RELIGION AND POLARIZATION: VARIOUS RELATIONS AND HOW TO CONTRIBUTE POSITIVELY RATHER THAN NEGATIVELY

by
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The theme of this Essay is that in our present culture, we need badly to understand and accept those who see things differently from ourselves, and to afford people some latitude not to directly violate their deepest convictions. For example, those with religious convictions that marriage should be between men and women need to see why those with gay sexual inclinations feel strongly they are entitled to equal treatment and the latter need not reject as deeply prejudicial all those whose religious convictions lead them to subscribe to the more limited, unwise, historical view about marriage. This understanding on both sides bears strongly on what exemptions, if any, should be granted from nondiscrimination requirements. A related major subject of the essay is exploration of the idea of public reasons, and the degree to which they can realistically and appropriately limit how far officials and citizens reach conclusions on political issues. Again, what is very important is that we be realistic about how people do reach their conclusions and not be intolerant of those who arrive at different positions.

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I. POLARIZATION IN OUTLOOKS AND ATTITUDES

In this Essay I focus on how political polarization can affect the attitudes toward, and treatment of, religious groups and their claims, and also how religious approaches themselves can contribute to, or moderate, polarization. In all this I believe that one overarching value is critical. We all need to be aware that others in our society, indeed any liberal democracy, will have perspectives that vary radically from our own. We need to respect those with divergent attitudes and to tolerate much behavior others find morally important, even when we believe they are misguided. Although particular religious views themselves may or may not embrace this outlook, it is strongly supported by this country's historical traditions, which have been substantially based on tolerant Christian understanding. Insofar as a person accepts such a perspective, or a similar one based on a different religion, he may see religious perspectives themselves as not only one source of regrettable polarization, but as constituting a genuine basis to moderate its divisiveness.

I want initially to clarify two different—but often related—senses of polarization. The simplest is that people have sharply different, conflicting views about what it is right to do. We can see this as being true about personal moral behavior as well as political outlooks. When the term is used about life in the United States now, people are generally referring to political divisions, which seem much sharper than they did over most recent decades. But when we think about key exemptions issues concerning abortion and same-sex marriage, it is easy to see that these divisions directly concern moral behavior and that they connect crucially to political controversies.

A rather different, though often related, form of polarization concerns respective attitudes. People can feel that there are other human beings they really cannot accept. They then experience a kind of individual or group opposition that goes beyond disagreement over issues and leads to some variety of personal rejection. The concern about our present society definitely reaches the sense that these attitudes have become more common.

Before turning to the place of religion, I want to say a brief word about modern perceptions that relate to this topic as well as many others. In respect to polarization, the comparison is with fairly recent times when our political parties cooperated and saw common objectives. But if we reflect on our country's history, we can recognize the critical and finally violent division over slavery and the continuing conflict about the rights of African Americans, sharp divergences over how far our governments should involve themselves in economic matters, and whether our gcountry's involvement in Vietnam and some other conflicts has been warranted. To take an analogous concern, the danger that terrorism poses to this country is now seen as very great, and it is; but sixty years ago it seemed

genuinely possible that the "Cold War" with the Soviet Union might lead to all-out nuclear war that would destroy a high proportion of the population of both countries. Things are a long, long way from being ideal now, but—both in respect to political polarization and other matters—our society's position is actually better now than it was in certain other historical periods.

II. RELIGIOUS PERSPECTIVES

When we reflect on how religion relates to polarization, we can identify five important connections. The most obvious is the possibility of polarization among religious groups themselves. Needless to say, all religious groups have some sharp disagreements with each other, and these can lead to full-scale rejection, hatred, and even violent conflict. A second connection is when the differing religious views are directly tied to competing forms of political order. If one religious group believes it should be the established religion, and another is convinced it should occupy that position, that can be a clear basis for polarization. The same can be true if other groups only want to eliminate an existing establishment rather than creating one of their own. Third, religious beliefs and practices may be closely related to what are seen as desirable political positions that are not directly about the treatment of religion. An obvious example here is the beliefs of some Christians that God had called for slavery of "Negroes" (defined in many southern states to include people who were 7/8 white and 1/8 black),[1] while other Christians did see this slavery and unequal treatment as fundamentally wrong. Fourth, the religious beliefs of individuals and groups may lead to strong convictions about what they should be allowed to do. If others disagree strongly about this, that can be one important cause of polarization, although I shall argue that this conflict is substantially avoidable. Finally, religious outlooks themselves, and society's treatment of religion, can actually counter or avoid polarization.

I shall begin with this last point which has a significant bearing on the place of the constitutional religion clauses. A religion may teach that we should tolerate and accept others who are quite different from us. In terms of cultural background, that was a key component of early Christianity. Not long after the death of Jesus, leaders who were preaching the truth of what Jesus had taught, made clear that one did not need to be Jewish to become a Christian; any believing gentile was welcomed.[2] Since then Christianity has avoided requiring a direct connection to a particular culture or parental heritage. One may reasonably see this as being

[1] Rachel L. Swarns, American Tapestry: The Story of Black, White, and Multiracial Ancestors of Michelle Obama 146–47 (2012).

[2] *See, e.g.*, *Romans* 1:16 (New Revised Standard).

tied to the development of liberal democracy, in which people of diverse views and backgrounds are accepted as equal citizens. Indeed, to generalize, despite many assumptions and actions by Christian groups over time that have been at odds with those values, I am convinced that Christian beliefs have been a powerful source of liberal democracy.

What is the place of the religion clauses of the First Amendment in relation to all this?[3] Of course, as originally adopted, the Establishment Clause,[4] "Congress shall make no law respecting an establishment of religion . . . ." left states to decide whether to retain establishments or not. That could be seen as avoiding polarization among states. But I shall pass over that and focus on what the Supreme Court has taken as the incorporation of both religion clauses by the Fourteenth Amendment Due Process Clause. The primary effect of both clauses is to permit polarization in religious views themselves, but sharply reduce the danger of political polarization as a consequence. If people are definitely free to choose what religions to join, and religions are broadly free to engage in what they take as true forms of worship, disagreements about what God wants us to do in those respects are not likely to lead to sharp conflicts and efforts to put down and suppress some forms of religion. Similarly, the basic idea of nonestablishment entails that the government cannot embrace one particular religion, effectively putting down other religions and directly or indirectly inhibiting free exercise. The bar on establishment eliminates one potential source of political polarization over whether any religion should be established and, if so, which one. In this core respect, we can see the basic aims of the religion clauses as partly designed to assure that religious disagreements will not themselves produce political polarization. The clauses and their values contribute to the basic diversity of religious outlooks themselves, which, as I have noted, can be regarded as one form of polarization. They can also reduce actual religious hostility and political divisions based on the status of particular religions and the involvement of our government in religious beliefs and practices.

Unfortunately, in a wide range of respects the relation of religious beliefs and practices, and the relevance of religion clause values to political polarization, are not this straightforward. We can have sharp disagreement over whether accommodation to religious outlooks and practices will reduce or enhance polarization and whether insisting that officials and citizens refrain from reliance on religious convictions in their political life is both feasible and likely to achieve greater justice and less divisiveness. Having written about a wide range of these topics in a

[3] For my more complete account of the religious clauses, see generally 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) and 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008), both published by Princeton Univ. Press, Princeton, N.J.

[4] U.S. CONST., amend. I, cl. 1.

recently published book, *Exemptions: Necessary, Justified, or Misguided?*,[5] and another soon to be published, *When Free Exercise and Nonestablishment Conflict*,[6] in this Essay I shall concentrate on two questions of this sort.

One is the appropriateness of exemptions from legal duties whose performance aids others and may protect their dignity. I shall concentrate on abortions, providing contraceptives, and assisting same-sex married partners. Here the value of free exercise can support exemptions for religious objectors, while the concern about establishment, as well as other concerns, can be in opposition. Plainly, one aspect of present polarization involves what should be done about this; but whether the granting of exemptions—and, if so, which ones—should rightly be seen as overall increasing or reducing polarization, is itself strongly disputed. Among the subquestions here lies the issue whether in particular instances, if ever, religious bases should be treated differently from nonreligious conscience.

The other topic on which I focus is one of overall political philosophy in this and other liberal democracies. When considering political alternatives, should officials and citizens rely on "public reasons," reasons that are accessible and comprehensible for citizens generally? The fundamental claim for this position is based on an idea of fairness, including the notion that were the practices followed, people generally would have a sense that the system is essentially fair to them. This approach would clearly preclude direct reliance on specific religious convictions not shared by everyone else. Someone could see nonestablishment as supporting this approach, but clearly insofar as the exercise of one's religion includes favoring laws and political positions that reflect God's will about how we should behave toward others, faithful adherence to "public reasons" can be seen as in tension with "free exercise," even if no direct legal prohibition of particular behavior is at stake.

These two general topics connect in certain important ways. If reliance was entirely or overarchingly on public reasons, should there ever be an exemption for religious objectors or would that be foreclosed? In fact, as I shall explain, that would not always be foreclosed; public reasons can support concessions of conscience that may or may not be limited to religion. A second important connection concerns the breadth of what public reasons can tell us generally and what can be assessed by ordinary people. Insofar as the status of abortion and some contraceptive use depends on the beginning of lives that deserve protection, is that resolvable by public reasons? Also, can these tell us whether those of the same gen-

[5] KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED (2016) [hereinafter GREENAWALT, EXEMPTIONS].

[6] KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT (forthcoming 2017) [hereinafter GREENAWALT, CONFLICT] (to be published by Harvard University Press).

der should be able to marry? In what follows, I will address the fundamental concerns about exemptions and the place of public reasons in our political life, and how these two basic issues connect to religion clause values in various ways.

My basic positions are these. In respect to exemptions, we often have genuine competing considerations. If those on each side thought carefully about their fellow citizens, and acted accordingly, our present divisiveness over these matters could be reduced. A regrettable aspect of our present polarization, perhaps promoted in part by individual messages sent with limited thought on the internet, is that people frequently do not give needed consideration to those with different outlooks. What actually makes sense in terms of whether an exemption should be granted and whether it should be limited to religious claims, depends greatly on what kind of exemption is being considered and what its actual scope should be. These are crucial questions about same-sex marriage.

In respect to "public reasons," the workability of this approach depends heavily on how one figures out what are public reasons, and how those reasons can carry most actual people—and even those most highly sophisticated—on some controversial topics.[7] I conclude that these reasons do have an important place in our political life but that they cannot sweep across the board. Among distinctions that are significant are the positions people occupy—are they officials or ordinary citizens?—and whether we are talking about every basis for a decision or public advocacy of what one supports. For all these questions, one can see the values of free exercise and nonestablishment as relevant, although often they will yield no obvious answer as to what is right overall.

On these two broad topics, exemptions is the one about which the interest is now broadest, and readers who care only about that can skip forward, but my sense is that overall understanding is best promoted by starting with "public reasons," partly so we can see how that topic relates to the one about exemptions.

III. PUBLIC REASONS AND RELIGIOUS CONVICTIONS

The basic idea that within our liberal democracy officials and individuals should rely on "public reasons" concerning the making of laws and other actions the government may take has had a significant place in political philosophy for at least a half century. Although the formulations and underlying justifications are different in various ways, the fundamental idea is that in respect to actions that represent and affect all citizens, the bases should be ones that make sense for all of us. As cast fairly re-

[7] These are addressed in *id.*, chapters 9 and 10, and in two earlier works, KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988), and KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995).

cently, within pluralistic democracies we should try to rely for lawmaking on "reasons everyone can reasonably be expected to accept."[8] The most famous proponent of public reasons has been John Rawls, who developed his theory in rich detail and altered some of what he claimed over time. In *A Theory of Justice*[9] he urged that we should ask what people would choose if in an original position, ignorant of their own personal characteristics, social status, and conceptions of the good.[10] He later emphasized that the principles could best capture what constitutes a "system of fair social cooperation between free and equal persons."[11] At its fundamental level, this concept makes good sense. If we are members of a group of people deciding what to expect of each other, the notion that we should rely on reasons that carry weight for all of us has appeal. However, a number of complications present themselves, and many of these reflect genuine questions about what we should hope for and expect.

The two complications I shall explore both relate to feasibility. One concerns the limits on what public reasons can actually resolve and the other involves what human perceptions are like and what we can expect of actual people. Before delving into these concerns, I shall mention some fairly obvious points without exploring these in detail.

The first point is that "public reasons" does exclude distinctive religious convictions as a basis for political decisions and their support. These convictions would include specific doctrines, such as whether sexual relations should occur outside marriage, and also personal intuitions that God has responded to prayer by providing a belief that one approach is better than another. This reality evidences genuine tensions between free exercise of religion, broadly understood, and any rigorous version of public reasons. Most people do consider the exercise of their religious convictions as including how they treat others and this, at least in some simple form, extends to what they think laws should require. For example, if someone believes God wants us to help those who are disadvantaged, that can affect how she sees proposals to provide more public assistance for education of the poor. Of course, insofar as a religious person finds the key idea of public reasons as sound, he may conclude that following that is not any interference with his free exercise, even if, on occasion, his political position deviates from what he takes as sound church doctrine. A notable illustration of this was the position of former Governor Mario Cuomo, a devout Roman Catholic, who, despite belief that abortion was morally wrong, supported a legal right to abortion.[12]

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[8] ANDREW LISTER, PUBLIC REASON AND POLITICAL COMMUNITY 116 (2013).

[9] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[10] *See, e.g., id.* at 12–17.

[11] John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229 (1985).

[12] *See* Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1989).

We need to be clear that "public reasons" does not exclude only religious convictions. It also covers reliance on personal intuitions that someone does not see supported by those reasons. I shall return to this distinction when we look at feasibility, but the basic theory does not rest on a special negative status for religious views. One might see nonestablishment values as giving special support to exclusion of religious bases but the primary defenses of public reasons do not rest on that.

The second fundamental point is that the restraint of public reasons may well depend on the position one occupies. We do expect judges to rely on a special form of public reasons in determining what the law provides, and executive officials implementing statutes should also do so. The suggestion that legislators should limit themselves to forms of public reasons is at least plausible. The hardest questions about feasibility concern ordinary citizens, although these also reach some choices made by legislators and other officials.

Another general point to which I shall return is whether the limits should be perceived as the same for all underlying bases for decisions as for public advocacy. This ties to concerns about feasibility.

Finally, we have the core question of what really count as public reasons and what is excluded by them. I shall simply touch on some of the suggestions and the problems these raise. To be clear, these problems do not rule out the relevance of public reasons, because many possible bases for decisions fall clearly on one side or the other, but the difficulties do show that we have no simple line to draw.[13]

One idea has been that ideas of the "good life," meaning here how one should live rather than whether one is wealthy and comfortable, are ruled out. However, many aspects of the "good life" in this sense—that it is preferable to have an interesting job rather than a boring and frustrating one, that serious involvement with other people is rewarding, that being a drug addict who has come to care about nothing else is unhealthy—are ones strongly supported by public reasons. And we certainly expect public schools to teach students about these things.

A second possibility is that public reasons preclude reliance on comprehensive views. This definitely excludes comprehensive religious perspectives as well as others, such as the utilitarian view that what ultimately counts is the "greatest happiness of the greatest number."[14] This is perhaps the most plausible account of what "public reasons" would exclude, but it is important to note here that this can be much more constraining for some than for others. Public reasons certainly suggest that happiness is better than misery, so a utilitarian is not barred from giving significant

[13] These topics are covered with references to scholars who have advocated various positions in Chapter 10 of GREENAWALT, CONFLICT, *supra* note 6.

[14] JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 3 (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776).

weight to what may make people happy, whereas a religious believer would properly not rely on a conviction that departs from whatever public reasons can support.

The idea of public reasons is sometimes cast in terms of what is generally accepted. An obvious problem here is that often we need reforms from what has been generally accepted, such as slavery, racial inequality, absence of rights for women, and criminalization of homosexual behavior. We cannot conceive that no reasons opposed to accepted practices can count as "public" ones. Genuine public reasons can support various reforms. A more moderate relevance of "acceptance" or "consensus" is that people should feel free to rely on assumptions that are widely accepted within their culture but are not resolved by public reasons. Yet another possibility is that people can properly rely on nonpublic reasons unless the public reasons approach itself has achieved general acceptance. This acceptance question relates to viability and fairness, to be examined shortly.

A final approach to public reasons is that they must be derived from rational bases. A concern here is what rationality can establish. One question is what level of generality does the rational basis need to have, another is what constitutes that. Both of these were involved when one of my sons once had me look at a book that urged that the infallibility of the words of the Bible is demonstrable on rational grounds. For such a person, any reliance on biblical passages could be seen as based on rationality. A much more complex relationship between faith and reason lies in the Roman Catholic endorsement of natural law, which is now claimed by leading natural law scholars to be convincing on nonreligious premises.[15] Is a Roman Catholic who is aware she is following church doctrine, and is quite sure the same position has a defense in natural law writing, relying on a rational ground even if she is not quite sure what is the content of the natural law argument? In some areas, such as climate change, we do think we have a rational basis for a position even if we are mainly relying on what experts have concluded.

Many of the complexities I have touched on figure about theoretical feasibility and human capabilities and fairness, but as I have noted, we can often identify what are obviously public reasons from what clearly is precluded by exclusive reliance on those reasons.

I now turn to the crucial questions about how far "public reasons" can actually take us concerning legal and political matters. The first concern is the intrinsic limits of shared reason in this and any other society that has multiple religious beliefs and commitments, including atheism and agnosticism. To be clear, no one asserts that public reasons as the source of evaluation will always lead to agreement on what should be done. Two legislators or ordinary citizens may agree about the reasons on

[15] *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

each side, but may disagree about their actual strength. This could be based partly on different rational predictions about what is likely to happen in the future. Such disagreements could easily occur over how much regulation is needed to counter genuine concerns about climate change or to improve economic welfare. In other circumstances, the balance of public reasons may point strongly in one direction. Given the fundamental sexual inclination of a significant proportion of people have to others of the same gender, I believe this is true about same-sex marriage. What I am addressing here is not the precise balance of competing considerations that definitely qualify as "public reasons," but problems about which public reasons run out at a fundamental level.

One illustration of the limit of public reasons is what we owe to higher animals who have lesser abilities than human beings, but have both capabilities and experiences that resemble ours in significant ways. Ordinary reason can tell us we owe more to dogs and apes than to leaves and mosquitoes, but it does not really have an answer to how much their welfare should count in relation to our own.

Much more important in our present culture is the status of human lives, when lives warranting protections begins, and whether the appropriate degree evolves. I want first to distinguish what basic reason itself fails to tell us from what such reason fails to tell us given fundamental premises of our culture. Should the lives of people in respect to the most fundamental protections count equally and should new born babies deserve full protection? A small minority of human beings are born with less actual capacity and less potential capacity than the most able nonhuman animals. Yet it is widely assumed that we should protect and care for those who suffer these severe disabilities. Although this approach may promote a degree of general security, we can imagine a liberal democracy in which severely disabled human babies were not kept alive. As far as newborn babies in general are concerned, we can also imagine a view that since they have not yet really developed any but the most primitive human capacities, parents should have the choice whether to keep them alive. Similarly, we can conceive of a position that once a person has, because of serious incapacity such as extreme dementia, or illness, or simply age, lived beyond any ability to function effectively, his life should be sacrificed to reduce the burden on others. All these possibilities are rejected in our culture largely on the basis of the premises that all human lives really count and, to a large degree, count equally. On may wonder how far those assumptions rest on basic religious premises or cultural history, or a combination of these, but it is not so easy to identify independent "public reasons." Nevertheless, we can take this assumption as a basic starting point upon which common forms of public reasons can be built.

In my view, contrary to the convictions of many others, neither this premise nor public reasons can really tell us when life deserving protection begins, or how great that protection should be. That is a subject on

which our society is sharply divided. What should individuals and legislators do if public reasons fail to give us answers? Certainly at a point from the time of fertilization to that of actual birth, an entity's warranting at least some protection begins; that degree of protection either remains the same or increases with further development. One may think a critical stage is whether the fetus could survive outside a woman's womb, but what if, as is likely to happy in the not too distant future, a method is discovered to develop an early fetus to birth independently of the pregnant woman? In terms of what the law actually provides now, the rights and interests of pregnant women are highly important, but these may well carry less weight when this new technology succeeds. My basic point here is that in respect to various issues about abortion and the use of some contraceptives that sometimes operate after fertilization, public reasons cannot tell us just how everything should be treated. I will explore this further in connection to exemptions. But the critical point here is that no one will be able to rely exclusively on public reasons on matters as to which those are crucially unrevealing about one or more key aspects.

This brings us to the feasibility, which is related in vital aspects. Whatever may be true at a theoretical level about what "public reasons" can resolve, what can we expect of actual behavior? It is important here to distinguish some basic standards about how we should behave from ones in which reciprocity is key. Almost all of us fall short of consistently acting as we think best; the Christian notion that nearly everyone falls into sin with some frequency is an illustration of this. That does not mean there is necessarily a problem with the basic standards of how we should act. But matters are a bit different if a crucial ground for action is that others are behaving similarly. We think it is fair to stand in line to buy a ticket if we believe most others will do the same, rather than butting ahead of us. Imagine a religious believer who has a clear conviction about what God wants in respect to a certain political issue. He may feel he should put that aside and rely only on public reasons if most others are doing the same. But if everyone else is relying on nonpublic reasons, asking him to restrain himself seems fundamentally unfair. In short, the practical force of an idea of public reasons depends considerably on how broadly one thinks it has been, or can be, embraced.

Can people distinguish public reasons from other bases for positions? We need here to look at perceptions about bases and about the force they carry, and also about how all this relates to perceptions of fairness. Often a person will be able to see what count as public reasons as distinguished from religious convictions and personal intuitions. But suppose a woman sees the balance of public reasons as far from obvious, and she has a powerful religious conviction that one side is right. She will very likely find it nearly impossible to put that aside and figure out exactly how she would see things if she took account only of the public rea-

sons. The same is true about nonreligious personal intuitions and sentiments. Trying to totally disregard these may not be feasible.

Tied to this intrinsic difficulty will be people's perceptions about what others are doing. If they are fairly sure that religious convictions and personal intuitions are playing a role in what others arrive at, they may well regard it as unfair to try very hard to discount these totally in their own decisions.

A factor that ties to this problem is the relation of all bases for decision as compared with public advocacy. I think the idea that it is healthy in our liberal democracy for people to advocate publicly in terms of public reasons is powerful, partly because it is much easier for others to recognize what they say from what constitutes all the bases for their positions.[16]

A particular concern about fairness connects to what different people and groups sees as the power of reason. Here, the place of Roman Catholic belief in natural law is highly important. If a particular Catholic has read and been persuaded by natural law accounts on matters such as the beginning of life, he may well conceive his position as dictated by public reasons. What of the Catholic who is aware of that position but has not actually explored its basis in rational argument? Can he claim to be relying on public reasons in a way essentially similar to the reliance many of us have on what experts have concluded, although we do not really pursue their bases? Of course, our basis for who counts as an expert may be unconnected to religious premises in a way that would not be true for the devout Catholic.

The natural law question presents a serious fairness issue concerning other religious believers. Suppose they are considering relying on personal faith, or church doctrine that they do not see supported by public reasons. Imagine they agree with the position natural lawyers defend. Do they need to disregard that conclusion if they do not think it is dictated by rational analyses, even aware that others will support it on just that basis? The problem is considerably greater when the other religious believers actually disagree with the natural law position and do not think it is supported by reasons. Such a believer might say to herself, "The Roman Catholic religion is seriously misguided about what reason tells us, but Roman Catholics following standard doctrines about public matters will assert that their reliance on those positions is merely one use of public reasons. It would be very unfair for me to put aside my contrary religious convictions because I do not see such support."

All these problems bear on how far we could expect public reasons to carry us and reduce political polarization. However, to be clear, these

[16] I defend this distinction, and respond to the critique that it is at odds with the fundamental value of honesty, in chapter 10 of GREENAWALT, CONFLICT, *supra* note 6.

reasons do undoubtedly bear heavily on some crucial political choices and on legal interpretations by public officials.

IV. EXEMPTIONS, POLARIZATION, AND THE PLACE OF RELIGION

We shall now look at three modern issues about exemptions, how they relate to political polarization, and the existing and possible place of religion in all this. A central theme of this Part of the Essay is that we all do need to avoid hostility to others whose views happen to differ from our own, that we should try to understand why they see things the way they do, and that this sensitivity should greatly affect what we expect from others and what we should be willing to do ourselves. If this could be accomplished in our culture, both about religious and nonreligious outlooks on particular issues, it could increase harmony and reduce polarization. In respect to exemptions, it would definitely lead to the granting of some but these would be limited in important respects.

The three issues on which this Part focuses are same-sex marriage, abortions, and contraceptive use. I shall begin with what I see as the relation to "public reasons," starting with the basic rights themselves. I have indicated that I do not believe public reasons can tell us when life warranting protection begins. If this is right, they provide no answer to whether the typical abortion is the significant taking of a life. Of course, if an abortion is needed to save the life of a pregnant woman, it is undoubtedly warranted, especially since the death of the woman would itself end the life of the fetus. More generally, despite any basic uncertainty about the beginning of life that should count, we do have strong "public reasons" that favor a right to abortions. The most fundamental are core concerns about the life and plans of the women who decide they need abortions. Relatedly, as history shows, a criminal prohibition here is sharply limited in its effect. Many women will seek and obtain abortions regardless of what the law provides; these will be more dangerous if carried out by individuals who do not see themselves as constrained by the law and may be using medical facilities that are far from ideal. If as Governor Cuomo concluded, this legal right is warranted,[17] definitely women should be able to use contraceptives that may sometimes operate after fertilization.

I believe the relevant answer about a basic right is also clear for same-sex marriage. For this, a number of factors are relevant. Given that in human history most people have been sexually attracted to those of the opposite gender, and marriage has been seen as closely related to the raising of children, who came into being because of sex between men and women, it is not surprising that marriage has been mainly seen as be-

[17] *See* Cuomo, *supra* note 12, at 16.

tween men and women. However, this is itself not a genuine public reason to now deny this right to couples of the same gender.

Connected to all this is the question why people are attracted to those of the same gender. Suppose one believed that for virtually everyone, sex with a partner of the opposite gender was really natural and healthy, and different feelings were a consequence of psychological problems or extremely limited exposure—such as within "prep schools" where boys lived and had contact only with other boys. One might conclude that same-sex relationships should be discouraged in order to promote better lives for those who temporarily have that inclination. An extreme example of this was the revelation of a young British Muslim man, Sohail Ahmed, who once believed in an extreme Islamic position and saw his own homosexual inclinations as contrary to God's will and the consequence of a personal defect; these feelings led him to believe he should commit a terrorist act as a counter, though his view shifted before this occurred.[18]

The general modern understanding about homosexuality is essentially different. The vast majority of gay people have that natural inclination, which is not the product of something else. Given the strong desire most people have for sexual involvement and how that can help create the most satisfying form of intimate involvement with another person, telling gay people they should simply refrain from sexual relationship is undeniably harsh. And if those involvements are, as they should be, accepted, and such couples are now able to adopt children and babies for which one of the two is a genetic parent, extending them the right to marry is definitely called for. This conclusion itself does not actually rest on an assertion that the Supreme Court's recognition of a constitutional right[19] here was necessarily right, although I believe that it was. Even if one thinks this issue should have been left to legislative choice, the public reasons argument favoring such a right is much stronger than any opposing public reasons.

If these conclusions are sound about abortion and same-sex marriage, one can see strong religious objections to any such rights as contributing to polarization over the legal and political issues. My response is that even if a religious person strongly believes that virtually all abortions and same-sex partnerships are deeply wrong based on the moral conclusions supported by church doctrine, nevertheless given general understandings at this stage of history, the legal rights are warranted.

The basic rights do not by themselves tell us what should be done about possible exemptions from ordinary duties. I shall pass over possible exemptions for government workers. Although I do believe that in certain circumstances they should be excused from ordinary responsibilities,

[18] *See, e.g.*, *The Rachel Maddow Show* (MSNBC television broadcast June 17, 2016).

[19] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

such as working on a capital punishment brief.[20] I shall focus here on private individuals and organizations.

Although much of what this paragraph contains is obvious to many readers, it is important to avoid possible confusion about the Supreme Court's discernment of a constitutional right of same-sex marriage, and what private behavior must be. In the United States, constitutional rights concern the government's treatment of people. They do not themselves constrain how private citizens treat each other. Thus many forms of unequal treatment barred by the constitution are still permitted for private citizens, unless an antidiscrimination statute forbids them. Thus, to take a simple example, a private restaurant could exclude all African-Americans and ascertainable Muslims unless a statute forbids racial and religious discrimination. For much of our history, such antidiscrimination laws did not exist. They are now extensive in both federal and state law. The key exemptions question is whether some people should be allowed to act differently from most others by relevant statutes. There are, however, two possibilities of constitutional interpretation that I shall mention without exploring. One may believe a state denies equal protection to same-sex couples if the exemptions from equal treatment are much more extensive than with respect to other bars on discrimination, and one may think this principle extends even to a state's failure to enact an antidiscrimination law for this subject.[21]

A separate, but obviously related, question from exemptions is what antidiscrimination laws themselves should actually cover. Although a number of states do now possess laws that bar discrimination against gay people and same-sex couples, many still do not. And, although the federal government has urged that provisions cast more generally in terms of discrimination based on gender may reach those matters, federal statutes contain no explicit provision about this. Until an antidiscrimination law covers same-sex married couples, private enterprises need no specific exemption. When the adoption of such a law is controversial, the granting of exemptions may reduce opposition and enhance passage. In this respect, the granting of exemptions can reduce polarization over whether

[20] To be clear, what is warranted is the excusing of individual government employees if doing so does not seriously affect most of their work and does not impair the rights of those needing service. Often the appropriate basis for such an excuse is a decision or policy set by a supervisor, not a formal legal exemption. And plainly government officials should not be able to have an entire office decline to carry out a right, as Kim Davis sought to do about same-sex marriage. *See, e.g.*, Bill Chapell, *Attorneys for Kim Davis: Marriage Licenses Issued Friday Are "Void,"* NPR (Sep. 6, 2015), http://www.npr.org/sections/thetwo-way/2015/09/04/437580385/attorneys-for-kim-davis-marriage-licenses-issued-today-are-void. This subject is covered in GREENAWALT, EXEMPTIONS, *supra* note 5.

[21] The equal protection argument is well developed in James M. Oleske, Jr., *"State Inaction," Equal Protection and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1 (2016).

there should be a basic right and whether it should reach private as well as government treatment of the individuals who possess the right.

An interesting example of one way religion can figure in all this was the action of the Mormon Church of Latter Day Saints, in Utah. That religion is strongly opposed both to any sex outside of marriage and to any gay sexual relationships. What it did within the state in 2015 was to support an antidiscrimination law that reached same-sex married couples but contained extensive exemptions. The church itself has not altered its refusal to treat such couples equally. But we can see its involvement in the law's passage as reducing, rather than enhancing, political polarization.

With these broader observations, I shall turn to specific exemptions issues about our three subjects. Many of these concern how direct the involvement in a practice is of those potentially receiving an exemption.

For much of this country's history, obtaining most abortions was formally criminal in the great majority of states, although actual enforcement of the law was uncommon. In 1973, the Supreme Court decided in *Roe v. Wade*[22] that prior to the ability of the fetus to survive outside the womb, a woman had a constitutional substantial due process right to receive an abortion. The decision was highly controversial, no doubt in part because of religious convictions about when life begins.[23] As I have suggested, nonreligious people may also think life deserving protection begins at conception, but they may generally be less likely to see that answer as clear than are individuals who have strong and relevant religious beliefs.[24] Here, we can see the creation of exemptions from ordinary medical duties as definitely reducing political polarization at this early stage. Some believe that connection has shifted over time, since the Court's approach to abortions has not been as widely accepted as its rulings about racial and gender equality. But I think much of the basis for this difference is that public reasons are so incomplete about the moral status of abortions, as compared with basic notions that people should not be discriminated against because of fundamental unalterable characteristics.

In respect to abortion, that some exemption is warranted from a general requirement set by ordinary laws or the medical profession is clear. Some people, including doctors and nurses, honestly believe that an abortion is the taking of an innocent life. They should not be compelled to do that if it violates their basic convictions, and if the woman who seeks an abortion suffers no genuine disadvantage. That, alone, does

[22] 410 U.S. 113 (1973).

[23] *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2030, 2064 n.134 (2011).

[24] *See, e.g.*, Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 736, 763–67 (1996).

not tell us how an exemption should be cast. Not long after *Roe v. Wade*, Congress adopted the Church Amendment, supplemented by the Hyde Amendment, that precluded the use of federal funding to require that all with relevant positions have an obligation to be involved in abortions.[25] The law bars requiring doctors, nurses, and hospitals with relevant religious beliefs or moral convictions from having to "perform or assist" with abortions. The law goes further, and precludes hospitals that perform or do not perform abortions from insisting that its workers act accordingly. Thus, hospitals cannot themselves choose to insist that their doctors and nurses perform abortions and hospitals that are opposed to abortions cannot discipline personnel who do perform them outside of their facilities. All states have adopted laws that contain similar exemptions. These generally, unlike the federal statute, do contain a specific exception when a woman's medical care will be seriously compromised if someone refuses to participate. And courts will often read in such an exception even if it is not explicit.

Three genuine questions about the federal law are whether "perform or assist" is a desirable categorization, whether hospitals should have been included, and whether religious convictions should have been treated specially.

"Perform or assist" does not resolve every possible controversy, since the edges of relevant assistance are not precise. Plainly, a nurse who is handing medical instruments to a doctor is assisting, the person at the front desk who admits a woman to a hospital and a janitor who cleans all rooms are not. What of a nurse asked to give concentrated attention to a woman after an abortion? That is more debatable. But this categorization is clear enough about most instances to be sensible, and it represents a general premise that should apply to many exemptions. They should not extend to every remote, peripheral involvement.

An important question about certain other exemptions is how far they should extend to enterprises as well as individuals. Given that many of the hospitals of this country have been connected to religious groups, and a significant percentage of our hospitals are Roman Catholic, allowing some latitude for these is wise, and probably helps to reduce polarization. However, it also makes sense to require institutions to make concessions to the strong convictions of those they employ.

Should the exemptions here be limited to religious convictions? As far as individuals are concerned, the answer is clearly "no." Especially since people have little incentive here to offer a false claim, those who are strongly troubled by involvement in an abortion on nonreligious grounds should receive a similar privilege not to participate. The matter is more debatable when it comes to institutions. I believe it is much more doubtful whether those who control a hospital should be able by a similar

[25] 42 U.S.C. § 300a–7(b)(1) (2012).

nonreligious assertion to have a right to refuse to perform abortions. In this instance, as in some others, it is often genuinely arguable whether a particular claim for an exemption should be limited to religious convictions. Some now contend that a "neutrality" approach is both fairest and least divisive. I strongly believe the right answer depends on context. If the drinking of alcohol or ingestion of peyote is forbidden, it is hard to imagine a nonreligious claim with the force of central use during worship services. That religious claims are sometimes appropriately singled out does not itself answer whether it is wise to have a general law such as the Religious Freedom Restoration Act[26] cast in those terms.

This brings us to contraceptive insurance, which has involved various controversies about how exemptions should be cast, and how a general law should be construed. I shall briefly mention a number of the key legal issues, but my main focus here is on how indirect involvement should be treated. As most readers understand, in the case of *Burwell v. Hobby Lobby Stores, Inc.*,[27] the owners of various stores with closely-held stocks, objected to providing insurance that would cover contraceptives that sometimes operate after conception. For them to succeed, they needed to count as "persons" under the Religious Freedom Restoration Act and to be suffering a "substantial burden," for which the government imposition lacked a "compelling interest" that could not be satisfied by a "less restrictive means." Since the statute was essentially enacted to reintroduce the standards for constitutional free exercise protections largely eliminated by the Supreme Court's interpretation in *Employment Division v. Smith*,[28] much in Justice Alito's *Hobby Lobby* opinion is hardly obvious.[29] Whether in this context for-profit businesses should themselves count as "persons" is dubious, and the Court's assuming that substantial burden is essentially completely subjective basically eliminates that as a genuine requirement when businesses may have some incentive, such as saving money, to claim an exemption. The Court does not really address the fact that "compelling interest" and "least restrictive means" were essentially dealt with in the free exercise jurisprudence as considerably more relaxed than they were when racial categorization and core interferences with free speech were involved.

What I want to emphasize here is that insurance coverage is actually fairly indirect. All it does is to supply a modest amount of money that allows someone who wishes to use that to buy contraceptives, ones she would be likely to buy with other money if that were needed. The insurer is not encouraging that choice, much less aiding more directly in the actual use of the contraceptives. In truth, this is not so different from pay-

[26] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

[27] 134 S. Ct. 2751 (2014).

[28] 485 U.S. 660 (1988).

[29] A fuller critique is in chapter 6, GREENAWALT, EXEMPTIONS, *supra* note 5.

ing general taxes, some of which may well be used to finance practices, such as fighting wars, to which one objects. If this is true about the insurance itself, it is even more obvious about the direct providing of notices that will allow the government to use an alternative means, the subject about which the Supreme Court in May of 2016 remanded cases to lower courts to try to see if compromises could be worked out.

In regard to same-sex marriage, we have strong questions about the appropriateness of any exemptions, their reach, and whether they should be limited to religious claims. I believe all these questions are tied both to the range of public reasons and the likely contribution to polarization or actual reduction of its force.

I have emphasized that we need to try to understand and care for each other. Here I think "public reasons" strongly support religious believers who are convinced that God does not approve homosexual relations to thoughtfully consider how gay people will see things. If a person's sexual desires are strongly directed to those of the same gender, he is likely to think engaging in such sex is perfectly appropriate and that those inclinations and actions are not a proper basis for others to treat him negatively. It is easy to see why most gay people in our society see private discrimination against them as unjustified inconvenience and insult to their dignity.

What can be said on the other side? We should also recognize that given the more common desire for intergender sex, the connection of that to the raising of children, and the long standing doctrines of many religions, it is genuinely not surprising that a fair number of people still do not see same-sex marriage as appropriate. If someone genuinely feels this way with deep convictions, we have a substantial public reason not to require that she act directly against that conviction. Although some have urged that if the exercise of religious conviction causes negative effects on others, it should never be accommodated, that disregards the fact that historically private individuals and groups were free to act in such ways because nondiscrimination laws did not restrict their behavior.

In summary, if we look at public reasons and at how we should care about each other, we can find both strong bases for equal treatment and for some exemptions. This brings us to the scope of any appropriate exemption and the relevance of directness of involvement. Here I want to emphasize a fundamental point. Almost all of us interact with others whose moral standards differ from our own. We do not refuse ordinary services we provide because of that. Yet if we are asked to perform an act we think is seriously immoral, we are likely to refuse. When it comes to businesses, few refuse services to former criminals, unmarried couples, or to women known to have had abortions. Without going into detail, I see all this as strongly supporting the argument that those with powerful objections should not have to participate in same-sex marriages but an exemption should not extend to unrelated services provided subsequently.

(I regard adoption as a service more related to the marriage itself, but I will not explore that here.)[30]

Saying just what counts as direct participation is not simple, but to take two actual cases, I believe being the primary photographer at a wedding is direct enough,[31] but baking and selling an ordinary cake to celebrate the wedding is not.[32] In some jurisdictions, a broader exemption may be needed to obtain passage of an antidiscrimination law, but that is a matter of political compromise rather than the most desirable resolution.

If people could genuinely see what counts on each side and support appropriate limited exemptions, that could well reduce political polarization over this issue. It is crucial here for those who are most concerned about the equality and dignity of gay people to reflect on why many others have the religious convictions they do. It is also crucial for those who think God disapproves of gay marriage to grasp why many, now most, people in our liberal society see things differently, and why for many of these, that is a crucial question about their own dignity and equality. If we can develop this far from simple mutual understanding and tolerance, we can have less polarization and more genuine community.

[30] My views are developed in GREENAWALT, EXEMPTIONS, *supra* note 5.

[31] Elaine Photography, L.L.C. v. Willock, 2013-NMSC-040, 309 P.3d 53 (N.M. 2013).

[32] Erik Eckholm, *Baker Who Denied Cake to Gay Couple Loses Appeal*, N.Y. TIMES, Aug. 14, 2015, at A15.