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THE LIMITS OF RATIONALITY AND THE PLACE OF RELIGIOUS CONVICTION: PROTECTING ANIMALS AND THE ENVIRONMENT

KENT GREENAWALT*

I. INTRODUCTION

When people hold religious views that have implications for moral choices and for the desirable uses of law, may they properly rely on those religious views in our liberal democracy? The commonly expressed ideas that church and state are separate and that no group should impose its religious views on others may seem to suggest that political dialogue and bases for political decisions should be wholly nonreligious. This position, which is the main target of this Article, receives articulate defense among prominent social philosophers. This Article urges a different position: that no commonly shared ground of decision is available for many issues, and that people should feel as free to rely on religious perspectives as on other perspectives that help determine political positions.

After setting out the position that liberal democracy requires decisions based on rational and secular grounds, I introduce the subjects of animal rights and environmental policy to illustrate my thesis. I suggest that the capacity of rational secular thought to deal with these subjects is limited, and argue that no sensible basis exists for excluding religious bases for judgment about them.

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This Article represents an expanded part of a broader treatment of religious convictions and lawmaking that was developed for a series of Cooley lectures delivered in March 1986 at the University of Michigan Law School, and published as Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985). A more expansive version of these lectures will be published as a book called *Religious Convictions and Political Choice* by Oxford University Press in late 1987. Another article drawn from this work, entitled *Religiously Based Premises and Laws Restrictive of Liberty*, appears 1986 B.Y.U. L. REV. 245.

My study of this subject has been aided substantially by a 1985 summer research grant from the Samuel Rubin Foundation. I also have profited greatly from my stay at the Marshall-Wythe School of Law as Lee Visiting Professor of Law. The cordial atmosphere, the time for research, and the perceptive criticisms of faculty members at a faculty seminar all contributed greatly to the development of this Article.

These comments lead to a more abstract exploration of the nature of religious convictions and why those convictions should be classified among a larger category of nonrational bases for judgment. This exploration exposes deeply troubling questions about the boundaries of rationality. Despite all its uncertainties and incompleteness, however, the exploration lays the groundwork for the straightforward claim that religious grounds for decision should not be regarded by liberals as inferior in status to the only other bases for political decision that often are available.

II. THE POSITION THAT CITIZENS SHOULD RELY ON NONRELIGIOUS JUDGMENTS

The idea that citizens and officials in a liberal democracy should rely on nonreligious bases for judgment is one that finds fairly frequent expression and occasional systematic defense. In an admirable recent introduction to ethics and law, for example, David Lyons suggested that political morality should be governed by principles and arguments "accessible to all persons." He stated that to reject the idea of "a naturalistic and public conception of political morality . . . is to deny the essential spirit of democracy."¹ Under this view, officials act improperly if they ground their decisions on religious bases, and citizens violate the spirit of democracy if they make arguments or press political objectives on religious grounds. The logic of Lyons' position also precludes citizens from making up their own minds about public issues on religious grounds.

Two decades earlier, in a well known article concerning obscenity as a sin, Louis Henkin wrote: "The domain of government, it is suggested, is that in which social problems are resolved by rational social processes, in which men can reason together, can examine problems and propose solutions capable of objective proof or persuasion, subject to objective scrutiny by courts and electors."² In a book defending reliance on religious convictions, Basil Mitchell grouped Henkin with other thinkers as representing a new liberalism that presumes that religion is a private matter that "belongs

1. D. LYONS, *ETHICS AND THE RULE OF LAW* 191 (1984).

2. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 393, 411 (1963).

to the realm of ideals, not to that of interests. It follows that religious considerations, as they affect morality, should have no place in law making."³ Mitchell also quoted Glanville Williams, who said: " 'For the legislator, it seems sufficient to say that theological speculations and controversies should have no place in the formation of rules of law, least of all rules of the criminal law which are imposed upon believers and non-believers alike.' "⁴

This sort of liberal view has received systematic explication and defense, if perhaps only incomplete application, from John Rawls.⁵ Rawls' theory is noted both for its "original position" approach to developing principles of justice⁶ and for the substantive principles of justice he endorses, including the "difference principle."⁷ Although the particularly critical portion of Rawls' theory for the purposes of this Article is the manner in which he believes that real people should resolve debated political issues in a society, Rawls' views concerning that issue briefly need to be put in the context of the rest of his theory.

Rawls imagines people in an original position, in which they have general knowledge but do not know their own personal characteristics, social position, or particular conceptions of "good." Behind this "veil of ignorance," they choose principles of justice that will best serve their own interests. This model is designed to produce principles that are fair, because every person in these circumstances would choose principles without knowing which principles would favor him in his actual place in society. The principles chosen under this model, according to Rawls, would be a combination of equal liberty, fair equality of opportunity, and a "difference principle" that permits inequalities of income and wealth only insofar as the improvements for members of higher classes work to the benefit of representative persons in the lowest class.

At first glance, Rawls' original position approach may appear to exclude all reference to religion in establishing principles of justice, and to do so by fiat. The resulting theory of justice could hardly be

3. B. MITCHELL, *LAW, MORALITY AND RELIGION IN A SECULAR SOCIETY* 100 (1967).

4. G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 208 (1958), *quoted in* B. MITCHELL, *supra* note 3, at 127.

5. *See* J. RAWLS, *A THEORY OF JUSTICE* (1971).

6. *See id.* at 17-22.

7. *See id.* at 75-80.

expected to persuade those who think that revealed truth demands some very different approach to social justice. For example, suppose that all the members of a society actually were committed to a singular religious vision, such as Islamic fundamentalism, that assigned roles and opportunities on a basis that varied from the equality of opportunity that would be chosen under Rawls' original position. In such a society, individuals would be guided by their revealed understanding of right social ordering, rather than by principles that would have been chosen in an original position under conditions of ignorance about "ultimate truth." If Moslem women, as well as Moslem men, freely choose the roles assigned to them by Islamic fundamentalism, even an outsider would have to concede that this society would not be "unfair" in failing to afford women every opportunity available to men. What otherwise might be unfair would be rendered fair by the free choice of the "disadvantaged" to remain in their positions.⁸

As Robert Wolff has said, "[It is] obvious that the parties in the original position are rational, secular, scientific men and women."⁹ Many readers of *A Theory of Justice* believed that Rawls effectively was stipulating that his principles of justice are the only principles that could result from rational self-interested choice under conditions of ignorance.¹⁰ In subsequent writings, Rawls has disclaimed any ambition to establish a single, rationally best set of

8. The conclusion suggested here raises some tricky issues. A Rawlsian might say that a failure to afford equal liberty and opportunity to all women would be unfair, even if every woman, or the vast majority of women, choose to restrict themselves. I assume that if all women of one generation and their growing daughters freely chose not to have certain opportunities, educating women in a way that would impair their access to those opportunities would not be unjust, even if the daughters had not yet reached a fully mature judgment about the opportunities. Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (children's interests and parents' interests assumed to coincide). That assumption is debatable, as is, of course, the notion that any group ever could *freely* choose to be as subservient as Moslem women, in the fundamentalist vision, are supposed to be. Perhaps a clearer example of a practice not being unjust that would be barred by the original position analysis would be society's keeping the least advantaged group at a very low level of income and wealth, when all members of that group freely believed that their religious salvation depended upon having only a subsistence income.

9. R. WOLFF, *UNDERSTANDING RAWLS* 127 (1977).

10. Some readers doubted that any single set of principles could be so derived, worrying that the conditions of the original position posited by Rawls were not specific enough to yield one set of principles, that they were manipulated to reach the results Rawls happened to favor, or that both problems were present in various aspects of the conditions.

principles of justice. Instead, he has stated that his goal has been to develop the principles that best elaborate the "basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation,"¹¹ most importantly the idea of "fair social cooperation between free and equal persons."¹² These basic intuitive ideas have been accepted by an "overlapping consensus" that includes the opposing philosophical and religious doctrines likely to persist in a more or less just democratic society.¹³ Thus, Rawls implicitly says that a strict Islamic republic is unjust by liberal conceptions, not that it is absolutely unjust.

Because Rawls asserts that his theory is based on shared ideas of liberal democracy, he is not directly concerned with what might lead an individual to accept these ideas. Some people, for example, might accept the substance of Rawls' theory because they believe that God created human beings to exercise their moral autonomy and a Rawlsian society would best promote that exercise. Rawls' theory, devoted to developing the implication of basic premises, does not suggest that religious grounds for accepting those premises are inappropriate.

What is inappropriate under Rawls' theory, however, is reliance on religious grounds to decide political issues in a society that accepts his conception of justice.¹⁴ Rawls makes clear that citizens should be guided by this conception in their political decisions. Because this conception of justice does not rely on a particular religious perspective or standard of good, citizens deciding what is just would not rely on particular religious perspectives or standards of good.

11. Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 225 (1985). For a sympathetic explanation and defense of Rawls' position, see Rorty, *The Priority of Democracy over Philosophy* (forthcoming).

12. Rawls, *supra* note 11, at 229; see Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 516-22 (1980) (indicating that aspects of his theory of justice may depend on a particular "conception of the person" in the original position).

13. Rawls, *supra* note 11, at 225-26.

14. As one commentator has noted, the reasons for adopting a theory of justice might differ from the reasons permitted to actors making practical choices in a society in which the principles of the theory were accepted. Ackerman, *What Is Neutral About Neutrality?*, 93 *ETHICS* 372, 387 (1983).

Discussing restrictions on exercises of religious conscience, Rawls has stated explicitly that the state "does not concern itself with philosophical and religious doctrine but regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality."¹⁵ Any reasonable expectation of damage to the public order that is relevant to political decisions must "be based on evidence and ways of reasoning acceptable to all. . . . [A] departure from generally recognized ways of reasoning would involve a privileged place for the views of some over others, and a principle which permitted this could not be agreed to in the original position."¹⁶ Rawls also has observed, more recently: "In public questions, ways of reasoning and rules of evidence for reaching true general beliefs that help settle whether institutions are just should be of a kind everyone can recognize."¹⁷ The relevant standards for political decision, according to Rawls, are the shared principles of justice "and practices of common sense and science."¹⁸ Rawls thus supposes that citizens in a liberal democracy should resolve the questions of value and fact that are relevant to justice without relying on particular religious convictions.

One possible qualification to Rawls' conclusion concerns subjects that are outside the reach of his theory of justice. By discussing only relations between human beings within an existing political community, Rawls has failed to address the relations of human beings to animals or the relations of one human society to another, although he has recognized that important political choices include these matters.¹⁹ Rawls may suppose that reciprocal relations among members of different societies could be addressed by extending the original position somehow,²⁰ but because reciprocity does not govern relations between human beings and other animals, Rawls' position gives no clear indication how sound principles to govern these interactions might be derived. Rawls gives no

15. J. RAWLS, *supra* note 5, at 212.

16. *Id.* at 213.

17. Rawls, *supra* note 12, at 539.

18. *Id.*

19. J. RAWLS, *supra* note 5, at 17, 504, 512.

20. See generally C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 126-83 (1979) (discussing justice between nations).

hint that a shift to a transcendental perspective might be appropriate in considering these relationships; because political choices about the treatment of animals affect other human beings and because Rawls does not qualify his later statements about reliance on shared standards and methods for ascertaining truth, one may suppose that he thinks that fairness to other individuals involved requires that political choices about animals be made on rational, secular grounds.

The inappropriateness of reliance on religious conviction in politics has been stated more clearly and absolutely by Bruce Ackerman in *Social Justice in the Liberal State*.²¹ Regarding constrained dialogue about power as the centerpiece of liberal political theory, Ackerman has said:

[N]obody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied [to] the rest of us. A power structure is illegitimate if it can be justified only through a conversation in which some person (or group) must assert that he is (or they are) the privileged moral authority:

Neutrality. No reason is a good reason if it requires the power holder to assert:

(a) that his conception of the good is better than that asserted by any of his fellow citizens, *or*

(b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.²²

Perhaps not every political reliance on religious conviction would amount to an assertion of one's own "conception of the good," though Ackerman's notion of what that conception covers is very broad. Ackerman, however, has made plain that the grounds for liberal political decisions should be secular and rational. He talks for example about the liberal state being "deprived of divine revelation" in developing a policy toward nature²³ and, in language that reflects less than enthusiastic sympathy with religious

21. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

22. *Id.* at 10-11; see also A. MACINTYRE, *AFTER VIRTUE* 112 (1981) (summarizing Ronald Dworkin's position as being "that the central doctrine of modern liberalism is the thesis that questions about the *good life* for man or the ends of human life are to be regarded from the public standpoint as systematically unsettling" (emphasis in original)).

23. B. ACKERMAN, *supra* note 21, at 103.

perspectives, he precludes restricting abortions "on the basis of some conversation with the spirit world."²⁴

Richard Flathman has spoken of Ackerman's notion of "neutral dialogue" as tolerably familiar as an aspect of liberal theory, one designed to avoid destructive conflict.²⁵ According to Flathman, the idea that "in politics each of us must cease to claim the superiority of our conception of good and order our interactions by principles neutral among such conceptions" is a "self-denying ordinance" that was "historically first or at least most emphatically adopted in respect to religious beliefs."²⁶

The thesis that political decisions should be made on secular rational grounds is a claim about the ethical import of liberal democracy, about what "good citizenship" in that polity entails. One who accepts this thesis is not committed to saying that people in existing liberal democracies actually do disregard religious convictions in making political decisions, or even that religious individuals are fully capable of doing so. The thesis also does not concern the minimal conditions in which liberal democracy can operate with reasonable effectiveness;²⁷ nor does it fundamentally concern legal constraints. Indeed, one aspect of religious and political liberty is that people are legally free to talk about and be influenced by the political implications of their religious views.

Indeed, short of arguments, or at least assumptions, that directly challenge religious premises themselves, the thesis does not even concern what a person who is a citizen in a liberal democracy should, overall, do. An example illustrates this point. Suppose that Jody believes that God considers the drinking of alcohol to be sinful, that God wishes humans to refrain from drinking alcohol, that God wishes organized societies to stamp out this practice, that individuals who drink alcohol will be visited with heavy penalties after death, and that individuals within societies that permit the drinking of alcohol will be visited with similar penalties. Jody understandably would seek to have her society enact laws against the drinking of alcohol, despite her recognition that many people in

24. *Id.* at 127.

25. Flathman, *Egalitarian Blood and Skeptical Turnips*, 93 *ETHICS* 357 (1983).

26. *Id.*

27. As Ackerman said, "[N]o liberal government can expect all its citizens to behave like liberal statesmen all of the time." B. ACKERMAN, *supra* note 21, at 302.

society do not share her religious convictions and believe that they have a moral right to use alcohol. Persuading her that neutral dialogue or a decision under the hypothetical conditions of an original position would lead to allowing adults freedom to choose whether or not to drink alcohol hardly would change her mind, given her present insight into transcendent truth. What Jody wants to accomplish makes perfect sense if she has conceived religious truth correctly. Her opponents would be silly, therefore, to tell Jody that she should not impose her religious views on others, as if some common basis of rational understanding would allow Jody to acknowledge the correctness of that claim without abandoning an aspect of her religious faith.

What a sensitive understanding of Jody's position does not require is that others acknowledge that her aims are consonant with the premises of liberal democracy. A liberal democracy tolerates people like Jody, just as it tolerates people who wish to establish a dictatorship of the proletariat, but Jody's political program definitely is not a liberal democratic program. History and the world around us afford ample demonstrations of religious views that are not consonant with the principles of liberal democracy, though people with such views may comfortably coexist for long periods of time within democratic states. Jody's opponents can say to her: "We understand why you are doing what you are doing, but we want to make clear that your aims fall outside the boundaries of our traditions and that, if similar aims were shared by many others, maintaining an open, pluralist society would be extremely difficult. In that important sense, you are not acting like a good citizen of a liberal democracy."

The claimed exclusion of religious grounds of decision is based in part on the notion that a liberal government knows no religious truth. The concession that religious truth is not the government's business is one that many Americans are not presently willing to make, but that assumption underlies a good bit of the American constitutional law of church and state, and it is a starting point for those who urge that citizens and legislators should not rely on religious convictions. The idea that the government knows no religious truth is logically distinguishable from the idea that rational public grounds cannot be used to settle disputes about religious truth, but the two ideas are closely related. If one starts with a supposition

that political dialogue and grounds of decisions should be cast in terms that are accessible to all, specialized religious convictions, in a liberal society, plainly would fall outside such terms, and therefore would have to be excluded. Although historical fears about religious divisiveness might help to generate belief that religious bases warrant exclusion, that exclusion could be best understood as one aspect of a positive program to develop shared bases of decision. Should such bases exist, those who defend political decisions could claim that the decisions are defensible for reasons that have intersubjective validity for all members of society. The law and its restrictions on liberty then could be seen as based on a shared understanding of reason, not on the whim of those who happen to be more numerous and powerful. This aspiration is appealing. Whether it is realistic is a major subject of this Article.²⁸

III. ANIMAL RIGHTS AND ENVIRONMENTAL POLICY

The areas that I use in this Article to test the soundness of the exclusion of religious bases of decision are animal rights and environmental policy. The critical inquiry concerns the capacity of rational secular grounds to resolve the critical questions that bear on desirable legal policy. I am highly skeptical about that capacity, and my conclusions about reliance on religious convictions are closely related to that skepticism.

A. Human Morality and Moral Consideration for Nonhuman Entities

What do human beings owe to other animals and to the rest of the natural environment? This broad question can be subdivided

28. Even if the claim that religious bases of decision are inappropriate in a liberal democracy is accepted, religious perspectives are not rendered wholly irrelevant to proper political decisions. Religious perspectives still may figure indirectly. For example, if a legislature must decide which day of the week to declare a day off and the majority of the population wishes strongly, for religious reasons, not to work on Sunday, satisfaction of that general desire would be a rational secular ground for choosing Sunday. Similarly, if polygamy was harmful for good secular reasons in a country in which the vast majority of the population was committed to monogamy, a generally held religious belief that God calls for monogamy might lead indirectly to a decision not to authorize polygamy. Rational secular bases of decision would not have to disregard the effect of practices that are embedded in the culture because of religious beliefs. What would be barred would be direct reliance on religious convictions in determining what the law should be.

into what humans owe to other individual entities in their individual capacities and what they should do about preserving nature in a more general sense. The drowning of cats terminates the lives of particular sentient creatures, but does not threaten the environment; constructing a ski resort above the timberline alters a natural setting, but may affect nonhuman creatures only incidentally.

Someone who is concerned about the interests of individual animals may be relatively indifferent to whether particular species or features of the physical world can survive over time, and someone who cares deeply about preservation of species and natural settings may be indifferent to the survival of individual members of plentiful species. Indeed, for some ethical choices, such as the propriety of sport hunting,²⁹ an environmental ethic may point in an entirely different direction from an animal rights ethic. Nonetheless, both ethics, and the subjects they address, go beyond a morality that concentrates exclusively on relations among human beings. In doing so, the two ethics share common themes and raise common questions.

An ethic that claims a morally protected status for nonhuman entities must face a possible threshold difficulty—one that is immediately terminological but that has underlying substantive implications. Morality often is viewed as a means by which human beings achieve a tolerable social existence together. The subjects of moral duties undoubtedly must have moral capabilities, and among creatures on this earth, those capabilities may exclude all but humans.³⁰ If rights and justice are understood as involving reciprocal moral relations among members of the same social community, then, barring the possibility of sufficiently significant interaction between animals with moral capacity and humans, only human beings, and perhaps only human beings with a minimal level of moral capacity, may qualify as bearers of rights who are

29. See, e.g., Loftin, *The Morality of Hunting*, 6 ENVTL. ETHICS 241 (1984).

30. For the position that some animals ought to be viewed as moral agents, see Miller, *Do Animals Have Interests Worthy of Our Moral Interests?*, 5 ENVTL. ETHICS, 319, 331-32 (1983); Rachels, *Do Animals Have a Right to Liberty?*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 205, 214-19 (1976); Watson, *Self-Consciousness and the Rights of Nonhuman Animals and Nature*, 1 ENVTL. ETHICS 99, 128 (1979). The minimum conditions of being a moral agent is a complex question that this Article does not pursue.

owed justice. Both Rawls and Ackerman, for example, assume that justice concerns relations among people.³¹

That a system of morality may include duties owed to creatures without moral capacity is perfectly clear.³² Most people think they have moral duties toward members of the human species who lack moral capacity, and also think they have duties toward higher animals that obligate them at least not to subject these animals to gratuitous cruelty. Among systematic moral views, utilitarianism traditionally has counted the pains and pleasures of all sentient creatures. Rawls explicitly has recognized that "how we are to conduct ourselves toward animals and the rest of nature" is a moral question "of the first importance," which his contract theory does not cover.³³ Ackerman has gone beyond Rawls in examining how these problems might be resolved, but what he has said is notably inconclusive. According to Ackerman, people may disagree concerning whether animals and the rest of nature are simply to be regarded as means to human ends or whether they should be preserved, and the liberal state must recognize the tentativeness of any policy established toward nature.³⁴

If moral duties can be owed to nonhuman creatures, as they undoubtedly can, the purely terminological question whether such creatures are potential subjects of rights or justice is not particularly important. What is important is whether duties of the type and stringency associated with rights and justice are owed to nonhumans. If a moral bar existed against killing innocent animals that was as absolute as the bar against killing innocent human beings, the duty to protect animals would have the same stringency

31. See J. RAWLS, *supra* note 5, at 17, 504, 512; see also B. ACKERMAN, *supra* note 21, at 69-103 (asserting that citizenship in the liberal state requires an ability to speak the language and participate in the dialogue of the state). *But cf. id.* at 74, 80 (asserting that an animal such as an ape someday may pass the test for citizenship in the liberal state).

32. See, e.g., G. WARNOCK, *THE OBJECT OF MORALITY* 151 (1971).

33. J. RAWLS, *supra* note 5, at 17; see *id.* at 504, 512. Tom Regan has interpreted the cryptic passages in Rawls' book somewhat differently, seeking to provide a coherent account of how Rawls' view about duties to nonhuman entities can be fitted within his contract theory. T. REGAN, *THE CASE FOR ANIMAL RIGHTS* 163-74 (1983). Regan amply demonstrates that Rawls' views about duties to nonhumans cannot be accommodated comfortably within his contractarian approach. The impossibility of this accommodation supports my reading that Rawls did not intend such a fit.

34. B. ACKERMAN, *supra* note 21, at 102-03.

as the duty associated with the right to life. No doubt some kinds of duties, such as truth telling, do not apply to relations with non-human animals, and other kinds of duties, such as the duty of fair play, may depend on reciprocal interactions.³⁵ Duties not to cause harm and duties of benevolence, however, are potentially applicable to animals, and their possible application cannot be foreclosed by some conceptual bar. For this reason, I shall not attempt to restrict the terms "rights" and "justice" to relations among creatures with moral capacity, assuming instead that moral "patients" may have rights and claims of justice, even though others must make the claims on their behalf.³⁶

The second common subject of animal rights and environmental protection concerns the place of human beings in the world. The relative predominance of human beings is critical in determining what they owe to nonhumans. At one extreme is the view that nature, including animals, is for human dominion. At the other extreme is the idea that nature is sacred, an aspect of God or gods. An intermediate conception is one of stewardship: that human beings have a responsibility for preserving the welfare and integrity of the natural world.

A third common problem concerns the standard for judging a proper moral conception. Should an individual considering whether a duty is owed to nonhuman entities view the question in terms of the intrinsic worth of those entities or in terms of the manner of thinking that would be best for human beings in the long run? If the proper moral standard for protecting animals and natural objects were explicitly the welfare of present and future human generations, then the standard still would concern morality among human beings, including intergenerational duties. Duties to other human beings might include not harming some animals, just as these duties might include not harming some automobiles, but no duties would be owed directly to the animals. If duties were

35. See T. REGAN, *supra* note 33, at 168 (analyzing the view that humans do not owe a duty of justice to animals because animals cannot owe a duty of justice to humans). Morality is not solely a matter of reciprocal interaction, however, as the existence of duties owed to future generations of humans demonstrates. See B. ACKERMAN, *supra* note 21, at 111-13. I assume, though I do not try to demonstrate, that such duties exist.

36. Readers who think this terminology is inapt can translate passages that use them into a terminology that refers to stringent human duties.

owed to animals and other natural objects because of their inherent worth, on the other hand, then a proper moral conception would transcend the interests of humans, even broadly conceived. An intermediate possibility, which was suggested by Immanuel Kant,³⁷ also exists. This view is that it is critically important for humans to respect animals and nature. The idea is that if humans become insensitive and cruel to animals, they will become hardened in their relations to other humans, and humans that do not respect nature will squander the earth in a way that will deprive future human beings whose interests they are not competent to assess. A respectful attitude toward nature, proponents of this view contend, teaches people to accept the severe restrictions on human endeavors and helps lower their level of frustration. Moreover, an attitude that animals and nature are not to be dominated contributes to less domineering and aggressive attitudes among people and thus enhances human social existence. Although this attitude is one in which ordinary people would attach intrinsic value to animals and nature, the ultimate philosophical justification for the attitude is that it will be good for people.³⁸ A supporter of a practical ethic favoring protection of animals or nature, of course, might claim both that the ethic is required by the inherent worth of non-human entities and that it is best for humans in the long run.

The crucial questions for the purposes of this Article are whether entities other than human beings intrinsically deserve protection and, if so, how much. Given the fundamental uncertainty about the impact that attitudes toward animals and toward nature have on the behavior of human beings toward each other, the critical questions also would arise if they were reformulated in terms of the attitudes that ultimately are best for humans. Because

37. See I. KANT, *Duties to Animals and Spirits*, in LECTURES ON ETHICS (L. Infield trans. 1963), reprinted in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 122-23 (1976).

38. See, e.g., M. FOX, RETURNING TO EDEN: ANIMAL RIGHTS AND HUMAN RESPONSIBILITY 157-58 (1980); C. STONE, SHOULD TREES HAVE STANDING? 42-54 (1974); see also Norton, *Environmental Ethics and Weak Anthropocentrism*, 6 ENVTL. ETHICS 131, 136 (1984) (asserting that Hindus and Jains proscribe the killing of insects out of concern for their own spiritual development rather than for the lives of the insects). This relation between ultimate justification and actual attitude is closely similar to the relation posited by the claim that nonconsequential attitudes toward morals will produce the best consequences over the long run.

the underlying issues remain the same, I do not pursue this extra step of complexity at each stage.

Once the major alternative views of the place of humanity in the universe have been identified, the alternatives that have relevance to animal rights and environmental protection are immediately evident, and the potential relevance of religious convictions is also apparent. A major theme of religions is interpreting the place of human beings in nature. Indeed, in some attacks on present environmental attitudes, the Judeo-Christian view that nature was created for man's domination has been portrayed as the major villain.³⁹ In response, some have argued that the major strands of Judaism and Christianity place stewardship responsibilities upon human beings, and that a modern secular notion of progress, and not religion, is the main threat to protection of nature.⁴⁰ One author has suggested that the break between humans and nature is much stronger in Judaism than in Christianity, with its doctrine of the Incarnation.⁴¹ Without question, some eastern religions accord greater respect to nature and animals, and perceive a much lesser break between human beings and the rest of nature than do major western religions.

The central question for my analysis is whether citizens should eschew religious perspectives in resolving the degree of protection to accord animals and nature. The plausibility of the position that citizens in a liberal democracy should disregard religious perspectives depends on the promise of secular rational grounds to resolve such matters.

B. Animal Rights

I first discuss what moral consideration is owed to individual entities as such, what may loosely be termed "animal rights." The label is loose because, as I have noted previously,⁴² use of the term "rights" in this context is disputable, no matter how stringent the duties of human beings. The label also is loose in including a

39. See, e.g., White, *The Historical Roots of our Ecological Crisis*, in *THE ENVIRONMENTAL HANDBOOK* 3 (J. Barr ed. 1971).

40. See R. ATTFIELD, *THE ETHICS OF ENVIRONMENTAL CONCERN* 20-87 (1983).

41. Schwarzschild, *The Unnatural Jew*, 6 *ENVTL. ETHICS* 347, 349-50 (1984).

42. See *supra* notes 29-36 and accompanying text.

position that animals are owed significant moral consideration, even if the manner in which humans should take their interests into account is by some sort of utilitarian calculus rather than stringent duties. Furthermore, the category of entities warranting protection might be narrower, or perhaps broader, than all animals.

What I mean by consideration owed to "individual entities as such" is that the consideration does not depend either on the interest of some other kinds of entities, such as human beings, or on the number of similar entities in existence. Protection is not owed, for example, because the entity is one of the last remaining members of a species or other set of natural objects.

The three major questions for public policy are: (1) which entities are owed moral consideration in their own right; (2) how does that consideration relate to the consideration owed to human beings; and (3) to what extent should judgments of this sort be embodied in law and other government decisions? The idea that some moral consideration is owed to certain entities would not necessarily dictate that legal protection is appropriate; one simply might leave choices to the private sector. The existence in many countries of laws forbidding cruelty to animals, however, shows that, at least at the edges, legal protection often is regarded as warranted. Under many views of the moral consideration owed animals, therefore, some protection by law is appropriate.

An individual holding an extreme version of the human dominion view would assert that other entities exist solely for the benefit of human beings. That basic view could be given a nonreligious cast in two ways. First, one could argue that the critical capacities of ordinary human beings⁴³ are so far superior to other existing creatures that any action that contributes to human welfare or satisfaction is warranted, no matter how little the contribution and no matter how great the impairment to other creatures. A traditional version of this position is the notion, found in the writings of Aris-

43. I refer to "ordinary human beings." Related to the issue of animal rights is the issue of how much consideration to give members of the human species who are incapable of development to even the level of the higher animals. Proponents of animal rights often have criticized "specism," and have claimed that severely retarded and handicapped human beings are owed no more consideration than animals of equivalent capacity. See T. REGAN, *supra* note 33, at 232-65.

tote and Kant, that the ability to reason abstractly is the basis for moral respect and that only humans have that capacity.⁴⁴ Under this view, human beings need not accord any inherent value to other animals.⁴⁵ This view claims to be objective, in the sense that it presents reasons that would be persuasive to hypothetical intelligent creatures from other planets and would lead them to accord moral consideration to human beings and to deny it to other animals.

Second, one could advance a kind of "law of the jungle" approach. Proponents of this view would assert that the interests of human beings and other animals come into conflict and, because human actions are incapable of eliciting moral restraint from other animals,⁴⁶ humans have nothing to gain by extending moral consideration to them. Therefore, in human morality, which is designed to make social life tolerable for human beings, no consideration need be given to other animals. This perspective is the substantive analogue of the terminological claim that animals cannot be subjects of rights and justice because they are not participants in moral practices. The force of this perspective is limited to the domain of human morality; it does not provide any reason, as the first view does, why creatures from another planet should similarly accord preference to human beings unless these creatures are capable of moral interactions with human beings and not animals.

Neither defense of the absolute dominion view is compelling. The uniqueness of some human capacities and the superiority of others hardly seems adequate to justify according no moral significance to the interests of other animals. The "law of the jungle" view either is circular, because it restates an undefended assumption that morality must be entirely reciprocal, or is confused. The propositions that many moral norms embody notions of reciprocity and that enrichment of human social life is a crucial aspect of mo-

44. See Miller, *supra* note 30, at 321.

45. One might say that human beings at least should weigh the interests of other animals when a matter is indifferent to humans but, because even having to think in these terms is something of an inconvenience, a total disregard of animal interests might be warranted under this extreme view by the human interest in avoiding that inconvenience.

46. See *supra* notes 30-31 and accompanying text. The assumption is that, if other animals are capable of exercising moral restraint at all, human actions are incapable of generating that restraint in favor of human interests.

rality do not entail the conclusion that the proper boundaries of morality are so rigidly set.⁴⁷ Perhaps human beings should consider the welfare of other beings who they can injure or benefit, though their own lives will not be enriched by doing so. For example, humans commonly assume that they owe something to distant generations who cannot enrich the social life of present generations. If the propriety of this duty is acknowledged, no reason appears for limiting it to present and future human beings to the exclusion of other occupants of the planet. Most people's strong intuition is that humans do owe something to at least some other animals.

If consideration is owed to some animals, what is the outer limit of this duty? Human beings seem confident that they do not owe anything to a stone or a dead twig. Individuals with a fancy to crush a small stone or to break a twig commit no moral wrong in doing so, at least so far as the stone or twig is concerned.⁴⁸ To deserve moral consideration, an entity must have at least one capacity or characteristic that stones and dead twigs do not have. Among the possibilities are moral capacity, capacity for language, self-consciousness—that is, conception of oneself as a distinct being—fear of death, fear of other consequences and anxiety, consciousness, ability to experience pleasure and pain, having a good of their own, and being alive.⁴⁹

The decision as to which animals deserve protection, of course, is complicated by the difficulty that humans have in understanding what animals' experiences are like. But humans can be virtually certain that many animals are conscious and do experience

47. A similar question is whether individuals should violate moral norms if they can do so with impunity. Of course, the simple answer to this question is that the violation is morally wrong. If the true basis of morality is reciprocal advantage, however, why should individuals not do what is morally wrong if they are confident it will be to their advantage? Moral norms themselves cannot provide an answer to this deeper question of what individuals "should" do.

48. One might think that any manifestation of anger is wrong, and that breaking a twig in anger thus might be wrong. This wrong, however, would not arise because of the interests of the twig. Whether it would be a "moral" wrong is a further question that is beyond the scope of this Article.

49. This list of possibilities is not exhaustive; nor are these possibilities necessarily distinctive. R.G. Frey, for example, has suggested that language is necessary to have self-consciousness and to have interests. R. FREY, *INTERESTS AND RIGHTS: THE CASE AGAINST ANIMALS* (1980). This view is criticized effectively in T. REGAN, *supra* note 33, at 38-49, and in Miller, *supra* note 30, at 322-29.

pleasure and pain,⁵⁰ and they can be fairly confident that many mammals also are self-conscious in some sense. Because avoidance of pain is a dominant aspect of human morality, the idea that people should not cause unnecessary pain to animals is an appealing starting point, which is reflected both in statutes forbidding cruelty to animals and in the traditional utilitarian view. As Jeremy Bentham put it: "The question is not, Can they Reason? nor Can they talk? but, Can they suffer?"⁵¹

Whether painless death is a moral consequence for animals is more complicated. If a healthy animal is killed and its death does not cause pain to other animals, such as its offspring, its death still cuts off the possibility of future pleasurable experiences. Viewed by itself, death is a harm to the animal even if the animal has no consciousness or fear of death.

A more troublesome question is whether that harm can be canceled effectively by the life of another similar animal.⁵² Often the infliction of death on one animal is part of a practice that permits life for a larger number of animals than would otherwise exist. This question is critical, for example, when animals are killed to provide meat. If every human being were a vegetarian, much smaller numbers of animals of some species, including cattle, would be alive. In one respect, therefore, meat-eating practices could be viewed as good for these species, and the painless death of some members of the species could be viewed as fully justified by the prospects of life for other members. Humans in effect would

50. Of course, human beings cannot be certain, for example, that when an animal reacts to a burn with physical manifestations that resemble human reactions, the animal is experiencing pain in the way that humans do. The conclusion that the animal does feel something similar, however, is not much less secure than a similar conclusion drawn about what other human beings feel. For a careful and persuasive discussion of animal awareness, see T. REGAN, *supra* note 33, at 1-81.

51. J. BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* ch. 27, § 1 (London 1789), *quoted in* T. REGAN, *supra* note 33, at 95, *and in* P. SINGER, *PRACTICAL ETHICS* 50 (1979). Regan has made the interesting point that not all pain involves suffering, and he considers Bentham astute for making his claim in terms of suffering. T. REGAN, *supra* note 33, at 95. For a defense of sentience as the critical standard for moral consideration, see L. SUMMER, *ABORTION AND MORAL THEORY* 124-60 (1981).

52. This question could be categorized as an aspect of the balancing of interests rather than as an aspect of the limits of moral consideration. It is discussed in this section, however, because the balancing of interests examined in this Article is between human interests and animal interests, and this inquiry involves a comparison of interests of similar animals.

owe no moral duty to preserve the life of an animal when its death is part of practice in which another similar life will be substituted. In that event, slaughter for food would be acceptable, quite independently of any human interests served by the practice.

The problem of "replaceability" exposes a critical distinction between a consequence-oriented approach to the treatment of animals and a genuine rights approach. If good treatment is based on utilitarian grounds, then killing that is painless, and that does not produce fear and anxiety in other animals, is canceled morally by substitution. If an individual animal has a right not to be killed, on the other hand, then its death is a moral wrong even if the result of sparing such animals is a marked decrease in the population of that part of the animal kingdom. Of course, the replaceability argument need not be adopted in its entirety. Peter Singer has suggested that the replaceability theory can justify the killing of animals who are not self-conscious, but not those who are self-conscious, a category in which Singer includes apes, whales, and dolphins, and perhaps monkeys, dogs, cats, pigs, and bears.⁵³ As Tom Regan has suggested, the utilitarian premises that Singer embraces are not conducive to this sharp distinction.⁵⁴ Under another approach to basic moral questions, however, self-consciousness more plausibly might be thought to form an appropriate dividing line between animals that should be recognized as having rights and animals that should not.

If the ability to experience pleasure and pain creates a basis for minimal moral concern, not all animals qualify on that ground. Some apparently do not have such experiences. Many people have no moral compunction about how they treat animals such as insects and worms, believing that these animals suffer little, if at all.

The basic standard of moral consideration could be broadened in various ways. If it were broadened to reach all living entities or all entities capable of having "a good of their own," it might reach all animals, and plants as well.⁵⁵ Although a defender of this position has acknowledged that the moral significance of plants can be

53. P. SINGER, *supra* note 51, at 93-105.

54. T. REGAN, *supra* note 33, at 206-11.

55. See R. ATTFIELD, *supra* note 40, at 154, 156-57.

"almost infinitesimal,"⁵⁶ this view would acknowledge that a tree's good can be frustrated, and that not only chopping the tree down but also tearing a leaf off the tree involves some moral harm.

Because my analysis is limited to examining the interests of entities insofar as they might bear on public policy and legal protection, plants and lower forms of animals perhaps can be disregarded. Even if individual flies and oak trees are entitled to some moral consideration, they are not on that basis likely candidates for protection by law.⁵⁷ No doubt the threshold of moral consideration necessary to affect what the government itself should do may be lower than the threshold necessary to justify government restrictions of private choice. If individual trees warrant moral consideration, that consideration might affect what the government should do in national forests even if it does not affect what the government demands of private owners of forests.

More important than this subtlety, however, are the hard questions about legal protection. These questions concern, most significantly, which animals warrant enough moral consideration to make them fit subjects for legal protection, and which of these animals' interests qualify in this respect. For example, is painless killing a harm against which legal protection is possibly appropriate? If so, is it possibly appropriate even if the factual conditions for replacement are met?

A judgment about the appropriate use of the law also requires some moral assessment of animal interests against human interests. At this level, the difficulties become even greater. The spectrum extends from equality, in some sense, to an extreme priority for human interests. The latter position can be viewed as the import of present law. No protection based on the capacities and characteristics of individual animals is given to animal life per se. Wanton, unnecessary cruelty is forbidden. Rules regulating the use of laboratory animals do provide safeguards regarding their care and the conditions in which these animals are kept, and they also constrain the infliction of pain in the absence of demonstrable

56. *Id.* at 154.

57. Of course, as valuable property, oak trees receive legal protection against damage from nonowners, and one certainly can imagine legal restrictions barring owners from destroying trees on aesthetic or broader environmental grounds. These reasons for legal protections, however, do not suppose that individual trees have inherent worth.

research needs. Still, virtually any tenable human interest carries the day, justifying severe imposition on the lives of animals. In animal laboratories, for example, extensive loss of animal life is permitted, even when the products being tested are considered luxuries.⁵⁸ No rules exist against factory farming, which allows animals to grow in terribly confined conditions so that their development will be quicker and less expensive and their bodies will be plumper than if they were permitted to roam free. The restrictions on how owners can treat pets also are very limited.

Some individuals favoring animal rights argue for a move toward a form of equality. The form of equality most favorable to the interests of animals would be one counting each animal life as heavily as each human life. Under this view, enhancing the life prospects of ten human beings would count no more than enhancing the life prospects of ten chimpanzees. No investigation would be made whether humans or chimpanzees have greater capacities for fulfillment and happiness. Many people currently adopt a similar standard for human beings, viewing each improvement of life prospects equally regardless of the particular individual's capacity for realizing the goods of life,⁵⁹ but few, if any, people would extend this egalitarianism to animals.⁶⁰

We can assume that the relevant principle of equality will take different capacities into account. The simple pain of a cat would count as much as the simple pain of a human being, but the

58. Indeed, a common test of toxicity is to see how intensive a dosage is needed to kill half of the experimental animals. T. REGAN, *supra* note 33, at 370-71.

59. One way to defend this egalitarianism among human beings is to claim that most humans have roughly equal capacities and that societies should not get into the business of judging comparative capacities.

60. Bruce Ackerman has suggested that any animal that crossed the threshold of ability to question allocations of power and wealth would qualify for equal consideration, including equal goods and a right to a liberal education. *See* B. ACKERMAN, *supra* note 21, at 80. This result follows from the rule that citizens cannot make arguments that depend on their conception of the good or their intrinsic superiority. Suppose that most animals in a species were capable of attaining the quality of life of a normal three-year-old human. According to Ackerman, each ordinary member of this species would be entitled as a matter of justice to roughly the same shares of goods as ordinary human beings. Many people, including myself, would find this conclusion strongly counterintuitive—so much so that Ackerman's rigorous notions of neutrality and constrained dialogue seem plausible only as rules for a community of rough equals in which the superiority of persons and of notions of the good is highly debatable.

principle also would recognize that, for some beings, the interest in avoiding pain "involves an interest in foregoing the fear and confusion which would accompany the pain; and for some humans it further involves an interest in being able to have unsullied memories and to form and implement future plans with confidence, and in being spared a sense of humiliation and rejection."⁶¹ Because of all these correlative elements, pain of the same amount would be treated as worse under the equality principle if it occurred in a human being.

Of course, any attempt to apply an egalitarian principle runs into the problem of assessing the "pure" pain that an animal feels in comparison with what a human being feels and then weighing the significance of the correlative elements. Although these "factual"⁶² questions may seem insurmountable, the equality approach at least provides an answer to the basic issue of valuation. When the deaths of animals and human beings are compared under the equality approach, one has to decide how much human death is worse because of foresight, fear, and the sense of loss of those who survive, and how much it is worse because greater potentialities are foreclosed.

The extent to which these troublesome questions of comparability would compromise an attempt to apply an equality approach may depend very much on the assumptions made about what moral consideration entitles an individual to receive. The comparability questions are most acute if one accepts some sort of consequentialist balancing of harms and benefits. They are largely avoided, on the other hand, if one adopts the view that animals have rights in a fairly strong sense. Tom Regan has provided a lucid explication of the latter view.⁶³ Regan suggests that animals, as innocent beings with a right to life, may not be used as means for the greater good. Under this view, even if the death of 1000 animals in experimentation would save 1000 human lives that otherwise would be lost,⁶⁴ the experiments would not be morally

61. R. ATTFIELD, *supra* note 40, at 169.

62. One might doubt whether physical pain can be weighed against the pain of sullied memory in any coherent way.

63. T. REGAN, *supra* note 33, at 266-400.

64. Although Regan, like other animal rights advocates, strongly contests the factual plausibility of such an assumption, the implications of his claim about moral rights remain.

justified. On the other hand, when a direct choice must be made between human and animal lives—for example, when humans or animals must be thrown from a lifeboat—the human life should be preferred because a human death is a worse harm than an animal's death.⁶⁵ Indeed, according to Regan, saving one human life is preferable to saving any number of animal lives, when a direct choice must be made. A lesser harm imposed on many creatures, Regan reasons, is better than a greater harm imposed on only one, even when the total of the lesser harms exceeds the greater harm.⁶⁶

Although Regan manages to sidestep many of the dilemmas of comparability, he does so at the cost of resolutions that are strongly counterintuitive. Regan recognizes this, but he claims that only a genuine rights approach can avoid inconsistency or indefensible differentiation—the inconsistency of treating animals worse than moral “patients” of the human species whose capacities are no greater than those of the animals, or the indefensible differentiation of moral agents from moral patients in terms of moral consideration.

Even Regan, however, does not press the consistency argument to its full logic. Human beings lacking moral capacity not only are protected from harm caused by other humans, but also are actively nurtured and protected from outside dangers. If moral considerations required humans to take an equivalent attitude toward mammals, humans would have to protect weaker species from predators. Such actions might upset the “natural balance,” but, under Regan's theory, that would not be a sufficient reason to refrain from protecting the rights of individual animals that humans are capable of protecting. The idea that humans should undertake to protect all mammals from predators and natural disasters is close to absurd, but its rejection substantially undermines the consistency argument that moral consideration for animals must be understood as conferring strong rights.⁶⁷ Between near absolute human priority and some version of equality lies an intermediate

65. T. REGAN, *supra* note 33, at 285.

66. *Id.* at 324-26.

67. Regan might respond by saying that defective humans have no right to be protected from natural hazards, or that in this particular respect membership in the human species does make a difference. If membership in the human species matters for this sort of positive right, however, the reasons why it would not also matter for negative rights against human

view that the higher capacities of humans give their interests greater weight *per se*. From this standpoint, the pain of a person is worse than the pain of a cat just because the person has greater capacities, quite apart from the ways in which these capacities actually enhance the pain and its effects.

I shall not develop the arguments for and against these various positions in a systematic way. The issue is discussed in a growing body of literature, but what I have said thus far is enough to suggest the tenor of the competing assertions. Without reviewing each claim carefully, one cannot confidently reach a conclusion about the limits of rationality to resolve the issues. My own sense, however, is that, while rational argument can answer some of these questions, and can raise often disturbing, new avenues of inquiry that challenge complacent assumptions, much is left unsettled by the possibilities of rational argument.

Rational argument can establish, I believe, that conscious animals capable of experiencing pain and pleasure should receive *some* moral consideration, and that the pain or death of any such animal, viewed by itself, is a harm to be avoided. These premises alone, however, do not go very far toward an understanding of the proper bounds of legal protection. Among the critical remaining questions are: (1) whether the replacement argument is sufficient to justify painless killing as part of a practice in which more animals live than otherwise would do so; (2) whether, in the sense in which equality is plausible, animal interests should be counted equal to human interests and, if not, how much priority should be given human interests; and (3) whether, in dealing with conflicts of human and animal interests, some kind of consequentialist weighing or some notion of strong rights is appropriate for animal interests. For these questions, analogies drawn to future generations of humans or to treatment of defective humans are so far afield, and of such uncertain resolution in their own right, that they provide no sure footing for resolution. In the final analysis, then, the place of convincing interpersonal argument seems decidedly limited, and on critical questions people must resort to their own personal sense of life and to reflective views with which they are comfortable.

harm are not clear. For a defense of a kind of species principle, see P. DEVINE, *THE ETHICS OF HOMICIDE* 51-57 (1978).

Given the limits of rational analysis, therefore, people inevitably must go beyond the boundaries of persuasive rational argument in assessing the proper legal protections of animals. This does not mean that rational argument has no place. Because most people in this society unthinkingly relegate the interests of animals, except for domestic pets, to a very low plane, largely disregarding their consciousness and capacity to suffer pain or frustration, rational argument, as well as emotional appeal, can shake people loose from any complacent and unthinking acceptance of near absolute human priority. Once people begin to think seriously about the problem of animals, however, rational analysis alone is incapable of resolving a number of the questions that are critical to appropriate legal protection.

C. Environmental Ethics

Skepticism about rational resolution of animal rights is multiplied manyfold for environmental protection. Strictly speaking, environmental ethics may include the possibility of protection for individual plants and individual natural objects, such as stones, as well as the possibility of protection for the environment in a more general sense. This Article, however, distinguishes between protection for individual entities as such and safeguards for more inclusive categories of being such as species, the land, the natural setting, ecosystems, and the biosphere.⁶⁸ For the purposes of this Article, an environmental ethic concerns itself with protections, over time, of one or more of these larger categories of beings. The worry is not the death or pain of individual entities, but human destruction of the environment or failure to preserve it. The fundamental ethical issue is whether humans owe any moral duty to protect the environment that goes beyond what they owe to other individual humans, including future members of the human race, and beyond what they may owe to individual animals.

Although a judgment that humans do owe some such duty may have implications for private individual action, the extensive

68. See Norton, *supra* note 38, at 132. Of course, what constitutes an individual entity and what constitutes a more inclusive category of being is not a matter of sharp distinction. In this Article, however, an assumption is made that a river or mountain is not an individual entity.

coordination needed to prevent despoilation or alteration of the environment makes this a problem whose main importance concerns defining public policy and formulating legal rules.

Consider a proposal to build a dam that would generate substantial human benefits but would endanger an obscure species of fish—a species that has made no apparent contribution to human welfare in the past and that is highly unlikely to make such a contribution in the future. Should the dam be built? The answer may depend on one's attitude toward the environment. Someone who focuses exclusively on the welfare of humans would weigh the benefits of the dam against the scientific and aesthetic interests in preserving species and the remote chance that this fish would contribute to human life in some unforeseen way in the distant future. On the other hand, someone who starts with a fundamental notion of respect for the environment, believing that humans have a responsibility not to work an irremediable change in the nature of the world they inhabit, might think that the dam should not be built even if the weighing of human interests was favorable to the dam.

Getting a rational secular handle on this borderline question of valuation is difficult, unless the focus is on identifying the attitudes that are psychologically healthy for human beings to have. If crushing one stone raises no moral question, why does destroying the Grand Canyon raise a question except in terms of aesthetic and other losses to people⁶⁹ and to other creatures warranting moral consideration? Why should the life of one nearly extinct snail darter count for more than the life of one salmon, if the salmon's capacities are at least as great? With the subject of animal rights, the inquiry at least could proceed by asking which of the capacities that are thought deserving of moral protection in humans also exist in animals. With the subject of environmental ethics, even this exercise in analogy to ordinary moral problems is unavailable.

That socialized human life will alter the environment in some ways is inevitable, because animals, including human beings, affect

69. For an analysis of this issue cast in terms of the long-term interests of human beings, see *id.*

the settings they inhabit.⁷⁰ Yet many people feel concern about the extermination of other species.⁷¹ Rawls, for example, mentions in passing that he views "destruction of a whole species" as a great evil.⁷² Others who have devoted themselves more intensely to the problem of environmental ethics have spoken of diversity as a good in itself;⁷³ of the moral significance of the wellbeing of species, wildernesses, and ecosystems;⁷⁴ and of the importance of "preserv[ing] the integrity, stability and beauty of the biotic community."⁷⁵

One argument in favor of this view is that humans should recognize themselves as members of a community with interdependent parts. Such a recognition, of course, necessarily would affect human actions toward the environment, but why should it preclude a human-oriented perspective—one that would allow manipulation of the environment so long as long-term human interests are not undermined? The idea that humans are an insignificant part of a vast chain of being is as consonant with a "law of the jungle" view, holding that humans should get all they can for themselves, as it is with the view that humans must respect the other beings and the environment as a whole.

Stuart Hampshire has written with some eloquence that "nature can sustain those emotions associated with the superhuman," and that it "is principally for this reason that the careless destruction of a species seems disgraceful," since such destruction "expresses an ignorant attitude, and a false philosophy, of dominance, as if men were situated in the world as in their own garden."⁷⁶ Granting Hampshire's point that the world is not our garden, the question remains why human beings should not take all they can out of it. If the main point is that nature deserves respect because of the emotions that respect for it can sustain, then Hampshire's conclusion

70. See Watson, *A Critique of Anti-Anthropocentric Biocentrism*, 5 ENVTL. ETHICS 245, 253 (1983).

71. See Gunn, *Why Should We Care About Rare Species?*, 2 ENVTL. ETHICS 17 (1980).

72. J. RAWLS, *supra* note 5, at 512.

73. See R. ATTFIELD, *supra* note 40, at 149-50 (discussing A. LOVEJOY, *THE GREAT CHAIN OF BEING* (1936)).

74. Johnson, *Humanity, Holism, and Environmental Ethics*, 5 ENVTL. ETHICS 345 (1983).

75. R. ATTFIELD, *supra* note 40, at 158 (quoting A. LEOPOLD, *A SAND COUNTY ALMANAC* 224-25 (1969)).

76. S. HAMPSHIRE, *TWO THEORIES OF MORALITY* 91 (1977).

requires reversion either to a complex plea about psychological health or to some nonrational judgment that this attitude is one humans should have.

Unless one puts the justification in terms of psychological health or in terms of a needed corrective to present human ignorance of future possibilities, the claim that people should respect nature in its own right and should try to preserve species is not one that can be grounded successfully in rational argument. People have radically different reactions to what humans owe to nature in a larger sense, and neither analogies to ordinary moral constraints nor other forms of rational analysis provide much assistance in settling the issue. Chief Seattle spoke of the rivers as "our brothers" to whom people owe "kindness."⁷⁷ This manner of looking at the natural world is so contrary to most modern views that it seems odd, but, unless it is based on some plain mistake about the location of spirits, it is not irrational. Views that attach value to the preservation of species, and even to maintenance of the physical environment, are not contrary to reason, but they do require some nonrational commitment or judgment of value.

IV. RELIGIOUS CONVICTIONS, NONRATIONAL JUDGMENTS, AND POLITICAL PREMISES

The discussion thus far suggests a serious vulnerability in the position that citizens and legislators should rely exclusively on publicly accessible reasons in reaching political decisions. If rational premises and arguments are radically inconclusive on some subjects, how can anyone reach positions concerning those subjects on rational grounds alone? If all citizens must reach beyond what can be established rationally, where are they to look? The answer to these questions is that religious bases of decision cannot reasonably be disfavored in comparison with other nonrational bases for decision.

To support this conclusion, I undertake a three-step analysis. First, I explore in a little more detail how religious convictions figure into determinations about animal rights and environmental protection. Second, I attempt the arduous task of distinguishing

77. See Brennan, *The Moral Standing of Natural Objects*, 6 ENVTL. ETHICS 35, 40 (1984).

between rational and nonrational judgments, and suggest that religious judgments should be treated as one kind of nonrational judgment. Third, and finally, I return to the position that reliance on religious judgments is inappropriate, inquiring whether the position that citizens should rely exclusively on rational grounds, or the position that religious grounds should be excluded even if other nonrational grounds are not, is defensible; I conclude that a persuasive defense of either of these positions is not possible.

A. Religious Convictions and Political Choice

Religious convictions of the kind familiar in this society bear pervasively on ethical choices, including choices about laws and government policies, in a rich variety of ways. Reliance on such convictions would be inapt if the convictions themselves were wrong or unhelpful, or if reliance on them were disqualified by some underlying principle of liberal democracy. Because those who urge that political decisions in a liberal society should be exclusively secular hope to establish their claim without tackling issues of religious truth, the latter possibility is the critical one, and is the main focus of the following analysis, although the analysis also considers briefly the possibility that religious convictions are unhelpful because they merely replicate what is discoverable through other means.

Exactly which beliefs and systems of beliefs are "religious" is a perplexing topic,⁷⁸ but one that is of limited concern in this Article, which focuses mainly on Christian and Jewish beliefs that undoubtedly are aspects of religious viewpoints. Like most other major religions, Judaism and Christianity involve belief in a transcendent reality, forms of worship and contemplation, experiences of the "Holy,"⁷⁹ ideas of sacred authority, myths and doctrines that interpret reality, and social institutions that embody

78. See D. LITTLE & S. TWISS, *COMPARATIVE RELIGIOUS ETHICS* 53-74 (1978); N. SMART, *THE PHILOSOPHY OF RELIGION* 3-39 (1970); Greenawalt, *Religion as a Constitutional Concept*, 72 CALIF. L. REV. 753 (1984).

79. See N. SMART, *supra* note 78, at 5, 6-7 (pointing out that contemplative mystical experience may not be captured well by the idea of experience of the "holy" because, although both Christianity and Judaism embrace groups with mystical traditions, mystical experiences have figured less prominently in them than in Hinduism and Buddhism).

the religion.⁸⁰ Most importantly for the purposes of this analysis, Christianity and Judaism, like most religions, embody ethical teachings.

To say without more that a religion embodies ethical teachings is to miss the various ways in which the connection between religious conviction and ethical conclusion can arise. Obviously, an authoritative text can prescribe behavior. In the Judeo-Christian tradition, the Ten Commandments are the most striking example, though various formulations of the "Golden Rule" in the Old and New Testaments are at least as important for Christians. Rather than behavior, the text may recommend attitudes of heart and mind, such as injunctions to love one's neighbor or one's enemies. It also may indicate something about goods worth attaining. Similar prescriptions and recommendations may come from acknowledged religious leaders, ranging from Popes to ordinary clergy, or from organized church bodies.

Religions typically embrace broad perspectives about the nature of human beings and society. These perspectives include not only appraisals that are essentially factual, such as whether people are intrinsically self-centered, but also visions that concern the "ultimate meaning" of human life and the place of mankind in the universe. Understandings about these matters affect ethical judgments about how people should govern their lives and about the respect that they owe to other people and nonhuman beings.

Other sources of ethical guidance can be found in the nature of the religious object that is worshiped and in conceptions of the role that a person properly occupies in relation to that object. The notion of God as Creator is an important one for Judaism and Christianity; whether one understands nature as being created by God for humans or supposes that humans have a responsibility to God to preserve this creation can gravely affect one's sense of the natural environment.

Finally, religions offer paths by which difficult ethical problems can be addressed. Many Christians, for example, believe that prayer is an avenue of direct inspiration about what they should do. Many regard consultation with fellow believers or clergy as a critical source of guidance.

80. See D. LITTLE & S. TWISS, *supra* note 78, at 54-63; N. SMART, *supra* note 78, at 3-39.

Typically, these various sources of religious insight into what one should do are not seen as mutually exclusive alternatives but as reinforcing or mutually correcting.⁸¹ Various segments of the Christian and Jewish traditions give them differing degrees of emphasis. Religious believers also differ widely in the degree of confidence they assign to ethical conclusions reached on religious grounds. Those who believe in the inerrancy of scripture, papal infallibility, or the assurance of their own religious inspiration may be certain that they are right on some subjects. Others strongly doubt their ability to ascertain ethical truth, but still believe that the religious perspective holds out an important means for highly fallible creatures to try to understand what is right.

Not all religious convictions that affect ethical views and practices are relevant to determinations of what the law should be in a liberal democracy. In the Christian tradition, the universal failure of people to live up to ethical norms is understood as a sin against God, requiring forgiveness and critically revealing human dependence on divine love. Disagreements about whether efforts to live morally gain merit in God's eyes or are exclusively the fruit of a divine grace already conferred reach to the heart of Christian faith, but they also do not immediately concern the determination of what constitutes correct behavior. Even when religious convictions bear on correct ethical choice, they need not concern what the law should be. The choice made by persons who rely on religious guidance to decide how much of their income should go to help the starving, for example, has no direct bearing on public laws and policies.

When these various connections between religion and ethics are put aside, however, a connection remains that is of the utmost importance for the purposes of this analysis. Religious premises pervade people's views of social reality and the justifiability of human actions in ways that can affect what people think the government should do. A person who thinks that animals warrant the same moral consideration as human beings, for example, is likely to

81. The idea of mutual correction is tricky in this context. A religious person does not believe that the actions God actually inspired him through prayer to take would conflict with the actions God actually instructed him through authoritative scripture to take. Instead, this idea recognizes that the fallibility of human receptivity generates the need for reference to diverse sources.

conclude that the government should give animals significant protection. If religious convictions properly are treated as irrelevant to political choices, therefore, the reason cannot be that they have no intrinsic bearing on such choices. Religious convictions should be disregarded only if they are subject to some kind of disqualification or if they merely replicate truth that is discoverable on other grounds.

Many religious persons believe that one can determine what is morally right action without reference to religious truth.⁸² Under this view, understandings about ethics reached through religious revelation in its various forms merely confirm understandings that can be reached through reason and ethical intuition. For example, in one of the best modern expositions of a natural law perspective, John Finnis' *Natural Law and Natural Rights*,⁸³ the author develops a comprehensive moral theory without reference to God, suggesting only in a final part of the book that the discovery of self-evident "goods" and moral truth points toward the existence of God.⁸⁴

This confirmatory view of revelation is radically opposed to the view that one's religious perspective critically affects the resolution of virtually every moral question, a view that is at least approximated among fundamentalist Protestant groups that suppose that people who are without salvation are nearly blind to moral truth, incapable not only of doing but also of understanding what is morally right.⁸⁵ Salvation becomes the dominant event in the moral as

82. See, e.g., Sweet, *Natural Religion and Religious Liberty in America*, 25 J. RELIGION 45 (1945).

83. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

84. *Id.*; see J. FINNIS, *FUNDAMENTALS OF ETHICS* 110 (1983). The natural law view of St. Augustine, which comes much closer to traditional Protestant views, is much more pessimistic about the power of reason. Though he recognized a basic moral law written on the hearts of all individuals, St. Augustine thought that ignorance and misguided will had almost effaced that law, and that people are "so readily subject to vanity that [they] judge the false for true, reject the true for false, and hold as uncertain what is actually certain." H. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 61, 85-95 (1963).

85. Jonathan Edwards, the dominant figure in the Great Awakening of the eighteenth century, said: "The least beam of the light of the knowledge of the glory of God in the face of Jesus Christ is worth more than all the human knowledge that is taught in all the most famous colleges and universities in the world." H. MAY, *THE ENLIGHTENMENT IN AMERICA* 54-55 (1976); see also G. HUGHES, *AUTHORITY IN MORALS* 5-6 (1978). Compare A. MACINTYRE, *supra* note 22, at 51-58.

well as the religious life of believers; through religious inspiration and the revelation of scripture, adherents come to understand what is right and to do it.

An intermediate possibility is that ordinary human sentiments and rational understanding can go a good distance toward settling what is morally right but that on some important moral questions, including some questions of justice and political morality, these sources of insight are unhelpful or exhaust themselves. On these occasions, one's resolution will depend on reference to religious premises.

For people who believe that religious premises are always or frequently a source of ethical truth that is unavailable elsewhere, an injunction to disregard these premises in political choices would be an injunction to make decisions on the basis of only part of what they regard as the relevant data.

Any idea that political choices should rest exclusively on nonreligious bases undoubtedly is in less severe tension with a view that religiously based sources confirm what is otherwise discoverable than it is with a view that these sources afford unique ethical insight. Only an extraordinary version of the confirmatory view, however, actually would be compatible with the claim that reliance should not be placed on religious grounds. A brief exploration of some possible variations of the position that revelation merely confirms what is discoverable by reason demonstrates why this is so.

Suppose that reason allows all people, without strenuous intellectual effort, to reach correct conclusions about every issue relevant to public law and policy, and that religious revelation either repeats what is otherwise plainly evident or illuminates matters for which the rationally establishable truth is clear once attention is directed to them. For example, the scriptural commandment against killing may be regarded as reinforcing a rationally derivable moral norm against murder, and the doctrine of original sin may be viewed as a powerful account of people's intrinsic selfishness, a selfishness that could not be denied by anyone who thoughtfully considered the facts of human history and human psychology. If, with respect to ethics, confirmation were the exclusive function of revelation, then any time a person took an ethical position indicated by a religious revelation that person could point to the independent rational grounds that dictated the position.

Though revelation might play some causal role in the development of a person's positions, by alerting him to consider certain factors, the person could state unambiguously that nonreligious grounds fully support those positions.

If the confirmatory role of religious revelation were less modest, however, with revelation actually being used to resolve uncertainties, people sometimes would rely on religious convictions in a way that might be barred by any principle that religious grounds are illegitimate bases for political decisions. One way in which religious revelations might play a role involves the limits of ordinary human capacities. Assume that many ethical questions, while yielding to reasoned resolution, are quite complex. If this is the case, perhaps most ordinary people are incapable of resolving these questions on rational grounds. As Finnis has noted, some derivations from first principles to moral norms require "wisdom, i.e., a reasonableness not found in everyone or even in most people."⁸⁶ Moreover, some of the people who can resolve issues on nonreligious grounds with enough effort may not have the time or inclination to make that effort.

Among the people who are incapable of reasoning fully about the complex questions or have not devoted the necessary effort, some believe that religious bases give them answers.⁸⁷ If these people also believe in a confirmatory view of religious revelation, they believe that the positions they accept are correct on rational grounds, but they do not understand on secular rational grounds why that is so, and they are not able to defend their positions against the major competing positions on such grounds. They adopt the position they hold on religious grounds, and they do not know what position they would accept if they abandoned the religious grounds. Religious convictions, informed by scripture or by authoritative church statements, thus can play a critical role in the formation of political views of many people when the rational grounds for some positions are not within comparatively easy grasp. This view, or

86. J. FINNIS, *supra* note 84, at 69.

87. This view might assume that religious sources could give easy and clear answers. Indeed, some religious people do believe that easy religious resolutions are available for some issues. That belief is challenged in G. HUGHES, *supra* note 85, at 11-25. Even if religious sources do not yield a clear answer, however, they may affect the believer's conclusion. See *id.* at 92-94.

something similar to it, may best represent the traditional Roman Catholic position.⁸⁸

A more subtle role for religious sources involves the inquiries and conclusions of those who are most competent to resolve issues on other grounds and who make the effort to do so. Some problems may have rational solutions, but solutions that are hard to grasp for anyone. Legal scholars, for example, often shift from thinking that one answer to a problem is correct, to thinking that the choice is a "toss-up" for which no correct answer is available, to thinking that a contrary answer is correct. Even scholars committed to the view that every legal problem has a rationally correct answer often are uncertain what the answer is. If the same were true about ethical problems, persons who believe that religious revelations are confirmatory of reason might attain a much higher degree of certainty about an answer than they otherwise would have, and they might accept on the basis of revelation a position that conflicts with a highly uncertain judgment reached on rational grounds. Of course, people rarely have the psychological objectivity and self-awareness to know that what they firmly believe is correct on one basis is something they would believe is probably wrong on another basis. A principle of eschewing religious convictions, however, would demand such an inquiry and occasionally would lead a person who is uncertain what is right to reject the position he thinks is supported by religious revelation.

In some instances of decisions about laws and policies, the degree of certainty of moral judgment is itself important. People who are highly uncertain about the correctness of their own positions may be much less willing to impose them on others and much more willing to accept some sort of compromise. A principle foreclosing

88. Basil Mitchell has noted:

[T]he Roman Catholic Church has regarded supernatural revelation as a moral or practical necessity, although not a theoretical one, for knowing the Natural Law without [an] admixture of error; so that neither in theory or in practice does the doctrine of Natural Law, whatever its merits, provide a means of determining moral questions without reference to controversial religious claims.

B. MITCHELL, *supra* note 3, at 105; see also G. HUGHES, *supra* note 85, at 10 ("[E]ven in the Catholic tradition, there are some moral theologians who hold in practice, if not in theory, that revelation is essential for our understanding of ethics.")

reliance on religious convictions also would foreclose any increments in the degree of certainty that these convictions provide.

Thus, even under most versions of the view that religious convictions and institutions merely confirm what is discoverable by human reason, the barring of religious convictions would preclude sources of insight with considerable practical significance. If the principle that religious grounds of judgment are illegitimate for political choices within a liberal democracy were accepted, a very high proportion of Christians and Jews, if they wanted to perform as conscientious liberal citizens, would have to eschew religious sources of insight that they otherwise would regard as relevant and perhaps critically determinative on some issues.

B. The Limits of Rationality and Religious Morality

I suggested previously that the plausibility of the position that liberal citizens should not rely on religious grounds of decision rests on the possibility that reliance on rational grounds alone will suffice. The examination of animal rights and environmental policy introduced a deep skepticism about this possibility. Now, I want to address the limits of rationality more generally and to consider how the claim in favor of the exclusion of religious grounds might try to meet those limits. A discussion of rational grounds also is important in helping to elucidate why I place religious convictions among a larger category of nonrational bases of judgment.

Examination of the power and boundaries of rational thought, of course, is a deep and unending problem in philosophy and culture.⁸⁹ This Article does not aim to make a fresh contribution to that topic. Instead, it attempts to develop an approach to rationality that fits with the claim that grounds of political decision should be exclusively rational. For that claim, the critical question seems to be whether judgments can be based on reasons that can be articulated and that have intersubjective validity.

The clearest instances of rational judgments are ones that can be justified to any competent and levelheaded observer. The proposition that logical deduction and empirical inquiry involve rational thought and judgment is fairly straightforward. Some time ago, for

89. As Hilary Putnam said, "there is no *neutral* conception of rationality to which to appeal." H. PUTNAM, *REASON, TRUTH AND HISTORY* 136 (1981).

example, my eight-year-old son had to determine the dollar value of 5000 ordinary pennies. Though two adults initially informed him that the answer was \$500, fifty dollars was the rationally demonstrable correct answer, derivable from the meaning of dollars and cents and the axioms of arithmetic. Once the answer was explained, any person of moderate intelligence would be irrational to reject it. If someone asked a simple empirical question, such as, "Did it rain here yesterday?", evidence would be forthcoming, typically the recollections of those who were present, that would yield a rational answer. A person who concluded that rain had fallen yesterday would be able to explain to another person the good reasons that led to that conclusion, and in ordinary instances the evidence would be so persuasive that reasonable people could not disagree about the conclusion.

What is the place of rationality in practical decisions about what *should* be done? That question matters for lawmaking, and it leads to more difficult terrain. Once certain premises are granted, some practical decisions are the product of logic and factual inquiry. If a broad rule is authoritative and accepted—for example, that persons under eighteen cannot vote—then the application of that rule to a particular person, such as an individual who is sixteen years old, can be derived logically. Judges thus make rational judgments when they apply accepted rules to circumstances undoubtedly covered by those rules.

Simple evaluation of the means available to reach a desired end, a form of empirical inquiry, also is within the domain of rational judgment. When one determines which of several possible means actually is capable of achieving a certain end, or which of several efficacious means will be least costly, one makes judgments of fact. Ideally, perhaps, such judgments should be made with a thorough knowledge of all aspects of all alternatives, but in ordinary life shortcuts usually are required. Given the need to make decisions in reasonable time and with reasonable effort, people are rational to proceed with something less than a full canvassing of the relevant considerations.⁹⁰

90. See D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY FOR DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* 69-81 (1963); Lindblom, *Some Limitations on Rationality: A Comment*, in *RATIONAL DECISION* 224 (C. Friedrich ed. 1964).

Most practical judgments are not reducible to purely factual issues, and therefore involve more than simple derivation. Often, a direct choice among ends, or a choice between means that considers the harms and benefits of subsidiary effects as well as capacity to achieve the immediate end, is needed. Such situations raise starkly the degree of relevance of rationality for value judgments.

At least if rough agreement exists about the importance of various ends, rational judgments about value choices are possible. Rational thought about values involves canons of regularity, generality, and consistency. Some conceivable choices may be regarded as outside the boundaries of rationality if they are at odds with choices made in similar situations or if they promote a concededly unimportant value at the expense of deeper values. Often, however, the correctness of value choices is not demonstrable beyond question, even when agreement exists about important ends.

One reason for this inability to demonstrate conclusively the correctness of some value choices is that the alternatives and all their implications rarely can be laid out systematically. A second reason strikes more deeply at reasoning about conflicting values. Much discourse in law and morality assumes that humans are able to identify in context which arguments are stronger than others, even though nothing that amounts to proof of their various strengths is possible. As Rawls has said, when proof is not possible, one still can hope, in the words of John Stuart Mill, to "present considerations capable of determining the intellect."⁹¹

A critical question regarding rationality and value judgments is the status of ultimate judgments of value. Before tackling that question and exploring its relevance for the thesis that political decisions should rest on rational secular grounds, however, I consider nonrational judgments and the reasons for placing religious convictions in that category.

What I mean by a nonrational judgment is a judgment grounded to some extent on a crucial element that cannot be established rationally. Nonrational judgments often concern matters that are not comfortably subject to rational conclusions. On other occasions, individuals may reach nonrational judgments on subjects that others

91. J. RAWLS, *supra* note 5, at 125 (paraphrasing J. MILL, *UTILITARIANISM* 6-7 (15th ed. 1907)).

with more ability or time might be able to resolve rationally. A nonrational judgment is not irrational. An irrational judgment is at odds with rationality, contradicting a judgment that could be reached with an appropriate effort on the basis of available information,⁹² while, in contrast, a nonrational judgment does not contradict the conclusions of rational thought but reaches beyond them in some way. Though talk of degrees of rationality and irrationality may capture nuances more precisely than these simple categories, the basic distinctions among rationality, nonrationality, and irrationality retain usefulness for the purposes of this analysis.

The most obvious sorts of nonrational judgments are those for which one can assign no grounds other than a subjective reaction. A judgment that vanilla ice cream tastes better than strawberry, for example, is of this sort, if it is a judgment at all. Even if an outsider could advance complex psychological reasons why someone preferred vanilla, these would not be rational grounds in the relevant sense. Conceivably, as the roots of this preference were revealed, the preference might shift, but the psychological reasons for the preference would not constitute a basis for thinking one's way to the preference. More critically, the psychological reasons would lack an intersubjective dimension; they could not be employed to argue that differently constituted individuals must or should prefer vanilla.

The analysis of a preference shared by everyone would be more tricky. Suppose, for example, that everyone preferred the taste of vanilla ice cream to the taste of castor oil. In this situation, one might conclude that, in some sense, vanilla ice cream "objectively" tastes better than castor oil, and therefore that people could make a rational judgment that it is better tasting, even if the source of evidence remained exclusively subjective preferences. One must be careful, however, about what this "rational judgment" means. It amounts to an assertion that, for undiscovered reasons, virtually all people prefer vanilla ice cream.⁹³ Perhaps the important point

92. The idea here is that a judgment is irrational not only if it contradicts facts or valid arguments of which a person is aware but also if it contradicts facts or arguments of which that person should be aware.

93. One might try to go beyond subjective sensations and discover physical characteristics that lead people to find sweet tastes pleasant and castor oil unpleasant. See *Children and Food: How Eating Habits Are Formed*, Int'l Herald Tribune, July 29, 1985, at 16, col. 1.

for practical decision is that it is rational to act on the assumption that vanilla ice cream tastes better. Someone might try to give a vanilla flavor to castor oil, but no one would use castor oil to flavor ice cream.

Perhaps one cannot even appropriately speak of an individual's making a "judgment" when that individual decides to act upon purely subjective preferences, but many other determinations clearly do appear to be matters of judgment. Often people reach decisions in some vague way based on their experiences or on some sense of life's significance. People facing decisions occasionally assign reasons favoring each alternative, conclude that one alternative seems better, and nevertheless choose the other alternative because it "feels right." Assuming that a person making such a decision is not simply surrendering to irrational feelings that he recognizes as such, he may feel there are deeper reasons supporting his choice, ones that he cannot articulate to himself, much less put to others in a way that will persuade them that the choice was right for him or that a similar choice would be right for them.

I do not suggest that for all purposes rationality *necessarily* requires an ability to explicate. If abilities to discern accurately are the product of training and experience that would produce similar abilities in other individuals, one may speak of a rational exercise of those abilities even when the person involved cannot verbalize standards of judgment.⁹⁴ Regardless of how one characterizes these decisions, however, other decisions often are made by people who are unsure that differently constituted individuals faced with the same choice would react similarly. Though these judgments may well be regarded as deeply reasonable for the choosers, this Article treats them as nonrational.

94. A noncontroversial example would be a person's identification of a voice over the telephone, without being able to explain how that identification was reached. More controversially, experienced police officers sometimes assert an ability to know intuitively what movements are suspicious. One is inclined to suppose that these are rational judgments, despite the inability of those who made them to explain the bases of their determinations, if the determinations are shown after the fact to have a high degree of accuracy. The assumption underlying this conclusion is that, if another person had similar contact with the person whose voice is heard or had similar experience as a police officer, that other person would be capable of making the same judgment. See H. PUTNAM, *supra* note 89, at 184 (denying that public checkability is an aspect of rational belief).

The preceding analysis suggests why I consider religious morality and religiously grounded moral judgments as nonrational: the crucial premises underlying such judgments are not subject to rational or convincing interpersonal demonstration. Because this basic idea obscures and oversimplifies, however, it warrants explication.

Any religious morality is likely to include many elements that are found in secular moralities and that plausibly can lay claim to being persuasively established on rational grounds. Judaism and Christianity strongly condemn the unjustified taking of life or infliction of pain. With respect to beliefs such as these, religious revelation most straightforwardly may be seen as confirming what is apparent to natural reason. Certain elements of religious morality, therefore, may be establishable rationally, but these elements are precisely those for which religious underpinnings are unnecessary to establish their correctness. The elements of religious morality that are nonrational are beliefs that owe their apparent force to a particular religious perspective, but might have no force or a different force if only a secular rational analysis were undertaken. In this sense, the force of religious morality rests on the power of the religious perspective.

I assume that the power of a particular religious perspective itself is not one that can be settled by rational means. It is logically possible that rationality could work in two steps here. For example, rational argument might establish the existence of a powerful and morally beneficent God, and further rational argument, based, for example, on miraculous occurrences, might establish the content of God's revelation to human beings. Doing what that revelation indicated then would be rational,⁹⁵ even though one could not rationally ascertain independent reasons for doing the actions that were called for.

Through the ages some people have believed that rational inquiry can establish important truths about religion, such as the existence of a benevolent, omnipotent Supreme Being. The competing view, which perhaps has dominated modern Protestant thought, is that one cannot arrive at religious truth through

95. This conclusion does not consider the dilemma of how one establishes that God has moral authority.

rational, nonrevealed premises.⁹⁶ The important point for the purpose of this analysis is that few, if any, major religious traditions claim that their own particular view of revelation can be established for fallible men and women by exclusively rational means. Even religious traditions with relatively ambitious claims for the rational establishment of religious truth usually do not suppose that reason shows the validity of the particular modes of revelation on which moral conclusions are based.

That does not mean that claims of religious truth or of religious morality are wholly beyond rational scrutiny. The latter are subject to the same tests of consistency and regularity that apply to nonreligious moral views. What rational scrutiny of religious claims amounts to is complex, but Ninian Smart has suggested a number of bases for assessing a historical religion such as Judaism or Christianity: (1) whether its historical claims are roughly in accord with actual historical events; (2) whether the leaders of the faith have been flagrantly unethical; (3) whether the elements of its faith involve self-contradiction or an intolerable tension; (4) whether acceptance of the faith produces the fruits that the faith values; (5) whether the faith produces a deep and meaningful account of the problems of life that are hardest to explain; (6) whether the founder and prophets had force and style; and (7) whether the narratives of the faith have a solidity and aesthetic coherence.⁹⁷ All, or most, of these inquiries involve elements that are subject to rational thought and discussion. But a person might concede that a faith passes these tests reasonably well and still decide that its acceptance is not warranted. Belief in a religion requires something more.

Typically, unless one accepts a religion unthinkingly on the basis of tradition, one must have a deep sense, grounded in personal experience, that the religious perspective conforms with one's own sense of life and social existence. If one has not grown up within a tradition, the religion must have an initial appeal that "speaks to one's condition." If one is to accept the religion, one must have a continuing sense that it illuminates life's possibilities and meaning.

96. See N. SMART, *supra* note 78, at 105.

97. See *id.* at 114-23. The second inquiry in this list is not circular if we assume some basic moral premises against which to judge these leaders' lives.

To take a Christian perspective, an account of life that emphasizes love and redemption and puts Jesus in a position of central importance will be seen as giving a more persuasive interpretation of the significance of the human condition than any other alternative. An ethical perspective grounded in these premises might be seen as similarly persuasive. This kind of deeper reason might support claims of religious truth, but it is not fully interpersonal in the manner of ordinary rational arguments. One reaches an impasse if someone else's view of life makes such a perspective unappealing. One recognizes, at least in a pluralist society, that people with essentially equivalent rational capacities may hold widely different views about religious matters.

My previous discussion of the relation between individuals' religious convictions and ethical judgments and the various religiously grounded sources of ethical judgments hints at the complexity of the ways in which religious people decide issues of ethics. No doubt, one standard for interpretation of authoritative texts, and for acceptance or rejection of particular religiously grounded ethical positions, is what seems ethically compelling on other than religious grounds. One's ethical sense, therefore, affects not only what general religious views one adopts, but also the manner in which one takes the ethical implications of these views. If rational analysis plays a significant role in the development of ethical positions, for some reasons already indicated and others to be identified shortly, then rational secular morality for many people becomes a kind of straining device and check on religiously grounded morality.⁹⁸ Still, this truth does not detract from the central point that the power of religiously grounded sources of insight derives in part from nonrational judgments.⁹⁹

98. See generally G. HUGHES, *supra* note 85.

99. Though I believe that religious truth and religious morality have crucial nonrational elements, and the terminology used in this Article reflects that belief, this conclusion perhaps is not critical for the broader purposes of the Article. Suppose, for example, that someone believes that religious truth and all of the morality based on it are establishable by convincing rational arguments. This person would have to concede that many people in existing liberal democracies do not accept the religious truth and morality that he believes are rationally demonstrable. If rational *secular* grounds were available to resolve all political issues, one could make a strong fairness argument in favor of relying on these grounds, rather than the controversial religious grounds that presently are unshared and that are believed nonrational by many and positively irrational by some. Thus, all that may be

I now return to the important question of the relation between rationality and the status of ultimate value judgments. There is a strong, though always controversial, tradition in liberal philosophy that treats ultimate value judgments as subjective.¹⁰⁰ That view may seem to pose a substantial obstacle to the recommendation of exclusive reliance on rational grounds for political decisions, because ultimate value judgments obviously figure in such decisions. A proponent of rational secular grounds of decision might respond by denying the premise that ultimate value judgments are subjective, or by claiming that critical nonrational judgments are settled by one's culture, or by urging that political decisions can sidestep debatable questions of ultimate value, or by advancing some combination of these approaches.

The first response takes head on the claim about the subjectivity of values, asserting that the domain of objective value judgments is much greater than supposed. As Isaiah Berlin has suggested, if someone derived pleasure from sticking pins in people and displayed complete indifference to the pain this caused, most people would conclude that the person was irrational.¹⁰¹ Some value judgments, however derived, thus simply are associated with rational persons. Perhaps, as John Finnis claims, fundamental truths are self-evident to rational beings;¹⁰² or, as Thomas Nagel suggests, perhaps an individual's understanding of the meaning of being a person among persons commits that individual to certain conclusions about values;¹⁰³ or, as R.M. Hare has argued, perhaps the nature of moral language implies a way to resolve value conflicts.¹⁰⁴ A view that was influential at the time of this country's founding, and that finds modern expression in "intuitionism," is the idea that people have a separate moral sense that tells them what is

needed for an argument in favor of rational secular grounds is a contention that religious convictions are widely understood to rest on something beyond rationality, and not a contention that correct religious convictions actually do so.

100. See, e.g., Oppenheim, *Rational Decisions and Intrinsic Valuations*, in RATIONAL DECISION 217 (C. Friedrich ed. 1964).

101. Berlin, *Rationality of Value Judgments*, in RATIONAL DECISION 221 (C. Friedrich ed. 1964).

102. J. FINNIS, *supra* note 84, at 20-21.

103. See T. NAGEL, *THE POSSIBILITY OF ALTRUISM* 83-88 (1970).

104. R. HARE, *FREEDOM AND REASON* (1963).

good and right.¹⁰⁵ Insofar as such a shared sense exists among humans, the appropriateness of calling it "rational" may be debatable, but the conclusions indicated by this intuition certainly would be an appropriate starting point for rational deliberations on political issues. Much the same might be said if one conceded that the starting point for morality and law is not a shared moral sense but subjective desires, and claimed that people share the same subjective desires.¹⁰⁶ Were ultimate desires and their personal ordering universal, in the way that a preference for vanilla ice cream over castor oil may be universal, these desires could be accorded a kind of objective status. Finally, some conclusions that appear initially to be ultimate claims about values may be reined in by canons of consistency as they apply to practical choice. As intimated above, if a person had desires or ends that, if satisfied, would defeat other desires or ends that are more important to that person, one could say that the desires or ends were irrational because they would not fit within the pattern of what would best serve the person's overall objectives.¹⁰⁷

This cursory canvass is barely a beginning for thinking about objectivity and rationality regarding values, but it illustrates how a proponent of rational secular discourse might argue that judgments about good and right are much more objective, and much more susceptible to rational judgment, than a full fledged subjectivist would admit.

A philosophically more modest response to this subjectivist worry is the claim that particular cultures settle what is valuable and what sorts of actions are right, and that these understandings appropriately underlie political decisions. This approach may be especially appealing to lawyers. The law may be viewed as embodying an immense number of judgments about values and resolutions of conflicts between them, and legal decisions in novel and difficult cases may be understood as attempts to resolve particular

105. See G. WILLS, *INVENTING AMERICA* 181-213 (1978). The basic idea is captured by Thomas Jefferson's opinion that if you state "a moral case to a plowman and a professor" the plowman "will decide it as well and often better than the [professor] because he has not been led astray by artificial rules." H. MAY, *supra* note 85, at 296.

106. The writings of Thomas Hobbes and Jeremy Bentham represent this position.

107. John Rawls has written of utility as the satisfaction of rational desires. J. RAWLS, *supra* note 5, at 22-27.

problems in light of the rich materials of the law. This view of legal decision, notably exemplified in the work of Ronald Dworkin,¹⁰⁸ might be extended more broadly to decisions about what the law should be. Citizens and officials then would be drawing from the rich materials of their culture to resolve novel problems, and the value judgments they would appropriately deploy would be drawn from the culture. Even if the culture's "choices" ultimately were subjective in some sense, the fact that the culture adopted these choices would be rationally determinable, and the explication and application of these choices could be a part of rational secular discourse within the culture.

Neither the possibility of objectivity independent of culture nor the possibility of objectivity rooted in culture is sufficient wholly to dispel the worry about the status of ultimate values. Most modern secular philosophers who have stressed the supracultural objectivity of many values and moral judgments have not supposed that *all* judgments about values and right action have correct, rationally determinable answers.¹⁰⁹ Even if various ways of establishing objective values can circumscribe the domain of subjectivity, they may not separately, or together, eliminate that domain. Though I confess to deep uncertainty about the full reach of rational judgment, I do not believe that it embraces the entire domain of values. If it does not do so, then the dimensions of the problem raised for the claim that political decisions should rest on rational secular grounds may be reduced, but the problem is not eliminated.

Similar doubts may be expressed about whether, within a culture, any comprehensive ordering of values exists that could eliminate the domain of subjectivity. But here a sharper objection exists. Regardless of what may be true for officials, citizens are free to urge and vote for measures that would represent a shift in prevailing values. No doubt citizens must communicate in terms that other people understand, and to that extent their discourse must connect to what people presently understand about values, but they are free to urge that their society has badly misconceived

108. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

109. See, e.g., A. MACINTYRE, *supra* note 22, at 8, 20; T. NAGEL, *THE LIMITS OF OBJECTIVITY* 135-36 (1979); H. PUTNAM, *supra* note 89, at 148; J. RAWLS, *supra* note 5, at 88; G. WARNOCK, *supra* note 32, at 28, 143-66.

what really matters. A private citizen is not doing anything at odds with the spirit of liberal democracy if he urges that the importance of private property has been badly overvalued and that a society presently committed to a substantial degree of private enterprise should move peaceably toward social ownership of the means of production. A private citizen would act within the spirit of liberal democracy if his votes and other political actions were determined by a desire to bring about that objective in the long run. Liberal democracy does not preclude citizens from self-conscious rejection of many accepted values and from efforts to have laws made that would reflect other values.¹¹⁰

A different response to the concern about the subjectivity of values is to concede its possible truth as far as ultimate values and some moral questions are concerned, but to claim that this reality need not compromise the rationality of political decisions. This is essentially the approach that both Rawls and Ackerman have taken. Rawls has asserted that people with very different life plans, and ideas of the good, all will want liberties, opportunities, and wealth. A theory of what is just, the theory relevant to political decision, can be developed from this "thin theory of the good." Ackerman's whole theory is built on the inappropriateness of political decisions that rest on any controversial assumptions about what is valuable. Although Ackerman has advanced reasons why people who believe in absolute values still should be liberals, his comment that "[t]here is no moral meaning hidden in the bowels of the universe"¹¹¹ makes his own position about ultimate values clear. His postulate of dialogue constrained by a principle of neutrality has been designed precisely to take many questions of ultimate value—at least all those that are involved in a person's conception of the good—out of the political arena. Like Rawls, Ackerman has supposed that almost everybody wants the means to accomplish their ideas of the good in their own lives, and that these desires for wealth and power are a sufficient basis for reaching political decisions. Thus, these decisions can be made on

110. This observation, of course, is subject to whatever preclusion may exist upon promoting values of a particular sort.

111. B. ACKERMAN, *supra* note 21, at 368.

rational and secular grounds even if many value assumptions are not objective and are not establishable in any rational way.

The theories of Rawls and Ackerman undoubtedly rest on at least some ultimate value assumptions, such as the assumption that people in a society are owed equal respect and concern.¹¹² Granting the truth of this claim, however, does not undermine the possibility that these theories would permit rational and secular political decisions. Conceivably, the necessary premise of equality could be drawn out of the nature of persons or moral concepts and thus could be given an objective and rational status, but even if it could not, this premise is an underlying foundation of liberal democracy. Regardless of whether this premise is more rational than competing premises, a person could not reject it and still be a good liberal democrat. This fact alone is sufficient to establish the egalitarian premise as a starting point for liberal democratic theory. If all political decisions could be made with a combination of this premise and rational and secular arguments, then the aspirations of Rawls and Ackerman would be vindicated.

The examination of animal rights and environmental policy, however, shows that the combination of essential liberal premises and rational and secular arguments cannot resolve all political issues. The premises of liberal democracy are quite indeterminate concerning the duties owed to other animals and to nature, and rational argument is inconclusive; yet important political decisions rest on how much consideration human beings should give to non-human entities. Any claim that reliance on religious grounds is always inappropriate, therefore, faces serious difficulties if it rests on an assertion that people should rely exclusively upon rational and secular grounds in making political choices.

V. THE APPROPRIATE PLACE OF RELIGIOUS CONVICTIONS

Before drawing some final conclusions about the appropriate place of religious convictions in political decisions, I summarize the discussion thus far, and examine three possible strategies for resisting the thrust of the preceding analysis. The argument that

112. Ronald Dworkin proposed this assumption as the fundamental concept of Rawls' deep theory. Dworkin, *The Original Position*, in *READING RAWLS* 50-51 (N. Daniels ed. 1975).

members of a liberal democracy should rely as much as possible on shared techniques for resolving issues has considerable appeal. It suggests, correctly in my view, that reliance on rational, nonreligious grounds of decision is appropriate when those grounds yield answers to the problems at hand. The examination of animal rights and environmental policy, however, indicates that rational techniques do not establish how much consideration humans owe to nonhuman entities, and thus leave unanswered critical questions that bear on appropriate legal protection. Each citizen must resolve these questions on some nonrational basis. One such basis—a basis that enjoys wide currency in this society—is religious conviction.

If nonrational value judgments are needed to arrive at positions regarding animal rights and environmental protection, a religious believer has an extremely powerful argument in favor of his reliance on religiously informed views of the place of people in the world, as he struggles with the relevant moral questions and their political implications. Different religious traditions adopt radically different perspectives on how human beings fit within the natural environment, and if rational secular morality provides no evidently correct perspective, it is hard to understand why a liberal democrat should eschew deeply held religious premises in favor of alternative nonrational assumptions that could yield a starting point.

A proponent of exclusive reliance on rational secular grounds might pursue at least three strategies to resist this conclusion. The first strategy would be to stick doggedly to the notion that good citizens should try to think exclusively in rational, secular terms. The proponent could claim that no moral or social problem exists to which rational analysis is irrelevant. Indeed, this Article contains some nonreligious rational claims with respect to animal rights and environmental policy. Although rational argument at this stage of understanding admittedly might be inconclusive on some critical questions, the proponent would argue that this inconclusiveness does not mean that rational argument fails to provide answers in a relevant sense. As long as rational argument speaks to one or both sides of an issue, a citizen should follow its indications even if that argument leaves considerable doubt about the correct answer. Although rational analysis leaves uncertain the answers to many historical questions, one may act as if the most likely

correct answer is the one supported by the strongest rational arguments, and one tentatively could adopt as correct the political decision that finds the most support in rational argument, even when the arguments on either side are less than fully persuasive.

This strategy for claiming the exclusivity of rational and secular arguments is unpersuasive for two different reasons. I shall assume first that the picture in the previous paragraph is accurate, that on every issue rational secular arguments have some bearing, and that the arguments on one side always are at least slightly stronger than the arguments on the other. Still, the assumption is that often the arguments on one side may not seem much stronger than the arguments on the other, and the conscientious citizen may feel that none of the arguments are particularly powerful. A citizen justifiably might conclude, therefore, that a great deal is left to be said on a particular subject, and that what has been said so far indicates a slight, but only a slight, probability that one particular side is correct. The same citizen may have religious convictions that establish quite strongly the correctness of the other side. Suppose, for example, that Joseph's examination of rational arguments leads him to suppose very weakly that human beings should not eat the flesh of higher animals, and that the law should prohibit the production and processing of meat for that purpose. In addition, suppose that Joseph believes that the Bible reveals God's will for human beings and clearly establishes the moral permissibility of eating meat. To ask Joseph to disregard his firm convictions because they are religiously based, and to ask him to base his political actions on unconfident conclusions founded on unconvincing rational arguments, would be odd. It also would call for a discomfiting split in Joseph's grounds of assessment that would compromise the integrity of his whole personality.

This first strategy for claiming exclusivity of rational secular grounds also is objectionable because it is founded on a misleading picture of the typical relation between religious convictions and rational grounds. Although this strategy calls for a careful distinction between religious and secular morality, many believers do not comprehend the distinct threads of these two types of thought. A religious person may believe that rational secular arguments have little to say on the issue at hand, but more often he will suppose that they are fairly powerful, and that the rational secular arguments

that fit with his religious convictions are correct. Identifying the special role that the believer's religious convictions play in this situation would be particularly difficult both for the believer and for others. This problem may make any effort to rely exclusively on rational grounds very difficult for most people.

But this problem alone is comparatively minor and does not undermine the effort as an ideal. The major problem is that, even on a careful reconstruction of many people's views, religious convictions are part of the groundwork against which rational arguments are set. For Monica, an overall sense, drawn partly from the Bible, of how humans relate to animals will form the perspective from which she evaluates claims about meat eating. Monica may be incapable of imagining what alternative perspective she might adopt if she disregarded her religious convictions. It is not as if she can easily separate religious conviction from rational analysis; the two are intermingled in the way she approaches complex social issues.

A second, different strategy for claiming the exclusivity of rational secular grounds moves toward the concession intimated during the treatment of the status of ultimate value judgments. The concession is that nonrational grounds can count, but only if they are part of a shared social consensus. Citizens can rely on premises that are very widely held in the society, even if these premises are not establishable rationally, but citizens cannot rely on controversial nonrational grounds.

Initially, one must inquire whether this proposal would be limited to reliance upon nonreligious grounds supported by a consensus, or whether it also would allow reliance upon religious grounds supported by a consensus. Given widespread belief in God and in certain premises of religious ethics—for example, that God loves people equally—one cannot rule out the possibility that a consensus might exist concerning certain religiously grounded ethical judgments. The argument that only a nonreligious consensus should count would encounter grave difficulties. Many of the most widely held ethical beliefs in our society have religious roots, and to say that citizens could rely on them only when the religious underpinnings have faded from the consciousness of the individual or the collective cultural mind would be odd. The more plausible version of this second strategy, therefore, would be one that permits

reliance on consensus judgments even if those judgments have recognized religious elements.

The deeper difficulties with this consensus approach concern the meaning and significance of the presence or absence of consensus. Giving content to the idea that political positions must rest on a consensus is difficult because so much depends on the level of generality at which the relevant ideas are cast. Let us assume that rational secular argument cannot establish how much consideration humans owe animals. Suppose that Jennifer favors a legal ban on certain forms of factory farming. This position could be cast in at least three different ways. First, it could be cast as an attempt to give specific application to an already existing consensus that animals should not be made miserable to serve marginal human interests. Second, it could be cast as opposed to an overwhelmingly accepted view that factory farming does not amount to improper behavior toward animals. Third, Jennifer's position could be understood as one not endorsed or rejected by any existing consensus because the relatively few people who have been informed fully about the facts of factory farming are deeply troubled about whether it is proper. One position, therefore, can implicate more than one storable consensus; they may be cast at different levels of generality and in terms of differential degrees of acquaintance with the facts.

The consensus approach also leaves a gaping hole for critical issues as to which no present consensus exists. The example concerning the moral opposition to factory farming, based on a nonrational judgment, again illustrates the point. Suppose that a consensus initially exists that the interests of animals are not great enough to warrant prohibition of factory farming, but that attitudes begin to shift and a consensus no longer exists. Must opponents of factory farming decline to change the law until their view is supported by a consensus, such as the views of ninety-five percent of the population? If that were the case, factory farming would continue until such a consensus condemns it. Suppose that happens, and factory farming is outlawed, but that opinion then starts to swing back. Do the proponents of factory farming have to wait for a new consensus until they try to lift the prohibition? These fanciful inquiries are enough to suggest the awkwardness of the contention that people should be allowed to rely on

nonrational values in making political decisions only if a present consensus supports those values. That is not how liberal democracy works, or how it should work. Shared social views develop over time through the pressing of positions that are not initially shared by a majority. A suggestion that no position should be taken unless it presently rests on a consensus or can be supported by rational argument would unacceptably cramp the democratic process.

The third, and final, strategy for excluding religious grounds of decision would be to contend that nonrational and nonreligious grounds are preferable to religious grounds. Although this position would not be totally absurd, given historical instances of divisiveness on religious lines, it would be an extremely odd one for a society such as ours, in which most people are religious and in which relations among people of different religious views have been mainly peaceable. This strategy also runs into the previously mentioned difficulty of distinguishing religious grounds from nonrational nonreligious ones, many of which are rooted in the religious pasts of individuals and cultures. In the late twentieth century United States, therefore, no substantial argument supports the contention that citizens who are permitted to rely on various sorts of nonrational grounds should have to eschew religious convictions of the sort that might bear on animal rights, environmental policy, and other important issues.

VI. CONCLUSION

Although some governmental choices about animals and the environment may not impair the liberty of private citizens, many protective legal rules do constrain the choices of those who own and use animals and parts of the environment. Some individuals who are constrained will take the human dominion view of nature, believing that they have a moral right of exploitation for human advantage. From their point of view, a regulation protecting animals or the environment infringes on their moral rights. On the other hand, at least in the case of animal rights, a reverse choice in favor of human dominion may also be understood by some people as a violation of rights—the rights of the animals whose interests are wrongfully denied protection.

Society cannot avoid deciding the degree of protection to extend to animals and other natural entities within its domain. Although a decision to protect does not usually work a severe imposition on those of differing views, the restraints that result when individuals properly rely on their religious convictions in these matters might curb liberty in a way that some people think is unjustifiable. Even if these controversial constraints are enforced in a liberal democracy, reliance on religious convictions nevertheless is appropriate because nonrational judgments about entities that deserve protection are unavoidable; and, given those judgments, the *nature* of the protection is of a kind that is called for in terms of rational secular objectives.

If conscientious religious citizens properly can rely on their religious convictions in deciding critical questions about animal rights and environmental policy, then the premise that legislators properly can rely on citizens' views formed in this way, and that they sometimes can develop their own political positions by a similar process, are fairly short steps. The conclusion that legislation adopted on such grounds does not offend the religion guarantees of the Constitution is another fairly short step. Although the argument is not developed in this Article, I believe these steps are warranted.

Any complete account of religious convictions and lawmaking must address a wide range of political issues and the ways in which views concerning them may be affected by religious premises, but the arguments advanced in this Article are sufficient to cast grave doubt on any broad and simple generalization that reliance on religious convictions is inappropriate in a liberal democracy.