

# Sodom's Shadow: The Uncertain Line Between Public and Private Morality

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*In citizens' debates about issues of public policy, we frequently encounter what this Article calls the "divine accountability thesis"—the controversial claim that the divine realm will punish a city, state, or nation unless it performs or proscribes certain forms of conduct. Many of us reject that claim, but its persistent usage in numerous societies over the past five thousand years teaches us a great deal about citizens' political self-conceptions. This Article begins by arguing that the divine accountability thesis illustrates human beings' deeply ingrained tendency to regard their political communities as discrete moral entities, individually deserving of punishment or reward. Drawing from the work of Ronald Dworkin and others, the Article then argues that the divine accountability thesis has an influential secular counterpart, consisting of two widely shared perceptions that, taken together, compose what this Article calls the "integration thesis." The integration thesis holds that our individual identities are integrated with, and partially constructed by, the political communities to which we belong, and that each of our political communities is akin to a personified moral agent whose conduct reverberates in the individual lives of its integrated members. The integration thesis and the divine accountability thesis often push in precisely the same direction—namely, toward using the law as a means of stripping individuals of their freedom to make certain moral decisions for themselves. Hoping to draw advocates of these and other political viewpoints onto common ground, the Article proposes seven questions that all scholars and citizens ought to ask when assessing whether a given moral issue should be resolved collectively by a political community or should be left for each individual to resolve on his or her own.*

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INTRODUCTION

In the spring of 2009, after a physician who performed abortions at a Kansas clinic was shot and killed in his church, a group of anti-abortion protestors attended his funeral carrying signs stating “America is doomed.”<sup>1</sup> Earlier that year, an anti-abortion organization suggested that the flooding of the Red River in North Dakota was God’s way of warning the North Dakota legislature to enact strict pro-life legislation.<sup>2</sup> In 2008, televangelist John Hagee predicted that God would permit terrorist attacks on the United States if it supported a two-state solution for the Israeli-Palestinian conflict<sup>3</sup> and declared that Hurricane Katrina had been sent by God as punishment for the sins of New Orleans.<sup>4</sup> In 2006, conservative legal scholar Charles Lugosi opened a law review article with the warning that America’s failure to repent of its sins would bring “the inevitable judgment of God’s anger” in the form of “bad weather, disease, military defeat, and natural disasters.”<sup>5</sup> Following the terrorist attacks of September 11, 2001, evangelical pastor Jerry Falwell declared that God had permitted the attacks as punishment for the activities of “the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the

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1. See Monica Davey, *In Wichita, a Shuttered Clinic Leaves Abortion Protestors at a Loss*, N.Y. TIMES, June 8, 2009, at A10.

2. See Steve Lefemine, *Is God Sending a Message to North Dakota? And to the Nation?* (Mar. 27, 2009), <http://www.christianlifeandliberty.net/2009-03-27-God-Sending-Message-to-ND.doc>.

3. See Holly Bailey, *A Turbulent Pastor*, NEWSWEEK, May 12, 2008, at 34.

4. See Maeve Reston, *Pastor Says He's Sorry for Anti-Catholic Rant*, L.A. TIMES, May 14, 2008, at A15. Televangelist Pat Robertson comparably attributed Haiti’s devastating earthquake in early 2010 to supernatural causes, asserting that “a long time ago” the people of Haiti “swore a pact to the devil” in order to escape French rule, and that “ever since they have been cursed by one thing after the other.” *The 700 Club* (Christian Broadcasting Network television broadcast Jan. 13, 2010), available at <http://www.youtube.com/watch?v=f5TE99sAbwM&feature=fvw>.

5. Charles I. Lugosi, *The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes*, 83 U. DET. MERCY L. REV. 641, 641 & n.2 (2006).

ACLU, People for the American Way—all of them who have tried to secularize America.”<sup>6</sup> Although such claims are most commonly associated today with political and religious conservatism, that correlation is not inevitable. Similar claims were frequently made by opponents of slavery, for example, such as when George Mason argued at the Philadelphia Convention in 1787 that slavery “bring[s] the judgment of heaven on a country” and that “[b]y an inevitable chain of causes and effects, providence punishes national sins by national calamities.”<sup>7</sup>

Those who link America’s tragedies with divine condemnation of America’s public policies usually base their arguments on the ancient religious texts of the Judeo-Christian tradition. Those texts contain numerous stories in which God either threatens to harm or promises to bless tribes, cities, or nations in accordance with their obedience to God’s commands.<sup>8</sup> The ancient city of Sodom, for example, is famously said to have been destroyed for its disobedience by “brimstone and fire from the Lord out of heaven.”<sup>9</sup> When accepted by religious believers as literal historical truth, these stories cast a long shadow. Meteorological events that our secular language still calls “acts of God,” together with diseases, military defeats, and other calamities, are all seen by these individuals as various means by which the God of the Judeo-Christian tradition might punish sinful political communities. From this vantage point, government regulation in a host of morality-laden areas is essential in order to ensure that the nation and its political subdivisions receive God’s favorable treatment.

For those who join me in rejecting such linkages between national tragedies and divine punishment, it might be easy to assume that the individuals who make these claims speak for only a handful of citizens. Yet warnings of God’s judgment upon cities, states, and nations build upon two propositions that enjoy a significant constituency in the United States: (1) that there is a divine realm that is actively engaged in the world’s affairs; and (2) that this divine realm often interacts with political communities as discrete moral entities, causing the fortunes of some

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6. See John F. Harris, *God Gave U.S. ‘What We Deserve,’ Falwell Says*, WASH. POST, Sept. 14, 2001, at C3.

7. EDWARD J. LARSON & MICHAEL P. WINSHIP, *THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON* 130 (2005); see also *infra* notes 110–11 (recounting comparable statements by Benjamin Rush and Abraham Lincoln).

8. See, e.g., *Deuteronomy* 28:1–68 (stating that God will bless the Israelites if they obey God’s commandments, but that God will inflict a variety of horrors if they disobey those commandments); *Leviticus* 26:3–39 (same); see also *Jeremiah* 18:7–10 (stating that God blesses or punishes nations and kingdoms based on whether they do good or evil); *Jonah* 3:1–10 (telling the story of the city of Nineveh, which is spared from being overthrown only when its citizens heed Jonah’s call for repentance).

9. *Genesis* 19:24 (New American Standard).

cities, states, and nations to rise and the fortunes of others to fall in accordance with their public policies and conduct. I shall call these two propositions, taken together, the “divine accountability thesis.”<sup>10</sup> Although they may disagree about the nature of the public policies and conduct that might provoke divine judgment, many Americans are receptive to arguments that presume a relationship between the behavior of a city, state, or nation and that political entity’s divine treatment.

Evidence of that receptiveness comes in a variety of forms. National survey data, for example, describe a fairly prevalent worldview in which invocations of the divine accountability thesis can easily resonate. A 2006 survey conducted by the Pew Research Center and the Pew Forum on Religion & Public Life found that 35% of Americans believe the Bible is the literal word of God, 32% believe the Bible should have more influence on U.S. law than the will of the people, and 69% believe “liberals have gone too far in trying to keep religion out of the schools and government.”<sup>11</sup> A 2001 Pew survey found that 8% of Americans agreed with the claim that the terrorist attacks of September 11 signaled “that God is no longer protecting the United States as much as in the past.”<sup>12</sup> Some additional percentage presumably believed the United States continues to enjoy God’s special protection. Indeed, a survey conducted four years later by the Gallup Organization and the Baylor Institute for Studies of Religion found that 18% of Americans believe God favors the United States in worldly affairs; that same survey found that 59% believe the federal government should defend Christian values.<sup>13</sup>

The belief that the divine realm often interacts with humanity along geopolitical boundaries also finds expression in the language of American patriotism. In the days and weeks following the September 11 attacks, for example, Wall Street traders, Broadway casts and audiences, baseball fans across the country, and countless other Americans expressed their patriotism with the song “God Bless America,” a song whose title and lyrics solicit God’s favorable treatment of the American

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10. Cf. RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* 15 (1998) (“In the past, most of the stories that have incited nations to projects of self-improvement have been stories about their obligations to one or more gods. For much of European and American history, nations have asked themselves how they appear in the eyes of the Christian God.”).

11. See Press Release, Pew Research Ctr. for the People & the Press & Pew Forum on Religion & Pub. Life, 69% Say Liberals Too Secular, 49% Say Conservatives Too Assertive, Many Americans Uneasy with Mix of Religion and Politics 6, 11, 13, 19 (Aug. 24, 2006), available at <http://people-press.org/reports/pdf/287.pdf>.

12. See Press Release, Pew Research Ctr. for the People & the Press & Pew Forum on Religion & Pub. Life, Post 9-11 Attitudes: Religion More Prominent, Muslims More Accepted 2 (Dec. 6, 2001) (internal quotation marks omitted), available at <http://people-press.org/reports/pdf/144.pdf>.

13. See Association of Religion Data Archives, Baylor Religion Survey, 2005, [http://www.thearda.com/Archive/Files/Codebooks/BRS2005\\_CB.asp](http://www.thearda.com/Archive/Files/Codebooks/BRS2005_CB.asp).

nation-state.<sup>14</sup> Our national political leaders often close their speeches with the same phrase.<sup>15</sup> Lest one think that most Americans ascribe no real content to those words, one should recall the national furor that erupted in 2008 when a video was released of a sermon preached by Jeremiah Wright, pastor of the Chicago church that then-presidential candidate Barack Obama had long attended.<sup>16</sup> After listing wrongs that the United States had committed against Native Americans, Japanese Americans, and African Americans, Wright incredulously continued:

[A]nd then [the government] wants us to sing “God Bless America.” No, no, no. Not “God bless America”; God *Damn* America! That’s in the Bible, for killing innocent people. God *Damn* America for treating her citizens as less than human. God *Damn* America as long she keeps trying to act like she is God and she is supreme.<sup>17</sup>

Describing the nation’s lamentable record on race was nothing new. Inviting God’s judgment on the nation for its racial evils was seen as a different matter indeed.

This Article aims to establish three overarching propositions. *First*, we greatly underestimate the divine accountability thesis’s influence on the nation’s public-policy debates and on the political impulse to restrict individuals’ moral autonomy if we assume that the thesis is inconsequentially embraced only by a marginalized few. From the emergence of the world’s first city-states in southern Mesopotamia to the presence of nationalistic Christianity in America today, variants of the divine accountability thesis have flourished across a wide range of cultures and civilizations. The historical prevalence of that thesis tells us a great deal about the construction of human beings’ communal identities and about the pressures that our constitutional system must bear as politicians and judges demarcate the realms of public and private morality. *Second*, the divine accountability thesis has a secular counterpart that is widely embraced in secular and religious circles alike. That secular counterpart often pushes in precisely the same direction as

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14. See Cesar G. Soriano, “*God Bless America*” Roars Back After Tragedy, USA TODAY, Sept. 18, 2001, at C11.

15. President George W. Bush, for example, sometimes underscored the sentiment by expressing the hope that God would “continue to bless” America. See, e.g., President George W. Bush, State of the Union Address (Jan. 28, 2003), transcript available at <http://www.cnn.com/2003/ALLPOLITICS/01/28/sotu.transcript>.

16. See Scott Helman & Sasha Issenberg, *Voters’ Views Diverge over Obama Flap; Leadership on Race Praised, Questioned*, BOSTON GLOBE, Mar. 21, 2008, at A1, available at [http://www.boston.com/news/nation/articles/2008/03/21/voters\\_views\\_diverge\\_over\\_obama\\_flap/](http://www.boston.com/news/nation/articles/2008/03/21/voters_views_diverge_over_obama_flap/); Jane Lampman, *Did Obama’s Pastor Preach Hate?*, CHRISTIAN SCI. MONITOR, Mar. 28, 2008, at A3, available at <http://www.csmonitor.com/USA/Society/2008/0328/p03s07-ussc.html>.

17. Rev. Jeremiah Wright, Sermon: Confusing God and Government (Apr. 13, 2003), transcript available at <http://www.blackpast.org/?q=2008-rev-jeremiah-wright-confusing-god-and-government> (emphasis added); see also YouTube, Bill Moyers—Rev. Wright’s “God Damn America” in Context, <http://www.youtube.com/watch?v=tFYeTrQMHA8> (last visited Apr. 27, 2010).

the divine accountability thesis—namely, toward using the law as a means of stripping individuals of their freedom to make certain moral decisions for themselves. *Third*, productive dialogue between advocates of the divine accountability thesis, its secular counterpart, and other political worldviews is not hopelessly precluded by those groups' differing religious and ideological commitments. To the contrary, we can increase the likelihood of constructive constitutional and political debate by identifying a series of inquiries that most scholars and citizens—regardless of their presuppositions—are likely to embrace as relevant to determining whether the morality of a given form of conduct should be resolved collectively by the political community or should be left for each individual to resolve on his or her own.

In Part I.A, I demonstrate that, for more than five thousand years, members of a wide variety of civilizations have believed that a divine realm regards their political communities as discrete moral entities, individually deserving of punishment or reward. In Part I.B, I argue that Americans' political usage of the divine accountability thesis as a justification for limiting individuals' moral autonomy can be traced to the emergence of nationalistic Christianity in the sixteenth century. In Part I.C, I consider two primary obstacles that the Constitution places in the path of those Americans who wish to rely upon the divine accountability thesis when shaping public policy on matters of moral concern.

In Part II, I argue that the divine accountability thesis has an influential secular counterpart. To demonstrate that the desire to limit individuals' moral autonomy is not limited to those who hold certain religious beliefs, I contend in Part II.A that even political liberalism manifests a desire to use government institutions to help define the moral lives that citizens ought to lead. I then argue in Part II.B that the secular impulse to make political judgments about the morality of individuals' conduct flows from two widely held perceptions that together function as the divine accountability thesis's secular counterpart: (1) our individual identities are integrated with, and partially constructed by, the political communities to which we belong; and (2) each of our political communities is akin to a personified moral agent whose conduct reverberates in the individual lives of its integrated members. I call these two perceptions, taken together, the "integration thesis."

In Part III, I identify ways in which our pluralistic society can find common ground in the effort to distinguish between those occasions when individuals ought to be left free to make their own moral choices and those occasions when government intervention is warranted. In Part III.A, I dispel the dialogue-stifling misperception that advocates of the divine accountability thesis believe the government ought to throw its weight behind *all* of the divine realm's expectations. No matter what

their moral perspective, nearly everyone—religious or secular—is working to distinguish between those public matters on which government action is appropriate and those private matters on which it is not. In Part III.B, I propose seven questions that all scholars and citizens ought to ask when deciding whether a given moral issue should be deemed a matter of public or private concern.

## I. GEOPOLITICAL INTERESTS AND RELIGIOUS BELIEFS

From the emergence of the world's first city-states to the present day, one finds a common tendency within political communities to embrace some version of the divine accountability thesis.<sup>18</sup> In both ancient and modern civilizations, one finds people powerfully inclined to perceive that there are deities or spirits whose particular foci of concern are the political bodies and physical territories with which individuals most closely identify, and whose benevolence must actively be cultivated lest those deities or spirits bring harm to that polity or region. Even if we deny its literal truth, the divine accountability thesis's historical prevalence suggests that we make a profound mistake if we suppose that, in America today, that thesis exerts little influence on the nation's political and constitutional discourse. Contemplating the divine accountability thesis's persistent and widespread usage helps us understand the way in which many citizens conceive of themselves and their place in the nation-state, as well as understand the recurrence of certain patterns in American constitutional litigation and the pressures our constitutional system must bear.

### A. THE DIVINE ACCOUNTABILITY THESIS'S HISTORICAL PREVALENCE

Without naively attempting to touch upon all of the world's major civilizations and religious traditions, consider the following brief survey of some of the ways in which people's religious beliefs and political interests have intersected throughout human history, beginning with the world's earliest city-states in southern Mesopotamia.

#### 1. *Ancient Sumer*

The world's first city-states appeared in ancient Sumer in the latter half of the fourth millennium BCE.<sup>19</sup> The Sumerians believed that each of their major cities was home to one of the gods of the Sumerian pantheon<sup>20</sup> and that these deities represented their respective cities in the

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18. See *supra* text accompanying note 10 (defining the divine accountability thesis).

19. See Robert Griffith & Carol G. Thomas, *Introduction* to *THE CITY-STATE IN FIVE CULTURES*, at xiii (Robert Griffith & Carol G. Thomas eds., 1981); Song Nai Rhee, *Sumerian City-States*, in *THE CITY-STATE IN FIVE CULTURES*, *supra*, at 1, 1.

20. See HARRIET CRAWFORD, *SUMER AND THE SUMERIANS* 28 (2d ed. 2004); see also HENRIETTA MCCALL, *THE LEGENDARY PAST: MESOPOTAMIAN MYTHS* 25 (1990) ("Because life was precarious, it was

council of the gods, where cities' and humanity's fates were determined.<sup>21</sup> Loyalty to a city's god played a prominent role in giving that city's inhabitants a sense of cohesion and independence; a city's temple was by far its most important structure<sup>22</sup> and a city's residents found it difficult to imagine building political alliances with those who worshipped other deities.<sup>23</sup> Each city's fate depended upon the power, decisions, and behavior of its god. A city's decline or downfall might be attributed to its deity's decision to abandon it,<sup>24</sup> for example, while war between cities might be attributed to the deities' anger.<sup>25</sup> The weighty responsibility of pleasing a city's god fell primarily on the city's ruler, who regularly honored the deity with rituals, ceremonies, and offerings.<sup>26</sup> As one historian wrote, "any ruler's first responsibility was to nurture the city's god, for without his or her favor the place was doomed."<sup>27</sup>

## 2. *Ancient Israel*

At the heart of the ancient Israelites' oral traditions and religious texts was the belief that, if the Israelites disobeyed the commands of their deity, Yahweh, he would strip them of their land and allow them to be scattered in foreign territories; but if the Israelites honored their obligations to Yahweh, he would bless them with land of their own.<sup>28</sup> When the Israelites suffered military defeats and lost territory to their conquerors, the losses thus were attributed to the people's sinfulness and

prudent for cities to be guarded by a special god who was responsible for both the city and its people.”).

21. See CRAWFORD, *supra* note 20; see also SAMUEL NOAH KRAMER, *SUMERIAN MYTHOLOGY: A STUDY OF SPIRITUAL AND LITERARY ACHIEVEMENT IN THE THIRD MILLENNIUM B.C.* 46–52, 59–63 (1961) (recounting specific Sumerian myths relating to gods and the netherworld and the organization of the universe).

22. See Rhee, *supra* note 19, at 1, 12–13.

23. See *id.* at 24.

24. See, e.g., MCCALL, *supra* note 20, at 60 (recounting the Epic of Ezra, a myth explaining Babylon's decline).

25. See, e.g., *id.* at 61–62 (recounting the Epic of Ezra, which further describes the ensuing war between Babylonian cities).

26. See CRAWFORD, *supra* note 20, at 28; Rhee, *supra* note 19, at 19.

27. CRAWFORD, *supra* note 20, at 31; see also Rhee, *supra* note 19, at 19 (stating that failing to keep a city's deity appeased “would incur divine wrath and bring calamity to the city-state”).

28. See SIEGFRIED HERRMANN, *A HISTORY OF ISRAEL IN OLD TESTAMENT TIMES* 33 (John Bowen trans., rev. & enlarged ed. 1981) (1975) (stating that a belief in God's promise of a homeland in Palestine was central to the Israelites' self-understanding); NIELS PETER LEMCHE, *THE ISRAELITES IN HISTORY AND TRADITION* 86–93 (1998) (discussing the central components of the Israelites' religious narratives); see also, e.g., *Deuteronomy* 4:1 (linking the Israelites' obedience to God and the Israelites' possession of the land that God wished to give them); *Joshua* 23:16 (New American Standard) (“When you transgress the covenant of the Lord your God, . . . then the anger of the Lord will burn against you, and you shall perish quickly from off the good land which He has given you.”); *1 Kings* 9:6–7 (New American Standard) (“But if you or your sons indeed turn away from following Me, and not keep My commandments and My statutes which I have set before you, . . . then I will cut off Israel from the land which I have given them . . .”).

Yahweh's retribution.<sup>29</sup> Some of the Israelites' religious texts were written, for example, to identify the sins that led to the fall of the northern kingdom of Israel at the hands of the Assyrians in 721 BCE, and to describe the conduct that was necessary for the Israelites to regain Yahweh's favor.<sup>30</sup> Other texts carried the same twin burdens with respect to Babylonia's defeat of the southern kingdom of Judah and its capital city of Jerusalem in 597 BCE.<sup>31</sup> The ancient Israelites firmly believed that their political autonomy and prosperity depended entirely upon whether they faithfully obeyed Yahweh's commands.<sup>32</sup>

### 3. *Ancient Greece*

In the ancient Greek world described in the Homeric epics, society was structured around aristocratic warriors (*basileis*) and their families, servants, and companions.<sup>33</sup> The *basileis* regularly sought the gods' aid for themselves and their households, such as by leaving offerings in private graves and tombs.<sup>34</sup> Beginning in the eighth century BCE, however, the *basileis* began to band together and form integrated political structures, thereby shifting Greek society toward domination by city-states.<sup>35</sup> As this shift occurred, the *basileis* and other leaders of the emerging cities redirected their religious energies away from making private offerings with the hope of receiving benefits for their individual households, toward leaving offerings in public sanctuaries and temples with the hope of receiving benefits for the larger community.<sup>36</sup> Indeed, the construction of elaborate temples in which such offerings could be made was "among the very first manifestations of the polis."<sup>37</sup> The Greeks believed that particular gods were attached to the territories on which the sanctuaries and temples were built and that, if properly

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29. See JAMES M. EFIRD, *THE OLD TESTAMENT WRITINGS: HISTORY, LITERATURE, AND INTERPRETATION* 147 (1982); VICTOR H. MATTHEWS, *A BRIEF HISTORY OF ANCIENT ISRAEL* 108 (2002).

30. See, e.g., *2 Kings* 17:7 (New American Standard) (stating that the kingdom of Israel fell to the Assyrians "because the sons of Israel had sinned against the Lord their God"); see also EFIRD, *supra* note 29, at 71–77 (discussing the Old Testament book of Deuteronomy).

31. See, e.g., *2 Kings* 21:1–16 (describing the sins leading to the fall of the kingdom of Judah); see also EFIRD, *supra* note 29, at 65–67 (discussing the Old Testament book of Leviticus).

32. See LEMCHE, *supra* note 28, at 86–93.

33. See FRANÇOIS DE POLIGNAC, *CULTS, TERRITORY, AND THE ORIGINS OF THE GREEK CITY-STATE* 6–7 (Janet Lloyd trans., Univ. of Chi. Press 1995) (1984); see also RICHARD SEAFORD, *RECIPROCITY AND RITUAL: HOMER AND TRAGEDY IN THE DEVELOPING CITY-STATE* 13 (1994) ("Homeric society is characterized by the solidarity of the household and by the near absence of collective organizations transcending households.").

34. See SEAFORD, *supra* note 33, at 194–97.

35. See DE POLIGNAC, *supra* note 33, at 58–59. Fully fledged Greek city-states were well established by the middle of the fifth century BCE. See Carol G. Thomas, *The Greek Polis*, in *THE CITY-STATE IN FIVE CULTURES*, *supra* note 19, at 31, 38.

36. See DE POLIGNAC, *supra* note 33, at 11–15; SEAFORD, *supra* note 33, at 196–97; see also *id.* at 194 (stating that the good of the community, rather than the good of the individual or of the household, became "the new standard of individual morality").

37. SEAFORD, *supra* note 33, at 197.

courted, these gods would come to the aid of those who resided in that area.<sup>38</sup> Most of the Greeks' sanctuaries and temples (with the temple in Athens standing as the major exception) were erected outside each city, so that those religious structures could mark the boundaries of the land that each city claimed for itself.<sup>39</sup> City officials were charged with carrying out certain cultic duties,<sup>40</sup> although the cities' other residents also regularly tended to the deities by participating in cults and festivals.<sup>41</sup> Joining in those religious activities "set the seal upon membership of the society, thereby defining an early form of citizenship."<sup>42</sup>

#### 4. *The Early Christians*

Part I.B will discuss modern Christianity's geopolitical dimensions, but a few words should be said here about one of the ways in which some of the political impulses that characterized other ancient religious systems found expression within early Christianity. In the first few centuries CE—an era of harsh religious persecution—Christians often gathered at the graves of their martyred predecessors, whom the faithful called "saints."<sup>43</sup> After Constantine brought state-sponsored persecution of Christians to an end, the title of saint was extended to include not only those who had been martyred, but also those who had lived exemplary lives.<sup>44</sup> Christians flocked to the saints' tombs, where the saints were believed to be present on earth through their bodily remains, and available to intercede with God on behalf of those who sought their assistance.<sup>45</sup> Many of those deceased Christians came to be seen as patron saints who interceded with God on behalf of the members of designated polities.<sup>46</sup>

Consider, for example, Saint Geneviève, the patron saint of Paris. In the fifth century, Geneviève reportedly led Parisian women in prayer and fasting when the city was threatened by approaching Huns; when the Huns failed to claim the city, Paris's preservation was attributed to Geneviève's intervention.<sup>47</sup> Geneviève's aid on that occasion was not

38. See DE POLIGNAC, *supra* note 33, at 20, 43.

39. See *id.* at 33–34.

40. See Thomas, *supra* note 35, at 55–56.

41. See *id.* at 56.

42. DE POLIGNAC, *supra* note 33, at 153.

43. See KENNETH L. WOODWARD, MAKING SAINTS: HOW THE CATHOLIC CHURCH DETERMINES WHO BECOMES A SAINT, WHO DOESN'T, AND WHY 50–52 (1990); David H. Farmer, *Introduction* to 1 BUTLER'S LIVES OF SAINTS, at xi, xiii (Paul Burns ed., 1995).

44. See WOODWARD, *supra* note 43, at 54; Farmer, *supra* note 43, at xiii.

45. See PETER BROWN, THE CULT OF THE SAINTS: ITS RISE AND FUNCTION IN LATIN CHRISTIANITY 3–6 (1981).

46. See generally BUTLER'S LIVES OF PATRON SAINTS 3–22 (Michael Walsh ed., Harper & Row 1987) (1756–1759) (listing the patron saints of numerous countries, cities, and places, as well as those of professions and other concerns).

47. See MOSHE SLUHOVSKY, PATRONESS OF PARIS: RITUALS OF DEVOTION IN EARLY MODERN FRANCE 11–12 (1998).

forgotten. In 885, nearly four centuries after her death, Geneviève's remains were carried to a high point in Paris when the city was threatened by Norman armies; the Parisians prevailed, thereby "inaugurat[ing] a tradition of public invocations of Sainte Geneviève for the well-being of the entire city of Paris and its inhabitants."<sup>48</sup> Her relics were brought out when Paris faced an epidemic of "[b]urning [s]ickness" in the twelfth century,<sup>49</sup> her relics were paraded through the city more than two dozen times when floods threatened Paris between the thirteenth and seventeenth centuries,<sup>50</sup> her relics were taken through the streets when civil war erupted in the fifteenth century,<sup>51</sup> her aid was repeatedly sought when the city's crops faltered in the sixteenth and seventeenth centuries,<sup>52</sup> and her relics were carried through Paris yet again as German forces approached the city in 1940.<sup>53</sup> Such invocations of patron saints offered Christians the opportunity to interact with their deity in ways that bore the strong imprint of their geopolitical attachments.

##### 5. *China*

For thousands of years, people in China worshipped earth gods—territorial gods who were believed to reside in the ground around the altars where they were worshipped, and who would inflict harm on the land if they were not properly honored.<sup>54</sup> In the sixth and seventh centuries CE, city-god cults began to emerge around the spirits of military and political heroes.<sup>55</sup> City residents believed that their localities' gods "could rescue them from famine, epidemic, warfare, and demons of all kinds."<sup>56</sup> The Chinese believed that these gods served as "local officials in a centralized celestial bureaucracy closely resembling the earthly bureaucracy of [those] times, and that, in addition, they were colleagues and allies of human magistrates and prefects."<sup>57</sup> Because it often was local political officials who rose to the status of gods following their deaths, city-dwellers who desired the gods' protection in the afterlife were doubly incentivized to behave as good citizens.<sup>58</sup> Such beliefs continued into the nineteenth and twentieth centuries, with every

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48. *Id.* at 17.

49. *See id.* at 22.

50. *See id.* at 32–36.

51. *See id.* at 47–48.

52. *See id.* at 57, 96–98.

53. *See id.* at 209.

54. *See* David Johnson, *The City-God Cults of Tang and Sung China*, 45 HARV. J. ASIATIC STUD. 363, 397 (1985).

55. *See id.* at 389–94.

56. *Id.* at 449.

57. *Id.* at 435–36.

58. *See* C.K. YANG, RELIGION IN CHINESE SOCIETY: THE FIRST COMPREHENSIVE SOCIOLOGICAL ANALYSIS OF CHINESE RELIGIOUS BEHAVIOR 156–58 (1961).

major Chinese city boasting its own city-god temple.<sup>59</sup> Even today, outside mainland China, people sometimes pay homage to the patron gods of their villages and cities, seeking protection from sickness, crop failures, and other communal threats.<sup>60</sup>

#### 6. *Africa*

The south-central African countries of Malawi, Zambia, and Zimbabwe have long been home to territorial cults—cults practiced by those who reside in a “particular land area, so that membership [in a] cult is in the final instance a consequence of residence and not kinship or ethnic designation.”<sup>61</sup> Individuals who move into a territory in which a cult is practiced are expected to submit themselves to the cults’ directives.<sup>62</sup> The cults’ objects of worship vary, ranging from gods, to nature spirits, to the spirits of deceased human beings.<sup>63</sup> The cults’ leaders engage in rituals that are aimed primarily at avoiding “droughts, floods, blights, pests and epidemic diseases” that threaten the land on which the cults’ practitioners live, and they issue orders concerning methods of production, limitations on fishing, and other matters that affect the land’s long-term sustainability.<sup>64</sup> Murder, incest, and other acts deemed immoral also fall within the cults’ concern; when natural disasters strike, they usually are believed to be the consequence of cult members’ wrongdoing.<sup>65</sup> “Reduced to their core,” one scholar writes, “territorial cults are based on the idea that the satisfactory functioning of the environment depends not only on the directly ecological activity of man but also on the satisfactory functioning of society as a whole.”<sup>66</sup>

#### B. THE DIVINE ACCOUNTABILITY THESIS IN MODERN CHRISTIANITY

The global and historical prevalence of the divine accountability thesis suggests that, when modern-day Americans link the United States’s successes and tragedies to divine action, they are expressing communal self-perceptions that—if five thousand years of history are any indication—are profoundly human. Once those who are inclined to believe in a divine realm begin to identify themselves as members of a political community, they often are powerfully inclined also to believe

59. *See id.*

60. *See, e.g.,* DAVID K. JORDAN, GODS, GHOSTS, AND ANCESTORS: THE FOLK RELIGION OF A TAIWANESE VILLAGE 42–45 (1972) (discussing King Guo, the god of the Taiwanese village that the author visited in the 1960s).

61. GUARDIANS OF THE LAND: ESSAYS ON CENTRAL AFRICAN TERRITORIAL CULTS I (J.M. Schoffeleers ed., Mambo Press 1979) (1978) [hereinafter GUARDIANS OF THE LAND].

62. *See id.* at 5.

63. *See* Terence Ranger, *Territorial Cults in the History of Central Africa*, 14 J. AFR. HIST. 581, 582 (1973).

64. *See* GUARDIANS OF THE LAND, *supra* note 61, at 2–4.

65. *See id.* at 5.

66. *Id.* at 41.

that the divine realm perceives their political community as a single moral entity and will cause that entity to suffer or prosper in accordance with its conduct. Those beliefs, in turn, often fuel a desire to use the law as a means of restricting individuals' moral autonomy. When told with greater particularity, the story of the divine accountability thesis's usage in America begins with the Protestant Reformation in sixteenth-century Europe.

*I. Nationalistic Christianity in Europe*

As students of the Middle Ages well know, western Christendom and the Holy Roman Empire tenuously coexisted for many centuries.<sup>67</sup> Western Christendom was led by the Pope; after Pope Gregory VII declared the Church's independence from the Crown in the eleventh and twelfth centuries, Christendom itself became a lawmaking and law-enforcing entity, with its own canon law taking jurisdiction over a wide range of conduct and concerns.<sup>68</sup> The Holy Roman Empire, led by a monarchical secular authority, supervised a parallel system of legal rules and institutions.<sup>69</sup> Prior to the Reformation, Christendom succeeded in gradually weakening its secular rival by fueling nationalist sentiments in France and elsewhere—but it thereby helped spark the flames of nationalistic patriotism that ultimately helped to undermine the authority of Christendom itself.<sup>70</sup>

The Reformation deeply fractured Christendom's empire-spanning governmental structures and prompted powerful nationalistic associations between states and the newly emerging Protestant denominations. In states where Protestantism took hold, the Catholic Church was stripped of its governmental power, leaving secular

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67. See generally I ROLAND H. BAINTON, *CHRISTENDOM: A SHORT HISTORY OF CHRISTIANITY AND ITS IMPACT ON WESTERN CIVILIZATION—FROM THE BIRTH OF CHRIST TO THE REFORMATION 177* (Harper & Row 1966) (1964) (stating that a twelfth-century agreement tried to ease the tensions between the two authorities by declaring that the Church, rather than the emperor, would appoint its own bishops, but that the bishops would then “swear fealty to the emperor”); NORMAN TANNER, *THE CHURCH IN THE LATER MIDDLE AGES*, at xvii–xix (2008) (describing the geographical reach of Christendom prior to the schism between eastern and western Christendom in the eleventh century).

68. See I BAINTON, *supra* note 67, at 201–02 (stating that “[b]oth Church and king had their separate courts and systems of law” and that, through its canon law, the Church claimed jurisdiction over such matters as inheritance, marriage, perjury, usury, and “all cases involving clerics”); ROLAND H. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY 4–11* (1952) [hereinafter BAINTON, *THE REFORMATION*] (discussing Christendom and the Papal Revolution).

69. See HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION 56–61* (1974) (discussing the emergence of a body of secular law to compete with canon law).

70. See I BAINTON, *supra* note 67, at 225 (stating that England, France, and Spain were the first three nations to emerge in the Empire in the fourteenth century, with each defining itself by its traditions, language, and territory, and that these emerging nations found themselves at odds with both of Europe's two supranational powers—the empire and the Church); BAINTON, *THE REFORMATION*, *supra* note 68, at 12 (“The papacy was speedily undone by its very successes in weakening the empire and in building up the emerging national states.”).

authorities as the sole source of civil and criminal law.<sup>71</sup> Yet with the exception of the Anabaptists (who believed that Christians should withdraw from the political realm and that states should take no real interest in the religions practiced within their borders),<sup>72</sup> Protestants had no desire to permit religious pluralism. To the contrary, “[u]ne foi, un roi, une loi—one faith, one king, and one law—was still the model for any sound body politic.”<sup>73</sup>

The Protestant nexus between government and religion first appeared within individual cities. Ulrich Zwingli helped found the Reformed Church in Zurich, for example, with the hope of making that city “a theocratic community resembling that of ancient Israel, resting to a degree on blood and soil.”<sup>74</sup> John Calvin helped found the Reformed Church in Geneva with the aim of establishing that city as “the new Israel of God,” with “the laity and the clergy, the Town Council and the ministers . . . all equally imbued with the same high purpose.”<sup>75</sup> As individual states shook themselves loose from the Holy Roman Empire’s control, comparable impulses expressed themselves on a larger scale. Sweden adopted Lutheranism as the world’s first Protestant national church in 1527,<sup>76</sup> for example, and in the ensuing centuries it fashioned itself as a new Israel, chosen by God to be blessed with “special divine favor” so long as the Swedes did not provoke God’s wrath with their sins.<sup>77</sup>

By the seventeenth and eighteenth centuries, membership in Europe’s emerging national states was defined by two primary features: sharing a common ruler and participating in the activities of a state’s established church.<sup>78</sup> Clergy fueled the latter marker of national self-definition, favorably contrasting their own nation’s religious teachings with those of the established churches in other, misguided countries.<sup>79</sup> The Old Testament became “an increasingly important source of political language,” as religious and secular leaders “found a prototype of nation in Old Testament Israel.”<sup>80</sup> Nations individually lay claim to being the special focus of God’s favor.

71. See BERMAN, *supra* note 69, at 63–64 (discussing the Protestant reformers’ “delegalizing” of the church).

72. See BAINTON, *THE REFORMATION*, *supra* note 68, at 78, 99–100, 213.

73. *Id.* at 141–42.

74. *Id.* at 88.

75. *Id.* at 117–18.

76. *See id.* at 156.

77. PASI IHALAINEN, *PROTESTANT NATIONS REDEFINED: CHANGING PERCEPTIONS OF NATIONAL IDENTITY IN THE RHETORIC OF THE ENGLISH, DUTCH AND SWEDISH PUBLIC CHURCHES, 1685–1772*, at 86, 583 (2005).

78. *See id.* at 11.

79. *See id.* at 12.

80. *Id.* at 8, 86–90.

Accompanying that self-association with Israel was the fear that the nation would suffer God's judgment if, like the Israel of the Old Testament, it failed to obey God's commands. Clergy repeatedly warned that God would refuse to bless any nation unless its people repented of their sins.<sup>81</sup> In a sermon delivered in 1704, for example, a Church of England minister declared:

This is a Truth which all Christians are agreed in, That National Wickedness is the Cause of National Punishments . . . . [T]his we may be sure of, that every publick Affliction which a People suffers, is the just Desert of their National Crimes. . . . God, who is perfectly holy, is oblig'd, by the Rules of his eternal Justice, to punish Nations, as well as particular Persons, according to their Doings . . . .<sup>82</sup>

While individuals' sins could be punished either in this life or the next, the minister reasoned, "National Wickedness must be accounted for in this present World, this being the only State in which a Nation, as such, can possibly be punish'd."<sup>83</sup> In a 1724 sermon delivered to the House of Commons, another Anglican minister starkly reminded his listeners of Sodom's fate: "The Ruins of *Sodom* and *Gomorrah* are such Horrid Monuments of God's Indignation against *Popular Impurity*, that, surely, the most Intrepid, or the most Lethargic Man alive, cannot turn his Eyes towards them, without Shivering and Shrinking under the very First appearance of them."<sup>84</sup> Another Anglican minister told the House of Commons in 1742 that God would "continue [England] as a flourishing people" only if the House mandated proper respect for the Sabbath.<sup>85</sup> When the Enlightenment began to take hold, clergy warned against the emerging tendency to "attribute natural Causes" to diseases and other phenomena that the national church identified as God's ways of "displaying his Vengeance upon a wicked and gainsaying People."<sup>86</sup>

As the eighteenth century neared its close, those warnings gradually became less frequent. As Pasi Ihalainen puts it, "the nation was increasingly understood not so much as a sinning community fearing divine punishments but as an active political agent advancing the common good in this world."<sup>87</sup> National leaders discovered that it was in their interest to encourage a strong sense of national patriotism—the

81. *See id.* at 86, 590.

82. W. TUCKER, *THE CAUSE OF GOD'S WRATH: OR, A CALL TO REPENTANCE, FOR THE NATIONAL SIN OF SACRILEGE I*, 19 (London, 1704).

83. *Id.* at 19–20.

84. WILLIAM LUPTON, *NATIONAL SINS FATAL TO PRINCE AND PEOPLE* 5, 11 (1724) (sermon delivered to the House of Commons at St. Margaret's in Westminster on Jan. 30, 1724).

85. WILLIAM STUKELEY, *NATIONAL JUDGMENTS THE CONSEQUENCE OF A NATIONAL PROFANATION OF THE SABBATH* 1–6, 21–22 (1742) (sermon delivered to the House of Commons at St. Margaret's in Westminster on Jan. 30, 1724).

86. SAMUEL ECCLES, *NATIONAL SINS THE CAUSE OF NATIONAL JUDGMENTS* 3 (1750).

87. IHALAINEN, *supra* note 77, at 4.

kind of affection for one's country that makes one willing to die for it.<sup>88</sup> References to Israel in national churches' sermons thus were tempered with the language of national patriotism; maintaining national unity through religious tolerance became more important than rigidly adhering to religious orthodoxy; and religion became increasingly focused on God's relationship with the individual rather than God's relationship with the nation.<sup>89</sup> The modern age of the European nation-state had dawned.<sup>90</sup>

## 2. *Nationalistic Christianity in America*

The intersection of religion and nationalism saw a similar arc of development in seventeenth- and eighteenth-century America. The Puritans who settled in America in the early 1600s brought with them the conviction "that God's redemptive efforts centered on England and English Christianity."<sup>91</sup> The Puritans were equally convinced, however, that Reformation principles had not been sufficiently implemented within the Church of England and that the church needed to be purged of its remaining vestiges of Catholicism.<sup>92</sup> They believed that settling for a time in a remote land offered them the opportunity to demonstrate how God wished England's civil and religious leaders to govern. Like the ancient Israelites, they believed they had entered a covenant with God: "If they kept their end of the bargain, they expected God to bless them and earthly governors to treat them fairly. If they fell short, they understood that punishment would be their due."<sup>93</sup> They anticipated that God would richly bless the new settlements for their faithfulness and that English officials then would call Puritan leaders back to their homeland to implement the reforms that had so plainly won God's favor in America.<sup>94</sup>

88. See E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAM, MYTH, REALITY* 80–85 (1990).

89. See IHALAINEN, *supra* note 77, at 581–82, 590–93; see also BERMAN, *supra* note 69, at 68–69 (noting the simultaneous post-Enlightenment emergence of individualism and nationalism); BAINTON, *THE REFORMATION*, *supra* note 68, at 222 (stating that religious tolerance increased as people's interests shifted "from orthodoxy to patriotism"); JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* 141 (1984) (stating that the Renaissance and the Reformation helped bring "about the modern sense of nationhood, replacing 'Christendom' as the definition of cultural identity and historical meaning").

90. See generally HOBBSAWM, *supra* note 88, at 14–19, 80–92 (discussing the emergence of the nation-state in the late-eighteenth and early-nineteenth centuries).

91. Conrad Cherry, *The Colonial Errand into the Wilderness*, in *GOD'S NEW ISRAEL: RELIGIOUS INTERPRETATION OF AMERICAN DESTINY* 25, 25 (Conrad Cherry ed., 1998).

92. See EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* 10 (1991); PERRY MILLER, *ERRAND INTO THE WILDERNESS* 10–12 (1964).

93. WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* 1 (1996).

94. See GAUSTAD, *supra* note 92, at 21; MILLER, *supra* note 92, at 11.

The Puritans thus set about creating townships in which church and state—although formally separate entities—were closely allied in the effort to identify and procure the conduct that God desired.<sup>95</sup> Little distinction was drawn between law and morality; it was the job of colonial authorities “to translate the divine moral law into criminal statutes.”<sup>96</sup> Even private immoral acts constituted a threat to the community’s welfare, because such acts could bring God’s wrath upon the entire community.<sup>97</sup> The threat of divine punishment was especially potent when a community’s members knew about individuals’ sins and did nothing to prevent them from recurring:

The toleration of notorious wickedness, including notorious heresy, . . . created the possibility that not only the evildoer but also those who tolerated the evil would suffer God’s judgment. New England Puritans found frequent evidence that God did not necessarily reserve righteous judgments until the world’s end. So far as they could see, he visited evildoers with stern doses of present wrath. . . . It required no immense step for . . . Puritans to see the divine hand of judgment poised over the community when it harbored wickedness. Portents of God’s judgment were ever close at hand.<sup>98</sup>

By the mid-1600s, however, the Puritans had become profoundly discouraged—many of those portents of divine judgment had been realized and the Puritans believed their sins were surely to blame. As Perry Miller observes, Puritan writings from that era “recite the long list of afflictions an angry God had rained upon them, surely enough to prove how abysmally they had deserted the covenant: crop failures, epidemics, grasshoppers, caterpillars, torrid summers, arctic winters, Indian wars, hurricanes, shipwrecks, accidents, and (most grievous of all) unsatisfactory children.”<sup>99</sup> Enthusiasm for the Puritans’ project waned; “[r]eligious dissent and diversity increased [and] church membership shrank.”<sup>100</sup>

Puritans and non-Puritans alike were stirred to renewed religious fervor in the early eighteenth century. A 1727 earthquake in New England prompted many terrified residents to flock to their churches, where clergy told them that it was only by God’s mercy that no one had died in the quake, and that New Englanders needed to repent of their

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95. See TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 53–62 (1998).

96. David H. Flaherty, *Law and the Enforcement of Morals in Early America*, in *LAW IN AMERICAN HISTORY* 201, 211 (Donald Fleming & Bernard Bailyn eds., 1971).

97. See *id.* at 217.

98. HALL, *supra* note 95, at 59–60.

99. MILLER, *supra* note 92, at 6; see, e.g., Michael Wigglesworth, *God’s Controversy with New England* (1662), reprinted in *GOD’S NEW ISRAEL*, *supra* note 91, at 42 (expressing such sentiments in verse).

100. MARTIN, *supra* note 93, at 2.

sins before God dealt them a more serious blow.<sup>101</sup> During the Great Awakening that began several years later, preachers delivered similar messages. George Whitefield told congregations in South Carolina, for example, that an epidemic of smallpox and yellow fever in Charleston had been God's punishment for the people's sins, and that worse would soon come if the people did not change their ways.<sup>102</sup> When a fire burned a third of Charleston later that year, a local minister compared the tragedy to the fiery destruction of Sodom.<sup>103</sup>

It was during the Great Awakening that Americans first became aware of the stirrings of a nascent nationalism, and that a link began to be forged in their minds between the colonies' joint conduct and their common fate at the hands of the divine.<sup>104</sup> Those national bonds grew stronger, of course, in the years leading up to the Revolution. As Americans' geopolitical attachments expanded in scope, their perception of the community that shared a singular relationship with God expanded as well. Americans increasingly prayed not just for God's blessing on their local community, but on the nation as a whole.<sup>105</sup> The original Puritan ambition of providing a model for reforming the Church of England was replaced with two broader ambitions bearing the marks of the new American nationalism: the religious ambition of having all American Christians "play the crucial role in advancing the Kingdom of God on Earth"<sup>106</sup> and the secular ambition of providing the world with a model of democratic self-government.<sup>107</sup>

During and after the Revolution, citizens of the newly independent United States increasingly became of two minds on matters of law, morality, and the prospect of divine national judgment. On the one hand, widespread enthusiasm for using the law as a means of securing compliance with divine commands diminished. Government leaders in

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101. See THOMAS S. KIDD, *THE GREAT AWAKENING: THE ROOTS OF EVANGELICAL CHRISTIANITY IN COLONIAL AMERICA 10–11* (2007).

102. See *id.* at 68–69; see also *id.* at 95 (stating that, in Massachusetts, high grain prices and an unstable currency were said to be God's attempts to awaken a spiritually slumbering people).

103. See *id.* at 76–77.

104. See REINHOLD NIEBUHR & ALAN HEIMERT, *A NATION SO CONCEIVED: REFLECTIONS ON THE HISTORY OF AMERICA FROM ITS EARLY VISIONS TO ITS PRESENT POWER 16* (1963) (stating that the quest for national unity in America "had its origin in the religious life of New England Puritanism, and more particularly in the Great Awakening"). Jonathan Edwards marked the colonists' emerging national bonds with his plea for all colonists to ask God to establish his kingdom in America. See *id.* at 16–17; see also Jonathan Edwards, *The Latter-Day Glory Is Probably To Begin in America* (1746), reprinted in *GOD'S NEW ISRAEL*, *supra* note 91, at 54 (predicting that God would establish his coming somewhere in America, mostly likely in New England).

105. ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION 14* (1966).

106. I WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE*, at xx (1971).

107. See NIEBUHR & HEIMERT, *supra* note 104, at 125.

the late 1700s reduced the criminal law's reach on certain matters of sexual morality, for example, choosing instead to focus on "the preservation of order in society without reference to the saving of souls."<sup>108</sup> In the same spirit, a growing desire to promote a sense of political unity gradually softened state and religious leaders to the demands of those seeking the disestablishment of state religions.<sup>109</sup>

At the same time, many continued to insist that there was a link between the nation's conduct and the nation's treatment by God. Indeed, that linkage had become a staple of American political and religious rhetoric. Immediately prior to the Americans' decision to sever their ties with England, for example, Benjamin Rush warned that God would punish America for the evils of slavery,<sup>110</sup> a sentiment that President Lincoln famously echoed nearly three-quarters of a century later.<sup>111</sup> During the Revolutionary War, Thomas Paine told a British official that "[t]here are such things as national sins" and that England stood in danger of being punished by God for its wrongdoings.<sup>112</sup> A New Hampshire minister preached in 1788 that Americans must learn the lessons of ancient Israel: if you "adhere faithfully to the doctrines and commands of the gospel, and practice every public and private virtue," he told his listeners, "you will increase in numbers, wealth, and power[;] . . . whereas, the contrary conduct will make you poor, distressed and contemptible."<sup>113</sup> Such warnings continued to appear in sermons throughout the nineteenth century.<sup>114</sup>

108. Flaherty, *supra* note 96, at 248.

109. See KIDD, *supra* note 101, at 268, 293; see also I McLOUGHLIN, *supra* note 106, at xxi (stating that, between 1630 and 1830, "the duty to follow the Truth of God becomes the right to seek the Truth wherever that search may lead; toleration of dissent becomes the right to believe anything or nothing").

110. See Benjamin Rush, An Address to the Inhabitants of the British Settlements on the Slavery of the Negroes in America (1773), in I AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 217, 230 (Charles S. Hyneman & Donald S. Lutz eds., 1983) ("Remember that national crimes require national punishments, and without declaring what punishment awaits this evil, you may [be assured] that it cannot pass with impunity, unless God shall cease to be just or merciful.").

111. See generally Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in GOD'S NEW ISRAEL, *supra* note 91, at 201 (stating that the Civil War may have been God's punishment for the national sin of slavery).

112. Letter from Thomas Paine to Lord Richard Howe (Jan. 13, 1777), in I THE WRITINGS OF THOMAS PAINE 179, 188–89 (Moncure Daniel Conway ed., 1967).

113. Samuel Langdon, The Republic of the Israelites an Example to the American States (1788), in GOD'S NEW ISRAEL, *supra* note 91, at 93, 98.

114. See, e.g., GEORGE DUFFIELD, A THANKSGIVING SERMON: THE RELIGIOUS CHARACTER OF A PEOPLE THE TRUE ELEMENT OF THEIR PROSPERITY *passim* (1839) (preaching that God was threatening to punish the nation for its national sins—ranging from slavery to dishonoring the Sabbath—by dissolving the Union); ROSWELL D. HITCHCOCK, OUR NATIONAL SIN: A SERMON *passim* (1861) (preaching that the Civil War was God's punishment for the nation's sins); WILLIAM INGRAHAM KIP, OUR NATIONAL SINS: A SERMON 9 (1840) (preaching that individuals' sins may be punished in this life or the next, but nations' sins must be punished in the present life because "[t]he tie which binds us together as a nation is severed at the grave"); Dudley A. Tyng, Our Country's Troubles *passim* (June

Today, warnings of geopolitical divine punishments are associated primarily (although not exclusively) with evangelical Christianity.<sup>115</sup> After a period of relative dormancy in the early twentieth century,<sup>116</sup> evangelicals gradually became more prominent in political affairs, frequently warning of impending divine retribution for the nation's sins. Evangelical preacher Billy Graham made national headlines in 1949, for example, when he declared at a Los Angeles revival that communism was a religion "inspired, directed, and motivated by the Devil himself" and was "more rampant in Los Angeles than any other city in America," that God's judgment was "about to fall" on Los Angeles, and that the only hope for the entire nation's continued survival "now lay in repentance and revival."<sup>117</sup> Fueled by that same anti-communist fervor and by their adverse reaction to "aggressive efforts to secularize public culture, of which the 1963 United States Supreme Court ruling against Bible reading in public schools became the chief symbol," evangelicals began to speak out on numerous social issues.<sup>118</sup> The stage was set for the kinds of arguments that we frequently see and hear today: God will bring harm upon the nation or its political subdivisions unless they conduct themselves in particular ways.<sup>119</sup>

### C. THE DIVINE ACCOUNTABILITY THESIS AND THE CONSTITUTION

When citizens propose a legislative agenda that is driven in whole or in part by the divine accountability thesis, to what extent may government officials adopt that agenda as their own? The Constitution erects two primary hurdles, the first more formidable than the second.

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29, 1856), in *N.Y. TIMES*, July 9, 1856, at 2 (preaching that slavery, nonparticipation in voting, and undue loyalty to political parties are national sins, and that "as bodies politic have no existence in the world to come, their judgment and recompense, unlike that of individuals, can take place only in this world").

115. See *supra* notes 1–6 and accompanying text (providing modern-day examples of such warnings); see also Robert F. Cochran, Jr., *Evangelicals, Law, and Abortion*, in *FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW* 91, 93 (Robert F. Cochran, Jr. ed., 2008) ("Evangelicals have two central beliefs in common. First is the importance of a new birth in Christ. . . . Second, evangelicals believe in the authority of scripture.").

116. See GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* 208–09 (2006) (stating that, despite their belief "that God judged whole nations," evangelicals in the early 1900s became involved in only a small handful of public-policy domains, such as campaigns to prevent the teaching of evolution in public schools).

117. MARTIN, *supra* note 93, at 29 (internal quotation marks omitted).

118. MARSDEN, *supra* note 116, at 240–41; see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212–27 (1963) (striking down a Pennsylvania law that required daily Bible readings in the public schools).

119. See MARSDEN, *supra* note 116, at 247–48 (noting that warnings of the imminence of divine judgment upon the United States have become commonplace).

### I. *The Establishment Clause and Its Foundations*

The First Amendment's Establishment Clause does not permit state or federal lawmakers to invoke the divine accountability thesis as a primary rationale for government action.<sup>120</sup> The Court has held that government bodies must act in service to predominantly secular objectives; the primary purpose underlying a governmental act cannot be to "advance[] a particular religious belief"<sup>121</sup> or "endorse a particular religious doctrine."<sup>122</sup> "[A]t the very least," the Court has insisted, the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"<sup>123</sup> The Court has stressed that the government cannot endorse religion in ways that send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>124</sup>

Those principles clearly would be violated by a law that proscribed certain kinds of conduct based on the conviction that the God of the Judeo-Christian tradition would punish the geopolitical community if it permitted that conduct to persist. By enacting such a law, legislators would be taking a position on religious questions, endorsing a set of religious doctrines, and sending a clear message to those of different religious persuasions that, by virtue of their religious beliefs, they are "outsiders" who do not fully belong to the community that the government represents.

When viewed from the historical vantage point described in Parts I.A and I.B, there is an unmistakable irony in the Supreme Court's establishment jurisprudence. The perception that the Court wishes to protect—the perception of membership in the American political community—is the very same perception that drives those who embrace the divine accountability thesis to seek legislation that runs counter to Establishment Clause principles. From ancient Sumer to the United States, the divine accountability thesis has emerged only after individuals

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120. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

121. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

122. *Id.* at 594; see also *Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . .").

123. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)); see also *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) ("[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community.").

124. *Allegheny*, 492 U.S. at 595 (plurality opinion) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (internal quotation marks omitted)).

have begun to forge communal bonds with one another. Invoking that thesis can help to reinforce community boundaries, but it does not create them; the divine accountability thesis is never applied to political communities that people have not already begun to define for themselves. It is precisely because individuals count themselves as members of the American political community—the community that they believe will either enjoy divine blessings or suffer divine punishment—that they feel compelled to try to align the community's conduct with what they believe God demands. In short, the good that the Court wishes to protect is one of the causes of the evil that the Court wishes to avoid.

There is a second, paradoxical irony in the Court's establishment framework: despite the Court's desire not to give citizens cause to perceive that their religious beliefs render them political outsiders, feelings of alienation from the political community are an inevitable consequence of the Court's establishment rulings.<sup>125</sup> In seventeenth-century Puritan settlements, it was religious skeptics and dissenters who felt ostracized.<sup>126</sup> To a significant extent, the tables are now turned—those who fear alienation today often include those who would like to enlist the government's aid in executing what they believe to be God's agenda.<sup>127</sup> Putting the divine accountability thesis to work in one's political arguments is thus both an expression of one's membership in the political community and an attempt to shape that community's behavior in ways that will prevent one's experience of communal membership from being eclipsed by alienation.

Ironies, however, do not always signal errors. The ironies in the Court's establishment jurisprudence are unavoidable consequences of laudable constitutional objectives. A robust Establishment Clause is a vital component of the nation's commitment to religious freedom and tolerance. As Kathleen Sullivan observes, the Establishment Clause calls a truce in interdenominational warfare by demanding that the nation's "public moral disputes . . . be resolved only on grounds articulable in secular terms."<sup>128</sup> If contested religious principles were permitted to undergird legislative, executive, or judicial action, government institutions would forfeit any hope of winning and keeping what John Rawls describes in a related setting as "the support of an overlapping consensus"—the support of those who subscribe to "opposing religious, philosophical and

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125. See Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 516–18 (2004) (discussing what it means to feel alienated from one's geopolitical community).

126. See I McLoughlin, *supra* note 106, at xviii ("The discontent of dissenters in colonial New England sprang less from any civil disabilities they suffered under the ecclesiastical laws than from feelings of social inferiority and ostracism.").

127. Cf. *Van Orden v. Perry*, 545 U.S. 677, 696–97 (2005) (Thomas, J., concurring) (suggesting that mandating the removal of religious displays from government property sends a hostile message to those who embrace the displays' religious significance).

128. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–98 (1992).

moral doctrines [that are] likely to thrive over generations in a more or less just constitutional democracy.”<sup>129</sup>

Those constitutional lines are not merely politically wise; they are morally essential. As Thomas Nagel points out, there is an important moral difference between the kinds of rationales that can justify an individual’s private beliefs and the kinds of rationales that can justify government coercion.<sup>130</sup> A belief that a divine realm exists, that the divine realm’s desires and intentions have been revealed in one manner or another, and that one must conform to the divine realm’s demands, all can provide a rational basis for an individual’s own convictions and behavior, but they do not constitute the kinds of reasons that can morally justify governmental restrictions on a pluralistic citizenry’s freedom. If you wish to make the public case for government coercion in a given setting, Nagel persuasively argues, you must be able

to present to others the basis of your own beliefs, so that once you have done so, *they have what you have*, and can arrive at a judgment on the same basis. That is not possible if part of the source of your conviction is personal faith or revelation—because to report your faith or revelation to someone else is not to give him what you have, as you do when you show him your evidence or give him your arguments.<sup>131</sup>

If the government restricts citizens’ freedom in an effort to serve some constituents’ religious goals, but those restrictions cannot be justified “in objective terms, [then] it is a particularly serious violation of the Kantian requirement that we treat humanity not merely as a means, but also as an end.”<sup>132</sup> Ronald Dworkin,<sup>133</sup> Richard Fallon,<sup>134</sup> Kent Greenawalt,<sup>135</sup> and Stephen Macedo<sup>136</sup> have reached comparable conclusions.

129. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987) (describing a desirable “political conception of justice”).

130. See Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 229 (1987).

131. *Id.* at 232.

132. *Id.* at 238. See generally Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 480–82 (discussing Immanuel Kant’s “practical imperative” and its widespread endorsement).

133. See Ronald Dworkin, *Rawls and the Law*, 72 FORDHAM L. REV. 1387, 1399 (2004) (“Judges may not appeal to religious convictions or goals in liberal societies because such convictions cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”).

134. See Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1549–50 (1989) (citing Nagel’s argument with approval and stating that, if government officials were permitted to justify their official actions with their private religious or moral convictions, it would “trample on the right to equal respect of mature and competent persons who could not reasonably be expected to acknowledge the justificatory force of the nonpublicly accessible reasons”).

135. See KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 91 (1988) (“[A] liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition.”).

136. See STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL

Although the Establishment Clause draws lines that are politically and morally desirable, the two ironies that I have described underscore the inevitability of church-state conflicts in a society where the divine accountability thesis enjoys a significant constituency. Those who embrace that thesis will continue to value their membership in the American political community and, as members of that community, will continue to try to shape government policy in ways that they believe are essential to win God's favorable treatment of the nation and its political subdivisions. Given the centrality of the divine accountability thesis to their worldview, those citizens will continue to foreground the religious convictions underlying their political preferences. Constrained by the Establishment Clause, elected officials will face the task of trying to identify secular rationales for the government actions that their religiously motivated constituents demand. Because judges are aware of the religious convictions that drive those demands, legislators who try to translate constituents' religious convictions into secular rationales will find a cloud hovering over their efforts, all but inviting judges to dismiss those secular rationales as mere pretexts. Court rulings that invalidate those legislative efforts will, in turn, reinforce religiously motivated citizens' belief that the threat of divine punishment looms larger with each passing day.

We see that pattern repeatedly. In its 2009 ruling striking down Iowa's ban on same-sex marriage, for example, the Iowa Supreme Court rejected numerous efforts to justify the ban on secular grounds, then cut to what it saw as the core of the issue—namely, “religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage.”<sup>137</sup> The court insisted that the state's “constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them.”<sup>138</sup> Efforts to identify secular rationales were deemed similarly problematic in the U.S. Supreme Court's rulings in *Edwards v. Aguillard*, where the Court used the word “sham” to describe an effort to justify the removal of evolution from public schools' science curricula on grounds of academic freedom;<sup>139</sup> in *Wallace v. Jaffree*, where the Court found no plausibility in the argument that Alabama had mandated a daily one-minute period of silence in the public schools merely as a religion-neutral

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CONSTITUTIONALISM 44 (1990) (arguing that government coercion must be based upon “justifications that are widely acceptable to reasonable people with a broad range of moral and philosophical commitments and interests”); *id.* at 46–47 (arguing that “appeals to inner conviction or faith, special insight, secret information, or very difficult forms of reasoning, are ruled out” because they do not treat dissenters “as free and equal moral beings”).

137. *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009).

138. *Id.* at 905 (emphasis omitted).

139. 482 U.S. 578, 586–89 (1987).

effort to accommodate students' religious practices;<sup>140</sup> and in *Stone v. Graham*, where the Court stated that "no legislative recitation of a supposed secular purpose can blind us to th[e] fact" that Kentucky's primary purpose for posting a copy of the Ten Commandments in each public-school classroom was "plainly religious in nature."<sup>141</sup> By applying laudable anti-establishment principles in all of these cases, the Justices gave many religiously motivated citizens cause to believe that, unless dramatic constitutional changes are made, the United States soon will suffer divine wrath.<sup>142</sup>

## 2. Majoritarian Morality as a Justification for Government Action

Recognizing the hurdles that the Establishment Clause places in their path, where are citizens and lawmakers who embrace the divine accountability thesis—but who need secular rationales for their legislative agenda—likely to turn? The moral judgments of political majorities have long been a leading candidate. The argument here is not "We, a political majority, believe God demands X," but rather, "We, a political majority, believe X is morally essential." So long as those moral judgments can be defended on secular grounds, they might seem like a perfect means of avoiding establishment difficulties. After all, there is a strong correlation between what religiously motivated citizens believe God demands and what those citizens believe is morally appropriate, yet moral judgments cannot quickly be dismissed as mere religious convictions dressed in secular clothing.<sup>143</sup> Might those who embrace the divine accountability thesis be able to get as much legislative mileage out of their moral judgments as they might have wanted to get out of their religious convictions?

The prospects for morality-based arguments were brighter prior to 2003 than they are today. In its 2003 ruling in *Lawrence v. Texas*, striking down Texas's criminal ban on homosexual sodomy, the Court erected a second hurdle in the path of religiously motivated citizens by casting

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140. 472 U.S. 38, 57 n.45 (1985).

141. 449 U.S. 39, 41 (1980) (per curiam).

142. See, e.g., M.J. Cavallaro, Letter to the Editor, FORT COLLINS COLORADAN, Aug. 19, 2004, at 6A ("The nativity scene has been taken away, prayer in school is gone, our pledge of allegiance under God is now in question, next will be In God We Trust. . . . How long will it be before the blessings will be taken away? Don't think it will be ignored much longer."); Kip Speckels, People's Forum, *Fox Network Offers Sleazy Programming*, GREEN BAY PRESS-GAZETTE, May 23, 2002, at 6A ("How can God bless a nation . . . that, in the early 1960s, took the Bible and prayer out of its schools and is now offended by his Ten Commandments?"); Gary Bergel, *Banning Prayer in Public Schools Has Led to America's Demise*, FORERUNNER, May 1998, [http://forerunner.com/forerunner/X0098\\_Ban\\_on\\_school\\_prayer.html](http://forerunner.com/forerunner/X0098_Ban_on_school_prayer.html) (arguing that God permitted numerous national problems to emerge or worsen following Supreme Court rulings of the sort described above).

143. See Stanley Hauerwas, *A Christian Critique of Christian America*, in RELIGION, MORALITY, AND THE LAW 110, 118 (J. Roland Pennock & John W. Chapman eds., 1988) (stating that although "religion and morality are conjoined" in the eyes of many Americans, it is not true "that morality must be embodied in religion").

doubt on the ability of majoritarian moral judgments, standing alone, to justify criminal legislation.<sup>144</sup> The Court acknowledged that

for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.<sup>145</sup>

The Court concluded that vindicating majoritarian moral judgments could not justify Texas's "intrusion into the personal and private life of the individual."<sup>146</sup> "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral," the Court wrote, "is not a sufficient reason for upholding a law prohibiting the practice."<sup>147</sup> The Court suggested that Texas's statute could have survived constitutional scrutiny only if it had been aimed at preventing "injury to a person or abuse of an institution the law protects."<sup>148</sup>

Much has already been written about *Lawrence*, and there is no need fully to immerse ourselves in that discussion here. For our purposes, four brief points are important. First, if moral judgments are indeed now out of play when legislators draft criminal codes, then *Lawrence* greatly ratchets up the pressure on those who believe that political communities must satisfy certain moral criteria in order to win God's favorable treatment. Justice Scalia certainly thought the *Lawrence* majority had indeed sweepingly declared moral judgments an insufficient basis for criminal legislation. In a heated dissent, he complained that the Court's ruling "effectively decrees the end of all morals legislation" and that "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" now stood on perilous constitutional ground.<sup>149</sup> If the courts hold to that line, we can expect those who subscribe to the divine accountability thesis to push hard for the appointment of judges who will provide them with a more accommodating interpretation of the Constitution.

Second, we can expect some religiously motivated citizens to believe that trying to articulate secular, nonmoral explanations for what they believe God demands is uncomfortably akin to the biblical story of

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144. See 539 U.S. 558, 577-79 (2003).

145. *Id.* at 571.

146. *Id.* at 578.

147. *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

148. *Id.* at 567.

149. *Id.* at 599 (Scalia, J., dissenting).

Adam and Eve's decision to eat the fruit of a tree that God had declared off limits.<sup>150</sup> If God tells us not to eat a particular fruit, some citizens might argue, then who are humans to second-guess God's reasons? Some believers surely will fear that setting out on a quest to find secular, nonmoral justifications for divine commands paves the way for the conclusion that, when such rationales cannot be found, obeying those commands is not terribly important after all. None of this will help alleviate the tension between judges who are interpreting the nation's constitutional traditions and citizens who believe the nation is edging ever closer to cataclysmic divine retribution.

Third, *Lawrence's* holding with respect to the justificatory sufficiency of moral judgments is actually less certain than Justice Scalia suggested. Although some commentators believe Justice Scalia's reading of the majority opinion was accurate,<sup>151</sup> there certainly are other reasonable interpretations. Flexibility might be found both with respect to the kinds of moral judgments that are sufficient to undergird legislation and with respect to the kinds of interests that morality-driven legislation can infringe. With respect to the former, Cass Sunstein argues that *Lawrence* permits lawmakers to base a criminal statute on constituents' moral judgments, so long as the statute genuinely reflects the citizenry's current moral commitments—the problem in *Lawrence*, he argues, was that the Texas statute reflected an old-fashioned morality that the people of Texas had largely abandoned.<sup>152</sup> With respect to the interests that morality-driven legislation can infringe, one cannot help but notice the *Lawrence* majority's choice of language and supporting precedent. Although the Court did not expressly declare homosexual sodomy a fundamental right meriting substantive due process's highest measure of protection,<sup>153</sup> the Court claimed the support of precedent involving fundamental rights<sup>154</sup> and described the right at issue in language that ordinarily would suggest the Court had deemed heightened protection appropriate.<sup>155</sup> Although morality was deemed an

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150. See *Genesis* 3:1–24. In that story, the forbidden fruit is described both by “the serpent” and by God as giving humans the capacity to discern good from evil. The story might thus be interpreted as endorsing blind obedience to divine commands.

151. See, e.g., Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 415 (2004).

152. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27–30.

153. See *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (making this observation).

154. See *id.* at 564–66 (majority opinion) (citing cases involving contraception, abortion, and parents' right to control the upbringing of their children).

155. See *id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”); *id.* at 578 (“The State cannot demean [homosexuals'] existence or control their destiny by making their private

insufficient legislative rationale for infringing on gay and lesbian adults' right to engage in consensual sexual intimacy, morality thus might be a constitutionally sufficient legislative justification when a lesser interest (such as the right to gamble or consume alcohol) is at stake.<sup>156</sup>

Finally, *Lawrence's* statements regarding the constitutional adequacy of legislative moral judgments must be viewed in historical context. The proper relationship between law and morality has been a perennial subject of debate at least since the days of Aristotle,<sup>157</sup> a debate typified in more recent times by the Hart-Devlin exchange in the 1960s.<sup>158</sup> Some have insisted that there are occasions when society is entitled to embody its moral judgments in law;<sup>159</sup> others have insisted that there are occasions when society's moral judgments cannot justify government coercion.<sup>160</sup> Even if *Lawrence's* holding were clear, it would be naïve to assume that the Court's five-to-four ruling in that case was the Court's and the Constitution's last word on the subject.

sexual conduct a crime.”).

156. *But cf.* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1236 (2004) (“[S]ince the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.”).

157. *See generally* HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 27 (1996) (“Far from maintaining that the moral life is no business of the political community, Aristotelianism maintains that the formation of character is its primary business.”).

158. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965) (“[H]istory shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.”); H.L.A. HART, LAW, LIBERTY AND MORALITY 48–52 (1963) (criticizing Devlin’s claim that preserving English and American society requires that homosexuality be criminalized); *id.* at 46–47 (arguing that sparing some citizens from the knowledge that conduct is occurring which they regard as immoral is an insufficient justification for criminalizing homosexual conduct).

159. *See, e.g.*, ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 309 (1999) (concluding that society is entitled to ban conduct that it regards as immoral and damaging to a person’s character and ability to form solid relationships); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 30 (2006) (“[I]ndividuals and groups need the help of the state acting through law in order to secure a social milieu or public moral-cultural-educational environment in which they can pursue their own flourishing.”).

160. *See, e.g.*, JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 165–66 (1960) (“It is not the function of the legislator to forbid everything that the moral law forbids . . . . Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order.”); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 98–101 (1988) (identifying reasons why citizens and legislators should be cautious about trying to codify their moral convictions); Joseph M. Boyle, Jr., *A Catholic Perspective on Morality and the Law*, 1 J.L. & RELIGION 227, 239–40 (1983) (concluding that, unless “serious violations of justice” are at stake, individuals must be left free to make and act upon their own moral judgments).

## II. THE DIVINE ACCOUNTABILITY THESIS'S SECULAR COUNTERPART

For more than five thousand years, the divine accountability thesis<sup>161</sup> has expressed a worldview that, in significant ways, subordinates a political community's individual members to the political community itself.<sup>162</sup> It asserts that a polity's well-being turns upon its collective relationship with the divine realm, and that divine justice often focuses broadly on entire cities, states, and nations, rather than narrowly on each individual's moral merits. If one revisits the claims recounted in this Article's opening paragraph, one finds no effort to distinguish between the morally culpable and the morally innocent within a political community that has been targeted for divine punishment. In the eyes of the individuals who made those claims, it apparently is one's very membership in a community stained by wrongdoing that makes one deserving of hardship. Because everyone in the political community will either justly suffer or justly flourish as a result of the conduct that the community performs or permits, these individuals implicitly argue, it is appropriate for decisions about many morality-laden matters to be made by the community itself.

That worldview has a powerful competitor—a competitor with which many who reject the divine accountability thesis likely associate themselves. Political liberalism is grounded in the conviction that individuals ordinarily must be left free to make their own moral decisions and to enjoy any benefits and suffer any hardships that those decisions bring their way. Yet even political liberalism is not the bastion of moral neutrality that its proponents often claim it to be. We can easily find within liberalism a desire to strip individuals of their freedom to make certain morality-laden decisions for themselves, and to give that decisionmaking power to the larger community instead. Of course, one finds the same desire among subscribers to other schools of political thought as well.<sup>163</sup> The fact that one finds that desire even in autonomy-championing liberalism, however, signals that something powerful is driving that desire to the surface. The impulse to restrict individuals' moral freedom flows directly from what I shall argue is the divine accountability thesis's secular counterpart.

### A. COMMUNAL MORALITY WITHIN POLITICAL LIBERALISM

In his 1871 essay *Democratic Vistas*, Walt Whitman identified a theme that he believed was central to American democracy: the theme of

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161. See *supra* text accompanying note 10 (defining the divine accountability thesis).

162. See *supra* Part I.A–B (describing variants of the divine accountability thesis in numerous societies).

163. See, e.g., Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688–95 (1992) (discussing three separate strains of communitarianism).

individualism, centered upon an “image of completeness in separatism, of individual personal dignity, of a single person, either male or female, characterized in the main . . . in the pride of himself or herself alone.”<sup>164</sup> In Whitman’s view, America’s well-being depended upon free and autonomous individuals joining together in democratic forms of government to achieve their common objectives on the strength of their own “inherent, normal, full-grown qualities, without any superstitious support whatever.”<sup>165</sup> A Whitmanesque commitment to individual freedom and autonomy characterizes much of modern political liberalism.

As a matter of political theory, liberalism today generally holds that the state must remain neutral on questions of morality, leaving individuals free to devise their own conceptions of what the good life entails.<sup>166</sup> Following the lead of John Stuart Mill, liberalism places harm at the center of its political morality: unless persons other than the actor are at risk of getting hurt, the government has no business intervening.<sup>167</sup> On this view, the chief function of many of the individual rights that the Constitution protects is to ensure that individuals remain free to define moral goods for themselves.<sup>168</sup> Liberalism also draws from Immanuel Kant, holding that when the government

164. WALT WHITMAN, *Democratic Vistas*, in *COMPLETE POETRY AND COLLECTED PROSE* 929, 942 (Justin Kaplan ed., 1982).

165. *Id.*; see also RORTY, *supra* note 10, at 16 (“[Whitman] wanted Americans to take pride in what America might, all by itself and by its own lights, make of itself, rather than in America’s obedience to any authority—even the authority of God.”).

166. See GREENAWALT, *supra* note 135, at 21 (“Liberalism is often associated with a rejection of corporate authority in favor of individual autonomy . . .”); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 294 (1996) (“By the 1970s, the version of liberalism that asserts the priority of the right over the good had become reigning American public philosophy. The notion that government should be neutral among competing conceptions of the good life in order to respect people’s rights to choose their own values and ends figured prominently in political discourse and constitutional law.”).

167. See JOHN STUART MILL, *ON LIBERTY* 73–74 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859) (“[W]hen a person’s conduct affects the interests of no persons besides himself, . . . there should be perfect freedom, legal and social, to do the action and stand the consequences.”); see also I JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING*, at ix (1988) (endorsing liberalism’s rejection of “legal moralism”—the view that the law may be used to “prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone”); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 413 (1986) (stating that Mill’s harm principle is usually invoked as an argument for “restrain[ing] both individuals and the state from coercing people to refrain from certain activities or to undertake others on the ground that those activities are morally either repugnant or desirable”). Many believe the Court endorsed the Millian harm principle in *Lawrence v. Texas*. See *supra* notes 144–48 and accompanying text (discussing *Lawrence*); see also Christian J. Grostic, Note, *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation*, 105 MICH. L. REV. 151, 152 (2006) (stating that most readers of *Lawrence* have concluded that the Court now follows Mill’s harm principle, under which moral justifications for laws must be accompanied by threatened harms).

168. Cf. Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 444 (2000) (discussing liberalism’s definition of “rights prior to, and independently of, the good”).

forces someone to serve an end whose status as an end she can reasonably decline to acknowledge—to do the purported will of a god in whom she does not believe, for example—it is [immorally] treating her as a mere means in the pursuit of others' purposes, and not as an end in herself.<sup>169</sup>

When framed at the level of overarching theories, liberalism and the divine accountability thesis appear starkly opposed to one another. Liberalism demands that individuals remain free to shape their own moral lives and that government officials intervene only when an individual's conduct poses a risk of harm to others; advocates of the divine accountability thesis demand that government officials help ensure that all individuals within a geopolitical community conduct themselves in the way that those advocates believe the divine realm demands. When one presses beneath the surface, however, one finds that advocates of political liberalism are much more deeply engaged in communal decisionmaking on moral matters than their rhetoric of governmental neutrality would suggest. In very real ways, advocates of political liberalism and advocates of the divine accountability thesis are joint participants in the same moralistic enterprise.

At two different levels, political liberalism's champions make moral claims about the kinds of lives that the government should permit or encourage its citizens to lead. First, liberalism's commitment to individual autonomy is itself morally significant. As communitarian scholars have pointed out, "even the liberal state constructs and promotes a particular moral framework, namely, one that places individual freedom and autonomy at the top of society's normative hierarchy."<sup>170</sup> Liberalism makes a first-order moral judgment, in other words, when it concludes that, in the absence of harm, government interference with individual autonomy cannot be justified.<sup>171</sup> In fact, absolute moral neutrality with respect to any given form of conduct is impossible: whether the government promotes individual autonomy by permitting that conduct to occur or strips individuals of their freedom to decide whether that conduct is appropriate, government cannot help but make a moral choice.

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169. Fallon, *supra* note 134, at 1549–50; *see also* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."); Pettys, *supra* note 132, at 480–82 (discussing Kant's "practical imperative" and its widespread endorsement).

170. Ball, *supra* note 168, at 445 & n.9 (attributing the quoted thesis to the communitarian scholars whose work Ball critiques); *see also* Nagel, *supra* note 130, at 217 (observing that, with their demands for governmental neutrality on moral matters, liberals open themselves to the charge "that all the pleas for toleration and restraint really disguise a campaign to put the state behind a secular, individualistic, and libertine morality—against religion and in favor of sex, roughly").

171. *See* RAZ, *supra* note 167, at 415 (stating that "regard[ing] personal autonomy as an essential ingredient of the good life" is a moral judgment).

Second, those who subscribe to political liberalism must, by necessity, make second-order, case-by-case moral judgments about whether government intervention is appropriate. As Joseph Raz explains, the elastic concept of harm that political liberalism places at the center of its political and moral calculus is inescapably infused with moral concerns: whether one believes something should count as politically remediable harm depends entirely on one's moral perspective.<sup>172</sup> It is our moral perspective that tells us in specific cases whether the risks of bodily injury, damage to physical property, harm to reputation, inconvenience to neighbors, feelings of disgust provoked in onlookers, and other consequences of the disputed conduct are harms warranting governmental interference with individuals' ability to live their lives as they see fit.

Not only are all assessments of harm morally laden, there even are instances when many advocates of liberalism likely would regard offense to their own moral sensibilities as a legislatively cognizable injury.<sup>173</sup> Consider, for example, the crimes of consensual bigamy among adults<sup>174</sup> and consensual incest between a parent and his or her adult biological child.<sup>175</sup> Regardless of their religious commitments, many (though admittedly not all) liberalism-endorsing Americans undoubtedly favor laws proscribing those practices. Yet what, precisely, are the harms in those cases that warrant public moral judgments? One thing seems certain: for many of us, an instinctive moral condemnation precedes any clear, empirically grounded understanding of the injuries that those practices inflict. To be sure, we could posit such harms—perhaps harm to children who are raised in bigamous households or are conceived in incestuous relationships. Yet suppose we devised means by which those posited harms could be avoided—suppose we declared that the only persons who may enter bigamous marriages or have incestuous sexual relations are those who do not have children and are unable to bear them. Would advocates of liberalism then withdraw their objections to those practices? Some would, but others would not. Some would find it morally intolerable if their political community permitted such conduct to occur—more intolerable than if the conduct were occurring in some

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172. *See id.* at 414.

173. *Cf. MACEDO, supra* note 136, at 209 (“Liberals need not be rights absolutists; most would permit, for example, certain minimal forms of political paternalism.”).

174. *See generally* RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 143 (1996) (“Most states do not distinguish between the concepts of bigamy and polygamy, punishing all plural marriages as bigamy. . . . In the vast majority of states, bigamy is a felony carrying a substantial maximum prison sentence.”).

175. *See generally* Brett H. McDonnell, *Is Incest Next?*, 10 *CARDOZO WOMEN'S L.J.* 337, 349 (2004) (“All but three states criminalize some forms of consensual adult incest. Every state that does so criminalizes at least incest between parents and their children.”).

other part of the world<sup>176</sup>—and they would not believe any further justification for government intervention was needed.

Why is that the case? Why is it that many who reject the divine accountability thesis and who celebrate liberalism's commitment to individual autonomy nevertheless find occasions when they wish to express moral condemnation through their government's civil and criminal codes? Are these necessarily instances of hypocrisy, or might there sometimes be a deeper, potentially more satisfying explanation? And why is it that offense to one's moral sensibilities is often more intolerable when the offensive conduct is occurring within one's own political community than when it is occurring somewhere else? The answers to those questions lie in the divine accountability thesis's secular counterpart.

#### B. THE INTEGRATION THESIS

The secular counterpart to the divine accountability thesis consists of two overlapping and widely held perceptions: (1) our individual identities are integrated with, and partially constructed by, the political communities to which we belong; and (2) each of our political communities is akin to a personified moral agent whose conduct reverberates in the individual lives of its integrated members. I shall call these two perceptions, taken together, the "integration thesis."<sup>177</sup> In all cases in which these perceptions are in play, the experience of membership in a political community can prompt even the most secular-minded individuals to ask government leaders to make and enforce moral judgments regarding the conduct that occurs within that community, just as the same experience of community membership prompts some to seek the same ends by invoking the divine accountability thesis.

With respect to the first perception composing the integration thesis, our individual identities unquestionably are partially bound up with the political communities to which we belong. Our immersion in political communities helps make us who we are.<sup>178</sup> Joel Feinberg writes that an individual "is essentially a social product"—he "is born into a family . . . and a larger political community, . . . his membership and

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176. See CLOR, *supra* note 157, at 90 (observing that we might feel outraged when we hear about terrible acts committed in other parts of the world, "but not a sustained outrage and sense of responsibility to do something about it; those countries are not *ours*").

177. This footnote serves merely to facilitate internal cross-references.

178. See Gardbaum, *supra* note 163, at 704 ("The social constitution of identity means . . . that, had we been brought up in a different society from the one we were in fact brought up in, we would now be different people in certain essential respects."); see also *id.* at 692 (acknowledging the claim made by some communitarians "that the community of which an individual is a member is constitutive of that individual's identity and not merely contingent or accidental to it").

sense of belonging imprinted from the start.”<sup>179</sup> Michael Sandel observes that “the story of my life is always embedded in the story of those communities from which I derive my identity—whether family or city, tribe or nation, party or cause.”<sup>180</sup> Kenneth Karst notes that “membership in the national community helps to provide a sense of wholeness, not only for the society but also for the citizen’s sense of self.”<sup>181</sup> All of these realities are captured in a declaration that most citizens of the United States would fully embrace: “I *am* an American.”<sup>182</sup>

The second perception composing the integration thesis extends the first perception’s significance in important ways. We have a striking tendency to personify the political communities to which we belong, to see ourselves as constituent parts of those personified communities, and to experience changes in our sense of well-being based on the conduct in which those personified communities engage. Of course, we do not ascribe actual metaphysical existence to political communities—we do not say that a political community is an actual super-sized person with its own thoughts and intentions.<sup>183</sup> Yet we do regularly conceive of our political communities as person-like moral agents. Because our individual identities are integrated with those communal moral agents, we experience greater or lesser measures of well-being based on those agents’ conduct.

Ronald Dworkin and Paul Kahn have made this point well. Why is it that “we feel responsible for public actions against which we may have voted or, even more dramatically, for public actions that preceded our own membership in the state”?<sup>184</sup> Why do we “see national history as an expression of our own identity—think of the ‘founding fathers’—

179. I FEINBERG, *supra* note 167, at 83; *see also id.* at 86–87 (stating that community allegiances form important parts of our individual identities).

180. Michael J. Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 1, 6 (Michael J. Sandel ed., 1984).

181. KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 184 (1989).

182. *Cf.* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 250 (1996) (finding in interviews with numerous Americans “a widespread and strong identification with the United States as a national community”).

183. *Cf.* I FEINBERG, *supra* note 167, at 85 (arguing that it is a mistake to suppose that political communities are “some sort of super-individuals with minds and bodies of their own, and rights and duties not reducible to those of any constituent officials, representatives, or other ordinary sorts of individuals”). In the late-nineteenth and early-twentieth centuries, however, such claims found greater traction. *See, e.g.*, SHAILER MATHEWS, PATRIOTISM AND RELIGION 4 (1918) (“We have come to see that our nation is more than a group of people existing under one government within definite boundaries. . . . It is a glorious super-person, possessed of virtues, power, ideals, daring and sacrifice.”); *see also* Todd E. Pettys, *Our Anti-Competitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1380–81 & nn.107–09 (2006) (discussing this view and its origins in the controversial political philosophy of G.W.F. Hegel).

184. Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 71 (1989).

regardless of any actual, empirical connection to that history”?<sup>185</sup> Why do Germans who were not alive during World War II experience feelings of shame arising from Germany’s treatment of the Jews?<sup>186</sup> Why do modern-day Americans feel morally implicated in the United States’s past dealings with slavery?<sup>187</sup> The answers to these questions, Dworkin and Kahn suggest, flow from two facts: we conceive of our national political community as “a single distinct moral agent,”<sup>188</sup> and, because we are integrated components of that moral agent, “the success or failure of [our political] community’s communal life is part of what determines whether [our individual] lives are good or bad.”<sup>189</sup>

Dworkin borrows an analogy from John Rawls that helps to clarify the argument:

A healthy orchestra is itself a unit of agency. The various musicians who compose it are exhilarated, in the way personal triumph exhilarates, not by the quality or brilliance of their individual contributions, but by the performance of the orchestra as a whole. It is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members.<sup>190</sup>

In much the same way, Dworkin argues, the “formal political acts” of a government’s legislative, executive, and judicial branches affect the well-being of the individuals whose identities are embedded in that political community.<sup>191</sup> “An integrated citizen,” Dworkin writes, “will count his community’s success or failure . . . as resonating in his own life, as improving or diminishing it.”<sup>192</sup> Just as a musician who individually plays well during an otherwise disastrous orchestral performance will regard his or her evening as a frustrating disappointment, an integrated citizen will regard the quality of his own life as reduced, Dworkin contends, “if he lives in an unjust community, no matter how hard he has tried to make it just.”<sup>193</sup>

Notice that, on Dworkin’s view, it is only the “formal political acts” of government that resonate in integrated citizens’ lives, and not the acts

185. *Id.*

186. See RONALD DWORKIN, *LAW’S EMPIRE* 172 (1986).

187. *See id.*

188. *Id.* at 187. It is on the strength of this insight that Dworkin builds his well-known argument that law demands “integrity”: “the state [must] act on a single, coherent set of principles” as if the state were indeed “a moral agent.” *Id.* at 166.

189. Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 492 (1989); see also Kahn, *supra* note 184, at 72 (“We hold ourselves responsible, and are held responsible, for the actions of the state, even when there is little we can do, or could have done, about them.”).

190. Dworkin, *supra* note 189, at 493 (citing JOHN RAWLS, *A THEORY OF JUSTICE* 520–29 (1971)).

191. *Id.* at 496.

192. *Id.* at 500; see also *id.* at 496 (“The formal political acts of a political community—the acts of its government through its legislative, executive, and judicial institutions—meet all the conditions of collective agency we identified when we considered why an orchestra has a communal life.”).

193. *Id.* at 501.

of fellow citizens behaving in their private capacities. By limiting the causes of communal integration's effects to a government's formal legislative, executive, and judicial acts, Dworkin hopes to protect political liberalism from an argument that has the potential to leave liberalism in tatters. Opponents of political liberalism argue that the commission of immoral acts by individuals within a political community can affect the well-being of all of that community's integrated members, and that government institutions thus ought to be permitted to punish those who engage in the morally objectionable conduct.<sup>194</sup> If that argument has merit, then liberalism's plea for tolerance and for broad respect for individual autonomy is at risk of being devoured by integration's effects: integration becomes the basis for restricting individuals' moral autonomy in a host of areas. Taking pre-*Lawrence* laws criminalizing homosexual sodomy as an example, Dworkin responds by insisting that, when allegedly immoral acts are committed by individuals, rather than by the government as a single moral agent, then any moral discomfort that others feel is not a legislatively cognizable consequence of communal integration. He argues that it is only formal governmental acts that "[o]ur practices identify . . . as acts of a distinct legal person[,] rather than [acts] of some collection of individual citizens," that affect integrated citizens' well-being.<sup>195</sup> Dworkin points to the prosecution of wars and the imposition of taxes as examples—these are acts in which a geopolitical community behaves as a single agent, and so, for better or worse, they reverberate in the lives of the community's integrated members.<sup>196</sup> In contrast, Dworkin contends, we do not have a national sex life; in its capacity as a moral agent, our national community does not engage in sexual practices that affect the well-being of its citizens.<sup>197</sup> Sexually conservative individuals thus are not "defiled by the sexual practices of" more sexually adventurous citizens within that same geopolitical community, and so they cannot cite their integration with that community as a basis for securing legislation that would declare those practices a crime.<sup>198</sup>

Some might believe, with Dworkin, that when determining whether communal integration gives citizens cause to seek legislation on a given matter, we ought indeed to distinguish between those areas in which the national community acts as a single moral agent and those in which the

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194. See, e.g., DEVLIN, *supra* note 158, at 13 ("[T]he loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."); see also Dworkin, *supra* note 189, at 491 (acknowledging this argument).

195. Dworkin, *supra* note 189, at 496.

196. See *id.*

197. See *id.* at 497.

198. See *id.*

community's members act on their own. Yet Dworkin's distinction does not accurately capture the way in which many Americans actually experience their communal integration, nor is it clear that Dworkin's argument provides the normative ammunition needed to persuade those citizens that they ought to feel otherwise.

Although it is the descriptive weakness of Dworkin's distinction that is most relevant for our purposes here, let us first briefly consider that distinction's normative difficulties. If, as Dworkin argues, the acts of a government's legislative and judicial branches are among the "formal political acts" that resonate in the lives of a community's integrated members,<sup>199</sup> then the practical distinction between the formal acts of government and the private acts of citizens can rather quickly break down. Return for a moment to the example of consensual incest between a parent and his or her adult biological child.<sup>200</sup> Suppose that such acts of incest were known to occur within a particular political community. On Dworkin's argument, we would not yet have a collective act that affects integrated citizens' well-being in ways warranting a legislative response. Yet suppose that morally outraged citizens nevertheless succeeded in securing a criminal ban on consensual adult incest (perhaps based on concerns regarding the health of those individuals' offspring). The enactment of that legislation would certainly be a formal governmental act that resonated in integrated citizens' lives, favorably for some and unfavorably for others. Further suppose that a court then ruled that the ban unconstitutionally infringed on adults' right to engage in consensual sexual intimacy. That ruling would be a second formal governmental act that would reverberate in integrated citizens' lives, again favorably for some and unfavorably for others. Even on Dworkin's model, citizens who were unhappy with the ruling thus would perceive an integration-driven reason to lobby for the very governmental action that Dworkin wishes to preclude. Some conservatives surely would describe their reaction to the Court's ruling in *Lawrence* in precisely this way.<sup>201</sup>

One might respond by arguing that opponents of adult incest never had an integration-driven reason to demand the initial legislative ban, and that they cannot bootstrap their way into an integration-driven argument by inappropriately provoking their legislatures or courts to speak as a single moral agent. Yet here we find that Dworkin's line fails conclusively to resolve the question of what actually is and is not appropriate for citizens to demand of their government in the first place. As Bernard Williams asks, why must we accept *a priori* that the line separating collective and individual acts marks the line separating those

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199. See *supra* notes 190–93 and accompanying text.

200. See *supra* note 175 and accompanying text.

201. See *supra* notes 144–60 and accompanying text (discussing *Lawrence*).

instances in which integration's consequences should and should not be deemed sufficient grounds for political action?<sup>202</sup> Why is it, for example, that changes in the nation's culture—changes that reverberate in the lives of those whose identity is partially embedded in that culture—should not be deemed to produce the kinds of integration effects that can justify a response from the government in which that culture is situated?<sup>203</sup> In the end, Dworkin fails to draw a line that liberals and nonliberals alike are obliged to endorse.

For purposes of understanding the work performed by the integration thesis in American politics, what matters most is recognizing that the individual effects of communal integration are, in large measure, a matter of perception. Regardless of what our normative theories suggest they *ought* to perceive, citizens frequently *do* perceive that, by virtue of their integration with a political community, their individual well-being is affected by the presence or absence of certain kinds of conduct within those geopolitical borders. When citizens demand that government respond by reshaping the conduct that those political communities permit, they enter the same territory that advocates of the divine accountability thesis have been entering for thousands of years.

Of course, coming to a richer understanding of the religious and secular reasons that drive people to behave as they do is valuable only if that understanding is a prelude to critical reflection. We ultimately must try to assess when collective political action that restricts individuals' moral autonomy is most defensible. It is to that difficult task that we now turn.

### III. GUIDEPOSTS FOR DISTINGUISHING BETWEEN PUBLIC AND PRIVATE MORALITY

My aim in Parts I and II was to examine some of the core beliefs and perceptions that drive individuals to want to shift decisionmaking responsibility—on numerous matters of moral concern—from individuals to their governments. Because those beliefs and perceptions relate directly or indirectly to many matters on which the citizenry is sharply divided, facilitating constructive dialogue on these issues is admittedly a tall order. Yet our system of democratic constitutionalism presupposes that members of the sovereign citizenry will constructively engage one another in the areas of their deepest conflicts, searching for ways in which bridges might be built and fundamental commitments might be

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202. See Bernard Williams, *Dworkin on Community and Critical Interests*, 77 CAL. L. REV. 515, 518–20 (1989) (arguing that we need not accept Dworkin's argument *a priori*).

203. Cf. Philip Selznick, *Dworkin's Unfinished Task*, 77 CAL. L. REV. 505, 506 (1989) (criticizing Dworkin's argument on the grounds that "the norms that govern our sex lives are collective, as are the institutions within which regulated sex life occurs").

adjusted,<sup>204</sup> even while understanding that many of our disagreements are unlikely ever to be fully resolved.<sup>205</sup> I try to point the way toward such bridges and adjustments here in Part III.

I first dispel what might otherwise be a dialogue-stifling misunderstanding: One might mistakenly assume that advocates of the divine accountability thesis<sup>206</sup> believe the government ought to throw its weight behind *all* of the divine realm's expectations. To the contrary, most advocates of that thesis are engaged in the same line-drawing enterprise that occupies everyone else who delves into the relationship between law and morality. No matter what their religious perspective, nearly everyone is working to distinguish between those public matters on which government action is appropriate and those private matters that must be reserved for each individual's own moral judgment. Hoping to draw advocates of the divine accountability thesis and the integration thesis<sup>207</sup> at least partially onto common ground, I then propose seven questions that ought to be addressed by anyone who is contemplating whether a given moral issue should be deemed a matter of public or private concern.

#### A. RELIGIOUS COMMUNITIES' EMBRACE OF THE PUBLIC-PRIVATE DISTINCTION

In the secular realm, it is clear that we are continually engaged in an effort to distinguish between those public areas of moral concern where government coercion is appropriate and those private areas where individuals ought to be free to live their lives as they see fit.<sup>208</sup> That task can be extraordinarily difficult at times, in large part because each of us as individuals is neither wholly integrated nor wholly autonomous.<sup>209</sup> Our individual identities are partially bound up with the political communities to which we belong,<sup>210</sup> yet we cherish our capacity to reflect critically on those communities and to demand that vast swaths of decisionmaking power remain in our own individual hands.<sup>211</sup> Constantly

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204. Cf. Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1072–73 (1986) (arguing that we should not assume there are inherent limits on the ability of people with different moral perspectives to reason with one another).

205. Cf. Fallon, *supra* note 134, at 1558 (“[R]eligious disagreements will seldom be reconcilable through arguments that rest on publicly accessible reasons, and we cannot reasonably ask those whose beliefs are rejected to acknowledge the justificatory force of reasons of other kinds.”).

206. See *supra* text accompanying note 10 (defining the divine accountability thesis).

207. See *supra* text accompanying note 177 (defining the integration thesis).

208. See *supra* notes 166–68 and accompanying text (discussing liberalism's focus on harm).

209. See Selznick, *supra* note 203, at 507–08 (observing that, because political communities are not homogenous, citizens experience continual tension between autonomy and integration).

210. See *supra* notes 178–82 and accompanying text.

211. See MACEDO, *supra* note 136, at 246–50 (making this observation).

pulled between those two dimensions of our identities, we debate how the public-private line ought to be drawn.

Contrary to what one might assume, most participants in the nation's religious traditions are engaged in precisely the same line-drawing task. There admittedly are some who, like the Puritans of the seventeenth century,<sup>212</sup> resist making any distinction between public and private morality and insist that the government ought to help ensure that all people obey all of the divine realm's commands. Catholic theologian John Murray complained half a century ago, for example, that some of his Protestant counterparts seemed unwilling to distinguish between public and private morality.<sup>213</sup> Yet in most mainstream religious circles today, we find an eagerness to try to make that very distinction.

The Ten Commandments provide several examples.<sup>214</sup> A few of those directives—such as the commandments against murder<sup>215</sup> and stealing<sup>216</sup>—concern matters on which religious and secular citizens alike are eager for the government to speak. Yet several commandments concern behaviors that most Jews and Christians appear to regard as private matters in which the government has little or no role to play. These ancient religious texts declare, for example, that people may neither make nor worship idols<sup>217</sup>—practices that are protected from governmental interference under the First Amendment's Free Exercise Clause,<sup>218</sup> to the apparent satisfaction of the mainstream Judeo-Christian community. Other commandments demand that children honor their parents<sup>219</sup> and that no person covet his or her neighbor's spouse or possessions<sup>220</sup>—matters for which we find no religion-fueled lobbying campaigns. Another commandment prohibits doing any work on the seventh day of the week<sup>221</sup>—a directive once widely enforced within the

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212. See *supra* notes 91–100 and accompanying text.

213. See MURRAY, *supra* note 160, at 158. This unwillingness is not unique to Protestants. Catholic scholar Charles Lugosi argues, for example, that the Ten Commandments “create absolute standards of right and wrong,” that “[t]o adopt a posture of assumed ‘neutrality’ [on the values expressed in the Ten Commandments] is in essence hostility toward God and the rule of law,” and that if Americans do not honor the Ten Commandments, the nation will “be cursed with disasters of biblical proportions.” Charles I. Lugosi, *How Secular Ideology Is Marginalizing the Rule of Law and Catholic Contributions to Law and Society II: The Ten Commandments and the Rejection of Divine Law in American Jurisprudence*, 47 J. CATH. LEGAL STUD. 145, 145–46, 148, 151 (2008).

214. See generally *Exodus* 20:1–17.

215. See *id.* at 20:13.

216. See *id.* at 20:15.

217. See *id.* at 20:4–5.

218. See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

219. See *Exodus* 20:12.

220. See *id.* at 20:17.

221. See *id.* at 20:8–11.

Anglo-American legal tradition,<sup>222</sup> but now regarded by many Jews and Christians as a matter of private responsibility.<sup>223</sup>

Far from demanding that government enforce all of the divine realm's commands, numerous religious traditions appear to regard obedience to some of those directives as a desirable means of setting themselves off from the larger culture in which they live. Honoring the Sabbath serves that function for Orthodox Jews, for example, as does avoiding meat during Lent for Catholics and avoiding alcohol and tobacco for Mormons. On these and other matters, religious communities forego dependence upon secular governments and embrace these opportunities to rely entirely upon the force of their own faith to secure compliance with what they believe are the divine realm's expectations.

Regardless of their religious perspective, therefore, nearly everyone who takes an interest in matters of law and morality is ultimately engaged in the same task—they are trying to discern when it is and is not appropriate to enlist the government's aid in procuring the conduct that one believes is morally appropriate.

#### B. SEVEN QUESTIONS

With respect to the task of demarcating the realms of public and private morality, the prospects for facilitating dialogue within our highly pluralistic society will be greatly improved if we at least can agree upon some of the central factors that ought to influence our deliberations. I propose several such factors here. I do not purport to provide an overarching political or moral theory that definitively tells us when the morality of a given form of conduct ought to be left for individuals to determine on their own. Given our pluralism, it would be naïve to suppose that any such theory could win the support of most reasonable Americans.<sup>224</sup> Rather, I aim to provide a vocabulary and framework for dialogue between scholars and citizens of diverse perspectives.

There are at least seven questions that everyone—regardless of their religious or ideological worldview—ought to ask when trying to draw lines between public and private morality. I attempt to frame each of

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222. See Lesley Lawrence-Hammer, Note, *Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 VAND. L. REV. 1273, 1275–78 (2007) (briefly reviewing the history of “blue laws”). These laws enjoy the blessing of the U.S. Supreme Court. See *McGowan v. Maryland*, 366 U.S. 420, 425–53 (1961) (rejecting attacks leveled under the Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Exercise and Establishment Clauses).

223. See Lawrence-Hammer, *supra* note 222, at 1278–82 (describing numerous ways in which “blue laws” have been softened, to the point where many regard them as “little more than irrelevant relics from America's Puritan past”).

224. Cf. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 58 (1999) (“Philosophers are never so provincial as when they are placing beyond the pale of the ‘reasonable’ the moral claims of people who do not belong to their narrow community.”).

these questions in a manner that advocates of the divine accountability thesis, advocates of the integration thesis, and advocates of other points of view all can embrace without being unfaithful to their core beliefs and political perceptions. I do not ask individuals to set aside their belief that God sometimes interacts with humanity along geopolitical boundaries, for example, nor do I ask them to ignore their perception that political communities' conduct affects the well-being of those communities' integrated members. No single one of these seven queries is necessarily dispositive, but each is relevant to the task.

*I. Does the Conduct at Issue Pose a Risk of Harm to Others? If So, Is the Harm Trivial or Weighty?*

These questions relate, of course, to the Millian principle of harm that I have already briefly addressed,<sup>225</sup> and so—despite their widely perceived importance—there is little need to discuss them in detail here. Although the concept of harm lacks precise contours,<sup>226</sup> the Anglo-American tradition has long regarded the question of harm to others as centrally relevant to the task of determining whether a given form of conduct ought to be criminally punished.<sup>227</sup> That tradition reflects our intuition that, in a society that is fundamentally committed to equality, it makes little sense to protect one person's freedom to pursue his or her own conception of the good life when that protection comes at the cost of undermining other individuals' capacity to do the same thing.

A tacit acknowledgement of harm's relevance might explain some religious communities' distinction between those divine directives for which the government's backing is sought and those for which it is not. Jews and Christians do not ask their government leaders to help enforce some of the directives one finds in the Ten Commandments, for example, such as the directives against making and worshipping idols and coveting others' possessions.<sup>228</sup> Might this reflect a recognition that, absent some discernable risk of harm that an actor's conduct poses to others, the argument for governmental regulation can be exceptionally difficult to make?<sup>229</sup>

225. See *supra* note 167 and accompanying text (discussing political liberalism's reliance on Mill).

226. See *supra* notes 172–76 and accompanying text (noting the elasticity of the concept of harm).

227. See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1152–59 (describing the powerful influence of the no-harm principle). Far more controversial is the question of whether governments ought to protect actors from harming themselves. Although many will regard the risk of self-inflicted harm as relevant to the moral propriety of government intervention, it is not a factor likely to receive the consensus support that I am seeking here.

228. See *supra* notes 214–23 and accompanying text (discussing the Ten Commandments).

229. As I have indicated, however, the concept of harm is so elastic—possibly even encompassing offense to others' moral sensibilities (as in my examples of bigamy and consensual adult incest), see *supra* notes 174–75 and accompanying text—that it is difficult to regard the harm inquiry as necessarily dispositive.

2. *Can the Harm Posed to Others Be Described in Nonreligious Terms?*

I indicated earlier that the Supreme Court's Establishment Clause jurisprudence rests in part on the sound moral premise that government restrictions on individuals' freedoms must be justified by reasons that can be objectively explained and fully grasped without the aid of religious faith or divine revelation.<sup>230</sup> With Nagel, I argued that if the government were permitted to regulate on the strength of principles embraced by some constituents solely as a matter of religious conviction, the government would violate nonbelievers' moral right to be treated equally as ends, rather than merely as means by which other constituents' religious goals could be achieved. As Amy Gutman and Dennis Thompson put it, "[d]eliberative democracy asks citizens and officials to justify public policy by giving reasons that can be accepted by those who are bound by it."<sup>231</sup> In nontheocratic democracies such as ours, government bodies must not dispositively rest their actions upon reasons that gain force only when one embraces principles of religious faith that cannot be established by ordinary methods of proof.<sup>232</sup> When describing the rationale for stripping individuals of their moral autonomy on a given matter, therefore, it is essential that one be able to frame any harm-based argument in nonreligious terms.

I noted earlier that some religious citizens might resist the morally appropriate demand that they try to identify secular rationales for what they believe to be God's commands.<sup>233</sup> That resistance might be softened if we openly acknowledged that religion does have an important role to play in these debates. Given the fact that many Americans' moral values "are deeply rooted in religion," it would be foolish to suppose that religious values either could or should be entirely eliminated from democratic discourse.<sup>234</sup> Religious convictions may play especially important roles in the early stages of public dialogue, prompting us to pose hypotheses to be tested, for example, and impelling us to take great care when examining data that conflicts with our deeply held convictions. In the end, however, the government's actions must rest upon justifications that can be explained in secular terms and that any rational

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230. See *supra* notes 130–36 and accompanying text.

231. AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52 (1996).

232. See *id.* at 56–57 (advancing this argument); see also Fallon, *supra* note 134, at 1549 (“[T]he stance of objectivity leads to a demand that state coercion be justified by reasons that would at least have the status of reasons before the tribunal of every (or virtually every) mature person’s understanding.”).

233. See *supra* note 150 and accompanying text.

234. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 21 (1984); see also GREENAWALT, *supra* note 135, at 44 (noting how extraordinarily difficult it would be for a religious person to try to remove all traces “of his own religious convictions in his political life”).

person—regardless of his or her religious beliefs—could embrace.<sup>235</sup> Evangelical scholar Robert Cochran goes a long way toward making this very point when he tells his readers that “[o]ur arguments should be framed primarily in moral terms that are accessible to all” and that “[i]f a law is to have broad support, it must be based on common grounds.”<sup>236</sup>

3. *Does the Conduct at Issue Significantly Detract from My Ability To Remain an Integrated Member of This Political Community? Conversely, Would Proscribing the Conduct at Issue Significantly Detract from the Ability of Others To Remain Integrated Members of This Political Community?*

The divine accountability thesis and the integration thesis are both grounded in a deep sense of political solidarity—the perception of a collective relationship with the divine realm emerges only after people have begun to define themselves as a political community,<sup>237</sup> while the effects of integration are felt only within the communities to which one belongs.<sup>238</sup> For the great majority of us, that sense of political solidarity is both deeply desired and practically essential. As Richard Rorty observes, most Americans “want to feel patriotic”—they “want to feel part of a nation which can take control of its destiny and make itself a better place.”<sup>239</sup> Moreover, a deep sense of “[e]motional involvement with one’s country—feelings of intense shame or of glowing pride aroused by various parts of its history, and by various present-day national policies—is necessary if political deliberation is to be imaginative and productive.”<sup>240</sup>

When others within one’s political community are engaged in conduct that one finds morally objectionable, therefore, it is appropriate to take account of the toll that allowing that conduct to persist might have on one’s ability to regard oneself as an integrated member of the community. By the same token, one must also take account of the toll that proscribing that conduct would take on those who wish both to engage in the conduct and to feel bound by those same ties of communal solidarity. Reconciling those conflicting perspectives—the perspectives

235. See GREENAWALT, *supra* note 135, at 247 (arguing that, in the language of the Due Process Clause, a law unconstitutionally lacks a rational basis if it cannot be justified in secular terms); cf. GEORGE, *supra* note 159, at 221 (arguing that participants in public debates should “appeal to principles of justice and other moral principles accessible to their fellow citizens by virtue of their ‘common human reason.’”). Of course, to say that a law must be supported by reasons that any rational person *could* embrace is not at all to say that a law must be supported by reasons that every rational person is *compelled* to embrace.

236. See Cochran, *supra* note 115, at 102–03; see also *id.* at 92 (identifying himself as an evangelical Christian).

237. See *supra* Part I.A–B.

238. See *supra* Part II.B.

239. RORTY, *supra* note 10, at 99.

240. *Id.* at 3.

of the actor and of the morally offended observer—is much of what the enterprise of distinguishing between public and private morality is all about. Because our individual identities are partially bound up with the political communities to which we belong,<sup>241</sup> and yet we also regard ourselves as autonomous individuals who are both equipped and entitled to shape our own moral destinies, we all have a tremendous stake in defining the breadth and limits of community members' freedom to chart their own moral courses.

Two parallel spectrums are in play. Looking at the prospect of government intervention from the perspective of one whose moral sensibilities have been offended by others' conduct, one must calibrate the limits of one's own tolerance. How difficult would it be to abide the conduct and still feel that one is politically at home?<sup>242</sup> Does the conduct cause one to experience mere minor moral discomfort, or does it cause one to experience a profound sense of moral dislocation? Looking at the prospect of government intervention from the perspective of one who is at risk of losing one's freedom to live life as one sees fit, how fundamental to one's identity and well-being is the ability to engage in the disputed conduct? Those spectral values must then be compared to one another; the higher the values on one spectrum, the greater weight that perspective ought to carry when judging the desirability of government coercion. When the actor's conduct poses only a weak threat to others' communal integration and the actor highly values his or her freedom to engage in that conduct, the scales are tipped in the actor's favor. When the actor's conduct makes it difficult for others to remain integrated with the political community and the disputed conduct is peripheral to the actor's ability to pursue his or her own conception of the good life, the scales are tipped in favor of those who find the conduct objectionable. Society's most intractable debates arise when both values are pushed to their highest levels—as when some see the willful termination of pregnancies as mass murder and others see it as essential to their ability to control their own bodies and futures, for example, or when some see same-sex marriage as a threat to the integrity of one of society's most fundamental institutions and others see it as an essential vehicle for expressing and protecting their deepest personal

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241. See *supra* Part II.B.

242. Needless to say, the level of difficulty will vary in accordance with what it takes for a particular person to regard him- or herself as integrated. Joel Feinberg argues, for example, that a liberal national community can inspire great devotion in its members by tolerantly permitting each individual to pursue his or her own conception of the good life. See I FEINBERG, *supra* note 167, at 111–12. Michael Sandel insists, however, that a society marked by liberal tolerance “cannot inspire the moral and civic engagement self-government requires.” SANDEL, *supra* note 166, at 323; see also Selznick, *supra* note 203, at 513 (arguing that a national community marked by liberal tolerance asks us “to endure a thin moral order, loosely anchored in tradition, and . . . a thin sense of self, one that is fluid, elusive, and vulnerable”).

commitments. In such hotly contested areas, our responses to the other six questions identified here must take on even greater significance.

4. *Do the Premises of My Moral Disapproval Withstand Scrutiny?*

Before arguing that conduct ought to be proscribed because it offends our moral sensibilities, we owe it to those whose freedoms are most sharply at stake to ensure that the grounds of our disapproval withstand critical scrutiny. With respect to religious convictions, for example, Michael Perry observes that human beings have a powerful tendency to convince themselves that the divine realm's moral judgments are no different from their own.<sup>243</sup> To counter that proclivity, Perry urges his religious readers to impose upon themselves the discipline of ascertaining whether their religious reasons for condemning a given form of conduct can be complemented by a secular argument that leads to the same condemnation.<sup>244</sup> Using many Christians' moral objection to homosexual sodomy as an example, Perry writes:

Because religious believers, like other human beings, are prone both to error and to self-deceit, the religious argument that all homosexual sexual conduct is contrary to what God has revealed in the Bible is highly suspect if there is no secular route to the religious argument's conclusion that all homosexual sexual conduct is immoral.<sup>245</sup>

The discipline of self-scrutiny is essential in the secular realm, as well. In many instances, one's moral condemnation may be driven by emotions that do not provide a reliable basis for making moral assessments. For example, our moral disapproval may be driven by the feelings of disgust that we experience when we view or contemplate particular forms of conduct. Whether those feelings of disgust withstand scrutiny is an important—and often uncertain—question. In his argument favoring the criminalization of homosexual sodomy in England, for example, Lord Devlin famously argued that one cannot “ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached.”<sup>246</sup> Martha Nussbaum strongly disagrees, contending that feelings of disgust often are grounded in unreasonable fears of contamination:

[W]here disgust is used as a criterion to support the prohibition of harmless acts, the claim appears to be: “This act (or, more often and

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243. See MICHAEL J. PERRY, RELIGION IN POLITICS 74–75 (1997).

244. See *id.*

245. *Id.* at 84.

246. DEVLIN, *supra* note 158, at 17. Without specifically addressing the issue of homosexual sodomy, Peter Huang and Christopher Anderson cautiously point in the same direction, arguing that “a shared disgust with [given] acts is a potentially relevant indicator that the acts should be abolished.” Peter H. Huang & Christopher J. Anderson, Review Essay, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1055 (2006) (reviewing MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004)).

usually inseparable, this person) is a contaminant; it (he or she) pollutes our community. We would be better off if this contamination were kept far away from us.”<sup>247</sup>

Too often, Nussbaum argues, those fears of contamination are misplaced.<sup>248</sup> Allowing ill-founded contamination worries to drive them, political majorities expressly or implicitly cite disgust as a reason to justify the subordination of minorities based on such traits as race, disability, or sexual orientation.<sup>249</sup> At a minimum, feelings of disgust— together with other emotions and premises that ground our moral judgments—ought to be carefully examined before we rely upon them to justify denying others the freedom to engage in conduct they deem desirable.<sup>250</sup>

5. *Is There Any Sense in Which I Ought To Feel Morally Implicated in Future Occurrences of This Conduct?*

One finds in both religious and secular circles a tendency to feel morally implicated in conduct in which one did not personally engage. The divine accountability thesis posits that entire political communities are sometimes justly punished as undifferentiated wholes,<sup>251</sup> while in the secular realm we find integrated citizens who feel guilty about communal wrongdoings in which they played no role.<sup>252</sup> Those perceptions then help drive individuals to demand that governments, rather than individually autonomous citizens, determine the moral propriety of certain forms of conduct; government proscriptions become a means of mitigating one’s own moral culpability. It is appropriate to ask, therefore, about the extent to which those perceptions of moral implication are well-founded in particular cases.

This is a complicated matter, about which only a few words can be said here. The question of what constitutes “national sins” for which entire communities deserve to suffer is best left to those who fully subscribe to that religious perspective.<sup>253</sup> Looking at matters from a

247. NUSSBAUM, *supra* note 246, at 122–23.

248. *See id.* at 14 (“[Disgust’s] thought-content is typically unreasonable, embodying magical ideas of contamination, and impossible aspirations to purity, immortality, and nonanimality, that are just not in line with human life as we know it.”).

249. *See id.* at 321.

250. *Cf.* Huang & Anderson, *supra* note 246, at 1055 (“Determinations of what is found disgusting and why must be made.”).

251. *See supra* notes 1–10 and accompanying text.

252. *See supra* notes 184–93 and accompanying text.

253. In a 1724 sermon, Anglican minister William Lupton offered the following taxonomy:

[Sins become national sins warranting national punishments] when They have the Direct Sanction of Publick Authority; or, when They are Unanimously espoused and embraced by the Society, though they have no Formal Sanction from Publick Authority; or, when the Contagion and Prevalence of Them amongst the People is become *General*, though not strictly Universal; or, when the *Occasions* and *Circumstances* of them are so Conspicuous and Flagrant, that their Rise, or Progress, or Continuance may be properly imputed to the

secular vantage point, I have already indicated that much of the tendency to feel implicated in a political community's wrongdoings flows from the perceptions that our individual identities are partially bound up with the political communities to which we belong and that political communities' conduct reverberates in the lives of those communities' integrated members.<sup>254</sup> The power of those perceptions is underscored by the fact that, in other settings, we insist upon making finely tuned judgments about guilt, and we instinctively resist overbroad restrictions on freedom. When a schoolteacher forces an entire class to miss its recess break on the first day of the school year because several troublemakers were passing notes to one another, the well-behaved child who played no part in the wrongdoing instinctively feels that she is being unjustly punished for others' misdeeds—in no sense does she feel that she too is culpable.<sup>255</sup> Once we become integrated members of communities, however, things often appear different—like the musician in Dworkin's orchestra,<sup>256</sup> we find our own self-appraisals being affected by the conduct of the larger community. It thus should come as no surprise when citizens feel driven to seek legislation proscribing conduct they regard as immoral. Demanding such legislation might strike some as a necessary act of moral self-preservation; indeed, the very failure to lobby for such legislation might seem tantamount to morally condemnable acquiescence in the wrongdoing.

As powerful as those perceptions can be, it is important to see whether they can withstand our critical examination and should be permitted to drive our legislative demands in specific cases. Ancient notions of intrafamily punishments provide an interesting case study. In its story of the Ten Commandments, the Bible describes God as telling the Israelites that they could neither make nor worship idols, “for I . . . am a jealous God, visiting the iniquity of the fathers on the children, on the third and the fourth generations of those who hate Me.”<sup>257</sup> A comparable notion of punishment once found expression in the English criminal penalty of the “corruption of blood,” by which “[a]n attainted person lost all property as well as the legal ability to inherit or pass on property to his heirs,” thus causing wrongdoers' heirs to suffer for their ancestors' crimes.<sup>258</sup> One can imagine the psychological and political

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Concurrence, or Approbation, or Connivance of the State.

LUPTON, *supra* note 84, at 13–14.

254. *See supra* Part II.B (discussing these perceptions).

255. The student's reaction might be different later in the school year, if her identity has become partially integrated with the entire class.

256. *See supra* note 190 and accompanying text (recounting Dworkin's analogy).

257. *Exodus* 20:5 (New American Standard).

258. Max Stier, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729 (1992).

presuppositions that underlay those notions: our identities are integrated with our families, we might have said, and so, up to a point, the hardship we suffer for our parents' crimes corresponds to our feelings of moral culpability. In both the religious and secular realms today, however, these notions have long since fallen out of favor. Religious leaders appear reluctant to defend the idea that God would punish children for sins their parents committed,<sup>259</sup> while the corruption-of-blood penalty was banned by England's Parliament in 1870<sup>260</sup> and our own Constitution expressly proscribes the penalty in cases of treason.<sup>261</sup> Over time, we have concluded that we ought to resist those feelings of familial culpability—we now insist that, no matter how much one family member might feel integration-provoked guilt for the conduct of others, those feelings of guilt should not be countenanced by the law.

When we are inclined to seek legislation banning conduct we regard as immoral, it thus is appropriate to identify any sense of culpability we might feel for the wrongdoing and ask whether, upon reflection, it provides solid grounds for political action. To what extent are we to blame for the conduct? Does my own moral integrity demand that I lobby for a ban on this conduct? To what extent should I resist that perception of culpability? Do I find that the effects of communal integration lose their strength once I raise them to consciousness, rather than allowing them to exert their force beneath the surface?

6. *By Demanding the Government's Intervention, Am I Dishonoring Any Higher Principles to Which I Purport To Subscribe?*

Before demanding that government ban conduct one finds morally objectionable, one ought to be sure that, by making that demand, one is not unjustifiably straying from overarching principles that one holds dear. Our long-term principled commitments are always at risk of being shoved to the side when they inconveniently conflict with our short-term preferences.<sup>262</sup> In the secular realm, for example, a principled commitment to liberal tolerance would be an empty shell if there were no occasions when we had to endure conduct that we found

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259. See, e.g., John Piper, *How God Visits Sins on the Third and Fourth Generation* (Mar. 6, 2009), [http://www.desiringgod.org/ResourceLibrary/TasteAndSee/ByDate/2009/3664\\_How\\_God\\_Visits\\_Sins\\_on\\_the\\_Third\\_and\\_Fourth\\_Generation/](http://www.desiringgod.org/ResourceLibrary/TasteAndSee/ByDate/2009/3664_How_God_Visits_Sins_on_the_Third_and_Fourth_Generation/) (declaring that the Ten Commandments story actually means that the children of sinful generations will only be punished for their own sins).

260. See Stier, *supra* note 258, at 730.

261. See U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

262. One of the chief functions of a constitution, for example, is to document a community's long-term commitments, thereby helping to ensure that those commitments are not forgotten when they stand in the way of our short-term political desires. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

objectionable. Similarly, a deep commitment to equality would demand that we treat others “as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived,” even when we think they are living their lives unwisely.<sup>263</sup> Before proceeding in the heat of the moment to demand that government vindicate our moral judgments, we thus ought to ask whether such legislation would come at the cost of our long-term commitment to higher principles.

One overarching principle that many of us likely regard as in play when determining whether a given moral issue ought to be resolved at the communal or individual level is the principle that a person deserves moral praise only for doing those things that he or she freely chooses to do.<sup>264</sup> Each time the government declares that it will punish anyone who engages in a form of conduct that a political majority deems immoral, the government undercuts people’s ability to attain the moral virtue that would flow from freely choosing to engage in morally praiseworthy conduct on their own. Of course, we ultimately must place limits on this line of reasoning; if left to run its course unchecked, we might never proscribe any immoral conduct at all. Moreover, as Harry Clor points out, law is one of the means by which societies inculcate desirable moral norms in their members, so there is good reason to doubt “that either a good character or an authentic personality can be expected from a regime of simple moral laissez faire.”<sup>265</sup> There nevertheless is a case to be made—and individually weighed in each instance—that we should not regulate individuals’ lives so heavily that we deprive people of opportunities to develop the moral traits that we believe are the hallmarks of a well-developed individual and a virtuous citizen.

7. *Do I Have Good Reason To Believe That, in This Instance, Government Coercion—Rather than an Alternative Form of Moral Encouragement—Is Essential?*

Government institutions wield coercive powers that are unmatched by any of society’s other institutions. Families, churches, social organizations, and other institutions all play vital roles in shaping society’s moral norms, but none of them has government’s power to sweep across entire geographical areas and deprive individuals of their liberties or their lives when they behave in morally condemnable ways. Because it is the most potent weapon in the arsenal, it is only natural to contemplate the prospects for government intervention when we encounter morally objectionable conduct within our geopolitical

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263. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272 (1978).

264. See CLOR, *supra* note 157, at 137 (noting the widely held view that free choice is essential to moral virtue); cf. RAZ, *supra* note 167, at 369 (noting that there is widespread support in the western world for “the ideal of personal autonomy,” which holds “the free choice of goals and relations as an essential ingredient of individual well-being”).

265. CLOR, *supra* note 157, at 143.

communities. Moreover, when a problem is perceived as extending to an entire community (as the divine accountability thesis and the integration thesis both posit is often the case), it is reasonable to contemplate seeking the aid of the government whose jurisdictional reach is as broad as the troubled community.<sup>266</sup> Yet society's other norm-shaping institutions have considerable power as well. Before rushing past opportunities to enlist those institutions in our cause, we ought to ask ourselves whether the powers wielded by those institutions are indeed inadequate.

Looking beyond an overarching societal commitment to individual autonomy (about which I have already spoken),<sup>267</sup> citizens have good reasons to think twice before demanding the aid of government when alternative means of moral encouragement are adequate for the task. First, difficult though it might be to imagine when we are caught up in the heat of cultural battle, it is possible that our moral assessments are mistaken and that we ultimately will regret forcing others to abide by our benighted views.<sup>268</sup> An eighteenth-century preacher told a congregation in South Carolina, for example, that a fire in Charleston had been sent by God as punishment for a sexual "abomination" of which, he said, not even the residents of ancient Sodom had been guilty—interracial sexual relations.<sup>269</sup> One certainly assumes that preachers in South Carolina today would denounce that moral assessment. Second (and relatedly), government coercion robs those in the political minority of powerful opportunities to demonstrate that the political majority is mistaken. Jeremy Waldron and Richard Posner make the case that we are unlikely ever to recognize the weaknesses in some of our deeply held moral convictions unless others have a chance to engage in the conduct that we condemn and empirically demonstrate that our assumptions about that conduct's consequences are mistaken.<sup>270</sup> Third, when we succeed in our efforts to persuade the government to regulate a given moral matter to our satisfaction today, we undercut our ability to cite the virtues of tolerance when an election cycle gives our political opponents the upper hand tomorrow.<sup>271</sup> Finally, government coercion causes those in the political minority to suffer—it denies them the ability to act upon the

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266. Cf. Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 349–50 (2003) (discussing the shift in regulatory power from the states to the federal government in the late 1800s and early 1900s, once societal problems started to become national in scope).

267. See *supra* notes 166–69 and accompanying text (discussing the widely embraced tenets of political liberalism).

268. See PERRY, *supra* note 160, at 98.

269. KIDD, *supra* note 101, at 76–77.

270. Jeremy Waldron, Review, *Ego-Blotted Hovel*, 94 NW. U. L. REV. 597, 610–11 (2000) (reviewing POSNER, *supra* note 224, at 250–52).

271. See PERRY, *supra* note 160, at 99.

dictates of their own conscience and to engage in those activities that they believe constitute the best uses of their lives.<sup>272</sup> Such suffering should not be unnecessarily imposed.

Those whose public-policy demands are grounded in religious rationales might have additional good reasons to examine the assumption that only governmental intervention on a given matter will suffice. John Yoder points out that many American Christians instinctively assign “to nation rather than to church the functions of moral discipline, of defining personal identity, and of carrying God’s action in history.”<sup>273</sup> Stanley Hauerwas sharply criticizes that popular mode of thinking, arguing that American Christians have lost “exactly the skills necessary to see how deeply they have been compromised by the assumption that their task is to rule, if not the government, at least the ethos of America,” and that those Christians have thus placed themselves in the paradoxical position of wanting the government to be “religiously neutral” in accordance with the Establishment Clause, while also wanting manifestations of their faith to “be more present in public life.”<sup>274</sup> By endorsing governmental coercion in a particular area of citizens’ moral lives, are religious believers compromising the integrity of their faith, or implicitly conceding weaknesses in the retail power of their religious teachings and institutions, in ways that might ultimately disserve their commitments in the long run? Is the moral issue at stake sufficiently important to warrant taking those long-term risks?

#### CONCLUSION

From the emergence of the world’s first city-states to the present day, countless people have believed that political communities must win the favor of deities who interact with humanity along the geopolitical boundaries that human beings have defined for themselves.<sup>275</sup> Here in the United States, many embrace a form of nationalistic Christianity that traces its roots to sixteenth-century Europe and asserts that the God of the Judeo-Christian tradition causes the fortunes of the United States to rise or fall in accordance with the conduct that its public policies promote or permit.<sup>276</sup> Our courts have repeatedly been asked to evaluate the constitutional propriety of governmental efforts to align political communities’ laws with what some in those communities have believed God desires.<sup>277</sup> Those efforts to conform public policies to religious directives have fueled an overarching demand that governments be

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272. *See id.* at 100.

273. YODER, *supra* note 89, at 142 & 211 n.15.

274. Hauerwas, *supra* note 143, at 123–24.

275. *See supra* Part I.A–B.

276. *See supra* Part I.B.

277. *See supra* Part I.C.

permitted to make moral judgments about the forms of conduct in which individuals may engage.<sup>278</sup>

Yet the demand for morality-driven legislation is by no means confined to religious circles. The religious worldview that posits a political community's collective relationship with the divine realm finds a secular counterpart in two widely held perceptions: that our individual identities are significantly integrated with, and constructed by, the political communities to which we belong, and that those political communities are akin to single moral agents whose conduct affects the moral well-being of their integrated members.<sup>279</sup> When our government behaves in ways that we find immoral, or when it permits others to engage in morally objectionable conduct, we often find that those actions resonate deeply in our own individual lives—we often perceive that what reflects well or poorly on the political communities with which we are integrated also reflects well or poorly on us individually. Sensing that our own moral well-being is at stake, even those of us who endorse political liberalism's commitment to governmental moral neutrality can find ourselves inclined to seek public policies that advance our own moral worldview.

Whether for religious or secular reasons, we thus are pulled in two opposing directions. Deeply desiring the experience of full membership in our political communities, and not wanting to suffer the sense of dislocation that comes when those communities fail to provide us with a deep moral sense of home, we want to align our governments' public policies with what we believe is morally appropriate. Yet deeply desiring the autonomous freedom to make our own moral judgments and to reject the path of majoritarian morality in favor of paths "less traveled,"<sup>280</sup> we instinctively recoil when political majorities claim the right to deny us the ability to express our moral autonomy in ways we find attractive. The tectonic pressure between those two conflicting aspects of our individual and collective identities shapes much of our nation's political and constitutional terrain.

It would be foolish to suppose that those tensions could be resolved by trying to persuade all reasonable Americans to rally around a single moral theory, test, or viewpoint. Our religious and moral pluralism is simply far too pervasive, and our differing convictions far too deeply held. Moreover, people's opinions on contested issues of public policy are often grounded in deep-seated, emotion-laden convictions that are unlikely to be changed by scholarly efforts to rule some of those convictions out of bounds and to tame or harmonize the remainder with

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278. *See supra* Part I.C.2.

279. *See supra* Part II.B.

280. ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 9, 9 (1916).

a unified theoretical structure.<sup>281</sup> Perpetual moral conflict is simply inevitable—the lines that we ought to draw between public and private morality are continually contested. In our collective efforts to find the ideal relationship between law and morality, the best we can do is identify the core questions that most citizens and scholars are likely to regard as relevant to the overarching task.<sup>282</sup> By focusing our energies on a common set of inquiries, we have an opportunity to clarify our positions, to contemplate changes in our stances, and to eliminate disagreements based on misunderstandings rather than principled differences. Perhaps most important of all, we have an opportunity to maximize the likelihood that, even when we heatedly disagree, we can maintain the sense of political community that drives religious- and secular-minded individuals alike to feel so deeply invested in the public-private morality debate in the first place.

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281. See Waldron, *supra* note 270, at 616–17.

282. See *supra* Part III.B.

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