desire is derived from the Christian doctrine of original sin, and its sense of higher purpose is inspired by the Christian promise of salvation. It arose and developed at the time when Christianity was the universal religion in Europe, and when religion determined people's world view and suffused all aspects of their lives. The morality of self-fulfillment, in contrast, is the product of Europe's secularization. Its origins can be traced most definitively to the Enlightenment, which represented an explicit rejection of religion as an organizing principle for society, politics, and individual existence. Its development can be ascribed to the Freudian view of human beings, a view grounded in scientific discourse and explicitly secular in content. Thus, one can expect that religious people, and in the Western context, believing Christians, would adhere to the morality of higher purposes, while more secular people, for whom Christianity is less important, would embrace the emerging morality of self-fulfillment.

The moral values debate is a direct reflection of this uneven transition from one morality to another. Those segments of the population that continue to accept the morality of higher purposes will naturally oppose gay marriage and abortion. Gay marriage is a union between two people explicitly endorsing a sexual relationship that cannot possibly serve the higher purpose of reproducing the human species. Abortion is a specific reversal of sexual intercourse's only valid purpose; it declares, in virtually explicit terms, that the woman wanted to engage in sex but did not want to reproduce, or that, having originally wanted to reproduce, is now rejecting that legitimizing purpose. The reason people who assert

93. See supra notes 73-78 and accompanying text.
94. In theory, the same argument would lead to the disapproval of marriage between a man and a woman when one of the partners is known to be sterile, when they have been counseled not to have children of their own for genetic reasons, or when they are past the age of reproduction. The fact that such prohibitions are never even suggested indicates that we are dealing with cultural imagery, not reason-based argument.
that abortion is the murder of a human being are often willing to
countenance abortion when the pregnancy results from a rape is
that a woman who was raped, unlike other women who seek
abortions, did not choose to engage in sex unrelated to the higher
purpose of reproduction.

Views about other sex-related issues spring from similar sources.
People committed to the morality of higher purposes want sex
education in public schools to limit the discussion of birth control
techniques to abstinence. Their claim that abstinence is the only
totally reliable technique is clearly a verbal facade for their real
motivation. Abstinence is not a technique at all, but a result, like
preventing ovulation. Just as the technique that prevents ovulation
is taking birth control pills, the technique that produces abstinence
is the use of willpower, and willpower, as several thousand years of
human history suggest, is quite far from being totally reliable. The
real reason for abstinence-only sex education is that its proponents
believe that sex is only moral for the higher purpose of reproduc-
tion; they do not want high school students having sex at all,
bigame by universal agreement, too young to begin

The same moral system controls attitudes toward various
pharmaceutical products such as Plan B. Plan B, or "the morning-
after pill," is a high dose contraceptive, administered within
seventy-two hours of intercourse, that prevents implantation of the
fertilized egg in the woman's uterus. Viewing Plan B as an
abortion-inducing, antiabortion groups have tried to convince the FDA
to withhold approval of the drug for general use on the ground that
it will increase risky sexual behavior by women. This seems like
a rather transparent attempt to hide the real reason for their

95. See Gary J. Simson & Erika A. Sussman, Keeping the Sex in Sex Education: The First
Amendment's Religion Clauses and the Sex Education Debate, 9 S. CAL. REV. L. & WOMEN'S
STUD. 265, 284-91 (2000).
96. See id.
1997). Plan B is the brand name for the particular morning-after pill manufactured by Barr
Pharmaceuticals, the company that applied to the Food and Drug Administration for
approval. Other morning-after pills include Preven and Levonelle.
98. See Marc Kaufman, Morning-After Pill Study Contradicts Claim by Foes: Easy Access
opposition behind a health-related argument, and one that is vulnerable to empirical refutation. 99 The interesting question is why anti-abortion groups have decided to oppose the morning-after pill in the first place. Unlike RU-486, 100 Plan B does not cause the destruction of a developing embryo, but prevents a fertilized egg from becoming an embryo in the first place. 101 It seems difficult to apply all the emotive appeals that motivate the antiabortion movement, such as the claim that abortion is the murder of a human being, or that a human with tiny little hands and feet has been destroyed, to a single cell that has not begun developing. Moreover, it is quite possible that extensive use of Plan B has further lessened the political clout of the antiabortion movement, which commands only a minority of the population and has achieved only limited political success in the decades since Roe v. Wade. 102 But for opponents of abortion, Plan B is just as bad as RU-486 or surgical abortion because it represents the same violation of the morality of higher purposes; it facilitates the separation of sex from reproduction and thus encourages sex for its own sake.

In contrast, members of society who have embraced the newer morality of self-fulfillment naturally regard gay marriage and abortion as not only morally acceptable, but as individual decisions that should be positively endorsed. Because a rewarding sex life is an important element of personal self-fulfillment, the only constraint on sexual activity is that it should not interfere with the self-fulfillment of others. Gays should have the same opportunities for sexual expression as other people; the mutuality of marriage, and its connection in most people's lives to deeper and more fulfilling levels of intimacy than mere sexual activity, makes it a particularly favored opportunity. 103 Abortion prevents the unwanted

99. See id. (summarizing a study by the Center for Reproductive Health Research and Policy at the University of California at San Francisco).
100. RU-486 is the brand name for mifepristone, which was initially manufactured by the French pharmaceutical company Roussel-Uclaf. It causes the shedding of the uterine wall, thereby expelling a fertilized egg. See Wilks, supra note 97, at 159-61.
101. Id. at 154-55.
103. This is not to say that the morality of self-fulfillment disapproves of promiscuity,
consequences of one's sex life, a potentially or actually fulfilling experience, from interfering with one's future self-fulfillment. In addition, it prevents the creation of an unwanted child, whose own possibilities for self-fulfillment would be seriously endangered by its status. Just as the hostility to sex and abortion motivates proponents of the morality of higher purposes to interpret even the destruction of a fertilized egg as akin to killing a child, the opposing attitude motivates proponents of the morality of self-fulfillment to interpret even mid-pregnancy abortions as the termination of a not-yet-human potentiality. Positive attitudes toward contraceptive and abortifacient drugs follow naturally from this perspective; the use of a drug that poses genuine health dangers must be medically supervised, so that people will not cause themselves discomfort or permanent injury that impairs their later life, but this is the only basis for such supervision.

With respect to sex education, the morality of self-fulfillment suggests that teenagers should be provided with full information about the techniques of contraception. The damage to their own possibilities for self-fulfillment from having an unwanted child at such an early age are so serious that they overcome any disadvantage that might result from exposing them to this information. The impaired possibilities for any child born under such circumstances are equally serious considerations. Precisely what this morality suggests with respect to early teenage sex 104 itself does not seem to be settled at the present time. It is clear, however, that if the morality of self-fulfillment counsels against such sexual activity, it will not be on the ground that it is immoral, but because it can be an upsetting experience, and because it may impair the person's ability to have a fully rewarding sex life in the future. These are important concerns, but they clearly do not outweigh the risk to self-fulfillment that would result from having an unwanted child at an early age.

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104. That is, sex before the age of eighteen or graduation from high school.
B. Morality and Politics

Lakoff notes that political views come in clusters that can be explained by conceptual orientations, rather than by logical connections. The orientations that he proposes involve styles of child rearing—the Strict Father versus the Nurturant Parent. One theme that seems particularly notable in our current political environment, but that is not fully captured by Lakoff's otherwise illuminating explanation, is sex and sex-related issues. While these issues seem more closely related to each other, the relationships are once again not dictated by logic. There is no logical reason, for example, why an opponent of abortion cannot be a strong supporter of gay marriage, because one thing a gay marriage cannot lead to is an unwanted pregnancy. Likewise, there is no logical reason why those favoring abortion rights should also favor rights for gays, and there is certainly no logical reason why opponents of abortion should be opposed to providing contraceptive information to teenagers. As suggested above, the linkages among these views are forged by divergent conceptions of morality, conceptions which are closely linked to massive changes in Western society during the last several centuries.

The phenomenon that generates the particular texture of the conflict between these two moralities is that the morality of higher purposes, once dominant, is rapidly eroding, and the morality of self-fulfillment is replacing it. This is apparent from the historical forces that are aligned with these moralities. The morality of higher purposes was generated by the Christian religion and the tradition-oriented culture that supported it. The morality of self-fulfillment is associated with the forces that have undermined that culture during the past two centuries and replaced it with a new one—rationalization, secularization, industrialization, urbanization, and the development of social science and psychology. These trends were already dominant among intellectual elites by the end of the eighteenth century. Progress among other segments of society has

105. See supra Part I.A.
106. See supra Part I.A.
107. See 2 GAY, supra note 92, at 555-68; see discussion infra notes 155-59.
been much slower, and did not become truly widespread until the twentieth century. Even now, as suggested above, the pattern is uneven, but the general trend is unmistakable.

Developments during the past several decades involving the specific subject of sex reflect this general trend in a particularly dramatic manner. As recently as the 1950s, homosexuality was regarded as a disgrace that few people dared confess. It was a criminal offense in every state and was actually enforced, if not by searches of people's bedrooms, then certainly by police raids against gay bars and similar harassment. Now, it is a publicly recognized status, proudly acknowledged by many, that is protected by antidiscrimination laws. During the same period of time, birth control changed from a secretive practice, illegal in several states, to an open, widely discussed option for both married and unmarried people. Abortion, mostly illegal in every state before 1970, is now generally available, and openly performed in general hospitals and special clinics in most urban areas. Drugs enhancing male sexual performance are not only widely prescribed, but are now covered by Medicare and are advertised on television.

Constitutional decisions have, of course, played an important role in this process, although not necessarily a crucial one. Protection for the use of birth control for married couples came first, followed by an expansion of that protection to everyone, regardless of marital status. Abortion became a constitutional right in 1973, and the Supreme Court has maintained this position;


110. Devins & Fisher, supra note 102, at 143-44; Eskridge, supra note 109, at 98-138.


114. Roe v. Wade, 410 U.S. 113 (1973). Rosenberg argues that Roe was not particularly influential because the states were moving toward legalization of abortion on their own. Rosenberg, supra note 111, at 268-65. His conclusion seems a bit overstated, but the evidence he marshals indicates the decision was just one part of a general trend.
SEX, POLITICS, AND MORALITY

Despite enormous pressure, the Court has been willing only to nibble away at its edges.115 With respect to homosexuality, the Court originally allied itself with the opposition,116 but reversed that stance in Lawrence v. Texas,117 declaring criminal laws against private, consensual homosexual conduct unconstitutional. Massachusetts's highest court has declared that restricting the right to marry on the basis of gender violates the state constitution.118

It seems apparent, then, that the religiously-based morality of higher purposes is rapidly giving way, both in terms of social practices and legal rules, to the successor morality of self-fulfillment. For those who remain committed to the earlier morality, it is certainly not a comfortable or welcome process. This would be true even if the change involved were stylistic or aesthetic; for example, fans of Broadway music were unhappy about the advent of rock music, and fans of rock music were unhappy about heavy metal. When the change involves morality, however, it is much more disconcerting because the new mentality will strike proponents of its predecessor as not only unappealing, but positively immoral. The more rapidly their viewpoint seems to be losing ground, the more assiduously they will support it.119 The result is a more uneven process than the study of conceptual trends would predict, a process where change in one direction is followed by retrenchment or partial reversal before a new wave of change takes hold.

115. For cases allowing abortion restrictions, see Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (finding that publicly funded medical facilities are not required to provide abortion counseling); Harris v. McRae, 448 U.S. 297 (1980) (holding that Congress may limit Medicaid grants to explicitly exclude abortion expenses); and Maher v. Roe, 432 U.S. 464 (1977) (ruling that a state need not provide Medicaid funds for abortions). Roe was definitively reaffirmed, albeit by a narrow 5-4 margin, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
119. This could be interpreted as cognitive dissonance. See LEON FESTINGER ET AL., WHEN PROPHECY FAILS (Harper & Row 1964) (1956) (chronicling several religious groups who, when their predictions of world destruction were disproved, increased their proselytizing efforts to maintain their beliefs). The reaction is not an effort to deny disproof, but a more rational attempt to maintain a belief system that is losing its former hold on people.
This dynamic is largely responsible for the strength of the social movement that is variously described as the Christian right, the new Christian right, conservative Christianity, or moral values.\(^{120}\) The alarmist character of this movement, the sense of impending social doom, is apparent in its public statements and associated publications.\(^{121}\) In the manner characteristic of social movements, these intense feelings served as a basis by which large numbers of people were mobilized to contribute, volunteer, and vote in support of their beliefs, that is, in support of the morality of higher purposes and in opposition to the morality of self-fulfillment.\(^{122}\) Either of the two dominant explanatory theories for these movements, the American or resource mobilization approach, and the Continental or identity-oriented approach, readily explain this process.\(^{123}\) According to the resource mobilization approach, social movements are generated by leaders using a variety of instrumentally rational strategies such as fundraising, dramatic events, and media

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\(^{121}\) See, e.g., JAMES C. DOBSON, STRAIGHT TALK (1991) (calling for a return to traditional sex roles); JAMES C. DOBSON & GARY L. BAUER, CHILDREN AT RISK: THE BATTLE FOR THE HEARTS AND MINDS OF OUR KIDS (1990) (describing the pressures confronting modern teens); BRAD HAYTON, FOCUS ON THE FAMILY, THE HOMOSEXUAL AGENDA: WHAT YOU CAN DO 1 (undated) ("Homosexuals are attempting to force their lifestyle and its consequences upon society.").


access. According to the identity approach, social movements spring from people’s changing self-conceptions, from trends within civil society that generate new opinions and beliefs. Whichever approach one adopts, and it is not necessary to choose between them, the new Christian right is explicable in these terms, and, in fact, is clearly one of the most important social movements to have developed in the past two decades.

Whether the new Christian right is shaped by policy entrepreneurs, or whether it is primarily a product of identity politics that provided an opportunity for such entrepreneurs, it is equally clear that the leaders of the Christian right have chosen to affiliate themselves with the Republican Party, and that leaders of the Republican Party have assiduously sought the support of the new Christian right. The reasons for this connection are a matter of American political history that need not concern us here. What is important, for present purposes, is simply the fact of this connection between the social movement in question and one of the two major parties. The morality of self-fulfillment has also generated a number of social movements, such as the women’s movement or


126. Out of the exit poll respondents who chose “moral values” as the most important election issue, eighty percent voted for Republican candidate President Bush. Only eighteen percent voted for Democratic challenger Senator Kerry. See 2004 Presidential Election Exit Polls, supra note 1.

127. See Sara Evans, Personal Politics: The Roots of Women’s Liberation in the
the gay rights movement, and these, for reasons equally beyond the scope of this discussion, have become affiliated with the other major political party.

These affiliations between the two groups of social movements representing rival moral systems and the two dominant political parties are responsible for America's current political topography. If one looks at a state-by-state political map of the United States, with the states that voted Republican in the 2004 election represented in the now-familiar, post-Cold War shade of red, and the Democratic voting states in blue, what one sees is a vast expanse of red in the South and center of the country, and small, but more densely populated concentrations of blue in the Northeast, Upper Midwest, and West Coast. This pattern corresponds, albeit roughly, to the distribution of the two moralities. The new morality of self-fulfillment has taken hold most fully in areas with high levels of urbanization, high levels of education, and concentrations of professional elites with nationwide and international connections. These are the blue regions of the country, while the older morality of higher purposes still prevails in more rural, less educated, and more insulated areas. There are anomalies, however; some very red states, such as Texas and Georgia, have very large cities, while some very blue states, such as Illinois and California, have extensive rural areas. The correspondence becomes more precise, and more striking, if one moves down one level of detail to a county-by-county voting map. There one sees that the pattern for the nation as a whole is reiterated within virtually every state, with


large expanses of red in rural areas, and small concentrations of blue corresponding to the urban ones.\textsuperscript{130}

To return to the question that began this Essay, moral values loomed so large in the election polls because the issue represents the mobilized resentment of a portion of the population which is finding its moral system under attack. At first blush, the term moral values seems like a code word for sex or sex-related issues, particularly because the opposing side can obviously claim moral values of its own, such as toleration, equality, and freedom. But these sex-related issues are really emblems of a more comprehensive morality, the morality of higher purposes. This morality, which dominated society in premodern times, is steadily being eroded and replaced by a new morality, the morality of self-fulfillment. The more traditional members of society, those furthest from the epicenters of this cataclysmic social change, are committed to the earlier morality, but being so committed, they cannot perceive that the beliefs that are replacing it are moral as well—not the belief in toleration, equality, and freedom, which they would agree with and claim on their own behalf—but belief in the positive value of sexuality as an element of the individual’s self-fulfillment. This conflict is naturally translated in politics, as each major party aligns itself with the opposing sides of this incendiary and divisive issue. In its specifically sexual form, it has been salient for at least twenty or thirty years, and is likely to continue as a major part of our political scene for a good many years to come. The trend, however, is sustained and unmistakable; it has been in process for three centuries or more. When it has finally run its course, our society will have a new consensus morality—the morality of self-fulfillment.

\textsuperscript{130} See 2004 Presidential Election Results by County, USA TODAY, http://www.usatoday.com/news/politicselections/vote2004/countymap.htm (last visited Sept. 19, 2005). There are, of course, exceptions. Some of these result from racial divisions; rural counties that are predominantly African American, such as those in the lower Mississippi Valley, or predominantly Hispanic, such as those in south Texas and New Mexico, voted Democratic. In Vermont, Massachusetts, and Maine, even rural counties voted Democratic; in Nebraska, Oklahoma, and Utah, even urban counties went Republican. See id.
C. Law

Thus far, there are no judgments in this Essay, only descriptions. While a definitive trend has been identified, no claim has been asserted that this trend represents progress, improvement, or some sort of social evolution. To do so, at least without adducing any further arguments, would be a fallacy—the notorious "whig interpretation of history."\textsuperscript{131} In fact, the argument in this Essay has been quite the opposite. What renders changes in morality so disconcerting, so vertiginous, is that they place our framework for making judgments in question; by problematizing morality itself, they leave us without any solid ground from which we can exert moral leverage on matters of moral controversy.

In the context of the American political system, however, as opposed to sociology, ethics, or social theory, definitive judgments can be made. Our system gives us a fixed set of principles from which the political consequences of conflicting moralities can be judged. Those principles, established by the Constitution, are quite broad, and open to various interpretations. In this case, however, the interpretation is reasonably clear, although it will naturally be resisted by those whose position it opposes. Enforcement of the morality of higher purposes through law is unconstitutional. It violates the Establishment Clause of the First Amendment, particularly when that clause is read in conjunction with the protection of liberty that is found in the Fifth Amendment, the Fourteenth Amendment, and the document as an entirety.

1. The Establishment Clause

The meaning of the Establishment Clause, like that of so many of the Constitution's important provisions, is highly controversial, and subject to a number of competing approaches. These can be described, moving from most to least restrictive on governmental action, as strict separation, neutrality, and accommodation.\textsuperscript{132} Strict

\textsuperscript{131} See H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1965) (observing that historians tend to judge the past by the standards of modern morality).

\textsuperscript{132} See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.2.1 (1997). John Witte suggests that recent cases display several additional principles, which he
separation is the principle expressed by *Everson v. Board of Education*, the Supreme Court's first decision that applied the Establishment Clause to the states. It sees the First Amendment as having erected a "high and impregnable" wall between church and state and as creating an essentially secular government. Strict separation's stringency has led to its decline in recent years and to its displacement by the principle of neutrality. Neutrality forbids government from favoring one religion over another. It is distinguishable from separationism, at least in theory, because it also forbids the government from favoring secularism over religion. It is often operationalized through the *Lemon* test, which provides that a statute is constitutional only if it has a secular purpose, neither advances nor inhibits religion as its primary effect, and does not foster excessive government entanglement with religion. The *Lemon* test itself is far from unambiguous. But it has never describes as endorsement, coercion, and equal treatment. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 196-201 (2d ed. 2005).

133. 330 U.S. 1 (1947).


been overruled and probably remains the leading interpretation of the Establishment Clause.\textsuperscript{141}

The third principle is often described as accommodation and reflects the Court's more sympathetic treatment of religion in recent years.\textsuperscript{142} This approach allows government to acknowledge the religious character of the American people, and only invalidates laws that coerce religious activity. It has been advanced in several spirited dissents\textsuperscript{143} and by the plurality opinion in \textit{Mitchell v. Helms},\textsuperscript{144} but it does not seem to have supplanted the neutrality test, and it has been extensively criticized by commentators.\textsuperscript{145} Some of the recent cases decided under the neutrality principle, however, have an accommodationist flavor.\textsuperscript{146}

Justice O'Connor, often considered a decisive vote on the Court, advanced still another approach, generally known as the endorsement criterion).


\textsuperscript{144} 530 U.S. 793, 820-25 (2000) (allowing federal aid to private religious schools in the form of library and media materials and computer equipment).


ment test. In a series of concurring opinions,147 she proposed that state action violates the Establishment Clause if a reasonable or objective observer would perceive that action as endorsing a particular religion.148 This principle has a somewhat accommodationist flavor, since it would allow public support for religious activity as long as that support fell short of endorsement. Thus, allowing religious groups, among others, to use public facilities would be deemed constitutional, but a number of activities that are now regarded as permissible might not be, such as financial aid to religious institutions for secular purposes or exemption of religious groups from a generally applicable law. Critics have also noted that it holds otherwise acceptable state action subject to the aggrieved sensibilities of religious minorities.149 Given Justice O'Connor's retirement, the ultimate fate of this approach is uncertain, at best.

In the midst of this doctrinal farrago,150 it is important to keep the central and agreed upon purpose of the Establishment Clause in mind. After Martin Luther posted his Ninety-five Theses on the door of All Saints Church in Wittenberg in 1517,151 thereby initiating the Protestant Reformation, Europe experienced two centuries of almost continuous and often devastating religious war.152 By the eighteenth century, thoughtful people throughout...

148. See, e.g., Allegheny, 492 U.S. at 635.
149. See Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses 27-34 (1995); Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 Mich. L. Rev. 266 (1987). According to Choper, even allowing a religious group to be one of many groups using a public facility might be deemed endorsement, because some groups, such as those supporting terrorism or endorsing race hatred, would be excluded on the ground that the public authority disapproved of them. See Choper, supra, at 32-34.
150. In the final chapter of his book discussing the doctrinal complexities of the First Amendment, Professor Daniel Farber states: “From a lawyer's point of view, the Establishment Clause is the most frustrating part of First Amendment Law. The cases are an impossible tangle of divergent doctrines and seemingly conflicting results.” Daniel Farber, The First Amendment 263 (1998).
151. See Roland H. Bainton, Here I Stand: A Life of Martin Luther 79 (1960); Franz Laü & Ernst Bizer, A History of the Reformation in Germany to 1555, at 17 (Brian A. Hardy trans., 1969); John M. Todd, Luther: A Life 102-04 (1982).
152. See G.R. Elton, Reformation Europe 1517-1559 (Blackwell Publishers 2d ed. 1999)
Europe had begun to recognize that such conflict was inevitable as long as governments attempted to impose one or another religion on their increasingly diverse populations. This insight became a constitutive tenet of the intellectual movement known as the Enlightenment. The Framers of the U.S. Constitution were the heirs of the Enlightenment, at the very least, and were often identified, both by themselves and by contemporary Europeans, as full-fledged members. Given the freedom to create a political regime, they seized the opportunity, which was denied to their tradition-bound European mentors, of making what they conceived as a clean break between religion and government.

Of course, their conception could not be fully realized. In the social world, breaks are never clean. No matter how clearly stated a distinction is in theory, it will become complex and tangled in practice. But the underlying principle can serve as an interpretive guide, however obscured it may become in the dense thicket of relationships between a comprehensive regulatory state and the personal belief systems of its diverse and numerous inhabitants. Whatever the rule should be regarding subtle issues such as the release of children from public school to attend religious institutions, the use of public facilities by groups that include those with varying levels of religious affiliation, or the public support of secular eleemosynary activities by religious organizations, it seems clear that the state should not compel people to follow the dictates of any given religion or impose burdens on them for failing to do so. It was state action of this sort that led to the religious wars which convulsed Europe, and it was the horror of these wars that the


153. See, e.g., JEAN BODIN, COLLOQUIUM OF THE SEVEN ABOUT SECRETS OF THE SUBLIME (Marion Leathers Daniels Kunz trans., 1975) (stressing that all religions share an essential core more important than their variations); JOHN LOCKE, A LETTER CONCERNING TOLERATION (Patrick Romanell ed., William Poppel trans., Bobbs-Merrill 2d ed. 1955) (1689) (arguing that forcing religion on another person is inherently un-Christian and endangers the soul of both the public official and his subject).

Framers were so anxious to avoid, and that continues to be a source of incalculable misery in our modern world.

Thus, the Establishment Clause is properly read as containing a principle that disfavors coercive or burdensome action against individuals. This principle does not appear in any of the current tests for Establishment Clause violations, and may seem, at the outset, more applicable to the Free Exercise Clause. The reason is that it resolves relatively few Establishment Clause cases. It may be a violation of the Establishment Clause to display a cross or a nativity scene on public property, but the display is entirely noncoercive. Similarly, financial support for religious schools may violate the Establishment Clause, but even a diversion of some state funds for improper purposes is not really much of an intrusion on a person's life. Robert Nozick argues that all state taxation is a form of forced labor, so that every additional dollar collected by the government represents a further violation of the people's liberty, but only such an extreme position would equate government expenditure of already available tax funds with coercion.

While coercion and burden may not be a useful principle for most Establishment Clause cases, it does appear to be an underlying consideration that, if present, should add to the stringency with

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which the existing tests are applied. Thus, where coercive govern-
mental action is involved, the wall of separation should be higher,
neutrality more strict, and accommodation less extensive. In terms
of the Lemon test for the neutrality principle, coercive or burden-
some action would mean that courts should demand a particularly
strong showing that the state action in question does not advance
religion, and that it possesses a clear and convincing secular
purpose.

2. The Morality of Higher Purposes

It is difficult to imagine any state action outside criminal law
that is more coercive than compelling a woman to go through
pregnancy and childbirth against her wishes. Prohibitions on birth
control methods and gay marriage, while not as coercive as
restrictions on abortion, are coercive nonetheless, because they
prevent individuals from engaging in a desired course of action. The
contrast, again, is with those rather common establishment cases
where the government has granted funding, or made facilities
available, to a religious group. One way to express this distinction
is that in these latter cases, the government is often acting in its
proprietary capacity. Capitol Square Review and Advisory Board v.
Pinette\textsuperscript{158} involved a private display on the statehouse plaza; Good
News Club v. Milford Central School\textsuperscript{159} involved the availability of
a public school facility for use by private groups. In other words, the
government was allowing religious uses of its own property—its
land, its building—which is generally as noncoercive as a govern-
ment can be. In contrast, when religiously based actions occur
during the school day, and the students are required to attend, the
Establishment Clause prohibition is interpreted more stringently.\textsuperscript{160}

Coercion, of course, is a familiar and essential tool of governance.
According to Kelsen, it is the defining characteristic of public law.\textsuperscript{161}

\textsuperscript{158} 515 U.S. 753 (1995) (allowing a privately funded religious display).
\textsuperscript{159} 533 U.S. 98 (2001) (prohibiting exclusion of religious groups).
\textsuperscript{160} See, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a statute requiring
that creationism be taught whenever evolution is taught); Wallace v. Jaffree, 472 U.S. 38
(1985) (striking down a statute requiring a moment of silence for prayer or meditation).
\textsuperscript{161} HANS KELSEN, GENERAL THEORY OF LAW AND STATE 15-20 (Anders Wedberg trans.,
1945); HANS KELSEN, PURE THEORY OF LAW 33 (Max Knight trans., 1967).
Moreover, many coercive laws that are universally recognized as constitutionally unimpeachable, such as laws against murder or theft, have at least partially religious origins.\textsuperscript{162} But as the social history presented above suggests, laws against abortion, birth control, and gay marriage do not simply correspond to religion. Rather, they are religion itself. They are a direct embodiment of the morality of higher purposes that has constituted the prevailing interpretation of Christianity for the past millennium. They are distinctive to this interpretation, and, unlike laws against murder or theft, cannot be derived from other religions, or even other interpretations of the Christian religion. The compulsion these laws exercise is the compulsion to follow the dictates of a particular religion, and thus precisely the type of state compulsion that is forbidden by the Establishment Clause.

To be sure, even a law that coerces or burdens individuals and that is directly derived from a particular religion might survive constitutional scrutiny if it is justified by an independent secular purpose. What constitutes an independent secular purpose is less than obvious. In free exercise cases, the Court has held that the state interest or purpose must be compelling.\textsuperscript{163} This compelling interest level of scrutiny, however, which is generally regarded as creating an unattainable standard of justification,\textsuperscript{164} depends on the existence of an underlying constitutional right. Whether there is a constitutional right to abortion or birth control or gay marriage is the matter under consideration, and it is not being asserted on independent grounds. But it is not necessary to apply a compelling interest test in order to invalidate the laws in question. They have no secular justification at all; they are simply enactments of the

\textsuperscript{162} See, e.g., Exodus 20:2-17 (the Ten Commandments).

\textsuperscript{163} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); Employment Div. v. Smith, 494 U.S. 872, 883-86 (1990); Sherbert v. Verner, 374 U.S. 398, 403 (1963). Smith upheld a law criminalizing the use of peyote, a hallucinogenic substance, despite the fact that such use was part of a Native American religious ceremony, but the basis for the ruling was that the law was neutral. See Smith, 494 U.S. at 879. The decision has been the subject of extensive criticism, see, for example, Jesse H. Choper, The Rise and Decline of the Constitutional Protection of Religious Liberty, 70 Neb. L. Rev. 651, 670-80 (1991); Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 2-3.

morality of higher purposes. The post hoc secular justifications that have been offered for them are unconvincing as a general matter, and certainly too insubstantial to be credited when subjected to the more demanding standard that should be required of state action with a coercive or burdensome impact on individuals.

This lack of secular justification is most obvious in the case of gay marriage because there is no discernable social harm that such marriages produce. In fact, the only argument against gay marriage is that marriage has traditionally meant a union between a man and a woman, a true but unavailing assertion because the tradition in question is a religious one.\textsuperscript{165} It has seemed secular, that is, an aspect of Western society in general, because the countervailing morality of self-fulfillment developed gradually over the course of the past two centuries, and only began to displace its predecessor during the past several decades. While its rise to prominence is recent, it reflects trends that are deeply embedded in the historical experience of our society, and now reveal the morality of higher purposes as a particular and contested point of view.

It cannot be argued that prohibitions against gay marriage are designed to ensure the reproduction of the human species, which is the secular restatement of religiously derived morality. To begin with, that goal is entirely implausible in a world where our well-being is threatened by mushrooming human populations, and the threat to our survival as a species, or a nation, is widely recognized as arising from the pressure those populations place on the world's natural resources.\textsuperscript{166} Besides, if gay marriage is forbidden, people who want to marry members of their own sex are not likely to marry members of the opposite sex and have lots of children with them. They are more likely to remain with their chosen life partner,

\textsuperscript{165} As with many other traditions, this one is as much an invention as a depiction of actual social circumstances. \textit{See generally} WILLIAM N. ESKRIDGE, JR., \textit{THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT} 15-50 (1996) (discussing same-sex unions in non-Western and premodern and modern Western cultures). With respect to tradition generally, see STEPHANIE COONTZ, \textit{THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP} (1992); \textit{THE INVENTION OF TRADITION} (Eric Hobsbawm & Terence Ranger eds., 1983).

and either choose not to have children out of wedlock, which hardly aids in the procreation of the species, or to have the same number of children they would have had if they were allowed to marry. Most important, at least for present purposes, the argument is clearly an excuse. In the context of our society's historical experience, the preference for procreative sex is derived from Christian doctrine, and courts need not close their eyes to this apparent fact because the proponents of this doctrine are able to concoct a post hoc, secular-sounding argument for their beliefs.

The argument that most people are offended by gay marriage, and suffer harm when witnessing its public acceptance, is equally unavailing. An argument of this kind would essentially undermine any protection for human rights. The First Amendment permits speech that many people find offensive. The freedom that we are justly proud of is necessary to protect Mein Kampf, the Communist Manifesto, and the Protocols of the Elders of Zion, not Winnie-the-Pooh. Admittedly, bruised feelings are a cost of living in an open, free society, but it is an inevitable cost that we accept. It is well established that the sense of offense that racists feel about being compelled to share public facilities with people of color is not cognizable in law, and neither is the offense that religious people feel about being compelled to witness the behavior of people who disagree with their beliefs.

With respect to abortion, the argument that prohibition protects women's health was never plausible, and is even less so now, because a massive number of abortions have been performed in the Western world with a very high level of safety. Opponents of

   A desire to exclude blacks from the work force because of antipathy, a desire to preserve a certain type of social structure, or a desire to associate only with whites, obviously is a personal preference. But, at a minimum, a fair employment law prohibits indulgence of preferences through exclusion of blacks, because of their color, from the work force or from better jobs.
   Id. at 253.
169. William Cates, Jr. et al., Assessment of Surveillance and Vital Statistics Data for Monitoring Abortion Mortality, United States, 1972-1975, 108 AM. J. EPIDEMIOLOGY 200, 203 (1978) (estimating that there were only 161 abortion-related deaths between 1973 and 1975);
abortion assert that it is murder, and may be prohibited on that entirely secular ground. The difficulty with this argument is that abortion possesses none of the indicia of murder, as that term is generally used in our society. Murder involves the deliberate killing of a person in society, and its prohibition is based, in part, on the need to protect each member of society and to secure civil order in society as a whole. Abortion is not a threat to civil order; whatever is being terminated is entirely within the woman’s body, and has no greater impact on society, or its members, than any other elective surgical procedure. Thus, the assertion that abortion is murder turns entirely on the claim that a fetus or a zygote is a human being, and this claim is a religious one.\textsuperscript{7} According to Christian doctrine, or at least some interpretations of Christian doctrine, a fetus or zygote is a human being because the soul enters the body at the moment of conception.\textsuperscript{171} Other religions take a different view,\textsuperscript{172} and the emerging morality of self-fulfillment suggests the fetus or zygote lacks the essential features of a human being, which is a conscious creature with an independent existence.

The question of when a fertilized egg becomes a human being is an abstract question, with very little emotional traction of its own.\textsuperscript{173} There is nothing in the Bible that compels the conclusion

\begin{itemize}
\item Council on Scientific Affairs, \textit{Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women}, 268 JAMA 3231, 3231 (1992) ("Deaths from legal abortion declined fivefold between 1973 and 1985 (from 3.3 deaths to 0.4 deaths per 100,000 procedures).... Serious complications from legal abortion are rare."). There is equally little evidence for the claim that abortion leads to psychological injury. See Nada L. Stotland, \textit{The Myth of the Abortion Trauma Syndrome}, 268 JAMA 2078 (1992).
\item 172. See DANIEL C. MAGUIRE, \textit{SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS} 27 (2001) ("Women have a good track record when it comes to serving and preserving life. They should be trusted with these decisions. We find solid support for this sensible position in the major and indigenous religions of the world.").
\item 173. The Court came close to recognizing this in \textit{City of Akron v. Akron Center for Reproductive Health, Inc.}, 462 U.S. 416, 444 (1983), by declaring that "a State may not adopt
that the egg is a human being. The Jewish Bible is filled with hundreds of prohibitions, some of them so trivial that the only explanation for them is that they test obedience to God, yet it does not contain a single verse prohibiting or even addressing abortion. When the Christian Bible was being written, abortion was under active discussion, and the contemporaneous Jewish Apocrypha contain various condemnations of the practice, but neither Jesus nor any of his disciples or apostles make reference to the subject. Efforts to read such references into unrelated or ambiguous biblical phrases are often based on outright theological errors, and, in any event, cannot explain why such an important subject would be dealt with only by indirection. The premodern Catholic position, reflected in the works of both St. Augustine and St. Thomas Aquinas, was that the soul does not enter the body until several months into the pregnancy, which is why the church did not baptize

one theory of when life begins to justify its regulation of abortions.”


175. See GUDORF, supra note 55, at 57. One could speculate that the premodern church did not need to assert that life began at conception in order to maintain its position that sex should be linked to procreation because its dominant position allowed it to advance procreative-only sex in other ways, and because abortions were technologically difficult to perform.

176. One of the most commonly cited passages is: “Before you were born I consecrated you; I have appointed you a prophet to the nations.” Jeremiah 1:5 (New American Standard). Apart from the fact that the passage fails to specify how long before Jeremiah was born he was ordained (virtually no one would allow abortion of an eight-month-old fetus), relying on it as proof that Jeremiah became a human being whom God could know when he was in the womb is simply a theological mistake. God stands outside time; that is how God can be omniscient and yet human beings can have free will. Jeremiah did not need to have become a human being for God to know him, and know what he would become; God knew that before Jeremiah ever existed in any material form. And in fact, the first part of the passage states: “Before I formed you in the womb I knew you ....” Id.

Citation of another passage makes even less sense. Exodus 21:22 imposes a fine on a man who accidentally hits a pregnant woman during a brawl and causes her to miscarry. But obviously, a pregnant woman who wants a child and has lost the opportunity to give birth has been done a great wrong, regardless of whether the zygote or fetus that she is carrying is a child at that time. A doctor who carelessly renders a non-pregnant woman who wanted to have children in the future incapable of doing so has also committed an actionable wrong against her. In fact, the passage seems to view the fetus as a potential life, not an existing one, as it prescribes only a fine for causing the miscarriage, while it imposes criminal punishment, according to the lex talionis, for injuring the woman herself. See Exodus 21:23-25.
miscarriages. As suggested above, the issue that does have emotional traction is the conflict between the morality of higher purposes and the morality of self-fulfillment, and it is these overarching frameworks that determine people's position on the status of the fertilized egg. Those who follow the morality of higher purposes want to limit sex to procreation; this leads them to oppose abortion, which in turn generates their assertion that a fertilized egg is a human being. Those who follow the morality of self-fulfillment want to enjoy sex for its own sake, and do not want its unexpected consequences to impair the quality of a person's life. This generates the assertion that the zygote, and indeed the fetus, is not a human being until the later stages of pregnancy.

Abstinence-only sex education is a closer issue. This is a religious position, as suggested above, and as Gary Simson and Erika Sussman have argued convincingly at greater length, but it involves considerably less coercion than forcing a woman to have an unwanted child or prohibiting gay couples from marrying. Nonetheless, the Supreme Court has consistently maintained that prayer in public school, no matter how attenuated its religious content, violates the Establishment Clause because the students are a captive audience. Similar considerations led the Court to strike down a statute requiring that public schools teach creationism along with evolution. If the coercive nature of public school instruction is accepted, then invalidation of abstinence-only sex education follows from the argument advanced above. The preference for sexual abstinence is an integral component of the morality of higher purposes, and thus just as clearly a religious position as prayer or creationism.


178. Simson & Sussman, supra note 95, at 284-91.


In evaluating efforts to assert secular justifications for essentially religious positions, it is important to remember that religion inhabits the realm of social meaning. An abstract definition of religious practice is impossible, because actions that are associated with religion in one culture can be entirely secular in another. Unlike Judaism, Hinduism, and Islam, for example, Christianity attaches no religious significance to different types of food. The control of body and breath that is a central element in the Hindu religion is a mode of secular exercise in Western culture. Whether a particular state action constitutes the establishment of religion is thus a matter that must be determined by our common understandings. If New York State, which has been notably deferential to Orthodox Jews,\(^1\) were to pass a set of health laws that happened to correspond exactly to the kosher rules, everyone in our culture would recognize these laws as the establishment of religion, despite the purported connection with health. Similarly, the morality of higher purposes, whatever its character in other cultures, is clearly an embodiment of Christian belief, and efforts to find secular justifications for its tenets cannot obscure its essentially religious character. Judges owe legislatures a large measure of respect, but they are not required to adopt the cultural naivete of strangers, and they should not do so when constitutional principles are at stake.

**CONCLUSION**

The principle purpose of this Essay is descriptive; it attempts to understand why the cluster of attitudes currently described as moral values exercises such a hold on American voters. Why would people, when faced with so many controversial issues that directly affect their lives, such as the economy, social security, health care, and the war in Iraq, base their votes on their sense of disapproval that other people want to have abortions or marry partners of their same sex? The suggestion is that we are undergoing a transformation of morality, from the morality of higher purposes that charac-

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181. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (invalidating creation of a separate school district in a Satmar Hasidic community to deal with the special education needs of its parochial school students).
terized Western society from the Middle Ages until the advent of the modern era to a morality of self-fulfillment that is characteristic of that modern era. The change is disconcerting, and for those who are committed to the older morality, profoundly disturbing. Their votes are a reflection of their irritation.

Normative conclusions about this transformation of morality are difficult to formulate because the very nature of the event is to place our frameworks for making normative judgments in question. But in the area of constitutional law, a framework has been given to us, or rather, we have imposed one on ourselves. It is hardly definitive, and the problem of interpreting its words often requires us to import the same roiling, tergiversating norms that a framework is supposed to hold at bay. But any fair interpretation of the Constitution, and in particular the Establishment Clause of the First Amendment, would suggest that laws that implement the morality of higher purposes by coercing or burdening citizens should be struck down. This morality embodies the Christian religion, and it is religion, particularly the Christian religion, that the Framers wanted to separate from the business of governance. The emergence of a new and opposing morality throws the religious character of the prior morality into high relief, thereby clarifying the constitutional invalidity of laws enacting that morality.